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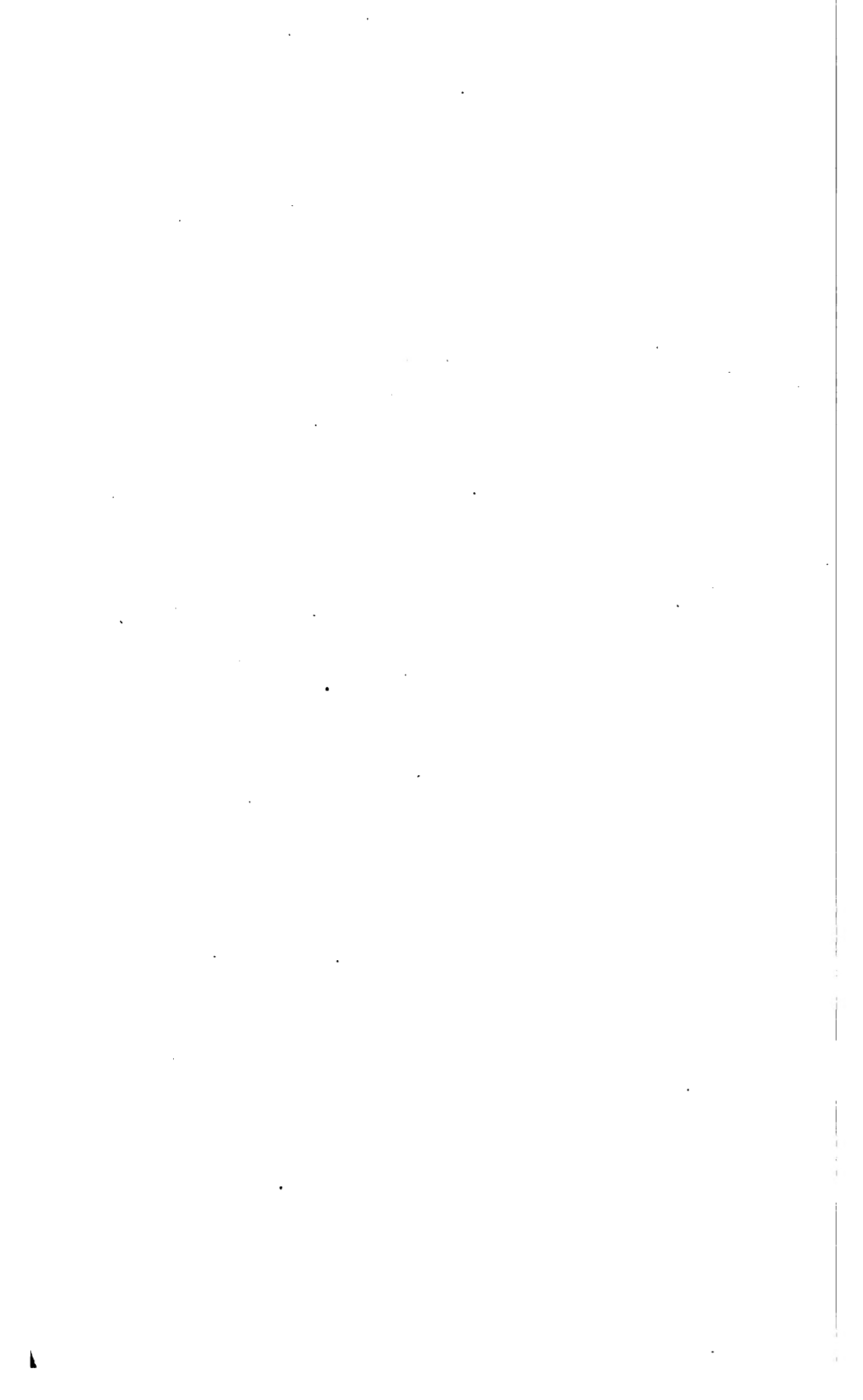


















THE  
LAWYERS REPORTS  
ANNOTATED

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BOOK XII.

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ALL CURRENT CASES OF GENERAL VALUE AND  
IMPORTANCE WITH FULL ANNOTATION  
ROBERT DESTY, EDITOR

BURDETT A. RICH, HENRY P. FARNHAM,  
ASSISTANTS.

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# SUPPLEMENTAL TABLE

OF ALL

## CASES REPORTED IN LAWYERS' REPORTS, ANNOTATED, BOOK 12.

NOT OFFICIALLY REPORTED WHEN THIS BOOK WENT TO PRESS.

(To be "tipped in" in front of regular table, used as a book mark or as data for marking each case. Like tables will be furnished for subsequent volumes as fast as possible.)

Alabama State Bar Asso., <i>Ex parte</i> (92 Ala. 113) . . . . .	134	Citizens Street R. Co. v. Robbins (128 Ind. 449) . . . . .	498
Almy v. Jones (17 R. I. 265) . . . . .	414	Clapp v. Pinegrove Twp. (138 Pa. 35)	618
American Freehold Land & M. Co. v. Thomas (47 Fed. Rep. 550) . . . . .	681	Columbus & H. Coal & I. Co. v. Tuck- er (48 Ohio St. 41) . . . . .	577
American Mortg. Co. v. Tennille (87 Ga. 28) . . . . .	529	Colville v. Miles (127 N. Y. 159) . . . . .	848
Argus Printing Co., <i>Re</i> (1 N. D. 434)	781	Consolidated Coal Co. v. Baker (135 Ill. 545) . . . . .	247
Atlanta v. First Presby. Church (86 Ga. 780) . . . . .	852	Consolidated Tank Line Co. v. Hunt (83 Iowa 6) . . . . .	476
Atwater v. Manchester Sav. Bank (45 Minn. 341) . . . . .	741	Copp v. Louisville & N. R. Co. (43 La. Ann. 511) . . . . .	725
Austin v. Davis (128 Ind. 472) . . . . .	120	Corson v. Dunlap (83 Me. 32) . . . . .	90
Baird v. Brooklin (86 Ga. 709) . . . . .	157	Crawford v. Oman & S. Stone Co. (34 S. C. 90) . . . . .	875
Baker v. Hart (128 N. Y. 470) . . . . .	60	Crouse v. Murphy (140 Pa. 335) . . . . .	58
Bennett v. State (86 Ga. 401) . . . . .	449	Curtin v. Somerset (140 Pa. 70) . . . . .	323
Berger v. Varrelman (127 N. Y. 281)	806	Demby v. Parse (58 Ark. 526) . . . . .	87
Bernard v. Whitney Nat. Bank (43 La. Ann. 50) . . . . .	802	Devereux v. McMahon (108 N. C. 184) . . . . .	205
Birmingham Mineral R. Co. v. Jacobs (92 Ala. 187) . . . . .	880	Dibrell v. Lanier (89 Tenn. 497) . . . . .	70
Blake v. Sawyer (83 Me. 129) . . . . .	712	Downing v. Indiana State Bd. of Agric. (129 Ind. 443) . . . . .	664
Bohn Mfg. Co. v. Kountze (30 Neb. 719) . . . . .	83	Drealer v. Hard (127 N. Y. 235) . . . . .	456
Booth's Will, <i>Re</i> (127 N. Y. 109) . . . . .	452	Dugan v. Lewis (79 Tex. 246) . . . . .	93
Bowar v. Chicago W. D. R. Co. (136 Ill. 101) . . . . .	81	Dunsmoor v. Furstenfeldt (88 Cal. 522)	508
Bowler v. Eisenhood (1 S. D. 577) . . . . .	705	Durant v. Pierson (124 N. Y. 444) . . . . .	146
Brace v. Chartrand (16 Colo. 19) . . . . .	209	Eisenbach v. Hatfield (3 Wash. 236)	632
Brown v. Balfour (46 Minn. 68) . . . . .	873	Eisenlord v. Clum (126 N. Y. 552) . . . . .	836
Brown v. Cunningham (83 Iowa 513) . . . . .	583	Ell v. Northern Pacific R. Co. (1 N. D. 336) . . . . .	97
Bull v. Kentucky Nat. Bank (Ky.) . . . . .	87	Elyton Land Co. v. Birmingham Ware- house & E. Co. (92 Ala. 407)	307
Bullard v. Shirley (153 Mass. 559) . . . . .	110	Empire Mills v. Alston Grocery Co. (Tex App.) . . . . .	366
Bumgardner v. Leavitt (85 W. Va. 194)	776	Fall River Nat. Bank v. Slade (153 Mass. 415) . . . . .	181
Bunting v. Hogsett (139 Pa. 303)	268	Farkas v. Powell (86 Ga. 800) . . . . .	397
Burbage v. Windley (108 N. C. 357)	409	Farmers Co-Operative Trust Co. v. Floyd (47 Ohio St. 525) . . . . .	846
Burlington, C. R. & N. R. Co. v. Dey (83 Iowa 812) . . . . .	436	Farrior v. New England Mort. Security Co. (93 Ala. 176) . . . . .	856
Butler v. Barnes (60 Conn. 170) . . . . .	273	Faulkner v. Edwards (1 N. D. 434) . . . . .	781
Butterfield v. Byron (153 Mass. 517)	571	Fields v. Osborne (60 Conn. 544) . . . . .	551
Calumet River R. Co. v. Brown (136 Ill. 822) . . . . .	84	Finney v. Harding (136 Ill. 573) . . . . .	605
Cannell v. Smith (142 Pa. 25) . . . . .	395	Fisher v. Dudley (74 Md. 242) . . . . .	586
Carnwright v. Gray (127 N. Y. 92) . . . . .	845	Fonseca v. Cunard S. S. Co. (153 Mass. 553) . . . . .	340
Cashman v. Root (89 Cal. 373) . . . . .	511	Ford v. Lake Shore & M. S. R. Co. (124 N. Y. 493) . . . . .	454
Cass County Bank v. Weber (83 Iowa 63)	477	Fort Smith & V. B. Bridge Co. v. Haw- kins (54 Ark. 509) . . . . .	487
Chaplin v. Brown (83 Iowa 156) . . . . .	428	Freeland v. Ritz (154 Mass. 257) . . . . .	561
Child v. Bemus (17 R. I. 230) . . . . .	57	Frink v. Thomas (20 Or. 265) . . . . .	239
Childers v. Lee (5 N. M. 567) . . . . .	67		
Cincinnati Inclined Plane Railroad Company v. City & S. Tele- graph Association (43 Ohio St. 390) . . . . .	534		



# SUPPLEMENTAL TABLE OF CASES.

Gammon Theological Seminary v. Rob-	506	Morse v. Hackensack Sav. Bank (47 N. J.	62
bins (128 Ind. 85)		Eq. (3 Dick) 279)	
Georgia P. R. Co. v. Dooly (86 Ga. 294)	342	Musch v. Burkhardt (83 Iowa 801)	494
Gibson County Comrs. v. Cincinnati		Oakes v. Northern P. R. Co. (20 Or. 392)	318
Steam Heating Co. (128 Ind.		Olympia v. Mann (1 Wash. 389)	150
240)	502	Pacific Express Co. v. Foley (46 Kan.	
Gill v. State (86 Ga. 751)	433	457)	799
Glenn v. Jackson (93 Ala. 342)	382	Patton v. East Tennessee U. & G. R. Co.	
Glennon v. Lebanon Mfg. Co. (140 Pa.		(89 Tenn. 370)	184
594)	321	Peabody v. Oregon R. & Nav. Co. (21 Or.	
Gloucester Isinglass & G. Co. v. Russia		121)	823
Cement Co. (154 Mass. 92)	563	Pennsylvania Hospital's Appeal (141 Pa.	
Gordon v. Anderson (83 Iowa 224)	483	201)	237
Graham v. Pennsylvania Co. (139 Pa.		Pell v. Reinhardt (127 N. Y. 381)	843
149)	293	People, Western U. Tele. Co. v. Tier-	
Guaranty Trust & S. D. Co. v. Bud-		ney (126 N. Y. 166)	251
dington (27 Fla. 215)	770	People, Western U. Tele. Co. v. Dolan	
Guest v. Lower Merion Water Co. (142		(126 N. Y. 166)	251
Pa. 610)	324	People, Union Trust Co. v. Coleman (126	
Haley v. Eureka County Bank (21 Nev.		N. Y. 433)	762
127)	815	Perry v. Jensen (142 Pa. 125)	393
Hamer v. Brainard (7 Utah 245)	434	Philadelphia v. Baxter (142 Pa. 357)	751
Hamer v. Sidway (124 N. Y. 538)	463	Philadelphia Third Nat. Bank's Appeal	
Harvey v. Crane (85 Mich. 816)	601	(141 Pa. 214)	223
Hastings v. Grimshaw (153 Mass. 497)	617	Phillips v. Madrid (83 Me. 205)	862
Hayes v. Hyde Park (153 Mass. 514)	249	Potter v. Jones (20 Or. 239)	161
Hobart v. Young (68 Vt. 86.3)	693	Powell v. Bently & G. Furniture Co. (84	
Holland v. Tennessee Coal I. & R. Co. (91		W. Va. 804)	53
Ala. 444)	232	Presbyterian Hospital's Appeal (141 Pa.	
Hopper v. Hopper (125 N. Y. 400)	237	201)	237
Hopper v. Lovejoy (47 N. J. Eq. (2 Dick)		Price v. Price (124 N. Y. 589)	359
573)	588	Proctor v. Clark (154 Mass. 45)	721
Howard v. Worcester (153 Mass. 426)	160	Purcell v. Richmond & D. R. Co. (108	
Hundley v. Farris (103 Mo. 78)	254	N. C. 414)	113
Hunter v. Cooperstown & S. V. R. Co.		Quinton's Appeal (141 Pa. 201)	227
(126 N. Y. 18)	429	Rand v. Hanson (154 Mass. 87)	674
Huss, Re (126 N. Y. 537)	630	Ray v. Western Pennsylvania Natural	
Huss v. Hochhausen (126 N. Y. 537)	620	Gas Co. (138 Pa. 576)	290
Jamieson v. Indiana. Natural Gas & O.		Reed v. Manchester Sav. Bank (45 Minn.	
Co. (128 Ind. 555)	652	841)	741
Jaques v. Swasey (153 Mass. 596)	566	Republic L. Ins. Co. v. Swigert (185 Ill.	
Johnson v. Ash (142 Pa. 45)	219	150)	828
Johnston v. State, Sefton (128 Ind. 16)	235	Ritchie v. Griffiths (1 Wash. 429)	884
Jones v. McEwan (91 Ky. 873)	399	Roddy v. Missouri P. R. Co. (104 Mo.	
Joyce v. J. I. Case Threshing Mach. Co.		234)	746
(89 Tenn. 337)	519	Rodgers v. Lees (140 Pa. 475)	216
Kernohan v. Durham (48 Ohio St. 1)	41	Romaine's Estate, Re (127 N. Y. 80)	401
Kilgore v. Rich (83 Me. 805)	859	Ross v. Hixon (46 Kan. 550)	760
Kingman, Re. (153 Mass. 566)	417	Rosson v. Carroll (90 Tenn. 90)	727
Koscisko v. Slomberg (68 Miss. 469)	528	Rozelle v. Harmon (103 Mo. 339)	187
Lafitte v. New Orleans City & L. R. Co.		Rucks v. Renfrow (54 Ark. 409)	862
(48 La. Ann. 34)	337	Rudd v. Robinson (126 N. Y. 118)	473
Lee v. Fletcher (46 Minn. 49)	171	Rymer v. Luzerne County (142 Pa. 108)	193
Lillienthal v. Suffolk Brewing Co. (154		St. Louis, I. M. & S. R. Co. v. Hopkins	
Mass. 185)	821	(54 Ark. 209)	189
Long v. State (73 Md. 527)	89	Salentine v. Mutual Benefit L. Ins. Co.	
v. State (74 Md. 565)	425	(79 Wis. 580)	690
Lostutter v. Aurora (126 Ind. 436)	259	Schumaker v. St. Paul & D. R. Co. (46	
Lovejoy v. Hopper (47 N. J. Eq. (2		Minn. 89)	257
Dick) 573)	588	Scott v. Eldridge (154 Mass. 25)	379
Lyons v. Planters Loan & Sav. Bank		Shelton v. Orr (89 Tenn. 82)	514
(86 Ga. 485)	155	Shinners v. Proprietors of Locks & O.	
McArthur v. Gordon (126 N. Y. 597)	667	(154 Mass. 168)	554
McCarty v. Woodstock Iron Co. (92 Ala.		Shipman v. Bank of the State of New	
463)	136	York (126 N. Y. 318)	791
McClain v. Garden Grove (83 Iowa 235)	482	Sloan v. Williams (138 Ill. 43)	496
Maine Trust & Bkg. Co. v. Butler (45		Smith v. Carroll (17 R. I. 125)	801
Minn. 506)	370	Smith v. Olmstead (88 Cal. 532)	46
Metropolitan Nat. Bank v. Jones (137 Ill.		Sparks v. Despatch Transfer Co. (104	
634)	492	Mo. 531)	714
Mills v. United States (46 Fed. Rep. 738)	673	Spaulding v. Pennsylvania Co. (142 Pa.	
Misch v. Russell (136 Ill. 22)	125	503)	698
Montgomery v. Crosthwait (90 Ala. 553)	140	Spencer v. Andrew (82 Iowa 14)	115

# SUPPLEMENTAL TABLE OF CASES.

Springer v. Chicago (185 Ill. 552)	609	Upham v. Detroit City R. Co. (85 Mich. 12)	129
State v. Neis (108 N. C. 787)	412	Vance's Estate, <i>Re</i> , (141 Pa. 201)	227
State, Grady, v. Chicago, M. & N. R. Co. (79 Wis. 259)	180	VanHaagen Soap Mfg. Co. <i>Re</i> , (141 Pa. 214)	228
State, VanAmringe, v. Taylor (108 N. C. 198)	202	Waller v. Bowling (108 N. C. 289)	261
Stensoff v. State, Lacour (80 Tex. 428)	864	Weinstein v. Freyer (98 Ala. 257)	700
Stewart v. Vandervort (84 W. Va. 524)	50	Wetzler v. Duffy (78 Wis. 170)	178
Stowers v. Postal Teleg. Cable Co. (68 Miss. 559)	864	Wheeler v. Selden (68 Vt. 429)	600
Stratton v. Dibrell (89 Tenn. 497)	70	Williamson v. Newport News & M. V. R. Co. (84 W. Va. 657)	297
Tennessee Coal, I & R. Co. v. Kyle (98 Ala. 1)	108	Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co. (141 Pa. 407)	220
Timoney v. Booth (137 N. Y. 109)	452	Wilson, <i>Re</i> (8 Mackey 841)	624
Tufts v. D'Arcambal (85 Mich. 185)	446	Wilson v. Wilson (154 Mass. 194)	524
Union Coal Co. v. La Salle (186 Ill. 119)	326	Zinn v. Rice (154 Mass. 1)	288



# TABLE

## OF

# CASES REPORTED

IN

LAWYERS' REPORTS, ANNOTATED, BOOK XII.

A.		Birmingham Warehouse & E. Co., Elyton	
Alabama State Bar Asso., <i>Ex parte</i> (Ala.)	184	Land Co. v. (Ala.)	807
Almy v. Jones (17 R. I. —)	414	Blake v. Sawyer (88 Me. 129)	712
Alston Grocery Co., Empire Mills v. (Tex.)	336	Bohn Mfg. Co. v. Kountze (Neb.)	83
American Freehold Land & M. Co. v.		Booth, Timoney v. (127 N. Y. 109)	452
Thomas (U. S. C. C. Ga.)	681	Booth's Will, <i>Re</i> (127 N. Y. 109)	452
American Mortgage Co. v. Tenuille (Ga.)	529	Bowar v. Chicago W. D. R. Co. (Ill.)	81
Anderson, Gordon v. (Iowa)	488	Bowler v. Eisenhood (S. Dak.)	705
Andrew, Spencer v. (Iowa)	115	Bowling, Waller v. (N. C.)	261
Argus Printing Co., <i>Re</i> (N. Dak.)	781	Brace v. Chartrand (Colo.)	209
Ash, Johnson v. (Pa.)	219	Brainard, Hamer v. (Utah)	484
Atlanta v. First Presbyterian Church (Ga.)	852	Brooklin, Baird v. (Ga.)	157
Auy-Gen., People, <i>ex rel.</i> , v. Dashaway		Brown v. Balfour (Minn.)	878
Asso. (84 Cal. 114)	117	Calumet River R. Co. v. (Ill.)	84
Atwater v. Manchester Sav. Bank (45		Chaplin v. (Iowa)	428
Minn. 841)	741	v. Cunningham (Iowa)	588
Aurora, Lostutter v. (Ind.)	259	Buddington, Guaranty Trust & S. D. Co.	
Austin v. Davis (Ind.)	120	v. (Fla.)	770
		Bull v. Kentucky Nat. Bank (Ky.)	87
		Bullard v. Shirley (Mass.)	110
		Bumgardner v. Leavitt (W. Va.)	776
		Bunting v. Hogsett (189 Pa. 368)	268
		Burbage v. Windley (106 N. C. 357)	409
		Burkhart, Musch v. (Iowa)	484
		Burlington, C. R. & N. R. Co. v. Dey	
		(Iowa)	486
		Butler v. Barnes (Conn.)	273
		Maine Trust & Bkg. Co. v. (Minn.)	870
		Butterfield v. Byron (Mass.)	571
		Byron, Butterfield v. (Mass.)	571
B.		C.	
Baird v. Brooklin (Ga.)	157	Calumet River R. Co. v. Brown (Ill.)	84
Baker, Consolidated Coal Co. v. (Ill.)	247	Cannell v. Smith (Pa.)	395
v. Hart (128 N. Y. 470)	60	Carnwright v. Gray (127 N. Y. 92)	845
Balfour, Brown v. (Minn.)	378	Carrol, Rosson v. (Tenn.)	727
Bank, Cass County, v. Weber (Iowa)	477	Carroll, Smith v. (R. I.)	301
Eureka County, Haley v. (Nev.)	815	Casey v. Cincinnati Typographical Union	
Fall River Nat. v. Slade (Mass.)	181	No. 8 (45 Fed. Rep. 185)	198
Hackensack Sav., Morse v. (N. J.)	62	Cashman v. Root (Cal.)	511
Kentucky Nat., Bull v. (Ky.)	87	Cass County Bank v. Weber (Iowa)	477
Manchester Sav., Atwater v. (Minn.)	741	Chaplin v. Brown (Iowa)	428
Reed v. (Minn.)	741	Chartrand, Brace v. (Colo.)	209
Metropolitan Nat. v. Jones (Ill.)	492	Chicago, Springer v. (Ill.)	609
Planters Loan & Sav., Lyons v.		Chicago, M. & N. R. Co., State, Grady, v.	
(Ga.)	155	(Wis.)	180
Third Nat., of Phila., Appeal of		Chicago W. D. R. Co., Bowar v. (Ill.)	81
(Pa.)	228	Child v. Bemus (17 R. I. —)	57
Whitney Nat., Bernard v. (La.)	302	Childers v. Lee (N. M.)	67
Bank of State of New York, Shipman v.			
(N. Y.)	791		
Barnes, Butler v. (Conn.)	278		
Baxter, Philadelphia v. (Pa.)	751		
Bemus, Child v. (R. I.)	57		
Bennett v. State (Ga.)	449		
Bentley & G. Furniture Co., Powell v.			
(W. Va.)	58		
Berger v. Varrelmann (127 N. Y. 281)	808		
Bernard v. Whitney Nat. Bank (La.)	802		
Birmingham Mineral R. Co. v. Jacobs			
(Ala.)	880		

Cincinnati Inclined Plane R. Co. v. City & S. Teleg. Asso. (48 Ohio St. —) -	384	Edwards, Faulkner v. (N. Dak.) -	781
Cincinnati Steam Heating Co., Gibson County Comrs. v. (Ind.) -	503	Eisenbach v. Hatfield (3 Wash. —) -	632
Cincinnati Typographical Union No. 3, Casey v. (U. S. C. C. Ohio) -	198	Eisenhood, Bowler v. (S. Dak.) -	705
Citizens Street R. Co. v. Robbins (Ind.) -	493	Eisenlord v. Clum (126 N. Y. 552) -	836
City & S. Teleg. Asso., Cincinnati Inclined Plane R. Co. v. (Ohio) -	534	Eldridge, Scott v. (Mass.) -	379
Clapp v. Pinegrove Twp. (188 Pa. 85) -	618	Ell v. Northern Pac. R. Co. (N. Dak.) -	97
Clark, Proctor v. (Mass.) -	721	Elyton Land Co. v. Birmingham Warehouse & E. Co. (Ala.) -	307
Clum, Eisenlord v. (N. Y.) -	886	Empire Mills v. Alston Grocery Co. (Tex. App.) -	366
Cochran, Kellogg v. (Cal.) -	104	Eureka County Bank, Haley v. (Nev.) -	815
Coleman, People, Union Trust Co. v. (N. Y.) -	763	F.	
Columbus & H. C. & I. Co. v. Tucker (48 Ohio St. —) -	577	Fall River Nat. Bank v. Slade (Mass.) -	131
Colville v. Miles (N. Y.) -	848	Farkas v. Powell (Ga.) -	397
Consolidated Coal Co. v. Baker (Ill.) -	247	Farmers' Co-operative Trust Co. v. Floyd (47 Ohio St. 525) -	346
Consolidated Tank Line Co. v. Hunt (Iowa) -	476	Farrior v. New England Mortgage Security Co. (Ala.) -	856
Cooperstown & S. V. R. Co., Hunter v. (N. Y.) -	429	Farris, Hundley v. (Mo.) -	254
Copp v. Louisville & N. R. Co. (43 La. Ann. —) -	725	Faulkner v. Edwards (N. Dak.) -	781
Corry Water Works Co., Wood v. (U. S. C. O. Pa.) -	168	Fields v. Osborne (Conn.) -	551
Corson v. Dunlap (83 Me. 32) -	90	Finney v. Harding (Ill.) -	605
Crane, Harvey v. (Mich.) -	601	First Presbyterian Church, Atlanta v. (Ga.) -	852
Crawford v. Oman & S. Stone Co. (S. C.) -	875	Fisher v. Dudley (Md.) -	586
Crosthwait, Montgomery v. (Ala.) -	140	Fletcher, Lee v. (Minn.) -	171
Crouse v. Murphy (140 Pa. 385) -	58	Floyd, Farmers' Co-operative Trust Co. v. (Ohio) -	346
Cumberland Teleph. & Teleg. Co. v. United Electric Ry. (U. S. C. C. Tenn.) -	544	Foley, Pacific Exp. Co. v. (Kan.) -	799
Cunard S. S. Co., Fonseca v. (Mass.) -	340	Follett v. United States Mut. Acc. Asso. (107 N. C. 241) -	315
Cunningham, Brown v. (Iowa) -	588	Fonseca v. Cunard S. S. Co. (Mass.) -	340
Curtin v. Somerset (140 Pa. 70) -	322	Ford v. Lake Shore & M. S. R. Co. (124 N. Y. 498) -	454
D.		Ft. Smith & V. B. Bridge Co. v. Hawkins (Ark.) -	487
D'Arcambal, Tufts v. (Mich.) -	446	Freeland v. Ritz (Mass.) -	561
Dashaway Asso., People, Atty-Gen., v. (Cal.) -	117	Freyer, Weinstein v. (Ala.) -	700
Davis, Austin v. (Ind.) -	120	Frink v. Thomas (Or.) -	239
Demby v. Parse (53 Ark. 526) -	87	Furstenfeldt, Dunsmoor v. (Cal.) -	508
Despatch Transfer Co., Sparks v. (Mo.) -	714	G.	
Detroit City R. Co., Upham v. (Mich.) -	129	Gallup v. Smith (59 Conn. 354) -	353
Devereux v. McMahon (108 N. C. 134) -	205	Gammon Theological Seminary v. Robbins (Ind.) -	506
Dey, Burlington, C. R. & N. R. Co. v. (Iowa) -	436	Garden Grove, McClain v. (Iowa) -	482
Dibrell v. Lanier (89 Tenn. 497) -	70	Georgia Pac. R. Co. v. Dooly (Ga.) -	342
Stratton v. (Tenn.) -	70	Gibson County Comrs. v. Cincinnati Steam Heating Co. (Ind.) -	503
Dolan, People, Western Union Teleg. Co. v. (N. Y.) -	251	Gill v. State (Ga.) -	433
Dooly, Georgia Pac. R. Co. v. (Ga.) -	342	Glenn v. Jackson (Ala.) -	382
Downing v. Indiana State Board of Agriculture (Ind.) -	664	Glennon v. Lebanon Mfg. Co. (140 Pa. 594) -	321
Dresler v. Hard (127 N. Y. 235) -	456	Gloucester Isinglass & G. Co. v. Russia Cement Co. (Mass.) -	563
Dudley, Fisher v. (Md.) -	586	Gordon v. Anderson (Iowa) -	483
Duffy, Wetzler v. (Wis.) -	178	McArthur v. (N. Y.) -	667
Dugan v. Lewis (79 Tex. 246) -	93	Grady, State ex rel., v. Chicago, M. & N. R. Co. (Wis.) -	180
Dunlap, Corson v. (Me.) -	90	Graham v. Pennsylvania Co. (139 Pa. 149) -	293
Dunsmoor v. Furstenfeldt (88 Cal. 523) -	508	Gray, Carnwright v. (N. Y.) -	345
Durant v. Pierson (124 N. Y. 444) -	146	Griffiths, Ritchie v. (Wash.) -	384
Durham, Kernohan v. (Ohio) -	41	Grimshaw, Hastings v. (Mass.) -	617
E.		Guaranty Trust & S. D. Co. v. Buddington (Fla.) -	770
East Tennessee, V. & G. R. Co., Patton v. (Tenn.) -	184	Guest v. Lower Merion Water Co. (Pa.) -	824
12 L. R. A.		H.	
		Hackensack Sav. Bank, Morse v. (N. J.) -	63
		Haley v. Eureka County Bank (Nev.) -	815

Hall & U. Co., Smithwick v. (Conn.)	279
Hamer v. Brainard (Utah)	434
v. Sidway (124 N. Y. 538)	468
Hanson, Rand v. (Mass.)	574
Hard, Dresler v. (N. Y.)	456
Harding, Finney v. (Ill.)	605
Harmon, Rozelle v. (Mo.)	187
Hart, Baker v. (N. Y.)	60
Harvey v. Crane (85 Mich. 316)	601
Hastings v. Grimshaw (Mass.)	617
Hatfield, Eisenbach v. (Wash.)	632
Hawkins, Ft. Smith & V. B. Bridge Co. v. (Ark.)	487
Hayes v. Hyde Park (Mass.)	249
Hixon, Ross v. (Kan.)	760
Hobart v. Young (Vt.)	698
Hochhausen, Huss v. (N. Y.)	620
Hogsett, Bunting v. (Pa.)	268
Holland v. Tennessee Coal, I. & R. Co. (Ala.)	232
Hopkins, St. Louis, I. M. & S. R. Co. v. (Ark.)	189
Hopper v. Hopper (125 N. Y. 400)	237
v. Lovejoy (N. J.)	588
Howard v. Worcester (Mass.)	160
Hundley v. Farris (103 Mo. 78)	254
Hunt, Consolidated Tank Line Co. v. (Iowa)	476
Hunter v. Cooperstown & S. V. R. Co. (126 N. Y. 18)	429
Huss v. Hochhausen (126 N. Y. 537)	620
Huss, <i>Re</i> (126 N. Y. 537)	620
Hyde Park, Hayes v. (Mass.)	249

I.

Indiana Natural Gas & Oil Co., Jamieson v. (Ind.)	652
Indiana State Board of Agriculture, Downing v. (Ind.)	664
Insurance Co., Mut. Benefit L., Salentine v. (Wis.)	690
Public L., v. Swigert (185 Ill. 150)	328

J.

Jackson, Glenn v. (Ala.)	832
Jacobs, Birmingham Mineral R. Co. v. (Ala.)	830
Jamieson v. Indiana Natural Gas & Oil Co. (Ind.)	652
Jaques v. Swasey (Mass.)	566
Jellico Mountain Coke & C. Co., United States v. (U. S. C. C. Tenn.)	753
Jensen, Perry v. (Pa.)	893
J. I. Case Threshing Mach. Co., Joyce v. (Tenn.)	519
John R. Williams Co., National Progress Bunching Mach. Co. v. (U. S. C. C. N. Y.)	107
Johnson v. Ash (Pa.)	219
Johnston v. State, Sefton (Ind.)	235
Jones, Almy v. (R. I.)	414
v. McEwan (Ky.)	399
Metropolitan Nat. Bank v. (Ill.)	492
Potter v. (Or.)	161
Joyce v. J. I. Case Threshing Mach. Co. (89 Tenn. 337)	519

K.

Kellogg v. Cochran (87 Cal. 192)	104
Kentucky Nat. Bank, Bull v. (Ky.)	87
12 L. R. A.	

Kernohan v. Durham (48 Ohio St.—)	41
Kilgore v. Rich (83 Me. 806)	859
Kingman, Petitioner (Mass.)	417
Kosciusko v. Slomberg (Miss.)	528
Kountze, Bohn Mfg. Co. v. (Neb.)	33
Kyle, Tennessee Coal, I. & R. Co. v. (Ala.)	108

L.

Lacour, State, <i>ex rel.</i> , Steusoff v. (Tex.)	364
Lafitte v. New Orleans City & L. R. Co. (La.)	387
Lake Shore & M. S. R. Co., Ford v. (N. Y.)	454
Lanier, Dibrell v. (Tenn.)	70
La Salle, Union Coal Co. v. (Ill.)	326
Leavitt, Bumgardner v. (W. Va.)	776
Lebanon Mfg. Co., Glennon v. (Pa.)	321
Lee, Childers v. (N. M.)	67
v. Fletcher (Minn.)	171
Lees, Rodgers v. (Pa.)	218
Lemmon v. Strong (59 Conn. 448)	270
Lewis, Dugan v. (Tex.)	93
Lillenthal v. Suffolk Brewing Co. (Mass.)	821
Long v. State (Md.)	89
v. State (Md.)	425
Lostutter v. Aurora (126 Ind. 436)	259
Louisville & N. R. Co., Copp v. (La.)	735
Lovejoy, Hopper v. (N. J.)	588
Lower Merion Water Co., Guest v. (Pa.)	324
Luzerne County, Rymer v. (Pa.)	192
Lynch, Mansfield v. (Conn.)	235
Lyons v. Planters Loan & Sav. Bank (Ga.)	155

M.

McArthur v. Gordon (126 N. Y. 597)	667
McCabe, <i>Ex parte</i> (46 Fed. Rep. 363)	589
McCarty v. Woodstock Iron Co. (Ala.)	136
McClain v. Garden Grove (Iowa)	432
McEwan, Jones v. (Ky.)	399
McMahon, Devereux v. (N. C.)	205
Madrid, Phillips v. (Me.)	863
Maine Trust & Bkg. Co. v. Butler (45 Minn. 506)	370
Manchester Sav. Bank, Atwater v. (Minn.)	741
Reed v. (Minn.)	741
Mann, Olympia v. (Wash.)	150
Mansfield v. Lynch (59 Conn. 320)	285
Metropolitan Nat. Bank v. Jones (Ill.)	492
Miles, Colville v. (N. Y.)	848
Mills v. United States (U. S. C. C. Ga.)	678
Misch v. Russell (Ill.)	125
Missouri Pac. R. Co., Roddy v. (Mo.)	746
Montgomery v. Crothwait (Ala.)	140
Morse v. Hackensack Sav. Bank (47 N. J. Eq. 279)	62
Murphy, Crouse v. (Pa.)	58
Musch v. Burkhardt (Iowa)	484
Mutual Benefit L. Ins. Co., Salentine v. (Wis.)	690

N.

National Progress Bunching Mach. Co. v. John R. Williams Co. (44 Fed. Rep. 190)	107
Nels, State v. (N. C.)	412
New England Mortgage Security Co., Farrior v. (Ala.)	856

New Orleans City & L. R. Co., Lafitte v. (La.)	887
Newport News & M. V. Co., Williamson v. (W. Va.)	287
Northern Pac. R. Co., Ell v. (N. Dak.)	97
Oakes v. (Or.)	318

## O.

Oakes v. Northern Pac. R. Co. (Or.)	318
Olmstead, Smith v. (Cal.)	46
Olympia v. Mann (1 Wash. 389)	150
Oman & S. Stone Co., Crawford v. (S. C.)	375
Oregon R. & Nav. Co., Peabody v. (Or.)	823
Orr, Shelton v. (Tenn.)	514
Osborne, Fields v. (Conn.)	551

## P.

Pacific Exp. Co. v. Foley (Kan.)	799
Parse, Demby v. (Ark.)	87
Patton v. East Tennessee, V. & G. R. Co. (89 Tenn. 370)	184
Peabody v. Oregon R. & Nav. Co. (Or.)	823
Peil v. Reinhart (127 N. Y. 881)	848
Pennsylvania Co., Graham v. (Pa.)	298
Spaulding v. (Pa.)	698
Pennsylvania Hospital's Appeal (141 Pa. 201)	227
People, Atty-Gen. v. Dashaway Asso. (84 Cal. 114)	117
People, Union Trust Co. v. Coleman (126 N. Y. 438)	762
People, Western Union Teleg. Co. v. Dolan (126 N. Y. 166)	251
v. Tierney (126 N. Y. 166)	251
Perry v. Jensen (Pa.)	898
Philadelphia v. Baxter (Pa.)	751
Philadelphia & E. R. Co., Williamsport & N. B. R. Co. v. (Pa.)	220
Philadelphia Third Nat. Bank's Appeal (Pa.)	223
Phillips v. Madrid (83 Me. 205)	862
Pierson, Durant v. (N. Y.)	146
Pinegrove Twp., Clapp v. (Pa.)	618
Planter's Loan & Sav. Bank, Lyons v. (Ga.)	155
Postal Teleg. Cable Co., Stowers v. (Miss.)	864
Potter v. Jones (Or.)	161
Powell v. Bentley & G. Furniture Co. (84 W. Va. 804)	58
Farkas v. (Ga.)	897
Presbyterian Hospital's Appeal (141 Pa. 201)	227
Price v. Price (124 N. Y. 589)	359
Proctor v. Clark (Mass.)	721
Proprietors of Locks & Canals, Shinnors v. (Mass.)	554
Purcell v. Richmond & D. R. Co. (N. C.)	113

## Q.

Quinton's Appeal (141 Pa. 201)	227
--------------------------------	-----

## R.

Railroad Co., Birmingham Mineral v. Jacobs (Ala.)	880
Burlington, C. R. & N. v. Dey (Iowa)	496
Calumet River v. Brown (Ill.)	84

13 L. R. A.

Railroad Co., Chicago, M. & N., State, Grady v. (Wis.)	186
Chicago W. D., Bowar v. (Ill.)	81
Cincinnati Inclined Plane v. City & S. Teleg. Asso. (48 Ohio St. —)	524
Citizens Street v. Robbins (Ind.)	498
Cooperstown & S. V., Hunter v. (N. Y.)	429
Detroit City, Upham v. (Mich.)	129
East Tennessee, V. & G., Patton v. (Tenn.)	184
Georgia Pac. v. Dooly (Ga.)	842
Lake Shore & M. S., Ford v. (N. Y.)	454
Louisville & N., Copp. v. (La.)	725
Missouri Pac., Roddy v. (Mo.)	746
New Orleans City & L., Lafitte v. (La.)	887
Northern Pac., Ell v. (N. Dak.)	97
Oakes v. (Or.)	318
Philadelphia & E., Williamsport & N. B. R. Co. v. (Pa.)	220
Richmond & D., Purcell v. (N. C.)	113
St. Louis, I. M. & S. v. Hopkins (Ark.)	189
St. Paul & D., Schumaker v. (Minn.)	257
Tennessee Coal & I., Holland v. (Ala.)	232
v. Kyle (Ala.)	108
Williamsport & N. B. v. Philadelphia & E. R. Co. (141 Pa. 407)	220
Railway & Nav. Co., Oregon, Peabody v. (Or.)	823
Railway, United Electric, Cumberland Teleph. & Teleg. Co. v. (U. S. C. C. Tenn.)	544
Rand v. Hanson (Mass.)	574
Ray v. Western Pa. Natural Gas Co. (188 Pa. 576)	290
Reed v. Manchester Sav. Bank (45 Minn. 341)	741
Reinhart, Peil v. (N. Y.)	848
Renfrow, Rucks v. (Ark.)	862
Republic L. Ins. Co. v. Swigert (185 Ill. 150)	328
Rice, Zinn v. (Mass.)	288
Rich, Kilgore v. (Me.)	859
Richmond & D. R. Co., Purcell v. (N. C.)	113
Ritchie v. Griffiths (1 Wash. 429)	384
Ritz, Freeland v. (Mass.)	561
Robbins, Citizens Street R. Co. v. (Ind.)	498
Gammon Theological Seminary v. (Ind.)	506
Robinson, Rudd v. (N. Y.)	473
Roddy v. Missouri Pac R. Co. (Mo.)	746
Rodgers v. Lees (140 Pa. 475)	216
Romaine, R. (N. Y.)	401
Root, Cashman v. (Cal.)	511
Ross v. Hixon (Kan.)	760
Rosson v. Carrol (Tenn.)	727
Rozelle v. Harmon (108 Mo. 389)	187
Rucks v. Renfrow (Ark.)	862
Rudd v. Robinson (126 N. Y. 113)	473
Russell, Misch v. (Ill.)	125
Russia Cement Co., Gloucester Isinglass & G. Co. v. (Mass.)	563
Rymer v. Luzerne County (Pa.)	192

## S.

St. Louis, I. M. & S. R. Co. v. Hopkins (Ark.)	189
--	-----

St. Paul & D. R. Co., Schumaker v. (Minn.)	257	Tucker, Columbus & H. C. & I. Co. v. (Ohio)	577
Salentine v. Mutual Benefit L. Ins. Co. (Wis.)	690	Tufts v. D'Arcambal (85 Mich. 185)	446
Sawyer, Blake v. (Me.)	712	U.	
Schumaker v. St. Paul & D. R. Co. (Minn.)	257	Union Coal Co. v. La Salle (Ill.)	326
Scott v. Eldridge (Mass.)	379	Union Trust Co., People, <i>ex rel.</i> , v. Coleman (126 N. Y. 433)	763
Sefton, State, <i>ex rel.</i> , Johnston v. (Ind.)	235	United Electric Ry., Cumberland Teleph. & Teleg. Co. v. (U. S. C. C. Tenn.)	544
Selden, Wheeler v. (Vt.)	600	United States v. Jellico Mountain Coke & C. Co. (46 Fed. Rep. 432)	753
Shelton v. Orr (89 Tenn. 82)	514	Mills v. (U. S. C. C. Ga.)	673
Shinners v. Proprietors of Locks & Canals (Mass.)	554	United States Mut. Acc. Asso., Follett v. (N. C.)	315
Shipman v. Bank of State of New York (126 N. Y. 318)	791	Upham v. Detroit City R. Co. (85 Mich. 12)	129
Shirley, Bullard v. (Mass.)	110	V.	
Sidway, Hamer v. (N. Y.)	463	Van Amringe, State, <i>ex rel.</i> , v. Taylor (108 N. C. 196)	202
Slade, Fall River Nat. Bank v. (Mass.)	131	Vance's Estate, <i>Re</i> (141 Pa. 201)	227
Sloan v. Williams (Ill.)	496	Vandervort, Stewart v. (W. Va.)	50
Slomberg, Kosciusko v. (Miss.)	528	Van Haagen Soap Mfg. Co., <i>Re</i> (Pa.)	223
Smith, Cannell v. (Pa.)	395	Varrelmann, Berger v. (N. Y.)	303
v. Carroll (17 R. I. —)	301	W.	
Gallup v. (Conn.)	353	Waller v. Bowling (108 N. C. 289)	261
v. Olmstead (88 Cal. 532)	46	Weber, Cass County Bank v. (Iowa)	477
Smithwick v. Hall & U. Co. (59 Conn. 261)	279	Weinstein v. Freyer (Ala.)	700
Somerset, Curtin v. (Pa.)	322	Western Pa. Natural Gas Co., Ray v. (Pa.)	390
Sparks v. Despatch Transfer Co. (Mo.)	714	Western Union Teleg. Co., People, <i>ex rel.</i> , v. Dolan (126 N. Y. 166)	251
Spaulding v. Pennsylvania Co. (Pa.)	698	v. Tierney (126 N. Y. 166)	251
Spencer v. Andrew (Iowa)	115	Wetzler v. Duffy (78 Wis. 170)	178
Springer v. Chicago (Ill.)	609	Wheeler v. Selden (Vt.)	600
State, Bennett v. (Ga.)	449	Whitney Nat. Bank, Bernard v. (La.)	302
Gill v. (Ga.)	433	Williams, Sloan v. (Ill.)	496
Long v. (Md.)	89	Williamson v. Newport News & M. V. Co. (34 W. Va. 657)	397
Long v. (Md.)	425	Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co. (141 Pa. 407)	220
v. Neis (N. C.)	412	Wilson, <i>Re</i> (D. C.)	624
Grady v. Chicago, M. & N. R. Co. (Wis.)	180	Wilson v. Wilson (Mass.)	524
Lacour, Steusoff v. (Tex.)	364	Windley, Burbage v. (N. C.)	409
Sefton, Johnston v. (Ind.)	235	Wood v. Corry Water Works Co. (44 Fed. Rep. 146)	163
Van Amringe v. Taylor (108 N. C. 196)	202	Woodstock Iron Co., McCarty v. (Ala.)	136
Steusoff v. State, Lacour (Tex.)	364	Worcester, Howard v. (Mass.)	160
Stewart v. Vandervort (34 W. Va. 524)	50	Y.	
Stowers v. Postal Teleg. Cable Co. (Miss.)	864	Young, Hobart v. (Vt.)	693
Stratton v. Dibrell (89 Tenn. 497)	70	Z.	
Strong, Lemmon v. (Conn.)	270	Zinn v. Rice (Mass.)	336
Suffolk Brewing Co., Lilienthal v. (Mass.)	821		
Swasey, Jaques v. (Mass.)	566		
Swigert, Republic L. Ins. Co. v. (Ill.)	328		
T.			
Taylor, State, Van Amringe v. (N. C.)	202		
Tennessee Coal, I. & R. Co., Holland v. (Ala.)	232		
v. Kyle (Ala.)	103		
Tennille, American Mortgage Co. v. (Ga.)	529		
Third Nat. Bank of Phila., Appeal of (Pa.)	223		
Thomas, American Freehold Land & M. Co. v. (U. S. C. C. Ga.)	681		
Frink v. (Or.)	239		
Tierney, People, Western Union Teleg. Co. v. (N. Y.)	251		
Timoney v. Booth (127 N. Y. 109)	452		
12 L. R. A.			



# CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

## A.

Abbott v. Bradstreet, 3 Allen, 587	724
v. Omaha Smelt, & Ref. Co., 4 Neb. 416	389
Abegg v. Schwab, 24 N. Y. S. R. 386	513
Abendroth v. New York Elev. R. Co. (N. Y.) 25 N. E. Rep. 495	547
Acherley v. Vernon, Willes, 163	112
Ackley v. People, 9 Barb. 609	450
Acton v. Blundell, 12 Mees. & W. 324	603
Adams v. Addington, 16 Fed. Rep. 89	142
v. Blothin, 66 Me. 19	372
v. Clem, 41 Ga. 65	384
v. Fitzpatrick, 125 N. Y. 124	812
v. Nichols, 19 Pick. 275	572
Adams County v. Quiney, 130 Ill. 566	855
Adams Exp. Co. v. Harris, 120 Ind. 73	807
v. Stettaners, 61 Ill. 184	807
Adderly v. Storm, 6 Hull, 624	784
Adsit v. Adsit, 2 Johns. Ch. 448, 1 L. ed. 446	692
Ætna L. Ins. Co. v. France, 94 U. S. 561, 24 L. ed. 287	412
Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 86	796
Agawam v. Hampden County, 180 Mass. 523, 530, 422, 494	426
Alabama G. S. R. Co. v. Arnold, 84 Ala. 159	234
Alcorn v. Philadelphia, 44 Pa. 348	752
Alexander v. Greenville, 54 Miss. 659	153
v. Mortgage Co. (Not reported)	685
v. Relfe, 74 Mo. 495	334
Alexandria v. Dearmon, 2 Sneed, 122	76
Allan v. Lake, 18 Q. B. 560	697
Allen v. Bartlett, 20 W. Va. 46	298
v. Blunt, 1 Blatchf. 480	776
v. McGaughey, 31 Ark. 252	277
v. McKean, 1 Sumn. 297	667
v. Montgomery R. Co., 11 Ala. 437	312
v. South Boston R. Co., 5 L. R. A. 716, 150 Mass. 200, 15 Am. St. Rep. 185	502
Allison v. Bristol M. Ins. Co., L. R. 1 App. Cas. 209, 226	573
Alston v. Alston, 3 Brev. 469, 2 Tread. L. 604	774
Altman v. Rittershofer, 12 West. Rep. 631, 68 Mich. 287	142
Aivany v. Powell, 3 Jones, Eq. 51	408
American Academy of A. and S. v. Harvard College, 12 Gray, 582	417
American & F. L. Union v. Yount, 101 U. S. 364, 25 L. ed. 890	368
American Cent. L. Ins. Co. v. McCrea, 8 Lea, 513	317
American Exp. Co. v. Sands, 65 Pa. 140	806
v. Spellman, 90 Ill. 455	615
American F. L. Mortg. Co. v. Sewall (Ala.) 9 So. Rep. 143	857
American K. Frog Co. v. Haven, 101 Mass. 306	787
American Rapid Teleg. Co. v. Hess (N. Y.) 26 N. E. Rep. 919	253
American Seamen's Friend Soc. v. Hopper, 33 N. Y. 624	165
American S. S. Co. v. Landreth, 102 Pa. 135	296
Ames v. Norman, 4 Sneed, 682	516
v. Port Huron Log. D. & B. Co., 11 Mich. 139	663
Amiable Isabella, The, 19 U. S. 6 Wheat. 71, 5 L. ed. 238	595
Amick v. Tharp, 13 Gratt. 564	55
Anderson v. Ballenger, 4 L. R. A. 680, 87 Ala. 384	143
v. Philadelphia Warehouse Co., 111 U. S. 479, 28 L. ed. 478	787
v. Santa Anna Twp., 116 U. S. 361, 29 L. ed. 634	293
v. Spence, 72 Ind. 815	506
v. Winston, 31 Fed. Rep. 528	102
Andrews v. Beck, 23 Tex. 455	136
Anglo v. Northwestern Mut. L. Ins. Co., 92 U. S. 341, 23 L. ed. 560	44

12 L. R. A.

Anglo-Egyptian Nav. Co. v. Renne, L. R. 11 C. P. 271	371
Aniba v. Yeomans, 39 Mich. 171	371
Anonymous, Jenk. 184	64
Appleby v. Myers, L. R. 2 C. P. 652	573
Appleton Bank v. McGilvray, 4 Gray, 518	263
Arends v. Com., 18 Gratt. 793	272
Argall v. Old North State Ins. Co., 84 N. C. 335	217
Arguelle's Case (U. S. Dip. Corr. 1864, pt. 2, 60-74)	595
Armstrong v. Burrows, 6 Watts, 266	461
v. Lancashire & Y. R. Co., 44 L. J. Exch. 89, L. R. 10 Exch. 47	270
v. Pomeroy Nat. Bank, 6 L. R. A. 625, 46 Ohio St. 512	797
Arnold v. Jones, 9 Lea, 548	515, 516
v. Mundy, 6 N. J. L. 1	648
v. Potter, 22 Iowa, 195	98
v. Stephenson, 79 Ind. 126	125
v. Stevens, 24 Pick. 106	61
Ash v. Marlow, 20 Ohio, 119	751
Ashcroft v. Butterworth, 186 Mass. 511	561
Asher v. Texas, 128 U. S. 129, 130, 32 L. ed. 368, 369	623, 627, 631
Ashfield's Case, Re, Cush. Elect. Cas. 583	128
Aspinwall v. Chicago & N. W. R. Co., 41 Wis. 474	98
v. Ohio & M. R. Co., 20 Ind. 492	370
Atchison v. Lucas, 83 Ky. 451	395
Atchison, T. & S. F. R. Co. v. Gault, 38 Kan. 618	827
Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732	645
Atkinson v. Dance, 9 Serg. 427	521
v. Jackson, 8 Ind. 31	125
Atlanta v. Central R. & Bkg. Co., 53 Ga. 120	856
v. Grant, 57 Ga. 346	157
Atlantic Nat. Bank v. Harris, 118 Mass. 147	577
Atty-Gen. v. Cambridge, 18 Gray, 247	421
v. Colney H. L. Asylum, L. R. 4 Ch. App. 146, 153	540, 550
v. Edison Teleph. Co., L. R. 6 Q. B. Div. 244	546
v. Iron County Board of Canvassers, 64 Mich. 607	226
Atwood v. Cobb, 16 Pick. 227, 230	561
Aughie v. Landis, 95 Ind. 419	506
Aughtie v. Aughtie, 1 Phillim. Eccl. 201	361
Augusta & S. R. Co. v. Randall, 85 Ga. 297	451
v. Renz, 55 Ga. 126	180
Auwerker v. Mathiot, 9 Serg. & R. 402	743
Avans v. Everett, 3 Lea, 76	517-520
Averett v. Booker, 15 Gratt. 163	848
Avery v. Pixley, 4 Mass. 459	774

## B.

Bacon v. Howard, 81 U. S. 20 How. 22, 15 L. ed. 811	668
v. State, 22 Fla. 46	775
v. Towne, 4 Cush. 217	761
Badger v. Badger, 88 N. Y. 546	841
Baglan Hall Colliery Co., Re, L. R. 5 Ch. App. 346	311
Bailey v. New Haven & N. Co., 107 Mass. 496	581
v. Pittsburgh & C. G. C. & C. Co., 69 Pa. 334	312
v. Rogers, 1 Me. 180, 190	92
Bainbridge v. Sherlock, 29 Ind. 364	651
Baird v. Daly, 68 N. Y. 547	558
Bakeman v. Talbot, 31 N. Y. 368	604
Bull v. Nye, 99 Mass. 582	549
Ballard v. Tomlinson, L. R. 29 Ch. Div. 115	549
Ballou v. Gile, 50 Wis. 614	375
Baltimore v. Green Mt. Cemetery, 7 Md. 517	886
Baltimore & O. R. Co. v. Chase, 43 Md. 23	650
v. Glenn, 28 Md. 287	367
v. Schwindingling, 101 Pa. 258	213, 219
v. Stricker, 51 Md. 47	300
Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 330, 27 L. ed. 739, 744, 56, 549, 667	8

Baltimore County Comrs. v. Maryland Hospital, 63 Md. 157	855	Benton v. Boston City Hospital, 140 Mass. 13...	161
Baltimore Elevator Co. v. Neal, 65 Md. 438	102	Berks County v. Jones, 21 Pa. 416	818
Baltimore, O. & C. B. Co. v. Rowan, 1 West. Rep. 914, 104 Ind. 88	300	Bernina, The [Mills v. Armstrong] L. R. 13 Prob. Div. 58	270
Baltimore Wheel Co. v. Bemis, 20 Fed. Rep. 65	198, 200	Berrigan v. Fleming, 2 Lea. 271	517
Bamford v. Turnley, 3 Best. & S. 63, 53	581	Berry v. Brown, 9 Cent. Rep. 896, 107 N. Y. 659	471
Bank v. Mfg. Co., 13 W. N. C. 174	325	v. Robinson, 9 Johns. 121	731
v. Rawlings, 1 Leg. Rep. 236	740	v. State, 10 Ga. 522, 523	451
Bank Comrs. v. Bank of Buffalo, 6 Paige, 497, 3 L. ed. 1075	118	Beel v. New York Cent. & H. R. R. Co., 70 N. Y. 171	101
Bank of Augusta v. Earle, 38 U. S. 13 Pet. 588, 592, 10 L. ed. 307, 309	307, 308, 370	Bethlehem v. Annis, 40 N. H. 34	497
British North America v. Merchants Nat. Bank, 31 N. Y. 106	796	Bettis v. Reynolds, 12 Ired. L. 344	419
Commerce's Appeal, 73 Pa. 59	786	Betz v. Williams & W. Land & L. Co. (recently decided)	809
Fort Madison v. Alden, 120 U. S. 372, 38 L. ed. 725	814	Bibb v. Bibb, 79 Ala. 444	858
New Orleans v. Case, 90 U. S. 638, 25 L. ed. 448	784	Bickford v. First Nat. Bank, 49 Ill. 238	495
State v. Cooper, 2 Yerg. 599, 608, 605, 73, 76, 78	848	Bicknell v. Dorion, 16 Pick. 478	290
Troy v. Topping, 9 Wend. 277, 18 Wend. 557	167	Bigelow v. Forrest, 76 U. S. 9 Wall. 339, 19 L. ed. 606	686
Banks v. Goodfellow, L. R. 5 Q. B. 590	105, 167	v. Gregory, 73 Ill. 197	399
Barber v. Roxbury, 11 Allen, 318, 320	260	v. Randolph, 14 Gray, 541	161
Barbo v. Rider, 67 Wis. 600	167	Bills v. Belknap, 30 Iowa, 583	668
Barelift v. Treece, 77 Ala. 538	145	Bingham v. Smith, 5 Ala. 651	302
Bard v. Poole, 12 N. Y. 505	370	Birdsall v. McDonald, 1 Bann. & Ard. 165	109
Barker, Jr. 6 Wend. 509	738	Birmingham v. Klein, 8 L. R. A. 399, 89 Ala. 451	851
Barker v. People, 3 Cow. 703	385	Bishop v. Schneider, 46 Mo. 472	391, 892
v. Perry, 67 Iowa, 146	615	Bissell v. Wheelock, 11 Cush. 277	574
Barksdale v. Morgan, 4 Mod. 185	773	Black v. Goodrich Transp. Co., 55 Wis. 319	807
Barnes v. Chase, 128 Mass. 211	93	Black's App., 44 Pa. 508	256
v. Suddard, 4 West. Rep. 134, 117 Ill. 237	531	Blackburne, <i>Ex parte</i> , 10 Ves. Jr. 204	225
Barnett v. Reed, 51 Pa. 190	290	Bladen v. Philadelphia, 60 Pa. 464	356
Barney v. Dudley, 40 Kan. 247	808	Blake v. Maine Cent. R. Co., 70 Me. 80	102
v. Keokuk, 94 U. S. 324, 24 L. ed. 224, 639, 649	661	Bland v. Bland (decided at present term)	39
v. Little, 15 Iowa, 327	328	Blandford v. State, 10 Tex. App. 627	594
v. Lowell, 98 Mass. 570	422	Blessing v. Miller, 102 Pa. 45	329
v. McCarty, 15 Iowa, 619	391, 398	Bliss v. Greeley, 45 N. Y. 671	605
v. Schneider, 76 U. S. 9 Wall. 251, 252, 19 L. ed. 649, 650	689	v. Lee, 17 Pick. 83	229
Barrett v. Failing, 111 U. S. 523, 28 L. ed. 506	361	Blundell v. Catterall, 5 Barn. & Ad. 287	619
v. Hall, 1 Aik. 239	697	Blythe v. Lovinggood, 2 Ired. L. 20	411
Barry v. Schmidt, 57 Wis. 173	180	Board of Comrs. v. Washington Twp., 121 Ind. 379	280
Barter v. Com., 5 Pennr. & W. 259	260	Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507	364
Bartholomew v. Bentley, 15 Ohio, 659, 1 Ohio St. 37	351	Bobbitt v. Liverpool & L. & G. Ins. Co., 68 N. C. 70	517
Bartlett v. Tucker, 104 Mass. 339	720	Bogart v. McClung, 11 Heisk. 105	740
Bartol v. Calvert, 21 Ala. 43	773	Bohan v. Port Jervis Gas Light Co., 9 L. R. A. 711, 122 N. Y. 18, and notes	56
Basy v. Gallagher, 87 U. S. 30 Wall. 680, 22 L. ed. 453	686	Bolton v. Bolton, 73 Me. 299	212, 213
Base Foundry & Mach. Works v. Parke County Comrs., 115 Ind. 224	504	Bomar v. Maxwell, 9 Humph. 622	319
Batchelder v. Queen Ins. Co., 135 Mass. 449	538	Bond v. Atkin, 6 Watts & S. 165	225
Bates v. Westborough, 7 L. R. A. 154, 151 Mass. 174	161	v. Bond, 51 Hun. 507	814
Batley v. Holbrook, 11 Gray, 212	95	v. Clark, 35 Vt. 577	697
Bauer v. Clay, 8 Kan. 555	761	v. Wool, 107 N. C. 139	651
Bauer's Estate, 79 Cal. 304	519	Bonds v. Smith, 106 N. C. 564	267
Baughman v. Calaveras County Super. Ct., 72 Cal. 573	101	Bone v. Delaware & H. Canal Co. (Pa.) 5 Atl. Rep. 71	539
Baumann v. Jam, L. R. 8 Ch. 508	561	Boorman v. American Exp. Co., 21 Wis. 154	808
Baumgartner v. Hasty, 100 Ind. 575, 580, 581	154	Booth v. Starr, 1 Conn. 245	379
Bayard's App., 72 Pa. 433	325	Boston v. Le Crawl, 58 U. S. 17 How. 426, 15 L. ed. 118	679
Bayles v. Wallace, 56 Hun. 423	505	Boston & M. R. Co. v. Chipman, 5 New Eng. Rep. 572, 146 Mass. 107	341
Bayle v. Travelers Ins. Co., 118 U. S. 330, 28 L. ed. 390	689	Boston Beer Co. v. Massachusetts, 97 U. S. 26, 32, 24 L. ed. 989, 991	653, 660
Baylor v. Delaware, L. & W. R. Co., 40 N. J. L. 23	300	Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 60	198
Beall v. White, 94 U. S. 332, 24 L. ed. 173	607	Boston Seaman's Friend Soc. v. Boston, 116 Mass. 181	423, 425, 856
Beals v. Olmstead, 24 Vt. 14	986	Bostwick v. Williams, 36 Ill. 65	497
Beard v. Whisler, 7 Watts, 149	291	Boughton v. Knight, 6 Moak, Eng. Rep. 359, 165, 167	167
Beardsley v. Knight, 10 Vt. 185	263	Boughton v. Crowder, 2 Barn. & C. 703	550
Beardslow v. Virginia, 41 Ill. 542	287	Bouton v. Demont, 11 West. Rep. 437, 123 Ill. 142	333
Beatty v. Duffet, 11 La. Ann. 74	296	Bowc. v. Jewell, 2 N. H. 543	144
v. Gilmore, 16 Pa. 463	237	Bowman v. Brown, 52 Iowa, 437	762
Beauchamp v. State, 6 Blackf. 209	237	v. Chicago & N. W. R. Co., 125 U. S. 466, 31 L. ed. 700	661
Beaumont v. Reeve, 8 Q. B. 483, Shir. Lead. Cas. 7	471	v. Wathen, 2 McLean, 376	186
Beckwith v. Talbot, 95 U. S. 239, 24 L. ed. 498	561	Bowman's Case, 67 Mo. 145	196
Beecher Mfg. Co. v. Atwater Mfg. Co., 114 U. S. 523, 29 L. ed. 232	109	Boyd v. England, 56 Ga. 598	860
Behn v. Young, 21 Ga. 207	157	v. State, 58 Ala. 608, 615	183
Belknap v. Bender, 75 N. Y. 446	471	Boynton v. Andrews, 63 N. Y. 93	312
Bell v. Bank of Nashville, Peck (Tenn.) 269, 270	74	v. Hatch, 47 N. Y. 235	312
v. Gough, 23 N. J. L. 624	650	Brace v. Evans (Pa.) 18 R. R. & Corp. L. J. 561	199
v. Mahin, 69 Iowa, 408	144	Brackett v. People, 1 West. Rep. 618, 115 Ill. 29	247
v. Newman, 5 Serg. & R. 91	256	Bradford Com. Bkg. Co. v. Cure, L. R. 81 Ch. Div. 338	149
v. Perkins, Peck (Tenn.) 262	738	Bradley v. Salmon Falls Mfg. Co., 30 N. H. 487	345
Bennett v. Butterworth, 52 U. S. 11 How. 675, 13 L. ed. 862	686	Bradshaw v. South Boston R. Co., 135 Mass. 407	827
Benson v. McMahon, 127 U. S. 432, 32 L. ed. 236	591, 598	Brady v. Huff, 75 Ala. 80	139
		v. Walters, 55 Ga. 25	180
		Branch v. Wilmington & W. R. Co., 77 N. C. 347, 351	114
		Brandenburg v. Thorndike, 189 Mass. 103	230
		Brandon v. Robinson, 18 Ves. Jr. 429	40
		Branson v. Philadelphia, 47 Pa. 329	260



# CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

## A.

Abbott v. Bradstreet, 3 Allen, 537	724
v. Omaha Smelt. & Ref. Co., 4 Neb. 416	369
Abegg v. Schwab, 24 N. Y. S. R. 388	813
Abendroth v. New York Elev. R. Co. (N. Y.) 25 N. E. Rep. 496	647
Acherley v. Vernon, Willes, 153	112
Ackley v. People, 9 Barb. 609	480
Acton v. Blundell, 12 Mees. & W. 324	663
Adams v. Addington, 16 Fed. Rep. 89	142
v. Blithen, 66 Me. 19	372
v. Clem, 41 Ga. 65	384
v. Fitzpatrick, 125 N. Y. 124	812
v. Nichols, 19 Pick. 275	572
Adams County v. Quincy, 130 Ill. 566	855
Adams Exp. Co. v. Harris, 130 Ind. 73	807
v. Stettaners, 61 Ill. 184	807
Adderly v. Storm, 6 Hill, 624	784
Adsit v. Adsit, 2 Johns. Ch. 448, 1 L. ed. 446	682
Etna L. Ins. Co. v. France, 94 U. S. 561, 24 L. ed. 287	412
Etna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 86	798
Agawam v. Hampden County, 130 Mass. 523, 530, 422, 434	435
Alabama G. S. R. Co. v. Arnold, 84 Ala. 150	234
Alcorn v. Philadelphia, 44 Pa. 348	762
Alexander v. Greenville, 54 Miss. 659	153
v. Mortgage Co. (Not reported)	685
v. Relfe, 74 Mo. 465	834
Alexandria v. Dearmon, 2 Sneed, 122	76
Allan v. Lake, 18 Q. B. 530	697
Allen v. Bartlett, 20 W. Va. 46	776
v. Blunt, 1 Blatchf. 480	776
v. McGaughey, 31 Ark. 232	277
v. McKean, 1 Sumn. 297	667
v. Montgomery R. Co., 11 Ala. 437	312
v. South Boston R. Co., 5 L. R. A. 716, 150 Mass. 300, 15 Am. St. Rep. 185	502
Allison v. Bristol M. Ins. Co., L. R. 1 App. Cas. 209, 230	573
Alston v. Alston, 3 Brev. 469, 2 Tread. L. 604	774
Altman v. Rittershofer, 13 West. Rep. 531, 68 Mich. 287	142
Alvany v. Powell, 2 Jones, Eq. 51	408
American Academy of A. and S. v. Harvard College, 12 Gray, 532	417
American & F. L. Union v. Yount, 101 U. S. 366, 25 L. ed. 890	368
American Cent. L. Ins. Co. v. McCrea, 8 Lea, 513	317
American Exp. Co. v. Sands, 65 Pa. 140	306
v. Spellman, 90 Ill. 455	615
American F. L. Mortg. Co. v. Sewell (Ala.) 9 So. Rep. 143	867
American R. Frog Co. v. Haven, 101 Mass. 366	797
American Rapid Teleg. Co. v. Hess (N. Y.) 26 N. E. Rep. 919	253
American Seamen's Friend Soc. v. Hopper, 33 N. Y. 624	165
American S. S. Co. v. Landreth, 102 Pa. 135	286
Ames v. Norman, 4 Sneed, 682	516
v. Port Huron Log. D. & B. Co., 11 Mich. 139	663
Amiable Isabella, The, 19 U. S. 6 Wheat. 71, 5 L. ed. 208	595
Amick v. Tharp, 13 Gratt. 564	55
Anderson v. Ballenger, 4 L. R. A. 680, 87 Ala. 384	143
v. Philadelphia Warehouse Co., 111 U. S. 479, 28 L. ed. 478	797
v. Santa Anna Twp., 116 U. S. 861, 29 L. ed. 634	298
v. Spence, 73 Ind. 315	505
v. Winston, 31 Fed. Rep. 528	219
Andrews v. Beck, 28 Tex. 456	126
Angle v. Northwestern Mut. L. Ins. Co., 92 U. S. 841, 23 L. ed. 580	44

Anglo-Egyptian Nav. Co. v. Renna, L. R. 11 Q. B. 271	872
Aniba v. Yeomans, 39 Mich. 171	371
Anonymous, Jenk. 184	64
Appleby v. Myers, L. R. 3 C. P. 653	573
Appleton Bank v. McGilvray, 4 Gray, 518	268
Arents v. Com., 18 Gratt. 768	272
Argall v. Old North State Ins. Co., 84 N. C. 365	317
Arguelle's Case (U. S. Dip. Corr. 1884, pt. 2, 60-74)	595
Armstrong v. Burrows, 6 Watts, 236	461
v. Lancashire & Y. R. Co., 44 L. J. Exch. 89, L. R. 10 Exch. 47	270
v. Pomeroy Nat. Bank, 6 L. R. A. 635, 46 Ohio St. 512	797
Arnold v. Jones, 9 Lea, 545	515, 516
v. Mundy, 6 N. J. L. 1	827
v. Potter, 23 Iowa, 195	98
v. Stephenson, 79 Ind. 136	125
v. Stevens, 24 Pick. 105	61
Ash v. Marlow, 20 Ohio, 119	781
Ashcroft v. Butterworth, 133 Mass. 511	561
Asher v. Texas, 128 U. S. 139, 32 L. ed. 898, 899	635, 637, 681
Ashfield's Case, Re, Cush. Elect. Cas. 583	128
Aspinwall v. Chicago & N. W. R. Co., 41 Wis. 474	88
v. Ohio & M. R. Co., 20 Ind. 492	370
Atchison v. Lucas, 53 Ky. 451	308
Atchison, T. & S. F. R. Co. v. Gantt, 38 Kan. 618	837
Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 723	645
Atkinson v. Dance, 9 Serg. 427	581
v. Jackson, 8 Ind. 31	125
Atlanta v. Central R. & Bkg. Co., 53 Ga. 120	856
v. Grant, 57 Ga. 346	157
Atlantic Nat. Bank v. Harris, 118 Mass. 147	577
Atty-Gen. v. Cambridge, 16 Gray, 247	421
v. Colney H. L. Asylum, L. R. 4 Ch. App. 146, 153	540
v. Edison Teleph. Co., L. R. 8 Q. B. Div. 244	546
v. Iron County Board of Canvassers, 64 Mich. 607	236
Atwood v. Cobb, 16 Pick. 227, 230	561
Aughie v. Landis, 95 Ind. 419	505
Aughtie v. Aughtie, 1 Philim. Eccl. 201	301
Augusta & S. R. Co. v. Randall, 55 Ga. 397	120
v. Renz, 55 Ga. 136	743
Auwerter v. Mathiot, 9 Serg. & R. 402	517-520
Avans v. Everett, 8 Lea, 78	524
Averett v. Booker, 15 Gratt. 163	345
Avery v. Pixley, 4 Mass. 459	774

## B.

Bacon v. Howard, 61 U. S. 20 How. 22, 15 L. ed. 811	608
v. State, 22 Fla. 46	775
v. Towne, 4 Cush. 217	781
Badger v. Badger, 88 N. Y. 540	841
Baglan Hall Colliery Co., Re, L. R. 5 Ch. App. 346	311
Bailey v. New Haven & N. Co., 107 Mass. 498	581
v. Pittsburgh & C. G. C. & C. Co., 69 Pa. 334	313
v. Rogers, 1 Me. 188, 190	93
Bainbridge v. Sherlock, 29 Ind. 864	651
Baird v. Daly, 68 N. Y. 547	558
Bakeman v. Talbot, 81 N. Y. 306	604
Ball v. Nye, 90 Mass. 582	549
Ballard v. Tomlinson, L. R. 26 Ch. Div. 115	549
Ballou v. Gile, 50 Wis. 614	214, 375
Baltimore v. Green Mt. Cemetery, 7 Md. 517	856
Baltimore & O. R. Co. v. Chase, 43 Md. 23	650
v. Glenn, 28 Md. 287	367
v. Schwindling, 101 Pa. 256	315, 319
v. Stricker, 51 Md. 47	300
Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 330, 37 L. ed. 736, 744, 54, 549, 697	697

Baltimore County Comrs. v. Maryland Hospital, 62 Md. 127.....	855	Benton v. Boston City Hospital, 140 Mass. 13.....	161
Baltimore Elevator Co. v. Neal, 65 Md. 438.....	102	Berks County v. Jones, 21 Pa. 416.....	518
Baltimore, O. & C. R. Co. v. Rowan, 1 West. Rep. 814, 104 Ind. 88.....	300	Bernina, The [Mills v. Armstrong] L. R. 13 Prob. Div. 58.....	270
Baltimore Wheel Co. v. Bemis, 29 Fed. Rep. 95.....	193	Berrigan v. Fleming, 2 Lea. 271.....	517
Bamford v. Turnley, 3 Best & S. 63, 53.....	551	Berry v. Brown, 9 Cent. Rep. 596, 107 N. Y. 659.....	471
Bank v. Mfg. Co., 13 W. N. C. 174.....	325	v. Robinson, 9 Johns. 121.....	781
v. Rawlings, 1 Leg. Rep. 239.....	740	v. State, 10 Ga. 522, 523.....	451
Bank Comrs. v. Bank of Buffalo, 6 Paige, 497, 3 L. ed. 1076.....	118	Beal v. New York Cent. & H. R. R. Co., 70 N. Y. 171.....	101
Bank of Augusta v. Earle, 38 U. S. 13 Pet. 588, 592, 10 L. ed. 307, 309.....	370	Bethlehem v. Annis, 40 N. H. 34.....	497
British North America v. Merchants Nat. Bank, 31 N. Y. 106.....	796	Bettis v. Reynolds, 12 Ired. L. 344.....	419
Commerce's Appeal, 73 Pa. 59.....	798	Betz v. Williams & W. Land & L. Co. (recently decided).....	809
Fort Madison v. Alden, 129 U. S. 572, 33 L. ed. 720.....	314	Bibb v. Bibb, 79 Ala. 444.....	555
New Orleans v. Case, 99 U. S. 625, 25 L. ed. 448.....	784	Bickford v. First Nat. Bank, 42 Ill. 528.....	495
State v. Cooper, 2 Yerg. 599, 606, 608.....	73, 76, 78	Bicknell v. Dorton, 16 Pick. 478.....	290
Troy v. Topping, 9 Wend. 277, 13 Wend. 527.....	848	Bigelow v. Forrest, 78 U. S. 9 Wall. 532, 19 L. ed. 680.....	628
Banks v. Goodfellow, L. R. 5 Q. B. 530.....	165	v. Gregory, 73 Ill. 197.....	399
Barber v. Roxbury, 11 Allen, 318, 330.....	260	v. Randolph, 14 Gray. 541.....	161
Barbo v. Rider, 67 Wis. 600.....	197	Bills v. Beeknap, 33 Iowa. 533.....	623
Barcliff v. Trece, 77 Ala. 523.....	145	Bingham v. Smith, 5 Ala. 651.....	302
Bard v. Poole, 12 N. Y. 505.....	370	Birdsall v. McDonald, 1 Bann. & Ard. 165.....	109
Barker, Ez. 6 Wend. 509.....	738	Birmingham v. Klein, 5 L. R. A. 399, 39 Ala. 461.....	554
Barker v. People, 8 Cow. 708.....	365	Bishop v. Schneider, 45 Mo. 472.....	393
v. Perry, 67 Iowa. 148.....	615	Bissell v. Wheelock, 11 Cush. 277.....	574
Barkdale v. Morgan, 4 Mod. 185.....	773	Black v. Goodrich Transp. Co., 55 Wis. 319.....	807
Barnes v. Chase, 123 Mass. 211.....	93	Black's App., 44 Pa. 508.....	256
v. Suddard, 4 West. Rep. 134, 117 Ill. 237.....	531	Blackburne, Ex parte, 10 Ves. Jr. 504.....	225
Barnett v. Reed, 51 Pa. 190.....	290	Bladen v. Philadelphia, 60 Pa. 464.....	356
Barney v. Dudley, 40 Kan. 247.....	808	Blake v. Maine Cent. R. Co., 70 Me. 60.....	102
v. Keokuk, 94 U. S. 824, 24 L. ed. 224, 639, 649.....	681	Blair v. Bland (decided at present term).....	39
v. Little, 15 Iowa. 527.....	382	Blanford v. State, 10 Tex. App. 627.....	594
v. Lowell, 98 Mass. 570.....	422	Blessing v. Miller, 102 Pa. 451.....	322
v. McCarty, 15 Iowa. 519.....	391	Bliss v. Greeley, 45 N. Y. 671.....	908
v. Schneider, 73 U. S. 9 Wall. 251, 252, 19 L. ed. 649, 650.....	689	v. Lee, 17 Pick. 83.....	294
Barrett v. Failing, 111 U. S. 523, 28 L. ed. 505.....	361	Blundell v. Catterall, 5 Barn. & Ad. 287.....	619
v. Hall, 1 Aik. 269.....	697	Blythe v. Lovinggood, 2 Ired. L. 23.....	411
Barry v. Schmidt, 57 Wis. 172.....	180	Board of Comrs. v. Washington Twp., 121 Ind. 379.....	290
Barter v. Com., 3 Penn. & W. 259.....	290	Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507.....	364
Bartholomew v. Bentley, 15 Ohio, 659, 1 Ohio St. 37.....	351	Hobbitt v. Liverpool & L. & G. Ins. Co., 66 N. C. 70.....	517
Bartlett v. Tucker, 104 Mass. 339.....	720	Bogart v. McClung, 11 Heisk. 105.....	740
Bartol v. Calvert, 21 Ala. 43.....	778	Bohan v. Port Jervis Gas Light Co., 9 L. R. A. 711, 122 N. Y. 13, and notes.....	56
Basy v. Gallagher, 87 U. S. 20 Wall. 680, 22 L. ed. 453.....	696	Bolton v. Bolton, 73 Me. 299.....	212
Bass Foundry & Mach. Works v. Parke County Comrs., 115 Ind. 224.....	504	Bomar v. Maxwell, 9 Humph. 622.....	319
Batchelder v. Queen Ins. Co., 135 Mass. 449.....	823	Bond v. Atkin, 6 Watts & S. 165.....	225
Bates v. Westborough, 7 L. R. A. 156, 151 Mass. 174.....	161	v. Bond, 51 Hun. 507.....	814
Batley v. Holbrook, 11 Gray. 212.....	93	v. Clark, 35 Vt. 577.....	697
Bauer v. Clay, 8 Kan. 585.....	761	v. Wool, 107 N. C. 139.....	651
Bauer's Estate, 79 Cal. 304.....	819	Bonds v. Smith, 106 N. C. 554.....	287
Baughman v. Calaveras County Super. Ct., 72 Cal. 573.....	101	Bone v. Delaware & H. Canal Co. (Pa.) 5 Atl. Rep. 71.....	539
Baumann v. James, L. R. 3 Ch. 508.....	561	Boorman v. American Exp. Co., 21 Wis. 154.....	808
Baumgartner v. Hasty, 100 Ind. 575, 580, 581.....	154	Booth v. Starr, 1 Conn. 248.....	279
Bayard's App., 72 Pa. 453.....	325	Boston v. Le Crow, 58 U. S. 17 How. 428, 15 L. ed. 118.....	679
Bayles v. Wallace, 56 Hun. 428.....	505	Boston & M. R. Co. v. Chipman, 5 New Eng. Rep. 572, 146 Mass. 107.....	341
Baylis v. Travelers Ins. Co., 113 U. S. 320, 28 L. ed. 390.....	689	Boston Beer Co. v. Massachusetts, 97 U. S. 26, 32, 24 L. ed. 999, 991.....	658, 660
Baylor v. Delaware, L. & W. R. Co., 40 N. J. L. 23.....	300	Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69.....	198
Beall v. White, 94 U. S. 322, 24 L. ed. 173.....	607	Boston Seaman's Friend Soc. v. Boston, 116 Mass. 181.....	422, 425, 456
Beale v. Olmstead, 24 Vt. 114.....	698	Bostwick v. Williams, 36 Ill. 65.....	497
Beas v. Wheeler, 7 Watts. 149.....	291	Boughton v. Knight, 6 Moak. Eng. Rep. 353, 165, 167.....	550
Beardsley v. Knight, 10 Vt. 185.....	277	Boulton v. Crowther, 2 Barn. & C. 703.....	333
Beardstown v. Virginia, 81 Ill. 542.....	363	Bouton v. Dement, 11 West. Rep. 437, 123 Ill. 142.....	143
Beatty v. Duffel, 11 La. Ann. 74.....	287	Bowe v. Jewell, 2 N. H. 543.....	384
v. Gilmore, 16 Pa. 483.....	295	Bowman v. Brown, 52 Iowa. 437.....	762
Beauchamp v. State, 6 Blackf. 299.....	287	v. Chicago & N. W. R. Co., 125 U. S. 465, 31 L. ed. 700.....	661
Beaumont v. Reeve, 5 Q. B. 483, Shif. Lead. Cas. 7.....	471	v. Wathen, 2 McLean. 376.....	651
Beckwith v. Talbot, 95 U. S. 239, 24 L. ed. 496.....	561	Bowman's Case, 67 Mo. 145.....	128
Beecher Mfg. Co. v. Atwater Mfg. Co., 114 U. S. 523, 29 L. ed. 332.....	109	Boyd v. England, 56 Ga. 598.....	160
Behn v. Young, 21 Ga. 207.....	167	v. State, 53 Ala. 608, 615.....	858
Belknap v. Bender, 75 N. Y. 446.....	471	Boynton v. Andrews, 63 N. Y. 93.....	312
Bell v. Bank of Nashville, Peck (Tenn.) 269, 370.....	74	v. Hatch, 47 N. Y. 226.....	312
v. Gough, 23 N. J. L. 624.....	650	Brace v. Evans (Pa.) 18 R. & Corp. L. J. 561.....	199
v. Mahin, 69 Iowa. 408.....	144	Brackett v. People, 1 West. Rep. 616, 115 Ill. 29.....	247
v. Newman, 5 Serg. & R. 91.....	256	Bradford Com. Bkr. Co. v. Cure, L. R. 31 Ch. Div. 326.....	149
v. Perkins, Peck (Tenn.) 262.....	738	Bradley v. Salmon Falls Mfg. Co., 80 N. H. 487.....	345
Bennett v. Butterworth, 52 U. S. 11 How. 675, 13 L. ed. 322.....	686	Bradshaw v. South Boston R. Co., 135 Mass. 407.....	827
Benson v. McMahon, 127 U. S. 462, 32 L. ed. 236.....	591, 593	Brady v. Huff, 75 Ala. 80.....	139
		v. Walters, 55 Ga. 25.....	160
		Branch v. Wilmington & W. R. Co., 77 N. C. 347, 351.....	114
		Brandenburg v. Thorndike, 189 Mass. 102.....	230
		Brandon v. Robinson, 13 Ves. Jr. 429.....	45
		Branson v. Philadelphia, 47 Pa. 829.....	260

Brant v. Ehlen, 59 Md. 1.	811	Bussell Trimmer Co. v. Stevens, 187 U. S. 423, 34	
Brastow v. Rockford Ice Co., 77 Me. 100.	598	L. ed. 719, 53 Pat. Off. Gaz. 2044.	108
Brayton v. Fall River, 124 Mass. 95.	422, 428, 425	v. Marshall, 47 U. S. 6 How. 284, 12 L. ed.	248
Bredin v. Cranberry Twp. Road Comrs., 87 Pa.	441	440.	149
Breese v. United States Teleg. Co., 48 N. Y. 182,	680	Butchart v. Dresser, 4 DeG. M. & G. 542, 10	
189, 141, 142.	802	Hare, 453.	600
Brehme v. Dinsmore, 25 Md. 829.	802	Butchers Ben. Assn. v. Crescent City, L. S. L.	
Breisch v. Core, 81 Pa. 536.	619	& S. H. Co., 77 U. S. 10 Wall. 278, 19 L.	
Brenham v. Story, 99 Cal. 188.	48	ed. 915.	497
Brett v. Murphy, 6 New Eng. Rep. 643, 80 Ma.	91	Butchers Union B. H. & L. S. L. Co. v. Crescent	738
353.	774	City L. S. L. & S. H. Co., 111 U. S. 740,	330
Brewer v. Harris, 5 Gratt. 285.	562	28 L. ed. 585.	95
v. Winchester, 2 Allen, 899.	517	Butler v. Duval, 4 Yerg. 285.	158
Brewington v. Lowe, 1 Ind. 23.	270	v. Hudson River R. Co., 8 E. D. Smith, 871	573
Bridge v. Grand Junction R. Co., 3 Mees. & W.	697	Butters v. Olds, 11 Iowa, 1.	
247.	697	Byng v. Byng, 10 H. L. Cas. 170.	
v. Wain, 1 Starkie, 504.	604	Byrne v. Schiller, L. R. 6 Exch. 519.	
Brill v. Brill, 11 Cent. Rep. 305, 108 N. Y. 511, 608.	549		
v. Flagler, 23 Wend. 354.	661	C.	
Brimmer v. Robman, 128 U. S. 78, 34 L. ed. 862.	663		
Brisbane v. St. Paul & S. C. R. Co., 23 Minn. 114.	661	Cadogan v. Kennet, Cowp. 432.	607
British Museum v. White, 2 Sim. & Stu. 594.	416	Cage v. Acton, 1 Ld. Raym. 531.	281
Broadway v. Buxton, 43 Conn. 282.	277	Cahill v. Eastman, 18 Minn. 524 (Gil. 228).	549
Broadway Baptist Church v. McAtee, 8 Bush.	508	Caldwell v. Fulton, 31 Pa. 490.	61
508.	856	Callender v. Marsh, 1 Pick. 418.	550
Brook v. Gale, 14 Fla. 523.	819	Calverley v. Williams, 1 Ves. Jr. 210.	277
v. Hidy, 13 Ohio St. 306.	242, 243	Calve's Case, 8 Coke, 32c.	384
Brooker's Case, Godbolt, 578, 377.	725	Cambridge v. Lexington, 17 Pick. 222.	422
Brooklyn v. Smith, 104 Ill. 428.	327, 586	Cameron v. M'Roberts, 16 U. S. 3 Wheat. 591, 4	
Brookville & M. H. Co. v. Butler, 91 Ind. 184.	586	L. ed. 467.	387
Broome v. New York & N. J. Teleg. Co., 5 Cent.	864	Cammack v. Lewis, 89 U. S. 15 Wall. 643, 21 L.	
Rep. 814, 42 N. Y. Ed. 141.	143	ed. 244.	412
Broughton v. Fuller, 9 Vt. 373.	362	Campbell v. Sildell, 5 La. Ann. 274.	305
Brower v. Bowers, 1 Abb. App. Dec. 214.	286	v. Tousey, 7 Cow. 65.	238
v. O'Brien, 2 Ind. 423.	562	Cannon v. Hare, 1 Tenn. Ch. 22.	88
Brown v. Bellows, 4 Pick. 179.	291	Canoy v. Troutman, 7 Fred. L. 155.	209
v. Bennett, 75 Pa. 420.	697	Cape May & D. B. N. Co., R. 51 N. J. L. 78.	798
v. Bigelow, 10 Allen, 242.	46	Capper v. Louisville, R. & St. L. R. Co., 1 West.	
v. Blydenburgh, 7 N. Y. 141.	101	Rep. 237, 108 Ind. 305.	102
v. Central Pac. R. Co. (Chl.), 7 Pac. Rep. 447.	259	Cardington v. Fredericks, 46 Ohio St. 442.	582
v. Chicago, M. & St. P. R. Co., 54 Wis. 342.	341	Cardwell v. American River Bridge Co., 113 U.	
v. Eastern R. Co., 11 Cush. 97.	673	S. 205, 28 L. ed. 959.	680
v. Harris, 2 Gray, 359.	78	Cariss v. Tattersall, 2 Man. & G. 890.	144
v. Haywood, 4 Heisk. 360.	149	Carlsw v. Aultman, 28 Neb. 672.	532
v. Higginbotham, 5 Leigh, 583, 27 Am. Dec.	618	Carney v. Shanly, 107 Mass. 568, 581.	250
618.	661	Carother's App., 11 Cent. Rep. 48, 118 Pa. 468.	662
v. Houston, 114 U. S. 622, 632, 39 L. ed. 257,	326, 627, 631,	Carr v. Le Fevre, 27 Pa. 418.	311
260.	495	Carroll County Supra. v. United States, 85 U. S.	
v. Lickie, 43 Ill. 497.	101	18 Wall. 71, 21 L. ed. 771.	858
v. Maryland, 25 U. S. 12 Wheat. 436, 442, 444.	632	Carson v. Godley, 26 Pa. 111.	324
6 L. ed. 624, 626, 627, 628, 629, 630, 631,	101	Carter v. Cambridge & B. B. Propria., 104 Mass.	
v. Minneapolis & St. L. R. Co., 31 Minn. 553.	287	236.	421, 422
v. Mitchell, 102 N. C. 367.	718	v. Towne, 98 Mass. 567.	250
v. Parker, 7 Allen, 337.	658	Caruthers v. Harbert, 5 Coldw. 362.	737
v. Piper, 91 U. S. 37, 23 L. ed. 200.	157	Carver v. Hayes, 47 Me. 237.	847
v. Redwyne, 16 Ga. 67.	598	Case v. Beauregard, 99 U. S. 119-124, 26 L. ed.	
v. United States, 113 U. S. 570, 571, 28 L.	291	370, 371.	149
ed. 1079.	774	v. Loftus, 5 L. R. A. 684, 89 Fed. Rep. 730	640
v. Vandergrift, 80 Pa. 142.	201	Catlin v. Hull, 21 Vt. 152.	408
Vanderneil v. Vaux, 2 U. S. 2 Dall. 302, 1 L. ed.	774	Caton v. Catlin, L. R. 2 H. L. 127.	453
300.	127, 128	Cattlin v. Hills, 8 C. B. 123.	270
Brush v. Lemma, 77 Ill. 496.	188	Cauley v. Pittsburgh C. & St. L. R. Co., 96 Pa.	
Buocleuch v. Metropolitan Board of Works, L.	641, 650	366, 98 Pa. 498.	218, 219
R. 5 H. L. 418, L. R. 5 Exch. 221.	201	Cave v. Cave, L. R. 15 Ch. Div. 643, 644.	797
Buchanan v. Smith, 43 Miss. 90.	76, 78	v. Hastings, L. R. 7 Q. B. Div. 125.	561
Buck v. Hermance, 1 Blatchf. 323.	750	Cayuga County Nat. Bank v. Purdy, 56 Mich. 6	142
Budd v. State, 3 Humph. 491, 492.	221	Cecil Nat. Bank v. Watontown Bank, 105 U. S.	
Buesching v. St. Louis Gas-Light Co. 78 Mo. 219.	856	217, 28 L. ed. 1039.	788, 790
Buffalo City Cemetery v. Buffalo, 46 N. Y. 508.	148	Central Iowa R. Co. v. Wright County Supra.	
Buffalo, N. Y. & P. R. Co. v. Harvey, 107 Pa. 319.	95	67 Iowa, 199.	445
Bulger v. Rosa, 119 N. Y. 459-465.	863	Central Pac. R. Co. v. Gallatin, 99 U. S. 700, 718,	
Bullard v. Thompson, 35 Tex. 819.	724	25 L. ed. 493, 504.	606
Bullock v. Bullock, 122 Mass. 3.	289	Central Shade Roller Co. v. Cushman, 3 New	
v. Downes, 9 H. L. Cas. 1, 14, 22, 30.	279	Eng. Rep. 505, 143 Mass. 263.	564
Bump v. Betts, 19 Wend. 421.	847	Chadwick v. Jeffers, 1 Rich. L. 397, 44 Am. Dec.	
Bunnell v. Reed, 21 Conn. 596.	752	280.	735
Burchell v. Slolcock, 2 Ld. Raym. 1545.	749	Chaffe v. Ludeling, 27 La. Ann. 607.	369
Burd v. Ramsay, 9 Serg. & R. 109.	136	Chalfant v. Grant, 3 Lea. 118.	530
Burdick v. Cheadle, 26 Ohio St. 363.	497	Chamberlain v. Chamberlain, 43 N. Y. 424, 71	
Burdine v. Grand Lodge of Ala., 37 Ala. 478.	736	N. Y. 423.	623, 341
Burger v. Rice, 3 Ind. 125.	798	v. Western Transp. Co., 44 N. Y. 305.	188
Burges v. Seligman, 107 U. S. 20, 29, 27 L. ed.	204	Chamberlayne v. Brockett, L. R. 8 Ch. 208.	416
359, 363.	841	Champaign v. Harmon, 98 Ill. 491.	152, 153
Burke v. Elliott, 4 Fred. L. 361.	78	Champlain First Nat. Bank v. Wood, 45 Hun,	
v. South-Eastern R. Co., L. R. 5 Q. P.	863	413.	814
Div. 1.	411	Chandlor v. Lopus, Cro. Jac. 4.	696, 697
Burkholz v. State, 16 Lea. 72, 73.	829	Chandler v. Simmons, 97 Mass. 508.	139
Burien v. Shannon, 115 Mass. 438.	130	Chapin v. Fellowes, 36 Conn. 132.	214
Burnet v. Blaco, 4 Johns. 235.	204	Chapman v. Albany & S. R. Co., 10 Barb. 360.	550
Burnham v. Grand Trunk R. Co., 63 Me. 238.		v. Robertson, 6 Paige, 627, 631-634, 3 L. ed.	
Burns v. Bellefontaine R. Co., 50 Mo. 139.		1123, 1181, 1182.	96
Burton v. Patton, 2 Jones, L. 124.		Charles River Bridge v. Warren Bridge, 36 U.	
13 L. R. A.		S. 11 Pet. 420, 9 L. ed. 773.	550



Charlton v. Donnell, 100 Mass. 229	577	Coffin v. Ransdell, 9 West. Rep. 33, 110 Ind. 417	811
Charrnaud v. Charrnaud, 1 N. Y. Legal Obs. 134	362	Cohens v. Virginia, 19 U. S. 8 Wheat. 284, 300,	808
Chatham v. Bradford, 50 Ga. 327	391, 398	400, 5 L. ed. 257, 260	
Chauncey's Case, 1 P. Wms. 408, note, 3 Lead.	509	Coit v. North Carolina Gold Amalgamating	811
Cas. in Eq. 4th Am. ed. 782		Co., 119 U. S. 343, 50 L. ed. 430	
Cheever v. Meyer, 52 Vt. 66	787	Cold Springs Iron Works v. Tolland, 9 Cush.	491
Chenango Bridge Co. v. Lewis, 63 Barb. 111	475	492	
Chess Carley Co. v. Purcell, 74 Ga. 467	160	Oole v. Kegler, 64 Iowa, 59	663
Chetlain v. Republic L. Ins. Co., 86 Ill. 230	382	Oole's Will, R. 49 Wis. 181	166
Chew Heong v. United States, 112 U. S. 536, 550,	62, 596	Coleman v. Coleman, 78 Ind. 344	399
28 L. ed. 770, 778		v. Henderson, 3 Ill. 251	83
Chicago v. Baptist Theological Union, 3 West.	356	v. Tennessee, 97 U. S. 531, 24 L. ed. 1127	690
Rep. 96, 115 Ill. 245	626	College Street, R. 5 R. I. 474	856
v. Bartee, 100 Ill. 61	327	Oollen v. Wright, 7 El. & Bl. 301	853
v. McGinn, 51 Ill. 296	327	Collins v. Collins, 2 Burr. 830	92
v. Rumsey, 87 Ill. 348	749	v. Farmville Ins. & Bkg. Co., 79 N. C. 284	317
Chicago & A. R. Co. v. McLaughlin, 47 Ill. 285	615	v. Hutchins, 21 Ga. 270	398
v. Maher, 91 Ill. 812	615	v. New England Iron Co., 115 Mass. 23	845
Chicago & E. L. R. Co. v. Loeb, 5 West. Rep.	615	v. St. Paul & S. C. R. Co., 30 Minn. 51	101
887, 118 Ill. 233	306, 807	Collis v. Sellen, L. R. 3 C. P. 485	324
Chicago & N. W. R. Co. v. Chapman, 8 L. R. A.	615	Colms v. Tennessee Bank, 4 Baxt. 422	737
508, 133 Ill. 96	615	Colt v. Barnard, 18 Pick. 360	731, 733
Chicago & P. R. Co. v. Francois, 70 Ill. 238	615, 661	v. Eves, 12 Conn. 219	356
v. Stein, 75 Ill. 41, 47		v. Eves, 81 Conn. 25	787
Chicago, B. & Q. R. Co. v. Chamberlain, 84 Ill.	85	Columbia Conduit Co. v. Com., 90 Pa. 307	668
353	327	Columbia Nat. Bank's App., 16 W. N. C. 367	170
v. Griffin, 68 Ill. 409	442, 448	Columbus v. Howard, 6 Ga. 218	376
v. Iowa, 94 U. S. 155, 24 L. ed. 94	538	Columbus & W. R. Co. v. Bradford, 86 Ala. 574	236
v. Lewis, 53 Iowa, 101		Commercial Bank of Buffalo v. Warren, 15 N.	144
Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28	118	Y. 577	
L. ed. 1084		Common Council of Indianapolis v. Cross, 7	290
Chicago Marine Bank v. Fulton County Bank,	796	Ind. 9	640
69 U. S. 2 Wall. 256, 17 L. ed. 787	615	Com. v. Alger, 7 Cush. 53	615
Chicago, M. & S. P. R. Co. v. Hall, 90 Ill. 42	392	v. Brown, 121 Mass. 69	629
Chicago, P. & S. W. R. Co. v. Marseilles, 84 Ill.	320	v. Campbell, 33 Pa. 380	339
145, 643	186	v. Carey, 12 Cush. 246, 252	774
Chicago, R. I. & P. R. Co. v. Conklin, 32 Kan. 55	806	v. Chambers, 4 U. S. 4 Dall. 143, 1 L. ed. 778	863
v. Houston, 95 U. S. 697, 24 L. ed. 543	422	v. Coburn, 7 N. H. 368	577
Chicago, St. L. & N. O. R. Co. v. Abels, 60 Miss.	422	v. Cutter, 13 Allen, 393	625
1017	68, 69	v. Gardner, 7 L. R. A. 666, 133 Pa. 385	594
Child v. Boston, 4 Allen, 41	247	v. Hawes, 13 Bush, 708, 709	57, 58
Childrens v. Talbott, 4 N. M. 168	416	v. Kinsley, 133 Mass. 578	668
Chiniquy v. People, 78 Ill. 570	774	v. Lane, 118 Mass. 458	868
Christ's Hospital v. Grainger, 16 Sim. 83, 1 Mac-	390	v. Lehigh Valley R. Co. (Pa.) 17 Atl. Rep.	444
N. & G. 460	361	179	339
Churchill v. Merchants Bank, 19 Pick. 639, 538	661	v. McLaughlin, 12 Cush. 615	421, 425
v. Siggers, 3 El. & Bl. 929	260	v. Newburyport, 193 Mass. 129	655
Chy Lung v. Freeman, 82 U. S. 275, 23 L. ed. 580	260	v. Peckham, 2 Gray, 514	
Cincinnati v. Penny, 21 Ohio St. 499	541	v. Plaisted, 2 L. R. A. 143, 148 Mass. 375,	421
Cincinnati & S. G. A. St. R. Co. v. Cummins-	775	382	868
ville, 14 Ohio St. 523, 545		v. Putnam, 1 Pick. 136	136
Cissell v. Pulaski County, 10 Fed. Rep. 591	655, 663	v. Reed, 1 Gray, 472	681
Citizens Gas & M. Co. v. Elwood, 14 West. Rep.	73	v. Roxbury, 9 Gray, 491-495	451
62, 114 Ind. 832	796	v. Scott, 123 Mass. 239	199
Citizens Nat. Bank v. Importers & T. Bank, 119	73	v. Shelton, 31 Va. L. J. 324	236
N. Y. 195	806	v. Sturdivant, 117 Mass. 122	543
Citizens Sav. & L. Asso. v. Topeka, 87 U. S. 20	79	v. Temple, 14 Gray, 69, 77	212
Wall, 682, 22 L. ed. 460	725	v. Wetherbee, 105 Mass. 149	614
City of Norwich, The, 4 Ben. 271	382	Concord R. Co. v. Greely, 23 N. H. 237	416
Clack v. White, 2 Swan, 549	382	Conington's Will, R. 8 Week. Rep. 444	671
Cladin's Case, 93 U. S. 136, 137, 23 L. ed. 838	405	Conkey v. Everett, 11 Gray, 95	177
Clapp v. Peterson, 104 Ill. 26	573	Conlan v. Grace, 36 Minn. 278	750
Clark, R. 20 N. Y. S. R. 650	549	Conlon v. Eastern R. Co., 135 Mass. 195	138
Clark v. Buss, 62 Ill. 515	573	Connecticut v. Bradish, 14 Mass. 236	214
v. Foot, 8 Johns. 421	573	Connecticut Mut. L. Ins. Co. v. Burroughs, 34	101
v. Franklin, 7 Leigh, 1	823	Conn. 305	840
v. Houghton, 12 Gray, 88, 40, 41	46	Connely v. Minneapolis E. R. Co., 38 Minn. 90	94
v. Igelstrom, 51 How. Pr. 407	650	v. O'Connor, 117 N. Y. 91	840
v. Peckham, 10 R. I. 35	299	Connor v. Donnell, 55 Tex. 174	61
v. Richmond & D. R. Co., 78 Va. 709	161	Cook v. Barr, 44 N. Y. 156	573
v. Walther, 123 Mass. 567	214	v. Champlain Transp. Co., 1 Denio, 91, 104	61
Clarke v. Johnston, 55 U. S. 18 Wall. 502, 508, 21	214	v. McCabe, 68 Wis. 260	
L. ed. 906	581	Cooley v. Wardens of Port of Phila., 58 U. S. 12	658, 660
v. Leslie, 5 Esp. 28	573	How. 290, 13 L. ed. 906	421
Clason v. Bailey, 14 Johns. 484	618	Coolidge v. Brookline, 114 Mass. 582	845
Clary v. Sobier, 120 Mass. 210	61	v. Ruggles, 15 Mass. 387	334
Clement v. Burns, 43 N. H. 609	136	Coope v. Bowles, 42 Barb. 87	632
v. Youngman, 40 Pa. 341	518	Cooper v. Cooper, 77 Va. 198	46
Clermont County v. Lytle, 8 Ohio, 289	581	v. Davies, 1 Ex. 468	
Cleveland v. Chamberlain, 66 U. S. 1 Black, 425,	222	v. Milwaukee & Fr. du. Ch. R. Co., 23 Wis.	101
17 L. ed. 93	745	668	
v. New Jersey Steam Boat Co., 5 Hun, 523	258	v. Pittsburgh, C. & St. L. R. Co., 24 W.	300
Cleveland & P. R. Co. v. Speer, 56 Pa. 325	505	Va. 51	625
Cleveland Co-op. Stove Co. v. Douglas, 27	101	Cooper's Case, McArthur & M. 250	231
Minn. 177	295	Coover's App., 74 Pa. 143	558
Clifford v. Denver, S. P. & P. R. Co., 9 Colo. 338	762	Corcoran v. Peekskill, 10 Cent. Rep. 428, 108 N.	798
v. Lubring, 60 Ill. 401	450	Y. 151	
v. Old Colony R. Co., 2 New Eng. Rep. 175,	49	Corn Exchange Bank v. Nassau Bank, 91 N.	110
141 Mass. 564	644	Y. 80	
v. Richardson, 18 Vt. 630	773	Corn Planter Patent Case, 90 U. S. 23 Wall. 181,	91
Cloon v. Gerry, 18 Gray, 201	724	218, 38 L. ed. 161, 168	
Cluck v. State, 40 Ind. 270		Corson v. Dunlap, 6 New Eng. Rep. 718, 80 Me.	
Coates v. Hughes, 3 Binn. 498		354	
Cobb v. Fisher, 121 Mass. 169		v. Maryland, 120 U. S. 502, 30 L. ed. 699	626, 627
Cockell v. Gray, 3 Brod. & B. 188			
Codman v. Krell, 152 Mass. 214			
12 L. R. A.			

Cotton's Trustees, <i>Re</i> , 1 L. R. 19 Ch. Div. 624	65	Dayton Nat. Bank v. Merchants Nat. Bank, 37 Ohio St. 215	786
Coughtry v. Globe Woolen Co., 56 N. Y. 124	750	Deadwood First Nat. Bank v. Gustin-Minerva Con. Min. Co., 6 L. R. A. 670, 43 Minn. 367	814
Coulton's Case, 86 Ala. 125	532	Dean v. Pennsylvania R. Co., 6 L. R. A. 143, 150 Pa. 520	270
Covington v. Threadmill, 88 N. C. 186	412	v. Carruth, 108 Mass. 242	270
Cowert, <i>Ex parte</i> (Ala.) 9 So. Rep. 225	532	DeCamp v. Randolph City, 132 Mass. 475	181
Cox v. Combs, 3 B. Mon. 231	525	DeCamp v. Sioux City, 74 Iowa, 392	483
v. White, 2 La. 425	505	DeCamp v. Carpin, 19 S. C. 121	379
Cozens v. Higgins, 3 Keyes, 506	516	DeFord v. State, 30 Md. 179, 195	749
Crabb v. Jones, 2 Miles, 130	302	Delaney's Estate, <i>Re</i> , 49 Cal. 76	47
Craig v. Parks, 40 N. Y. 181	273	Delaware, L. & W. R. Co. v. Cadow, 12 Cent. Rep. 725, 120 Pa. 559	226
Cramer v. Bradshaw, 10 Johns. 434	697	v. Napheys, 90 Pa. 135	297
v. Burlington, 45 Iowa, 427	558	Deleplaine v. Chicago & N. W. R. Co., 42 Wis. 214	651
Crandall v. Nevada, 73 U. S. 6 Wall. 36, 15 L. ed. 745	690	Demere v. Scranton, 8 Ga. 43	157
Crawford v. Delaware, 7 Ohio St. 459	541	Deming v. Darling, 3 L. R. A. 743, 143 Mass. 504	822
v. Edison, 11 West. Rep. 252, 45 Ohio St. 239	505	Demoville v. Davidson County, 37 Tenn. 217-223	74, 76, 77
v. Rambo, 4 West. Rep. 445, 44 Ohio St. 279	581	Den v. Reddick, 4 Fred. L. 368	304
v. Rohrer, 50 Md. 590	311	v. Snowhill, 28 N. J. L. 443	64
v. Slade, 9 Ala. 867	302	v. Tunn, 25 N. J. L. 638	569
v. West Side Bank, 1 Cent. Rep. 253, 100 N. Y. 53	796	Dent v. West Virginia, 120 U. S. 114, 32 L. ed. 623	655
Crease v. Babcock, 10 Met. 535	784	Denton v. Merrill, 43 Hun. 224-229	148
Crescent City L. S. L. & S. H. Co. v. Butchers Union S. H. & L. S. L. Co., 120 U. S. 141, 30 L. ed. 614	762	Depau v. Humphreys, 8 Mart. N. S. 1	95
Cresson's App., 30 Pa. 457	416	Desdortz, <i>Ex parte</i> , 1 Wend. 98	738
Crispin v. Babbitt, L. R. 3 Eq. 516	102	Des Moines v. Hall, 24 Iowa, 224	328
Crocker v. Fohureman, 7 Mo. App. 358	561	Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99	530
Cromwell v. Sac County, 98 U. S. 62, 24 L. ed. 687	95	Devendorf v. West Virginia Oil & L. Co., 17 W. Va. 135	720
Cronk v. Cole, 10 Ind. 455	323	Devereux v. McMahon, 102 N. C. 234	209
Cropey v. McKinney, 30 Barb. 47	362	Devitt v. Pacific R. Co., 50 Mo. 302	750
Crosby v. Jerolman, 37 Ind. 284	506	Devlin v. New York, 68 N. Y. 8	497
Crosley v. Ham, 13 East, 498	44	v. Smith, 89 N. Y. 470	750
Crowley v. Appleton, 148 Mass. 98, 141	557	Devol v. Dye, 7 L. R. A. 436, 128 Ind. 321	508
v. Christensen, 137 U. S. 86, 34 L. ed. 620, 655	559	Dew v. Clark, 3 Add. Eccl. 79	165
Crump v. Lambert, L. R. 3 Eq. 409	56	Dexter v. Norton, 47 N. Y. 62	572
Cuff v. Hall, 1 Jur. N. S. 972	66	Dickerman v. Miner, 43 Iowa, 508	143
Culbreath v. Culbreath, 7 Ga. 64	287	Dickey v. McCollough, 2 Watts & S. 99	291
Cullum v. Branch Bank of Mobile, 23 Ala. 797	775	Dickinson v. Mayer, 11 Helak. 520	515
Cumberland Valley R. Co. v. Mangans, 61 Md. 58	433	Dickson v. Thomas, 97 Pa. 278	513
Cummings v. Banks, 2 Barb. 602	238	Dickson's Case, 88 Ill. 431	833
v. Cummings, 6 New Eng. Rep. 123, 146 Mass. 501, 607	724	Diemer v. Herber, 75 Cal. 287	761
Curran v. Boston, 3 L. R. A. 243, 151 Mass. 505	161	Dietrich v. Bayhl, 23 La. Ann. 707	142
Curry v. Woodward, 63 Ala. 371	311	Dillon v. Parker, 1 Swanst. 359, 394, and note	602
Curtis v. Aspinwall, 114 Mass. 137, 193	562	Dimmick v. Brodhead, 75 Pa. 434	221
v. Leavitt, 15 N. Y. 44	333, 397	Dimon v. Hazard, 32 N. Y. 64	149
v. Lyman, 24 Vt. 338	391, 392	Dimpfel v. Ohio & M. R. Co., 110 U. S. 209, 28 L. ed. 121	170
Outhbertson v. North Carolina Home Ins. Co., 96 N. C. 480	317	Dingley v. Boston, 100 Mass. 544, 557	421
D.			
Dabney v. Bailey, 42 Ga. 521	692	District of Columbia v. Oyster, 1 Cent. Rep. 84, 4 Mackey, 235	626
Dale v. Delaware, L. & W. R. Co., 73 N. Y. 468	557	v. Wagaman, 1 Cent. Rep. 823, 4 Mackey, 323	625
Daly v. State, 13 Lea, 232	78	District of Columbia Nat. Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621	749
v. W. W. Kimball Co., 67 Iowa, 132	823	Dixon v. Clayville, 44 Md. 573	372
Dana v. Boyd, 2 J. J. Marsh. 594	401	v. Ramsay, 7 U. S. 3 Cranch, 317, 324, 2 L. ed. 453, 454	698
v. Jackson Street Wharf Co., 31 Cal. 118	640	Doe v. Griffin, 15 East, 233	842
Daniel Ball, The, 77 U. S. 10 Wall. 557, 19 L. ed. 999	662	v. Jones, 10 Barn. & C. 459	64
Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 518, 4 L. ed. 629	666	v. Randall, 2 Moore & P. 20	842
Dash v. Van Kleeck, 7 Johns. 477, and note	53	v. Roe, 4 Burr. 1998	83
Davenport v. Tilton, 10 Met. 320	744	v. Shall, 13 L. J. Q. B. 321	38
Davenport & N. W. R. Co. v. Renwick, 102 U. S. 180, 20 L. ed. 51	641	v. Wood, 2 Barn. & Ald. 724	61
Davidson v. Boston & M. R. 3 Cush. 105	680	Doloret v. Rothschild, 1 Sm. & Stu. 590	780
Davis, <i>Ex parte</i> , 5 Whart. 530	148	Donald v. Hewitt, 33 Ala. 534	703
Davis v. Anita, 73 Iowa, 325	116	Donoghoe v. People, 6 Park Cr. Rep. 120	450
v. Central Vermont R. Co., 55 Vt. 84	102	Donohue v. Kendall, 13 Jones & S. 386	845
v. Coleman, 7 Fred. L. 424	143	Dorgan v. Boston, 12 Allen, 223	424
v. Higgins, 91 N. C. 382	208	Dougan v. Champlain Transp. Co., 56 N. Y. 1	556
v. Inscoe, 84 N. C. 396	209	Douglas v. Ireland, 73 N. Y. 100	312
v. Mayor, 14 N. Y. 506	548	v. Pike County, 101 U. S. 677, 25 L. ed. 968	293, 857
v. Montgomery Furnace & C. Co. (Ala.) 8 So. Rep. 496	811	Dove v. Torr, 128 Mass. 38	724
v. Moss, 38 Pa. 346	291, 292	Dow v. Sayward, 14 N. H. 16-18	657
v. Randall, 115 Mass. 547	823	v. Wakefield, 103 Mass. 257, 273	432
v. State, 3 Lea, 877, 373, 380	74, 76, 77	Downer v. Shaw, 22 N. H. 277	574
v. State, 75 Tex. 420	363	Downey v. Hendrie, 46 Mich. 496	130
v. Titusville & Oil City R. Co., 5 Cent. Rep. 903, 114 Pa. 303	222	Downing v. Backenstoos, 3 Cal. 137	847
v. Wilson, 36 Tenn. 519	907	v. Potts, 23 N. J. L. 66	736
Day v. Holmes, 103 Mass. 310	787	Downs v. New York & N. H. R. Co., 36 Conn. 287	827
v. Roth, 18 N. Y. 443	472	Doyle v. Austin, 47 Cal. 853	855
v. West, 2 Edw. Ch. 592, 6 L. ed. 515	362	Drake v. Ramsay, 5 Ohio, 251	139
v. Woodworth, 54 U. S. 13 How. 363, 14 L. ed. 181	656	v. State, 75 Ga. 413	615
v. Worcester, N. & R. R., 15 Mass. 302, 307, 308	725	Drew v. Edmunds, 6 New Eng. Rep. 855, 60 Vt. 401	696
		Dubois v. Beaver, 25 N. Y. 124	436
		Duckworth, <i>Re</i> , L. R. 2 Ch. 578	334



Dudley v. Mayhew, 3 N. Y. 9	728	Fairbanks v. Eureka Co., 67 Ala. 109	701	
Duff v. Allegheny Valley R. Co., 91 Pa. 458	418	Fairfield v. Gallatin County, 100 U. S. 52, 25 L. ed. 546	859	
Duffy v. O'Conner, 7 Bart. 500	781	Falk v. Moebis, 127 U. S. 597, 32 L. ed. 366	719	
Duke v. Abbe, 11 Ired. L. 112	412	Falkenau v. Fargo, 3 Jones & S. 332, 55 N. Y. 643	808	
Dunning v. Heller, 108 Pa. 229	573	Fargo v. Miller, 5 L. R. A. 690, 150 Mass. 225	592	
Duntley v. Boston & M. R. Co. (N. H.) 19 L. R. A. 449	808, 804	Fargo v. Kitterton, 120 U. S. 233, 30 L. ed. 684	724	
Dupree v. Virginia Home Ins. Co., 98 N. C. 240, 32 N. C. 322	317, 518	Farmers Bank of Bridgeport v. Vail, 21 N. Y. 485	726	
Durbin v. American Exp. Co. (N. H.) 20 Atl. Rep. 323	804	Farmers Nat. Bank v. Rasmussen, 1 Dak. 60	142	
Durham v. People, 67 Ill. 414	247	Farnham v. Camden & A. R. Co., 55 Pa. 53	808	
v. State, 117 Ind. 477	238	Farnsworth v. Wood, 91 N. Y. 308	394	
Durham's Estate, Re, 49 Cal. 485	47	Farnum v. Pitcher, 151 Mass. 470, 475	557	
Dusenbury v. Mutual Teleg. Co., 11 Abb. N. C. 440	864	Farquhar v. Fidelity Ins. Co., 13 Phila. 473	142	
Dutton v. Strong, 65 U. S. 1 Black, 23, 17 L. ed. 29	639, 640	Farr v. Morrill, 53 Hun, 31	148	
Duval v. Malone, 14 Gratt. 24	52	Farrwell Case, 4 Met. 60	520	
v. Myers, 2 Md. Ch. 401	779	Fauver v. Fleenor, 13 Lea, 622	130	
Duvall v. Wilson, 9 Barb. 487	471	Fay v. Cordesman, 109 U. S. 468, 27 L. ed. 979	110	
Dye v. Garrett, 78 Ga. 471	689	Feather v. Strohoecker, 3 Penn. & W. 508	201	
Dyer v. Riley, 28 La. Ann. 6	389	Felton v. Sawyer, 41 N. H. 202	218	
		Fenn v. Harrison, 3 T. R. 761	713	
		v. Holme, 62 U. S. 21 How. 431, 484-487, 16 L. ed. 198, 199, 200	685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000	
R.				
East Brandywine & W. R. Co. v. Ranck, 78 Pa. 454	614	Fenton v. Reed, 4 Johns. 52	391, 841	
Eastman v. Meredith, 36 N. H. 284	161	Ferguson v. Wisconsin Cent. R. Co., 63 Wis. 145	829	
v. State, 7 West. Rep. 418, 109 Ind. 278	656	Ferguson's Estate (Pa.) 27 W. N. C. 63	228, 229	
Easton v. New York & L. B. R. Co., 24 N. J. Eq. 58	548	Ferris v. Thaw, 72 Mo. 448	720	
East Tennessee, V. & G. R. Co. v. Fain, 13 Lea. 41	186	Fertilizing & Mfg. Co. v. Newman, 40 Md. 584	142	
v. Humphreys, 12 Lea, 200	185	Filer v. New York Cent. R. Co., 49 N. Y. 47, 431	129	
a. Pratt, 65 Tenn. 13	185	Flimet v. Allison, 12 Mich. 328	297	
a. Telford (Penn.) 14 S. W. Rep. 778	608, 778	First M. E. Church v. Atlanta, 76 Ga. 181	863	
Eaton v. Badger, 33 N. H. 228	677	First Nat. Bank v. Bynum, 84 N. C. 24	143	
a. Boston, C. & M. R. Co., 51 N. H. 504	677	First Nat. Bank of Carthage v. Jacobs, 73 Mo. 85	143	
a. Smith, 20 Pick. 150	677	v. Marlow, 71 Mo. 618	143	
a. Walsh, 42 Mo. 272	267	First Nat. Bank Jersey City v. Leach, 52 N. Y. 850	408	
Eberhart v. Chicago & St. P. R. Co., 70 Ill. 847	615	Trenton v. Gay, 63 Mo. 33, 39	142, 143	
Eckert v. Des Coudres, 1 Mill. L. 69	731, 735	Firth v. Denny, 2 Allen, 468	229, 230	
Edgerly v. Bush, 31 N. Y. 199	704	v. Thrush, 8 Barn. & C. 387	738	
v. Farmers Ins. Co., 43 Iowa, 567	585	Fisher v. Boston, 104 Mass. 87	161	
Egerton v. Egerton, 17 N. J. Eq. 419	508	v. Consequa, 2 Wash. C. C. 382	744	
Robert v. O'Neill, 102 Pa. 302	682	v. Essex Bank, 5 Gray, 373	787	
Electric Light Co. v. San Francisco, 9 R. & Corp. Cas. 494	655	Flake v. Carr, 20 Me. 301	787	
Egin v. Eaton, 63 Ill. 585	615	Fitch v. Renner, 1 Bliss. 337	690	
Elliot v. McCormick, 3 New Eng. Rep. 871, 144 Mass. 10	574	Fitchburg R. Co. v. Boston & M. R., 3 Cush. 68	680	
Elliot Nat. Bank v. Beal, 3 New Eng. Rep. 343, 141 Mass. 566	573	Fitzgerald v. Faunce, 46 N. J. L. 536, 593, 597	618	
Elliot v. Chicago, M. & St. P. R. Co., 3 L. R. A. 368, 5 Dak. 523	101	v. Morrissey, 14 Neb. 199	506	
Ellison v. Jackson Water Co., 12 Cal. 542	505	Fitzmaurice v. Bayley, 8 H. L. Cas. 78, 102	561	
v. Wiehart, 20 Ind. 82	506	Fitzpatrick v. Dispatch Pub. Co., 83 Ala. 604	310	
Elmer v. Fessenden, 5 L. R. A. 724, 151 Mass. 359, 362, 363	506	v. Flannagan, 106 U. S. 648, 27 L. ed. 211	149	
Elton, Ex parte, 3 Ves. Jr. 229	250	Fitzsimmons v. Carroll, 123 Mass. 301	577	
Elwood v. Western U. Teleg. Co., 45 N. Y. 553	256	Flagg v. Farnsworth, 12 W. N. C. 500	577	
Emack v. Kane, 34 Fed. Rep. 47	200	v. Hudson, 2 New Eng. Rep. 632, 142 Mass. 290	250	
Emerson v. Babcock, 66 Iowa, 258	117	Flanagan v. Wood, 33 Vt. 332	601	
v. Senter, 118 U. S. 3-8, 30 L. ed. 49-51	149	Flanders v. Lamphere, 9 N. H. 201	497	
v. Slater, 63 U. S. 22 How. 28, 16 L. ed. 360	505	a. Tweed, 76 U. S. 9 Wall. 425, 19 L. ed. 678	618, 620	
Emery v. Raleigh & G. R. Co., 102 N. C. 309	267	Flatt v. Stadler, 16 Lea. 371, 379	639	
Emly v. Lye, 15 East. 7	718	Fleischman v. Walker, 91 Ill. 818	820	
Empire City Bank, Re, 18 N. Y. 199	784	Fletcher v. State, 49 Ind. 134	430	
Enger v. Dawley, 62 Vt. 164	698	Filke v. Boston & A. R. Co., 58 N. Y. 549	458	
English v. Delaware & H. Canal Co., 66 N. Y. 454	829	Florence Sewing Mach. Co. v. Grover & B. Sewing Mach. Co., 110 Mass. 11	565	
Enston's Will, Re, 3 L. R. A. 494, 113 N. Y. 174, 177, 5 Dem. 93, 46 Hun. 506, 405, 406, 408	409	Flower v. Pennsylvania R. Co., 69 Pa. 210	218	
Erie Dispatch v. Johnson, 57 Tenn. 490	807	Fluke v. Fluke, 16 N. J. Eq. 478, 479	64	
Erie R. Co. v. State, 31 N. J. L. 543, 544	370	Fogg v. Hill, 21 Me. 529	614	
Essex County Nat. Bank v. Bank of Montreal, 7 Riss. 193	496	Foley v. Cowgill, 5 Blackf. 18	823	
Estill v. Beers, 82 Ga. 612	158, 159	Fond du Lac v. May, 127 U. S. 386, 84 L. ed. 714, 53 Pat. Off. Gaz. 1884	109	
Eureka Co. v. Edwards, 71 Ala. 248	129	Ford v. Ford, 3 New Eng. Rep. 785, 143 Mass. 577	528	
European Bank, Re, L. R. 5 Ch. App. 358	45	Foreman v. Marianna, 43 Ark. 324	136	
Evans v. Foreman, 60 Mo. 449	144	Forepaugh v. Delaware, L. & W. R. Co., 5 L. R. A. 508, 123 Pa. 217	343	
Evans' App., 51 Conn. 435	682	Forsyth v. Cothran, 61 Ga. 278	451	
Everett v. Council Bluffs, 46 Iowa, 66	668	Ft. Madison Lumber Co. v. Batavian Bank, 71 Iowa. 270	787	
v. Henderson, 146 Mass. 89	230	Fortman v. Rottier, 8 Ohio St. 548	289	
v. Marquette, 55 Mich. 450	668	Ft. Wayne First P. Church v. Ft. Wayne, 36 Ind. 338	864	
Everhart v. Beattie, 71 Pa. 256	367	Foster, Ex parte, 2 Story, 181	744	
Ewing v. Colquhoun, L. R. 3 App. Cas. 339	680	Foster v. Caldwell, 18 Vt. 176	697	
a. Sanford, 19 Ala. 606	761	v. Dudley, 80 N. H. 463, 465	302	
		v. Fifield, 20 Pick. 97, 70	724	
		v. Fowler, 60 Pa. 27	325	
		v. Nowlin, 4 Mo. 18	187	
		Fowler v. Rapley, 82 U. S. 15 Wall. 323, 21 L. ed. 35	607	
		Fox v. People, 86 Ill. 71	451	
		Frankton v. Stephens, L. R. 21 Ch. Div. 164	811	
		Francis v. Cockrell, L. R. 5 Q. B. 601	824	
		v. Flinn, 118 U. S. 335, 30 L. ed. 165	193	
		Francisco v. Hendricks, 23 Ill. 64	497	
		Franco-Texan Land Co. v. Laigle, 59 Tex. 339	367, 368	



Frank v. Chemical Nat. Bank, 84 N. Y. 309.....	796	Girard Pt. Storage Co. v. Southwark Foundry Co., 105 Pa. 243.....	795
Franklin v. March, 6 N. H. 364.....	847	Glenn v. Baltimore, 5 Gill & J. 424.....	803
Franklin Ave. German Sav. Inst. v. Roscoe Board of Education, 75 Mo. 408.....	780	Goddard v. Grand Trunk R. Co., 57 Me. 208.....	800
Franklin Bank v. Commercial Bank, 36 Ohio St. 350.....	785	Godley v. Hagerty, 20 Pa. 387.....	804
Franklin F. Ins. Co. v. Gruver, 100 Pa. 366.....	806	Goggans v. Monroe, 31 Ga. 331.....	460
Franklin L. Ins. Co. v. Hazzard, 41 Ind. 116.....	412	Golden Rule v. People, 7 West. Rep. 219, 118 Ill. 491.....	118
Frash v. Polk, 67 Ind. 55.....	506	Golladay v. Union Bank, 2 Head, 58.....	737
Frazer v. Jackson, 46 Ga. 621.....	607	Golsan v. Powell, 32 La. Ann. 521.....	805
Frederick v. Marquette, H. & O. R. Co., 37 Mich. 342.....	823	Goodfellow v. Noble, 25 Mo. 60.....	70
Freilsen v. Witkowski, 40 La. Ann. 273.....	806	Goodlett v. Hansell, 66 Ala. 181.....	867
French v. Brunswick, 21 Me. 29.....	250	Goodloe v. Taylor, 3 Hawks, 453.....	149
Frese v. State, 23 Fla. 267.....	655	Goodrich v. Pendleton, 3 Johns. Ch. 885, 1 L. ed. 657.....	645
Frink v. Pratt, 26 Ill. App. 222.....	606	Goodsall v. Lawson, 42 Md. 348, 373.....	618
Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 817.....	171	Goodspeed v. Cutter, 76 Ill. 534.....	144
Frost v. Deering, 21 Me. 156.....	307	Goodwin Gas Stove & M. Co's App., 10 Cent. Rep. 761, 117 Pa. 514.....	819
Fulrum v. Nashville, 8 Lea, 635.....	76	Gordon v. Gordon, 96 Ind. 184.....	504
Fuller v. Hooper, 3 Gray, 341.....	730	v. Livingston, 12 Mo. App. 267.....	740
v. Hubbard, 6 Cow. 1.....	70	v. Muchler, 34 La. Ann. 634.....	306-307
v. Jewett, 80 N. Y. 46.....	456	v. Nieman, 118 N. Y. 152.....	823
v. Rose, 37 N. Y. 23.....	360	Gorham v. Gross, 125 Mass. 232.....	548
Fulmer v. Williams, 1 L. R. A. 603, 122 Pa. 191.....	679	Gorman v. Campbell, 14 Ga. 137.....	396
Furbush v. Cook, 2 Fish. Pat. Cas. 668.....	109	Gormley v. Ohio & M. R. Co., 72 Ind. 31.....	101
Furman v. New York, 10 N. Y. 565.....	651	Goshen & M. Turnp. Co. v. Hurtin, 9 Johns. 217.....	847
G.			
Gar v. Louisville Bkg. Co., 11 Bush, 180.....	142	Gough v. Bell, 22 N. J. L. 441.....	650
Gage v. Steinkraus, 181 Mass. 223.....	586	Gould v. Hudson River R. Co., 6 N. Y. 523, 36 N. Y. 548.....	641, 643, 650, 651
Gabagan v. People, 1 Park. Crim. Rep. 373.....	841	v. McKenna, 86 Pa. 297.....	226
Gainsford v. Griffith, 1 Saund. 53, note.....	92	v. Stein, 5 L. R. A. 218, 149 Mass. 670.....	697
Gaither v. Ballew, 4 Jones, L. 488, 60 Am. Dec. 764.....	510	Grace v. Adams, 100 Mass. 506.....	341, 308
Galey v. Kellerman, 123 Pa. 491.....	202	Graeff v. Hitchman, 5 Watts, 454.....	225
Gallagher's Estate, 76 Pa. 296.....	228	Graftenstein v. Epstein, 23 Kan. 443.....	821
Galloway v. Finley, 37 U. S. 12 Pet. 294, 9 L. ed. 1091.....	246	Grafton v. Cummings, 99 U. S. 100, 35 L. ed. 306.....	563
Galpin v. Page, 85 U. S. 18 Wall. 360, 21 L. ed. 960.....	574	Graham v. Dahlonega G. Min. Co., 71 Ga. 206.....	187
Galveston v. Menard, 23 Tex. 349.....	778	v. First Nat. Bank, 84 N. Y. 303.....	406
Galveston, H. & S. A. R. Co. v. Howrin (Tex.) 9 S. W. Rep. 661.....	506	v. La Crosse & M. R. Co., 102 U. S. 145, 26 L. ed. 106.....	170
v. State, 77 Tex. 388.....	508	Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 63.....	548
Ganea v. Southern Pac. R. Co., 51 Cal. 140.....	761	Grand Trunk R. Co. v. Stevens, 35 U. S. 355, 24 L. ed. 535.....	341
Gardner v. Gardner, 5 Cush. 483.....	307	Grant v. Crow, 47 Iowa, 633.....	436
v. Schwab, 110 N. Y. 630.....	814	v. Hughes, 98 N. C. 177.....	819
v. Tennessee Bank, 1 Swan, 419.....	737	v. Vaughan, 3 Burr. 1516.....	424
v. Thomas, 14 Johns. 134.....	238	v. Whitwell, 9 Iowa, 153.....	606
v. Walsh, 5 El. & Bl. 83.....	143	Graul v. Strutsell, 58 Iowa, 712.....	731, 734
Garnett v. Richardson, 35 Ark. 144.....	369	Graves v. Lake Shore & M. S. R. Co., 137 Mass. 83.....	802
Garrett v. Ramsey, 26 W. Va. 345.....	296	Gray v. Bell, 2 Rich. L. 67, 44 Am. Dec. 277.....	733, 735
Garth v. Caldwell, 72 Mo. 622.....	658	v. Boston Gas Light Co., 114 Mass. 149-153.....	191, 543
Gas Light & C. Co. v. Vestry of St. Mary Abbot's, L. R. 15 Q. B. Div. 1.....	548	v. Harris, 107 Mass. 432.....	549
Gaston v. Merriman, 33 Minn. 371.....	177	Great Northern R. Co. v. Shepherd, 8 Exch. 30.....	820
Gates v. Brooks, 59 Iowa, 510.....	445	Great Western R. Co. v. Birmingham & O. J. R. Co., 2 Phil. Ch. 697.....	301
Gaunt v. Fynnee, L. R. 8 Ch. 8.....	56	Green v. Cresswell, 10 Ad. & El. 453.....	835
Gebhardt v. Reeves, 75 Ill. 301.....	327	v. Langdon, 23 Mich. 323.....	506
Geddes v. Brown, 5 Phila. 180.....	858	v. Long (April Term, 1796).....	847
Gelpecke v. Dubuque, 68 U. S. 1 Wall, 175, 17 L. ed. 530.....	293	v. Neal, 81 U. S. 6 Pet. 237, 8 L. ed. 404.....	857
Gelpoke v. Dubuque, 68 U. S. 1 Wall. 206, 17 L. ed. 525.....	858	v. State, 33 Ark. 313.....	845
Georgia Pac. R. Co. v. Propst, 33 Ala. 618.....	204	v. State, 15 Lea, 708-710.....	73
Gerber v. Viozes, 3 Rob. (La.) 150.....	390	Greencastle v. Hazelett, 23 Ind. 156.....	683
German Theological School v. Dubuque, 64 Iowa, 736.....	618	Greenough v. Eichholtz (Pa.) 15 Atl. Rep. 712.....	505
Germania F. Ins. Co. v. Memphis & C. R. Co., 72 N. Y. 80.....	341	Greenwell v. Hayden, 78 Ky. 323.....	45
Germania Nat. Bank of New Orleans v. Case, 99 U. S. 623, 25 L. ed. 448.....	788	Greenwood v. Curtis, 6 Mass. 366.....	342
Germantown Pass. R. Co. v. Walling, 97 Pa. 55.....	130	v. Murphy, 181 Ill. 604.....	128
Gerrish v. Norris, 9 Cush. 167.....	568	Gregg v. English, 35 Tex. 139.....	243
Gest v. Flook, 2 N. J. Eq. 106.....	64	Gregg's Case, 2 Salk. 596.....	82
Gheen v. Johnson, 90 Pa. 38.....	513	Gregory v. Allen, Mart. & Y. 76.....	740
Ghornley v. Dinsmore, 21 Jones & S. 56.....	808	v. Forbes, 58 N. C. 77.....	679
Gibbons v. Ogden, 22 U. S. 9 Wheat. 1, 6 L. ed. 23.....	650	Greither v. Alexander, 15 Iowa, 470.....	597
Gibson v. Erie R. Co., 69 N. Y. 449.....	800	Griffin v. Banks, 24 How. Pr. 213, reversed, 37 N. Y. 621.....	302
v. Minet, 1 H. Bl. 639.....	797	v. Birby, 12 N. H. 458.....	496
Gilbert v. Showerman, 23 Mich. 448.....	549	v. Griffin, 125 Ill. 430.....	319
Gilbert & B. Mfg. Co. v. Butler, 5 New Eng. Rep. 573, 146 Mass. 82.....	573	v. Hasty, 94 N. C. 438.....	411, 412
Gilchrist's App., 100 Pa. 600.....	491	v. Shreveport & A. R. Co., 41 La. Ann. 508.....	340
Gill v. Latimore, 9 Lea, 381.....	530	Griggs v. Austin, 3 Pick. 20, 22.....	573
Gilleland v. Schuyler, 9 Kan. 582.....	363	Grimead v. Briggs, 4 Iowa, 559.....	144
Gillespie v. McGowan, 100 Pa. 144.....	218	Groce v. Field, 13 Ga. 24.....	187
Gillmore v. Shooter, 3 Mod. 310, 2 L. ed. 227, 1 T. Jones, 108.....	53	Grogan v. Adams Exp. Co., 5 Cent. Rep. 386, 114 Pa. 623.....	806
Gilman v. Philadelphia, 70 U. S. 3 Wall. 718, 18 L. ed. 98.....	549, 600	Gross v. Fowler, 31 Cal. 388.....	773
Gilmore v. Pittsburgh, V. & C. R. Co., 104 Pa. 275.....	221	Grove v. Wise, 39 Mich. 161.....	237
12 L. R. A.		Groves v. Steel, 3 La. Ann. 280.....	305
		Grubb v. Bayard, 2 Wall. Jr. 81.....	61
		Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co., 139 U. S. 127, 35 L. ed. 118.....	775
		Guerrero, Re, 69 Cal. 88.....	126
		Guillander v. Howell, 85 N. Y. 657.....	408
		Guinan's Case, 11 Lea, 98.....	833
		Gurley v. Missouri Pac. R. Co., 12 West. Rep. 330, 93 Mo. 445.....	749

## H.

Haas v. Taylor, 80 Ala. 465.....	384	Haycraft v. Bland (Ky.), 9 L. R. A. 599.....	29
Hackleman v. Henry County Comrs., 91 Ind. 86	504	Hayden v. Atlanta, 70 Ga. 817.....	654
v. Miller, 4 Blackf. 322.....	506	Haynes v. Boardman, 119 Mass. 414.....	786
Hafford v. New Bedford, 16 Gray, 297.....	161	v. Brooks, 8 N. Y. Civ. Proc. 106-113, 42	146
Hagadorn v. Stronach Lumber Co., 81 Mich. 506	506	Hun, 528, 116 N. Y. 487.....	476
Hager v. Cleveland, 36 Md. 477.....	475	v. Brown, 36 N. H. 545.....	260
Hagerty v. Arnold, 18 Kan. 367.....	286	v. Thomas, 7 Ind. 38.....	144
Haitley v. Haynes, 37 Mich. 535.....	607, 608	Hazard v. Spears, 2 Abb. App. Dec. 353.....	358
Haites v. Van Wormer, 87 U. S. 20 Wall. 353, 22	109	Head v. Georgia Pac. R. Co., 79 Ga. 358.....	568
L. ed. 241.....	371, 373	Head Money Cases, 112 U. S. 586, 599, 28 L. ed.	566
Hailey v. Falconer, 32 Ala. 536.....	371, 373	803, 804.....	851
Haines v. Chicago, St. P. M. & O. R. Co., 29	320	Heald v. Builders Mut. F. Ins. Co., 111 Mass. 38	149
Minn. 161.....	342	Heard v. Dubuque County Bank, 8 Neb. 10.....	116
v. Guthrie, L. R. 13 Q. B. Div. 518.....	683	Heath v. Des Moines & St. L. R. Co., 61 Iowa, 11	719
Haldeman v. Bruckhart, 45 Pa. 514.....	761	Heaton v. Myers, 4 Colo. 59.....	503, 17
Hale v. Boylen, 22 W. Va. 234.....	742	Heaven v. Pender, L. R. 11 Q. B. Div. 503, 17	324, 745
v. Horne, 21 Gratt. 112.....	784	Fed. Rep. 511.....	147
Hall v. Farmer, 5 Denio, 484.....	847, 848	Hecht v. Hatcheller, 6 New Eng. Rep. 610, 147	577
v. Fulgham, 86 Tenn. 451.....	515	Mass. 336, 339.....	389
v. Hall, 2 McCord, Eq. 269.....	693	Heck v. Shener, 4 Serg. & R. 249.....	564
v. Lanning, 91 U. S. 160-170, 23 L. ed. 271-274	148	Hedderich v. State, 101 Ind. 564.....	59
v. McHenry, 19 Iowa, 521.....	145	Heilboun, Re. 1 Park. Crim. Rep. 436.....	108
v. Memphis & C. R. Co., 15 Fed. Rep. 57.....	327	Heine v. Chicago & N. W. R. Co., 58 Wis. 525.....	325
v. Mulholland, 7 La. 389.....	306, 306	Heineman's App., 62 Pa. 95.....	239
v. Younts, 87 N. C. 285.....	297	Heise v. Pennsylvania R. Co., 62 Pa. 72.....	790
Hamilton v. Elliott, 5 Serg. & R. 375.....	291	Helm v. Swiggett, 12 Ind. 194.....	53
v. Third Ave. R. Co., 53 N. Y. 25.....	329	Helm v. Shuter, 2 Show. 17.....	45
Hamilton County v. Mighels, 7 Ohio St. 109.....	161	Henderson v. Case, 31 La. Ann. 215.....	36
Hamil v. Pairpoint Mfg. Co., 2 New Eng. Rep.	618	v. Connelly, 11 West. Rep. 729, 123 Ill. 98	660, 661
143, 141 Mass. 51.....	236	v. New York, 92 U. S. 336, 23 L. ed. 543, 600, 661	341
Hammock v. Barnes, 4 Bush, 391.....	618	v. Stevenson, L. R. 2 App. Cas. 470.....	668
Hampshire County Comrs., Petitioners, 3 New	422	Hennessey v. St. Paul, 37 Fed. Rep. 565.....	686
Eng. Rep. 433, 143 Mass. 424, 1 New	422	Hennick, Re. 7 Cent. Rep. 357, 5 Mackey, 400.....	451
Eng. Rep. 201, 140 Mass. 181.....	483	Hennies v. Vogel, 37 Ill. 242.....	598
Handelun v. Burlington, C. R. & N. R. Co., 73	483	Henrich, Re. 5 Blatchf. 414.....	148
Iowa, 710.....	750	Henry v. Coates, 17 Ind. 161.....	660
Hanna v. Chattanooga & N. R. Co., 6 L. R. A.	750	v. Newburyport, 5 L. R. A. 179, 149 Mass.	108
727, 58 Tenn. 310.....	660, 661	582.....	215
Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465,	319	v. Staten Island R. Co., 51 N. Y. 373.....	416
24 L. ed. 527.....	718	v. Thomas, 118 Ind. 27.....	697
v. Swift, 79 U. S. 13 Wall. 263, 30 L. ed. 423	148	Henshaw v. Atkinson, 3 Madd. 306.....	64
Hannibal First Nat. Bank v. North Missouri	775	v. Robins, 9 Met. 83.....	114
Coal & Min. Co., 86 Mo. 125.....	79	Herbert v. Northern Pac. R. Co., 3 Dak. 38, 116	768
Hanover Nat. Bank v. Johnson, 60 Ala. 549.....	573	U. S. 642, 29 L. ed. 755.....	83
Hansom v. Patterson, 17 Ala. 738.....	855	v. Tuthill, 1 N. J. Eq. 141.....	605, 604
Harding v. Goodlett, 3 Yerg. 52.....	564	Herin v. McCaughan, 32 Miss. 17.....	545
Hargrave v. Cinroy, 19 N. J. Eq. 281.....	504	Herman v. Brookerhoff, 8 Watts, 240.....	588
Harlem P. Church v. New York, 5 Hun, 448.....	504	Hernandez v. Drake, 81 Ill. 34.....	58
Harlow v. Putnam, 124 Mass. 553.....	341	Herrman v. Roberts, 7 L. R. A. 236, 119 N. Y. 37	588
Harmon v. James, 7 Ind. 263.....	345	Herron v. Keeran, 59 Ind. 472, 476.....	588
v. Salmon Falls Mfg. Co., 35 Me. 447, 58	345	Hestonville Pass. R. Co. v. Connell, 88 Pa. 530	518, 519
Am. Dec. 718, note.....	345	Hewett v. Western U. Teleg. Co., 4 Mackey, 424	588
Harriman v. Wilkins, 30 Me. 93.....	345	Hickey v. Hazard, 3 Mo. App. 490.....	588
Harris v. Burdett, 75 N. Y. 130.....	345	Hickok v. Hine, 23 Ohio St. 533.....	548, 561
v. Great Western R. Co., L. R. 1 Q. B. Div.	341	Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R.	588
515.....	355	82 Fed. Rep. 32.....	545
Harris County v. Boyd, 70 Tex. 537.....	745	Higgins, Re. 94 N. Y. 554.....	545
Harrison v. Gibbons, 71 N. Y. 59.....	704	Higgins v. Dewey, 107 Mass. 494.....	588
v. Sterry, 9 U. S. 5 Cranch, 289, 3 L. ed. 104	685	v. Kusterer, 41 Mich. 518.....	504
Harryman v. Roberts, 52 Md. 61.....	640	High v. Shelby County Comrs., 92 Ind. 590.....	504
Hart v. Burnett, 15 Cal. 530.....	512	Higham v. Harris, 5 West. Rep. 643, 106 Ind. 248	809, 370
v. Cleis, 3 Johns. 41.....	558	Hill v. Beach, 12 N. J. Eq. 81.....	160, 161
v. Lancaster & Y. R. Co., 31 L. T. N. S. 261	802, 805	v. Boston, 122 Mass. 344, 358.....	802
Hart Case, 112 U. S. 331, 28 L. ed. 717.....	776	v. Boston H. T. & W. R. Co., 3 New Eng.	87
Hartley v. Bloodgood, 16 Ala. 239.....	668	Rep. 916, 144 Mass. 234.....	305
Harvey v. Dewdney, 18 Ark. 232-261.....	109	v. Gill, 40 Minn. 441.....	475
v. New York Cent. & H. R. R. Co., 38 N. Y.	302, 305	v. Hanney, 15 La. Ann. 664.....	144
481.....	568	v. Manchester & S. Water-Works Co., 5	786
v. Terre Haute & I. R. Co., 74 Mo. 539.....	302, 305	Barn. & Ad. 808.....	841
Hartwell v. Rice, 1 Gray, 557, 594.....	143, 144	v. Nelms, 36 Ala. 445.....	223
Haskell v. Champion, 30 Mo. 136.....	618	v. Planter's Bank, 3 Humph. 670.....	256
v. New Bedford, 108 Mass. 208.....	365	v. Syracuse, B. & N. Y. R. Co., 73 N. Y. 361	507
Hassan v. Rochester, 67 N. Y. 523.....	368	v. Tucker, 54 U. S. 13 How. 456, 14 L. ed.	548
Hastings v. Cutler, 24 N. H. 481.....	697	223.....	581
v. Lovering, 3 Pick. 214.....	78, 77	v. Winsor, 118 Mass. 251.....	548
Hatch v. Traves, 11 Ad. & El. 702.....	615	Hillebrand v. Brewer, 6 Tex. 45.....	581
Hatcher v. State, 12 Lea, 370, 371.....	193	Hinchman v. Paterson Horse R. Co., 17 N. Y.	548
Hathfield v. St. Paul & D. R. Co., 33 Minn. 130.....	567	Eq. 77.....	421-424
Hathaway v. Crosby, 17 Me. 448.....	298	Hinckley v. Barnstable, 109 Mass. 125.....	309
v. Fall River Nat. Bank, 131 Mass. 14.....	422	Hingham v. Q. B. & Turnp. Corp. v. Norfolk	241
v. Tinkham, 148 Mass. 85, 87.....	126	County, 6 Allen, 363, 368.....	126
Havemeyer v. Iowa County Suprs., 70 U. S. 3	549	Hitt v. Lacey, 3 Ala. 104.....	840
Wall. 294, 17 L. ed. 38.....	126	Hoadley v. Northern Transp. Co., 115 Mass. 804.....	124
Haverhill Bridge Props. v. Essex County	594	Hoagland v. Creed, 81 Ill. 568.....	124
Comrs., 108 Mass. 120.....	594	Robert v. Hobart, 62 N. Y. 80.....	594
Haverly Inevincible Min. Co. v. Howcutt, 6	594	Roboken v. Pennsylvania R. Co., 124 U. S. 866,	594
Colo. 574.....	594	81 L. ed. 543.....	637, 640, 647
Hawes v. United States, 15 Alb. L. J. 361, 368.....	594	Robson v. Ewan, 63 Ill. 146.....	501
Hawesville v. Hawes, 6 Bush, 252.....	594	Hodges v. Easton, 106 U. S. 406, 27 L. ed. 169.....	594
Hawkins v. Giles, 45 Hun, 318.....	594	v. Percival, 132 Ill. 53.....	594
v. Pemberton, 51 N. Y. 198.....	594	v. Wilmington & W. R. Co., 105 N. C. 170, 113	124
Hay v. Cobosa Co., 2 N. Y. 159.....	549	Hodson v. Davis, 43 Ind. 268.....	594
		Hoeger v. Chicago, M. & St. P. R. Co., 68 Wis. 100	594



Hoffman v. Young, 2 Fed. Rep. 74	109	Irving Nat. Bank v. Alley, 79 N. Y. 536	797
Hoge v. Hollister, 2 Tenn. Ch. 612	522	Irvin v. Willis, 110 U. S. 510, 28 L. ed. 230	514
Holbrook v. Harrington, 16 Gray, 102, 104	724	Isaacson v. New York Cent. & H. R. R. Co., 94 N. Y. 278	819
Holburne, Re (Coates v. Mackillop), 53 L. T. N. S. 215	416		
Holden v. Fitchburg R. Co., 129 Mass. 206	101		
v. Cox, 60 Iowa, 449	607		
Holdsworth v. Tucker, 3 New Eng. Rep. 499, 143 Mass. 369, 376	562		
Holliday v. Rindon, 12 Ga. 417	187		
Hollingsworth v. Parish of Tensas, 17 Fed. Rep. 113	651		
Holla v. Chapman, 36 Tex. 1	573		
Hollman v. Pigges, 5 Cent. Rep. 638, 42 N. J. 137-131	64		
Holmes, Ex parte, 5 Cow. 426	787		
Holmes v. Jennison, 39 U. S. 14 Pet. 574, 10 L. ed. 592	593		
Holyoke Bank v. Burnham, 11 Cusb. 183	784		
Home Mut. v. Ins. Co. v. Garfield, 60 Ill. 124	317		
Home Nat. Bank v. Sanchez, 131 Ill. 330	812		
Hope v. Deaderick, 3 Humph. 8	74		
Hopkin v. Buftum, 9 R. I. 513	736, 737		
Horne v. Memphis & O. R. Co., 1 Coldw. 78	185		
Horne v. Nicholson, 56 Mo. 220	760		
Hornthal v. Western Ins. Co., 88 N. C. 73	817		
Hotchies v. Jones, 4 Ind. 260	818		
Houfe v. Fulton, 29 Wis. 297	433		
Houghton v. Kendall, 7 Allen, 72, 77, 78	724		
Houston & T. C. R. Co. v. Rider, 32 Tex. 367	101		
Hovey v. Crane, 10 Pick. 440	577		
Howard v. Chaffer, 9 Jur. N. S. 707	66		
v. Denver & R. G. R. Co., 38 Fed. Rep. 857	101		
Howard Mfg. Co. v. Water Lot Co., 39 Ga. 574, 53 Ga. 688	157		
Howe v. Cambridge, 114 Mass. 388	424		
v. Clark, 23 Ill. App. 145	608		
Howe Mach. Co. v. Gage, 100 U. S. 878, 25 L. ed. 704	327, 622, 629		
Howell v. Coupland, L. R. 1 Q. B. Div. 253	572		
v. Pugh, 25 Kan. 96	802		
v. Ray, 92 N. C. 519	208		
Howenstein v. Barnes, 5 Dill. 482	142		
Hoyt v. Jeffers, 30 Mich. 181	550		
Hubbard v. Harrison, 38 Ind. 327	142		
Hubbell v. Drexel, 11 Fed. Rep. 115-118	787		
Hudson v. Chicago & N. W. R. Co., 59 Iowa, 581	558		
v. Thorne, 7 Paige, 261, 4 L. ed. 143	152, 153		
Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co., 121 N. Y. 367	541		
Hufford v. Grand Rapids & L. R. Co., 53 Mich. 118, 64 Mich. 631	327, 822, 829		
Hughlett v. Hughlett, 5 Humph. 454, 464	74, 75, 79		
Hulder v. Golden, 36 N. Y. 446	812		
Hull v. Ruggles, 58 N. Y. 424	426		
Humble v. Humble, 2 Jur. 696	65, 66		
Humphreys v. Gullow, 13 N. H. 387	143		
Hunt, Re, 110 N. Y. 278	454		
Hunt v. Gilmore, 59 Pa. 450	822		
v. Harber, 20 Ga. 748	687		
v. Missouri R. Co., 6 West. Rep. 203, 39 Mo. 807	720		
v. Wickliffe, 27 U. S. 2 Pet. 201, 7 L. ed. 397	774		
Hunter v. Middleton, 13 Ill. 50	327		
v. Whitfield, 89 Ill. 229	606		
Huntington v. Ballou, 2 Lans. 120	144		
Hurlbut v. Hurlbut, 49 Hun, 189	819		
Huson v. Young, 4 Lans. 64	604		
Hussey v. Cogger, 3 L. R. A. 559, 112 N. Y. 614	102		
Hutchinson v. Bowker, 5 Mees. & W. 535	379		
Hutchinson's App., 92 Pa. 186	59, 60		
Hyde v. Lynde, 4 N. Y. 387	334		
Hydraulic Works Co. v. Orr, 83 Pa. 332	218		
Hynes v. McDermott, 82 N. Y. 41	622		

## I.

Illinois v. Illinois Cent. R. Co., 83 Fed. Rep. 730	651
Illinois & Mich. Canal v. Havens, 11 Ill. 554	327
Imhoff v. Witmer, 31 Pa. 243	105
Indiana Car Co. v. Parker, 100 Ind. 191	102
Indianapolis v. Lawyer, 38 Ind. 348	280
Indianapolis, B. & W. K. Co. v. Hartley, 67 Ill. 437	327
Jingle v. Jones, 69 U. S. 2 Wall. 1, 17 L. ed. 762	572
Jinglebright v. Hammond, 19 Ohio, 337	581
Jingis v. Sailors Snug Harbor, 28 U. S. 3 Pet. 99, 7 L. ed. 617	416
Ingraham v. Taylor, 58 Conn. 508	513
Ingram v. Hall, 1 Hayw. 193	209
v. Ingram, 4 Jones, L. 188	411
Irby v. Graham, 46 Miss. 425	256
Irvine v. Irvine, 76 U. S. 9 Wall. 617, 19 L. ed. 800	138
12 L. R. A.	

## J.

Jackson v. Bard, 4 Johns. 230	639
v. Brooks, 3 Wend. 423, 481	839
v. Clark, 7 Johns. 217	773
v. Cooley, 5 Johns. 123	841
v. Hasbrouck, 5 Johns. 366	83
v. Nelson, 6 Cow. 248	839
v. Shelton, 89 Tenn. 68	521, 523
v. Traer, 64 Iowa, 488	811, 812
v. Van Dusen, 5 Johns. 144	839
Jacobs, Re, 98 N. Y. 93, 99-110	437, 668
Jacobus v. Mutual Ben. L. Ins. Co., 27 N. J. Eq. 605-608	63
Jamestown v. Chicago, B. & N. R. Co., 69 Wis. 643	183
Jarrell v. Lillie, 40 Ala. 271	145
Jenkins v. Hutchinson, 13 Q. B. 746	851
v. Shields, 36 Iowa, 528	585
Jennings v. Florence, 2 C. B. N. S. 467	390
Jenny v. Zehnder, 101 Pa. 299	59, 60
Jerome v. Smith, 48 Vt. 230	627
Jewell v. Grand Lodge A. O. U. W., 41 Minn. 405	375
Jimison v. Adams County, 130 Ill. 588	128
Johns v. Davidson, 16 Pa. 512	491
v. Johns, 67 Ind. 440	124
Johnson v. Crofoot, 53 Barb. 574, 37 How. Pr. 69	850
v. Jackson, 27 Miss. 498	243, 244
v. Jordan, 2 Met. 234	580
v. Mosser, 66 Iowa, 536	481
v. Skidman, 29 Minn. 95	644
v. Slappey, 35 Ga. 578	451
v. Taber, 10 N. Y. 819	277
v. Tutewiller, 35 Ind. 355	124
v. Wallis, 2 L. R. A. 828, 112 N. Y. 230	239
v. Westchester P. R. Co., 70 Pa. 367	423
Johnston v. Griest, 85 Ind. 508	504
v. Speer, 32 Pa. 227	142
v. Stone, 11 Humph. 419	319
Johnston's Case, 79 Ala. 438	833
Jolly v. Walker, 26 Ala. 630	505
Jones v. Fleming, 37 Hun, 223, reversed, 6 Cent. Rep. 513, 104 N. Y. 418	363
v. Jones, 18 Ala. 248	704
v. Judd, 4 N. Y. 411	573
v. Kirksey, 10 Ala. 839	762
v. McMasters, 61 U. S. 20 How. 8, 15 L. ed. 805	686
v. Perry, 10 Yerg. 71, 72, 75	76, 77, 79
v. Radatz, 27 Minn. 240	142
v. Richardson, 5 Met. 247, 253	568
v. Robinson, 11 Ark. 504	731, 734
v. Souard, 65 U. S. 214 How. 41, 16 L. ed. 604	491
v. United States, 137 U. S. 202, 34 L. ed. 691	658
v. Witter, 13 Mass. 304	272
v. Zoller, 29 Hun, 551, 32 Hun, 280	362
Jordan v. Fall River R. Co., 5 Cush. 69	819
v. Hurst, 12 Pa. 299	735
v. Smith, 83 Ala. 329	857
Jose Ferreira dos Santos's Case, 2 Brock. 498	563
Judd v. Fargo, 107 Mass. 284	581
Judson v. Western R. Corp., 6 Allen, 486	807
Julia Bldg. Assn. v. Bell Teleg. Co., 5 West. Rep. 357, 89 Mo. 258	864
Jupitz v. People, 24 Ill. App. 516	615

## K.

Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104	309
Kallman v. United States Exp. Co., 3 Kan. 205	802, 803, 805, 806, 807
Kane v. Northern Cent. R. Co., 128 U. S. 91, 33 L. ed. 339	300
Kansas Cent. R. Co. v. Allen, 22 Kan. 285	604
Kansas City, St. J. & C. B. R. Co. v. Simpson, 30 Kan. 645	801, 804, 805, 806
Kansas Pac. R. Co. v. Peavey, 29 Kan. 169	806
Katzenburger v. Lano (Tenn.), 16 S. W. Rep. 611	832
Kearly v. Duncan, 1 Head, 397	697
Kearney v. Case, 79 U. S. 12 Wall. 231, 20 L. ed. 398	689
v. London, B. & S. C. R. Co., L. R. 6 Q. B. 759, 10 Cent. L. J. 261	191
Keck v. Sedalia Brew. Co., 4 West. Rep. 887, 22 Mo. App. 187	720
Keeran v. Cox, 116 Mass. 239	577
Keeler v. Newbern, Phil. L. 506	204
Keene v. Lizardi, 5 La. 431	399
Keiffer v. Barney, 31 Ala. 192	775

Keith v. Boston, 120 Mass. 108, 118.....	425	Lampert v. Laclede Gas Light Co., 14 Mo. App. 376.....	749
Kelley, <i>Re</i> , 25 Fed. Rep. 288.....	562	Lancaster v. Connecticut Mut. L. Ins. Co., 10 West. Rep. 409, 92 Mo. 490.....	750
Kellogg v. Chicago & N. W. R. Co., 26 Wis. 223 v. Thompson, 66 N. Y. 88.....	514	Land v. Camden & A. R. Co., 46 N. Y. 271.....	807
Kelly v. Southern Minn. R. Co., 28 Minn. 68.....	557	Land Grant R. & T. Co. v. Coffey County Comrs., 6 Kan. 252, 254.....	370
Kemp v. Drucker, 6 N. Y. Supp. 945.....	813	Lane, <i>Ex parte</i> , 6 Fed. Rep. 34.....	592
Kendall v. Gleason, 158 Mass. 457.....	724	Lang v. Gale, 1 Maule & S. 111.....	773
v. Granger, 5 Beav. 300.....	120	Langdon v. New York, 93 N. Y. 155.....	641
Kennard v. Harvey, 80 Ind. 37.....	607	Lange, <i>Ex parte</i> , 85 U. S. 18 Wall. 183, 21 L. ed. 872.....	698
Kennedy v. Milwaukee & St. P. R. Co., 22 Wis. 581.....	86	Langford v. Freeman, 60 Ind. 46.....	388
v. Stacy, 1 Bart. 225.....	522	Lanier v. Youngblood, 73 Ala. 592.....	655
Kenrich v. Smick, 7 Watts & S. 41.....	291	Lanigan v. New York Gas Light Co., 71 N. Y. 29.....	549
Keokuk v. Scruggs, 29 Iowa, 447.....	152	Lansing v. Smith, 8 Cow. 148, 4 Wend. 9.....	49
Kern v. Chalfant, 7 Minn. 437.....	745	Larco v. Casanueva, 80 Cal. 561.....	60
Kerr v. Clark, 19 Mo. 132.....	69	Laughran v. Smith, 75 N. Y. 206.....	109
v. Smith, 5 B. Mon. 558.....	401	Laundry Machinery Co. v. Bunnell, 27 Fed. Rep. 810.....	724
Kershaw v. Cox, 3 Esp. 246.....	144	Lavery v. Egan, 3 New Eng. Rep. 439, 143 Mass. 389, 392.....	725
Keyport & M. P. S. R. Co. v. Farmers Transp. Co., 18 N. J. Eq. 518.....	650	Law v. Henry, 99 Ind. 414.....	126
Keys v. Pennsylvania Co. (Pa.) 1 Cent. Rep. 698.....	101	Lawrence v. Fairhaven, 5 Gray, 110.....	161
Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274, 24 L. ed. 344.....	110	Lawson v. Sherwood, 1 Starkie, 251.....	739
Khron v. Brock, 4 New Eng. Rep. 424, 144 Mass. 516.....	191	Lawton v. Comer, 7 L. R. A. 55, 40 Fed. Rep. 480.....	680
Kidd v. Horry, 28 Fed. Rep. 778.....	198	Leader v. Barry, 1 Esp. 363.....	841
v. Pearson, 123 U. S. 1, 32 L. ed. 345.....	200	Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 107, 29 L. ed. 816.....	796
Kidder v. Dunstable, 7 Gray, 104.....	662	Leathers v. Blessing, 105 U. S. 628-630, 26 L. ed. 1192, 1194.....	681
Kiley v. Froese, 57 Mo. 390.....	718	Leavitt v. Jones, 54 Vt. 423.....	600
Kilgore v. Dempsey, 25 Ohio St. 415.....	96	v. Putnam, 3 N. Y. 494.....	701
Kilkelly v. Martin, 34 Wis. 525.....	144	Lee v. Cameron, 14 La. Ann. 700.....	806
Killen v. Sistrunk, 7 Ga. 294.....	345	v. Virginia & M. Bridge Co., 18 W. Va. 299.....	298
Killian v. Augusta & K. R. Co., 79 Ga. 241.....	750	Leech v. Baldwin, 6 Watts, 448.....	327
Kilpatrick v. Heaton, 3 Brev. 92.....	372	Lefevre v. Detroit, 2 Mich. 586.....	856
Kimball v. Huntington, 10 Wend. 675.....	847	Leffingwell v. White, 1 Johns. Cas. 99.....	778
Kime v. Brooks, 9 Fred. L. 218.....	207	Legal Tender Cases, 79 U. S. 12 Wall. 457-561, 20 L. ed. 237-315.....	654
Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 686.....	661	Leggett v. Doremus, 25 N. J. Eq. 122.....	64
Kincaid v. Indianapolis Nat. Gas Co., 3 L. R. A. 602, 124 Ind. 578.....	290	Lehigh Valley R. Co. v. McKeon, 90 Pa. 122.....	699
King v. Frick, 135 Pa. 575.....	213	Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059.....	293
v. Hunt, 12 Mo. 97.....	144	Leifchild's Case, L. R. 1 Eq. 251.....	335
v. Kelly, 25 Minn. 524.....	374	Leisy v. Hardin, 135 U. S. 100, 102, 34 L. ed. 128, 132, 137.....	663
v. Lagrange, 50 Cal. 328.....	49	Leloup v. Port of Mobile, 127 U. S. 648, 32 L. ed. 819.....	626
v. Remington, 35 Minn. 15-32.....	742	Leonard v. Leonard, 7 Allen, 277.....	725
v. Ruckman, 20 N. J. Eq. 316.....	243	Lerned v. Wannemacher, 9 Allen, 412.....	561
v. Smith, 2 Dougl. 441.....	641	Leroy v. Beard, 49 U. S. 8 How. 451, 12 L. ed. 1151.....	686
v. West Riding of Yorkshire, 2 East, 342.....	220	Level v. Farris, 24 Mo. App. 461.....	256
v. Winants, 71 N. C. 469.....	411	Levering v. Philadelphia, G. & N. R. Co., 8 Watts & S. 450.....	221
Kingston Bank v. Eldinge, 40 N. Y. 391.....	288	Lewes v. Lewes, 6 Sim. 304.....	40
Kirby v. Adams Exp. Co., 3 Mo. App. 370.....	806	Lewis v. Bush, 90 Minn. 244.....	704
v. Schoonmaker, 3 Barb. Ch. 46, 5 L. ed. 809.....	149	v. Hartley, 7 Car. & P. 405.....	616
Kirkpatrick v. McCullough, 3 Humph. 171.....	731	v. McAfee, 32 Ga. 465.....	396
Kisler v. Cameron, 69 Ind. 438.....	236	v. Marshall County Comrs., 16 Kan. 102, 22 Am. Rep. 275.....	236
Kittredge v. Emerson, 15 N. H. 227.....	744	v. Nicholson, 18 Q. B. 612.....	351
v. Warren, 14 N. H. 509.....	744	v. Seifert, 9 Cent. Rep. 504, 116 Pa. 623.....	102
Kivett v. McKeithan, 90 N. C. 106.....	644	License Cases, 43 U. S. 5 How. 504, 12 L. ed. 256.....	659
Kling v. Childs, 30 Minn. 995.....	745	License Tax. Cases, 72 U. S. 5 Wall. 462, 13 L. ed. 497.....	654
Knap v. Sioux City & P. R. Co., 65 Iowa, 93.....	453	Lieber v. St. Louis Agr. & M. Asso., 36 Mo. 389.....	302
Kneeder v. Norristown, 100 Pa. 369.....	152	Life & F. Ins. Co. v. Mechanics Ins. Co., 7 Wend. 85.....	118
Knott v. Stephens, 5 Or. 235.....	242-244	Lima v. Cemetery Asso., 42 Ohio St. 129.....	856
Knowlton v. Sanderson, 2 New Eng. Rep. 101, 141 Mass. 323.....	724	Lincoln v. Boston, 3 L. R. A. 237, 143 Mass. 578.....	161
Knox v. Armistead, 5 L. R. A. 297, 97 Ala. 511.....	144	v. Davis, 63 Mich. 375.....	651
v. Exchange Bank of Virginia, 79 U. S. 12 Wall. 353, 20 L. ed. 414.....	293	v. Perry, 4 L. R. A. 215, 149 Mass. 369, 378.....	724
v. Lee, 79 U. S. 12 Wall. 571, 20 L. ed. 318.....	680	Lindell v. Rokes, 60 Mo. 249.....	471
Kopitz v. Gustavus, 48 Wis. 48.....	69	Lindsey v. Leighton, 150 Mass. 285.....	845
Kreider v. Boyer, 10 Watts, 64.....	569	Lindvall v. Woods, 4 L. R. A. 793, 41 Minn. 212.....	102
Kreiser's App., 90 Pa. 194.....	662	Line v. Taylor, 3 Fost. & F. 731.....	616
Krutz v. Stewart, 54 Ind. 178.....	506	Lineberger v. Tidwell, 104 N. C. 510.....	267
Kurtz v. Moffitt, 115 U. S. 457, 459, 29 L. ed. 458, 460.....	382	Little v. Hackett, 116 U. S. 339, 29 L. ed. 652.....	270
Kutzmeyer v. Ennis, 27 N. J. L. 371.....	506	Littleton v. Richardson, 32 N. H. 59.....	581
L			
Lacon v. Hooper, 6 T. R. 224.....	773	Liverpool & G. W. Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 32 L. ed. 788.....	342
Ladies' Seamen's Friend Soc. v. Halstead, 58 Conn. 144.....	679	Lockhart v. Lichtenthaler, 46 Pa. 151.....	239
Lafayette v. Male Orphan Asylum, 4 La. Ann. 1.....	856	Lockwood v. Crawford, 18 Conn. 361.....	735
v. Nagle, 12 West. Rep. 637, 113 Ind. 425.....	260	v. St. Louis, 24 Mo. 20.....	856
v. Weaver, 92 Ind. 477.....	559	Loeb v. McCullough, 78 Ala. 533.....	857
La Follett v. Kyle, 51 Ind. 446.....	125	Lofton v. Murchison, 80 Ga. 391.....	158
Lahr's Case, 6 Cent. Rep. 371, 104 N. Y. 268.....	647	Logan v. Caffrey, 30 Pa. 196.....	322
Laird v. Hiester, 24 Pa. 452.....	619	Lohman v. State, 81 Ind. 15.....	653
Lake Erie & W. R. Co. v. Fix, 88 Ind. 381, 384.....	829	Lombard S. Street Pass. R. Co. v. Christian, 124 Pa. 125.....	296
Lake Shore & M. S. R. Co. v. Cincinnati S. R. Co., 30 Ohio St. 604.....	543	Long v. Brown, 66 Ind. 160.....	124
Lake Shore Bkg. Co. v. Fuller, 1 Cent. Rep. 109, 110 Pa. 156.....	618	v. Miller, L. R. 4 C. P. Div. 450.....	561
Lake Superior Iron Co. v. Drexel, 90 N. Y. 37.....	513	v. State (Wd.), 12 L. R. A. p. 89.....	428
v. Erickson, 30 Mich. 422.....	750	v. Straus, 4 West. Rep. 235, 107 Ind. 98.....	504
Lambeth v. North Carolina R. Co., 66 N. C. 494.....	433		
12 L. R. A.			



Mempis & L. R. Co. v. Dow, 120 U. S. 237, 30 L. ed. 595.	812	Morrison v. Wisconsin, O. F. M. L. Ins. Co., 59 Wis. 163.	817
Memphis Freight Co. v. Memphis & Coldw. 435	79	Morse v. Minneapolis & St. L. R. Co., 30 Minn. 465.	558
Menagh v. Waukegan, 52 N. H. 146.	148	v. Presby, 25 N. H. 299.	574
Mennard v. Boston & M. R. Co., 150 Mass. 285	558	Mooley v. Walker, 84 Ga. 274.	680
Merchants Nat. Bank v. Sevier, 14 Fed. Rep. 671	142	Moses Taylor, The, 71 U. S. 4 Wall. 429, 18 L. ed. 401.	736
Merweather v. Garrett, 102 U. S. 422, 28 L. ed. 197	298	Moisher v. St. Louis, I. M. & S. R. Co., 28 Fed. Rep. 383.	887
Merrick v. Amherst, 12 Allen, 530.	425	Moulton v. St. Paul, M. & M. R. Co., 31 Minn. 55	806
v. Van Santvoord, 34 N. Y. 208, 230.	367	Mount Holly, L. & M. Turnp. P. Co. v. Ferree, 17 N. J. Eq. 117.	502
Merrill v. Lombard, 13 Allen, 16.	549	Moyer v. Well, 1 Dem. 71.	238
Merrill v. American Exp. Co., 62 N. H. 514.	804	Mugler v. Kansas, 128 U. S. 623, 31 L. ed. 205, 656, 659,	662
v. Montgomery, 25 Mich. 73.	589	Muhleman v. National Ins. Co., 6 W. Va. 508.	293
v. Preston, 135 Mass. 451.	724	Muhlado v. Brooklyn City R. Co., 30 N. Y. 370.	616
Merritt v. Mason, 12 Johns. 102.	453	Mullen v. St. John, 67 N. Y. 567.	615
Methodist Epis. Church v. Wood, 5 Ohio, 283.	186	Munn v. Burch, 25 Ill. 35.	496
Metropolitan Bank v. Godfrey, 23 Ill. 579.	373	v. Illinois, 44 U. S. 135, 24 L. ed. 87.	658
Metropolitan Teleph. & Tel. Co. v. Colwell Lead Co., 13 Jones & S. 488.	864	Munroe v. Armstrong, 96 Pa. 307.	291
Metzger, Re, 46 U. S. 5 How. 388, 12 L. ed. 100.	594	Murch v. Concord B. Corp., 29 N. H. 9.	235
Meyer v. Dresser, 16 C. B. N. S. 646.	581	Murdoch v. Boston & A. R. Co., 137 Mass. 298.	629
Meysers v. St. Louis, 8 Mo. App. 296, affirmed in 82 Mo. 367.	644	Murphy, Re, 51 Wis. 519.	787
Michael v. Foil, 100 N. C. 178.	819	Murphy v. Lookwood, 21 Ill. 611.	245
Middlebroch v. Williams, 4 L. R. A. 738, 45 N. J. Eq. 723.	106	v. Sioux City & P. R. Co., 55 Iowa, 473.	586
Millburn v. Fowler, 27 Hun, 555.	167	Murray v. Charleston, 98 U. S. 432-440, 24 L. ed. 760, 761.	286
Miles v. James, 36 Ill. 999.	608	v. Marshall, 94 N. Y. 611, 617.	812
v. United States, 103 U. S. 304, 26 L. ed. 481	841	Murrill v. Neill, 49 U. S. 8 How. 414, 12 L. ed. 1135.	256
Millbank v. Penniman, 73 Ga. 136.	157	Musgrove v. Bonser, 5 Or. 813.	391
Miller v. Ewer, 27 Me. 529.	367	Musselman's Estate, 5 Watts, 9.	569
v. Mendonhall, 18 L. R. A. 88, 43 Minn. 95.	679	Musser v. Johnson, 43 Mo. 74.	719
v. Miller, 64 Me. 484.	91	Mutual Ben. L. Ins. Co. v. Brown, 80 N. J. Eq. 183.	207
v. Montgomery, 78 N. Y. 282.	840	Myer v. Regaly, 39 Pa. 229.	60
v. Pendleton, 8 Gray, 547.	581	Myers v. Manhattan Bank, 20 Ohio, 301, 302.	388
v. Saunders, 18 Ga. 422.	157		
v. Tiffany, 68 U. S. 1 Wall. 293, 17 L. ed. 540	95		
v. Trueheart, 4 Leigh, 539.	55		
Millwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256.	299		
Minneapolis v. Wilkin, 30 Minn. 140.	138		
Minnesota Springs Imp. Co. v. Coon, 10 W. N. C. 602.	298		
Minnesota v. Barber, 126 U. S. 813, 820, 34 L. ed. 455, 458.	601		
Minter v. Pacific R. Co., 41 Mo. 508.	320		
Missouri Historical Soc. v. Academy of Sciences, 13 West. Rep. 203, 94 Mo. 459.	416		
Missouri Steamship Co., Re, L. R. 43 Ch. Div. 323, 327.	348		
Missouri & P. R. Co. v. Harris, 67 Tex. 166.	807		
Mitchell v. Liipe, 8 Yerg. 180.	521		
Mitchum v. State, 11 Ga. 615.	451		
Mix v. People, 81 Ill. 118.	247		
Mobile County v. Kimball, 103 U. S. 691, 26 L. ed. 228.	688, 691, 693		
Mobile & M. R. Co. v. Smith, 56 Ala. 245.	284		
Mobile & O. R. Co. v. Hopkins, 41 Ala. 486.	807		
v. Thomas, 42 Ala. 672.	238		
Moffit v. Moffit, 69 Ill. 649.	501		
Mogul S. Co. v. McGregor, L. R. 15 Q. B. Div. 476.	198		
Mort v. Mut. F. Ins. Co. v. Buffum, 115 Mass. 243.	341		
Monroe v. Hoffman, 39 Ia. Ann. 651.	154		
v. Smith, 79 Pa. 459.	170		
Montgomery v. Meredith, 17 Pa. 42.	619		
v. Wyman, 120 Ill. 17.	336		
Montgomery & W. P. R. Co. v. Branch, 59 Ala. 139.	311		
Moore v. Anderson, 8 Ind. 18.	494		
v. Fields, 1 Or. 318.	245		
v. Fitz Randolph, 6 Leigh, 175.	779		
v. Hegeman, 27 Hun, 68, affirmed, 92 N. Y. 321.	362, 863		
v. Hobbs, 79 N. C. 535.	411		
v. Kessler, 36 Ind. 152.	286		
v. Maple, 25 Ill. 343.	818		
v. Pennsylvania R. Co., 60 Pa. 301.	218		
v. People, 12 West. Rep. 130, 123 Ill. 645.	247		
v. Sanford, 7 L. R. A. 151, 151 Mass. 235.	421		
Moore v. Bricklayers Union, No. 1, 23 Weekly Law Bulletin, 48.	198		
v. Moore, 41 N. J. L. 441, 444.	64, 66		
Moreland v. Lemasters, 4 Blackf. 383.	125		
Morgan v. Casey, 73 Ala. 222.	189		
v. Evans, 72 Ill. 586.	88		
v. Jaudon, 40 How. Pr. 366.	513		
v. Reed, 2 Head, 276.	77		
Morgan's L. & T. R. & S. Co. v. Louisiana, 118 U. S. 464, 30 L. ed. 341.	658		
Morice v. Durham, 9 Ves. Jr. 399.	120		
Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 393, 32 L. ed. 715.	110		
Morrill v. Otis, 12 N. H. 466.	143		
Morrison v. Morrison, 136 Mass. 310.	523		
v. Springer, 15 Iowa, 306.	445		
		Morrison v. Wisconsin, O. F. M. L. Ins. Co., 59 Wis. 163.	
		Morse v. Minneapolis & St. L. R. Co., 30 Minn. 465.	
		v. Presby, 25 N. H. 299.	
		Mooley v. Walker, 84 Ga. 274.	
		Moses Taylor, The, 71 U. S. 4 Wall. 429, 18 L. ed. 401.	
		Moisher v. St. Louis, I. M. & S. R. Co., 28 Fed. Rep. 383.	
		Moulton v. St. Paul, M. & M. R. Co., 31 Minn. 55	
		Mount Holly, L. & M. Turnp. P. Co. v. Ferree, 17 N. J. Eq. 117.	
		Moyer v. Well, 1 Dem. 71.	
		Mugler v. Kansas, 128 U. S. 623, 31 L. ed. 205, 656, 659,	
		Muhleman v. National Ins. Co., 6 W. Va. 508.	
		Muhlado v. Brooklyn City R. Co., 30 N. Y. 370.	
		Mullen v. St. John, 67 N. Y. 567.	
		Munn v. Burch, 25 Ill. 35.	
		v. Illinois, 44 U. S. 135, 24 L. ed. 87.	
		Munroe v. Armstrong, 96 Pa. 307.	
		Murch v. Concord B. Corp., 29 N. H. 9.	
		Murdoch v. Boston & A. R. Co., 137 Mass. 298.	
		Murphy, Re, 51 Wis. 519.	
		Murphy v. Lookwood, 21 Ill. 611.	
		v. Sioux City & P. R. Co., 55 Iowa, 473.	
		Murray v. Charleston, 98 U. S. 432-440, 24 L. ed. 760, 761.	
		v. Marshall, 94 N. Y. 611, 617.	
		Murrill v. Neill, 49 U. S. 8 How. 414, 12 L. ed. 1135.	
		Musgrove v. Bonser, 5 Or. 813.	
		Musselman's Estate, 5 Watts, 9.	
		Musser v. Johnson, 43 Mo. 74.	
		Mutual Ben. L. Ins. Co. v. Brown, 80 N. J. Eq. 183.	
		Myer v. Regaly, 39 Pa. 229.	
		Myers v. Manhattan Bank, 20 Ohio, 301, 302.	
		N.	
		Nagel v. Missouri P. R. Co., 75 Mo. 665, 696.	
		Nagle v. Pacific Wharf Co., 20 Cal. 529.	
		Nalley v. Hartford Carpet Co., 51 Conn. 524.	
		Nash v. Harrington, 2 Ark. 9.	
		v. Lull, 103 Mass. 60.	
		v. Williams, 87 U. S. 20 Wall. 228, 22 L. ed. 254.	
		Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352.	
		National Bank of Watertown v. Landon, 45 N. Y. 410, 414.	
		National State Bank v. Rising, 4 Hun, 798.	
		Naylor v. New York C. & H. R. R. Co., 33 Fed. Rep. 801.	
		Nasro v. Ware, 38 Minn. 443.	
		Neal v. Murphy, 60 Ga. 323.	
		Nearpass v. Gilman, 6 Cent. Rep. 667, 104 N. Y. 506.	
		Necker v. Harvey, 49 Mich. 518.	
		Nedham v. Thayer, 147 Mass. 536.	
		Neely v. State, 4 Lea, 316.	
		Neff v. Wellesley, 2 L. R. A. 500, 145 Mass. 457.	
		Nelson v. Hartford, 5 Mees. & W. 806.	
		Nellus v. Brickell, 1 Hayw. 19.	
		Nell v. Dayton, 43 Minn. 242.	
		Nelms v. Edinburgh Am. L. Mortg. Co. (Ala.) 9 So. Rep. 141.	
		Neposet Bank v. Leland, 5 Met. 259.	
		Nerece's Estate, 35 Cal. 332.	
		Nesbitt v. Bartlett, 14 Iowa, 48.	
		New Albany & S. R. Co. v. Peterson, 14 Ind. 117.	
		New Brighton & N. C. R. Co's App., 105 Pa. 123.	
		Newby v. Harrell, 96 N. C. 149.	
		New England Glass Co. v. Lovell, 7 Cush. 821.	
		New England Mort. Sec. Co. v. Gray, 33 Fed. Rep. 636.	
		v. Ingram (Ala.) 9 So. Rep. 140.	
		New Gloucester School Fund Trustees v. Bradbury, 11 Me. 124.	
		New Jersey Ins. Co. v. Meeker, 37 N. J. L. 300.	
		New London N. R. Co. v. Boston & A. R. Co., 102 Mass. 386.	
		New Orleans Gas Light Co. v. Louisiana, L. & H. P. & Mfg. Co., 115 U. S. 850-872, 29 L. ed. 516-524.	
		New Orleans J. & G. N. R. Co. v. Hurst, 36 Miss. 680.	
		New Orleans Water-Works Co. v. Louisiana S. R. Co., 125 U. S. 18, 31 L. ed. 807.	
		Newport & C. Bridge Co. v. United States, 105 U. S. 470, 28 L. ed. 1143.	
		New York, Re, 11 Johns. 77.	
		New York v. Hart, 95 N. Y. 443.	





People v. Cooper, 20 Hun, 486.....	88	Pond v. Williams, 1 Gray, 680.....	714
v. Davenport, 91 N. Y. 574, 585.....	406	Ponsford v. Johnson, 2 Blatchf. 51.....	868
v. Davidson, 30 Cal. 879.....	661	Pool v. Pool, 1 Hill, 580.....	671
v. Detroit White Lead Works (Mich.) 46	56	Poole v. Tolleson, 1 McCord, L. 199.....	731, 735
N. W. Rep. 735.....	768	v. West Point B. & C. Assn., 80 Fed. Rep.	785
v. Dolan, 36 N. Y. 59.....	768	513.....	785
v. Ferguson, 38 N. Y. 89.....	768	Poorman v. Mills, 85 Cal. 118.....	645
v. Geneva College, 5 Wend. 211.....	118	Porter v. Hannibal & St. J. R. Co., 71 Mo. 66.....	750
v. Gibbs, 70 Mich. 425.....	819	v. Midland R. Co., 125 Ind. 476.....	260
v. Gillson, 12 Cent. Rep. 616, 109 N. Y. 389, 426.....	427	v. Pequonnoe Mfg. Co., 17 Conn. 249.....	285
v. Gonzalez, 35 N. Y. 49.....	615	v. Sullivan, 7 Gray, 441.....	618
v. Hicks, 40 Hun, 600.....	254	v. Wormser, 94 N. Y. 431, 450.....	471
v. Holden, 28 Cal. 124.....	128	Porterfield v. Butler, 47 Miss. 165.....	471
v. Humphrey, 7 Johns. 314.....	941	Potomac S. B. Co. v. Upper Potomac S. B. Co.,	661
v. Kostka, 4 N. Y. Crim. Rep. 429.....	199	109 U. S. 672, 27 L. ed. 1070.....	661
v. Larned, 7 N. Y. 445.....	615	Potter v. Chicago & N. W. R. Co., 21 Wis. 372.....	235
v. Loomis, 8 Wend. 396.....	128	Powell v. Dayton, S. & G. R. Co., 14 Or. 356.....	243
v. McCreery, 34 Cal. 456.....	855	v. Pennsylvania, 127 U. S. 678, 32 L. ed. 258.....	655
v. Manhattan Co., 9 Wend. 351.....	623	Power v. Tazewell, 25 Gratt. 786.....	618
v. Mather, 4 Wend. 229, 235.....	381	Powers v. Provident Sav. Inst., 123 Mass. 448.....	577
v. Morris, 13 Wend. 331.....	667	v. Wheeler, 63 Ill. 29.....	607
v. Murray, 5 Hill, 408.....	453	Pownall v. Blair, 78 Pa. 408.....	323
v. New York, 10 Wend. 393, 395.....	183, 773	Pratt v. Brown, 3 Wis. 603.....	543
v. Nordheim, 99 Ill. 553.....	236	v. Taunton Copper Mfg. Co., 123 Mass. 110.....	503
v. Orange County, 17 N. Y. 235-241.....	656	v. Weymouth, 6 New Eng. Rep. 671, 147	360
v. Pease, 27 N. Y. 59.....	363	Mass. 245, 252.....	360
v. Pittsburgh R. Co., 53 Cal. 694.....	118	Prentice v. Geiger, 74 N. Y. 842.....	604
v. Rensselaer & S. R. Co., 15 Wend. 113.....	119	Presser v. Illinois, 116 U. S. 238, 29 L. ed. 620.....	690
v. Robertson, 27 Mich. 116, 118.....	236, 711	Preston v. American Linen Co., 119 Mass. 408.....	345
v. Robinson, 64 Cal. 373.....	785, 787, 789, 790	v. Spaulding, 120 Ill. 266.....	813
v. Schermerhorn, 19 Barb. 558.....	356	Prettyman v. Unland, 77 Ill. 206.....	606
v. Schielllein, 95 N. Y. 124.....	236	Price v. Hannibal & St. J. R. Co., 77 Mo. 506.....	758
v. Staton, 73 N. C. 546.....	204	Prigg v. Pennsylvania, 41 U. S. 16 Pet. 539, 10 L.	659
v. Sutherland, 41 Mich. 177.....	236	ed. 1060.....	659
v. Syracuse, 2 Hun, 433.....	856	Prince v. International & G. N. R. Co., 64 Tex.	827
v. Tax Comrs., 6 Cent. Rep. 381, 104 N. Y.	799	148.....	858
240.....	248	v. Prince, 67 Ala. 555.....	686
v. Taxes & Assessments Courts., 10 Hun,	207	Pritchard v. Norton, 106 U. S. 124, 130, 133, 27 L.	143
v. Tax Courts., 23 N. Y. 192, 224, 225.....	408, 767	ed. 104, 106, 107.....	686
v. Utica Ins. Co., 15 Johns. 358.....	118	Proctor v. Baldwin, 82 Ind. 370.....	143
v. Washington & W. Bank, 6 Cow. 211.....	118	v. Proctor, 2 New Eng. Rep. 333, 141 Mass.	671
v. Weaver, 34 Hun, 322.....	254	165.....	144
v. White, 24 Wend. 520.....	450	Prouty v. Wilson, 123 Mass. 297.....	679
v. Wilzig, 4 N. Y. Crim. Rep. 403.....	199	Providence S. E. Co. v. Providence S. Co., 13 R.	650
v. Wing, 6 Ops. Atty. Gen. 58, 432.....	594	I. 848.....	138
People's Bank v. Gridley, 91 Ill. 457.....	787	Prudential Assur. Co. v. Knott, L. R. 10 Ch. 142.....	198, 199
People's Ice Co. v. Steamer Excelsior, 44 Mich.	586	Prudhomme v. Henry, 5 La. Ann. 700.....	143
229, 38 Am. Rep. 246, and notes.....	586	Puckett v. Bates, 4 Ala. 390.....	505
Peoria & P. U. R. Co. v. Chicago, R. I. & P. R.	443	Pullman v. Upton, 96 U. S. 323, 24 L. ed. 818.....	754, 798
Co., 109 Ill. 135.....	312	Pulse v. Miller, 81 Ind. 190.....	504
Peoria & S. R. Co. v. Thompson, 103 Ill. 187.....	234	Pumpelly v. Green Bay & M. C. Co., 80 U. S. 13	645, 677, 678, 679
Perry v. Marsh, 25 Ala. 659.....	145	Wall 168, 175, 20 L. ed. 557, 559.....	138
v. State, 87 Ala. 30.....	83	Putnam v. Ross, 46 Mo. 387.....	158
v. Tupper, 70 N. C. 538.....	237	Pye v. Peterson, 45 Tex. 312.....	158
Person v. Wilson, 25 Minn. 189.....	65		
Peters v. Lewis & E. G. R. Co., L. R. 16 Ch. Div.	671		
703, L. R. 18 Ch. Div. 430.....	369		
Pettee v. Case, 2 Allen, 549.....	750		
Petis v. Atkins, 60 Ill. 454.....	721		
Petty v. Hannibal & St. J. R. Co., 8 West. Rep.	820, 827		
237, 88 Mo. 300.....	149		
Peterson v. Brown, 17 N. W. Rep. 175.....	311		
Petrie v. Pennsylvania R. Co., 42 N. J. L. 449.....	819		
Peyton v. Stratton, 7 Gratt. 380.....	256		
Phelan v. Hazard, 5 Dill. 45.....	557		
Phelps v. London & N. W. R. Co., 19 C. B. N. S.	323, 829		
321.....	91, 93		
v. McNeely, 66 Mo. 554.....	454		
v. Mauckato, 23 Minn. 276.....	527		
Philadelphia & B. O. R. Co.'s App., 70 Pa. 355.....	796		
Philadelphia & R. R. Co. v. Boyer, 97 Pa. 91.....	109		
v. Hummell, 44 Pa. 375.....	864		
Philadelphia, W. & B. R. Co. v. Rice, 64 Md. 63, 823.....	207		
Philbrook v. Burgess, 32 Me. 271.....	247		
Phillips, Re, 98 N. Y. 267.....	787		
Phillips v. Phillips, 10 Jur. 849.....	834		
Phoenix Bank of New York City v. Risley, 111	287		
U. S. 125, 38 L. ed. 374.....	818		
Pickering v. McCullough, 104 U. S. 310, 26 L. ed.	800		
749.....	222		
Pierce v. Drew, 136 Mass. 75.....	657		
v. Hakes, 23 Pa. 231.....	549		
Pike v. People, 64 Ill. 80.....	828		
Pinkerton v. Manchester & L. R. Co., 42 N. H.	639, 643, 645		
463.....			
Piscataquis F. & M. Ins. Co. v. Hill, 60 Me. 178.....			
Pitt v. Petway, 12 Ired. L. 69.....			
Pittsburgh v. Allegheny, 1 Patsb. Rep. 99.....			
Pittsburgh & C. R. Co. v. Senthmeyer, 92 Pa. 270.....			
Pittsburgh, V. & C. R. Co. v. Com., 101 Pa. 192.....			
Planters Bank v. Prater, 64 Ga. 609.....			
Platt v. Johnson, 15 Johns. 218.....			
Poland v. Brownell, 131 Mass. 138.....			
Pollard v. Hagan, 44 U. S. 3 How. 212, 11 L. ed.			
563.....			





Sewell v. Cohoes, 75 N. Y. 54.....	559	Smyth v. Mayor, 68 N. Y. 553.....	248
Sext v. Geise, 80 Ga. 686.....	505	Snider v. Adams Exp. Co., 77 Mo. 535.....	720
Seymour v. Osborne, 73 U. S. 11 Wall. 546, 20 L. ed. 39.....	110	Snow v. Fitchburg, 136 Mass. 183.....	425
Shackelford v. Clark, 78 Mo. 491.....	256	v. Lake Shore & M. S. R. Co., 121 U. S. 617, 30 L. ed. 1004.....	110
Shadwell v. Shadwell, 9 C. B. N. S. 159.....	470	v. Parsons, 28 Vt. 459.....	549
Shafer v. Brooklyn P. Ins. Co., 58 Wis. 361.....	317	Snyder v. Cabell, 29 W. Va. 48.....	55, 58
Shafer v. Ryan, 84 Ind. 140.....	505	v. Warren, 2 Cow. 518.....	773
Shasley v. Garey, 6 Serg. & R. 539.....	774	Society Prop. Gosp. in F. P. v. Atty-Gen., 3 Russ. 143.....	416
Shardlow v. Cottrell, L. R. 13 Ch. Div. 280, L. R. 20 Ch. Div. 90.....	561	Solomon v. Manhattan R. Co., 4 Cent. Rep. 775, 103 N. Y. 437.....	433
Sharkey v. McDermott, 18 Mo. App. 80, 61 Mo. 647.....	124	Somerby v. Buntin, 118 Mass. 287.....	593
Sharp v. Farmer, 4 Dev. & B. L. 123.....	411	Somerset v. Fogwell, 5 Barn. & C. 888.....	649
Shatruck v. Stoneham, 4 B. R. 6 Allen, 117.....	614	South & North Ala. R. Co. v. Henlein, 53 Ala. 615.....	804
Sheaffer v. Sheaffer, 87 Pa. 525.....	291, 292	South Bend Iron Works v. Paddock, 37 Kan. 510.....	142
Shearin v. Riggsbee, 97 N. C. 221.....	267	South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 732.....	673, 679, 680
Sheazle, Re, 1 Woodb. & M. 68.....	594	South Park Comrs. v. Todd, 113 Ill. 379.....	85, 86
Shew v. Hale, 13 Ves. Jr. 404.....	40	Southern Exp. Co. v. Moon, 39 Miss. 323.....	808
Sheehan v. Good Samaritan Hospital, 50 Mo. 155.....	856	v. Seide, 67 Miss. 609.....	806, 807
Sheeler v. Chesapeake & O. R. Co., 81 Va. 138.....	249	v. Texarkana Water Co. (Ark.) Jan. 17, 1891.....	192
Sheets v. Bray, 125 Ind. 33.....	819	Southern Pac. R. Co. v. Maddox, 75 Tex. 300.....	807
v. Seiden, 69 U. S. 2 Wall. 177, 17 L. ed. 623.....	774	Spalding v. Lowe, 59 Mich. 383.....	761
Shelby v. Guy, 24 U. S. 11 Wheat. 363, 6 L. ed. 497.....	857	Speed v. Atlantic & P. R. Co., 71 Mo. 306.....	749
v. Judd, 24 Kan. 163.....	872	Speer v. Athens, 9 L. R. A. 402, 85 Ga. 49.....	854
Sheldon v. Benham, 4 Hill, 129-131.....	460	v. Evans, 47 Pa. 141.....	396
v. Edwards, 36 N. Y. 279.....	267	Spelman v. Freedman, 54 Hun. 400.....	813
Shelton v. Lake Shore & M. S. R. Co., 29 Ohio St. 214.....	827	v. Jaffray, 6 N. Y. Supp. 370.....	813
Shepard v. Carrigan, 116 U. S. 593, 29 L. ed. 723.....	110	Spence v. Crockett, 5 Baxt. 376.....	737
Shepherd v. Kain, 5 Barn. & Ald. 240.....	697	Sperry v. Horst, 32 Iowa, 184.....	143
r. Sawyer, 2 Murph. 26.....	411	Spicer v. Spicer, 16 Abb. Pr. N. S. 113.....	362
Shepard v. Johnson, 2 Humph. 295.....	76	v. Spicer, 23 Vt. 578.....	309
Sherry v. Argenbright, 1 Heisk. 143, 144.....	521	Spiro v. Paxton, 3 Lea, 75.....	520
Sherlock v. Ailing, 33 U. S. 99, 23 L. ed. 819, 658.....	680	Springfield v. Gay, 12 Allen, 612.....	422, 425
Sherwood v. Lafayette, 7 West. Rep. 524, 100 Ind. 411.....	85	v. Schmoock, 88 Mo. 394.....	614
Shields v. Boucher, 1 De G. & S. 40-52.....	843	Sprout v. Hemmingway, 14 Pick. 1.....	749
v. Netherland, 5 Lea, 201.....	517	Spurlock v. Union Bank, 4 Humph. 336.....	740
Shipley v. Fifty Associates, 106 Mass. 194.....	549	Squire v. New York Cent. R. Co., 96 Mass. 239-245.....	802, 804
Shippin v. Bowen, 122 U. S. 573, 30 L. ed. 1172.....	697	Stackhouse v. Halsey, 3 Johns. Ch. 73, 1 L. ed. 547.....	773
Shirley v. Bishop, 67 Cal. 543.....	651	Stackpole v. Arnold, 11 Mass. 27.....	713
Shoup v. Shoup, 15 Pa. 361.....	322	Standish v. Dow, 21 Iowa, 393.....	525
Shower v. Pilch, 4 Exch. 478.....	508	Stanton v. Westover, 3 Cent. Rep. 139, 101 N. Y. 265.....	149
Shuetz v. Bailey, 40 Mo. 69.....	719	Starkweather v. American Bible Soc., 72 Ill. 50.....	383
Shumate v. Williams, 84 Ga. 249.....	159	State v. Addington, 77 Mo. 110.....	656
Sibbald v. United States, 37 U. S. 12 Pet. 492, 9 L. ed. 1169.....	637	v. Berdette, 78 Ind. 185.....	200
Sibley v. Quinsigamond Nat. Bank, 138 Mass. 515.....	737	v. Burnett, 6 Heisk. 189.....	76
Siebold, Ex parte, 100 U. S. 385, 25 L. ed. 722.....	680	v. Byrd, 93 N. C. 624.....	206, 209
Sill v. Sill, 31 Kan. 348.....	693	v. Canterbury, 28 N. H. 126.....	491
Silvey's Estate, Re, 42 Cal. 210.....	49	v. Carr, 9 West. Rep. 818, 111 Ind. 335.....	696
Simons v. French, 23 Conn. 245.....	650	v. Carroll, 38 Conn. 449.....	304
v. Patchett, 7 El. & Bl. 598.....	352	v. Chicago, St. P. M. & O. R. Co., 40 Minn. 207.....	444
Simpson v. Turney, 5 Humph. 419.....	738	v. Cincinnati G. L. & C. Co., 18 Ohio St. 293.....	542
Singer v. State, 3 L. R. A. 551, 73 Md. 486.....	427	v. Columbia, 6 Rich. L. 404, 27 S. C. 137.....	37, 41
Singer Mfg. Co. v. Lamb, 61 Mo. 221.....	139	v. Craig, 6 New Eng. Rep. 160, 80 Me. 85.....	136
Sinnett v. Herbert, L. R. 7 Ch. 232.....	416	v. Dalrymple, 3 L. R. A. 322, 70 Md. 294.....	408
Sixoux City & P. R. Co. v. Stout, 84 U. S. 17 Wall. 667, 21 L. ed. 745.....	830	v. Dockstader, 42 Iowa, 436.....	450
Skowhegan v. Cutler, 49 Me. 515.....	737	v. Easton Social L. & M. Club, 10 L. R. A. 64, 73 Md. 97.....	414
Slaughter House Cases, 83 U. S. 16 Wall. 36, 21 L. ed. 394.....	655	v. Farmers & M. Mut. Ben. Assn., 18 Neb. 281.....	212
Slawson v. Loring, 5 Allen, 340.....	718	v. Ferris, 42 Conn. 580.....	735, 739, 790
Sloman v. Great Western R. Co., 6 Hun. 546.....	320	v. Gibbs, 13 Fla. 65, 7 Am. Rep. 223.....	236
Smaltz v. Donohue, 11 W. N. C. 220.....	753	v. Glidden, 8 New Eng. Rep. 849, 55 Conn. 46.....	193, 201
Smee v. Smee, L. R. 5 Prob. & Div. 84.....	165	v. Griffey, 5 Neb. 161.....	123
Smethurst v. Proprietors of Ind. Cong. Church, 2 L. R. A. 635, 148 Mass. 261.....	537	v. Hartford, 3 Am. & Eng. Corp. Cas. 610.....	355
Smith v. Alabama, 124 U. S. 465, 31 L. ed. 506, 600.....	661	v. Haworth, 7 L. R. A. 240, 122 Ind. 462-467.....	654
v. Alexander, 31 Mo. 198.....	719	v. Hayes, 78 Mo. 307, 308.....	655, 663
v. Alvord, 63 Barb. 423.....	367, 370	v. Indiana & O. O. G. & M. Co., 6 L. R. A. 579, 130 Ind. 875.....	655, 569, 660, 662, 663
v. Barker, 10 Me. 453.....	302	v. Jacobs, 2 Harr. (Del.) 543.....	773
v. Benson, 1 Hill, 176.....	267	v. Lewis, 11 L. R. A. 105, 107 N. C. 987.....	204
v. Burlington, C. R. & N. R. Co., 59 Iowa, 75.....	535	v. Lockyer, 95 N. C. 693.....	412, 414
v. Dorsey, 38 Ind. 451.....	508, 508	v. McCullough, 20 Nev. 154.....	519
v. Ferguson, 30 Ind. 229.....	508	v. McKinnon, 6 Or. 501.....	236
v. Huckabee, 53 Ala. 191.....	309, 311	v. McMillen, 23 Neb. 335.....	365
v. Junction R. Co., 29 Ind. 546.....	817	v. Maltster, 57 Md. 287.....	102
v. Kendall, 6 T. R. 123.....	847	v. Manchester Commercial Bank, 8 Smedce & M. 237.....	118
v. McCall, 2 Humph. 168-166.....	521	v. Mordecai, 65 N. C. 207.....	615
v. Melhory, 24 Ala. 638.....	256	v. Mott, 61 Md. 297.....	603
v. Mariand, 59 Iowa, 649.....	484	v. Murray, 23 Wis. 96.....	395
v. New York & H. R. Co., 19 N. Y. 127.....	750	v. Newark, 36 N. J. L. 478.....	856
v. Pentinsular Car-Works, 60 Mich. 501.....	254	v. Noble, 4 L. R. A. 101, 118 Ind. 350-361.....	236
v. Robertson, 89 N. Y. 553.....	47, 49	v. Olin, 23 Wis. 519.....	395
v. Shell Lake Lumber Co., 65 Wis. 89.....	607, 608	v. O'Neal, 7 Ired. L. 251.....	450
v. Tebbitt, L. R. 1 Prob. & Div. 396.....	165	v. Patterson, 2 Ired. L. 346.....	623
v. Thompson, 3 Ga. 23.....	773	v. Pescook, 15 Neb. 442.....	236
v. Wash. Corp., 61 U. S. 20 How. 136, 15 L. ed. 868.....	550	v. Penny, 19 S. C. 218.....	639
Smith's App., 23 Pa. 9, 47 Pa. 123.....	59, 213		
Smoot v. Mobile & M. R. Co., 67 Ala. 13.....	343		

State v. Pettinelli, 10 Nev. 141.....	785, 789	790	Swett v. Colgate, 20 Johns. 208.....	697
v. Rauscher, 1 Lea, 90, 97.....	76, 77		Swift v. Bennett, 10 Cush. 436.....	861
v. St. Paul, 36 Minn. 529.....	856		Swigert, Re, 6 West. Rep. 785, 119 Ill. 83.....	128
v. Sargent, 45 Conn. 353.....	650		Symonds v. Hall, 37 Me. 354.....	851
v. Schlier, 3 Heisk. 281.....	76			
v. Smith, 15 Or. 98.....	786, 78	789		
v. Smith, 14 Wis. 565.....	365			
v. Stearns, 11 Neb. 104.....	286			
v. Tierney, 23 Wis. 430.....	128			
v. Upham, 38 Me. 261.....	450	451		
v. Vincennes University, 5 Ind. 78.....	667			
v. Wilkinson, 23 Neb. 711.....	236			
v. Williams, 2 Strobb. L. 474.....	126			
v. Williams, 69 Ala. 311.....	135			
v. Wilson, 2 Lea, 28.....	626			
v. Woodruff, 67 N. C. 89.....	615			
v. Woodruff S. & P. Coach Co., 13 West. Rep. 311, 114 Ind. 155.....	663			
v. Woodward, 89 Ind. 110.....	664			
v. Wordin, 6 New Eng. Rep. 732, 56 Conn. 216.....	655			
State Board of Agriculture v. Citizens St. R. Co., 47 Ind. 407.....	667			
State Ins. Co. v. Horner, 14 Colo. 591.....	218			
Stater v. Hill, 10 Ind. 176.....	125			
Stayton v. Hulings, 7 Ind. 144.....	125			
Stebbins v. Central Vermont R. Co., 54 Vt. 464.....	285			
v. Willard, 53 Vt. 635.....	149			
Steele v. Boston, 123 Mass. 533.....	161			
Steers v. Brooklyn, 1 Cent. Rep. 798, 101 N. Y. 51.....	679			
v. Liverpool, N. Y. & P. S. S. Co., 57 N. Y. 1.....	843			
Steffin v. Steffin, 4 N. Y. Civ. Proc. 179, 17 N. Y. W. Dir. 418.....	851			
Stein v. Howard, 65 Cal. 616.....	313			
v. Levy, 53 Hun. 381.....	813			
Stephens v. Koonce, 103 N. C. 256.....	297			
v. State, 20 Tex. App. 256.....	450			
Stephenson v. Brooklyn C. T. R. Co., 114 U. S. 149, 29 L. ed. 58.....	109			
Sterry v. Arden, 1 Johns. Ct. 501, 1 L. ed. 133.....	44			
Stevens v. Goodell, 3 Met. 34.....	287			
v. Hatch, 6 Minn. 64 (Gil. 19).....	177			
v. Patterson & N. R. Co., 34 N. J. L. 522, 532.....	651			
v. Reeves, 9 Pick. 198.....	845			
Stewart v. First Nat. Bank of Port Huron, 40 Mich. 348.....	144			
v. Harvard College, 12 Allen, 58.....	750			
v. Polk County Supra., 30 Iowa, 9.....	445			
Stickrod v. Com., 86 Ky. 235.....	656			
Stillwater First Nat. Bank v. Larsen, 80 Wis. 206.....	142			
Stillwell v. Pease, 4 N. J. Eq. 74.....	671			
Stockwell v. McCracken, 100 Mass. 84.....	574			
Stoeber v. Whitman, 6 Binn. 416.....	581			
Stokes v. New Jersey Pottery Co., 46 N. J. L. 237.....	718			
Stone v. Charlestown, 114 Mass. 214, 223, 224.....	422			
v. Denny, 4 Met. 155.....	697			
v. Hubbard, 7 Cush. 595.....	463			
v. Mississippi, 101 U. S. 814, 25 L. ed. 1079.....	656			
Stoneman v. Pyle, 35 Ind. 163.....	143			
Storer v. Freeman, 6 Mass. 435.....	618			
v. Storer, 1 Robb. Eccl. 99-101.....	527			
Story's Case, 90 N. Y. 122.....	647			
Stothart v. Lewis, 1 Overt. (Tenn.) 236.....	736			
v. Parker, 1 Overt. (Tenn.) 200.....	785			
Stoutenburgh v. Hendrick, 129 U. S. 141, 142, 32 L. ed. 637, 638.....	626, 627			
Stow v. Kimball, 23 Ill. 93.....	501			
Stratton v. Physio Medical College, 5 L. R. A. 23, 149 Mass. 505.....	113			
Streatfield v. Streatfield, Cas. t. Talb. 176, 1 White & T. Lead. Cas. in Eq. 397.....	229			
Strickland v. Parker, 54 Me. 363.....	297			
Strong v. Birchard, 5 Conn. 357.....	774			
v. Smith, 15 Hun. 222.....	778			
Strout v. Nauma Water & Mfg. Co., 9 Cal. 78.....	787			
Stubbs v. Holywell R. Co., L. R. 2 Exch. 311.....	573			
Studds v. Watson, L. R. 28 Ch. Div. 305.....	561			
Stupp, Re, 11 Blatchf. 125.....	597			
Sturgis v. Galindo, 59 Cal. 28.....	497			
Sullivan v. Boston, 126 Mass. 540.....	161			
Sulzbacher v. Charleston Bank, 85 Tenn. 201.....	737			
Summers v. Bean, 13 Gratt. 412.....	780			
Sumner v. Woods, 67 Ala. 139.....	701			
Sunderland Bridge Case, 112 Mass. 459.....	424			
Supreme Council Am. L. of H. v. Parry, 1 New Eng. Rep. 715, 140 Mass. 580.....	375			
Supreme Lodge K. of H. v. Nairn, 60 Mich. 44.....	213			
Sussex County Freeholders v. Strader, 18 N. J. L. 106, 121.....	161			
Sutter v. Robinson, 119 U. S. 530, 30 L. ed. 492.....	110			
Sweeney v. Allen, 1 Pa. 380.....	302			
v. Perney, 40 Kan. 102.....	761			
Sweetapple v. Bindon, 2 Vern. 536.....	158			
Sweetser v. Smith, 5 N. Y. Supp. 378.....	813			
13 L. R. A.				
Tabor v. Cilley, 53 Vt. 487.....	397			
Taggart v. Newport St. R. Co., 16 R. L. 663, 7 L. R. A. 205.....	540			
Talbot v. Hudson, 16 Gray. 417.....	420			
v. Linfield, 1 W. Bl. 450.....	773			
Talbot v. Stemmons (Ky.) 5 L. R. A. 558.....	470			
Talcott v. Philbrick, 10 L. R. 150, 59 Conn. 473.....	538			
Tanner v. Albion, 5 Hill. 121.....	564			
Tarbell v. Northern Cent. R. Co., 24 Hun. 53.....	829			
Tarry v. Ashton, L. R. 1 Q. B. Div. 314.....	570			
Tasker v. Stanley (Mass.) 10 L. R. A. 468.....	306			
Tate v. Hilbert, 2 Ves. Jr. 119.....	309			
Tatom v. White, 95 N. C. 433.....	617			
Tyul v. Campbell, 7 Serg. 319.....	842			
Taylor, Re, 9 Paige, 313, 4 L. ed. 837.....	841			
Taylor v. Caldwell, 3 Best & S. 823.....	572			
v. Cartwright, L. R. 14 Eq. 167, 176.....	663			
v. Ficks, 64 Ind. 172.....	68			
v. Horde, 1 Burr. 60.....	641			
v. Underhill, 40 Cal. 471.....	857			
v. Yssilanti, 105 U. S. 12, 26 L. ed. 1019.....	549			
Tenant v. Golding, 1 Salk. 21.....	630			
Tennessee v. Davis, 100 U. S. 801, 25 L. ed. 663.....	736			
Tennessee Bank v. Cowan, 7 Humph. 70.....	558			
Terre Haute & I. R. Co. v. Clem, 7 L. R. A. 533, 133 Ind. 15.....	220			
Terre Haute & I. R. Co. v. Bissell, 6 West. Rep. 253, 108 Ind. 113.....	45			
Texas v. White, 74 U. S. 7 Wall. 735, 19 L. ed. 240.....	320			
Texas etc. R. Co. v. Capps (Tex.) 16 Am. & Eng. R. R. Cas. 118.....	320			
Texas Land & Mortg. Co. v. Worsham, 76 Tex. 558.....	269			
Thames Loan & T. Co. v. Beville, 100 Ind. 309.....	134			
Thames Mfg. Co. v. Lathrop, 7 Conn. 550.....	356			
Tharp v. Yarbrough, 79 Ga. 382.....	158			
Thatcher Heating Co. v. Burtis, 121 U. S. 236, 30 L. ed. 943.....	109			
Thayer v. Pratt, 47 N. H. 470.....	303			
Thellan v. Porter, 14 Lea. 627.....	77			
Theobald v. Louisville, N. O. & T. R. Co., 4 L. R. A. 735, 66 Miss. 279.....	864			
Thomas v. Beaton, 25 Tex. Supp. 313.....	244			
v. Winchester, 6 N. Y. 397.....	749			
Thompson v. Central Ohio R. Co., 73 U. S. 6 Wall. 134, 18 L. ed. 765.....	638			
v. Gould, 20 Pick. 134.....	179			
v. Mead, 67 Ill. 395.....	606			
v. Thompson, 1 Coll. 381.....	417			
v. Waters, 25 Mich. 221, 222.....	367			
v. Watson, 10 Verg. 383.....	521			
Thomson v. Davenport, 2 Smith. Lead. Cas. 8th ed. pt. 1, p. 408, notes.....	360			
Thorndike v. De Wolf, 6 Pick. 120.....	308			
Thornton v. Carver, 80 Ga. 397.....	607			
Thorogood v. Bryan, 8 C. B. 118.....	270			
Thorp v. Thorp, 90 N. Y. 602.....	863			
Thorpe v. Missouri Pac. R. Co., 6 West. Rep. 671, 80 Mo. 651.....	750			
Thraher v. Buckingham, 40 Miss. 67.....	302			
Thurman v. Morrison, 14 B. Mon. 387.....	651			
Thurston v. Hancock, 12 Mass. 220.....	549			
Tibbitts v. Tibbitts, 19 Ves. Jr. 656.....	662			
Tiffany v. United States Illum. Co., 19 Jones & S. 230.....	864			
Timnings v. Timmings, 3 Hagg. Eccl. 78.....	527			
Tindley v. Salem, 137 Mass. 171.....	161			
Tinicum Fishing Co. v. Carter, 61 Pa. 21.....	650			
Tinson v. Francis, 1 Campb. 19.....	781			
Tippling v. St. Helen's Smelt. Co., 4 Best & S. 608, 615, 11 H. L. Cas. 642.....	581			
Titus v. Preston, 1 Strange, 652.....	773			
Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 40.....	427			
v. McDonough, 58 Ind. 289, 293.....	829			
Tomlin v. Dubuque, B & M. R. Co., 32 Iowa. 641.....	109			
Tomlinson v. Briles, 101 Ind. 538.....	504			
Tompkins v. Dudley, 25 N. Y. 272.....	572			
v. Williams, 19 Ga. 569.....	687			
Toole v. Perry, 80 Ga. 681.....	159			
Toomer v. Rutland, 57 Ala. 379.....	143			
Townsend v. Derby, 3 Met. 363.....	848			
v. New York Cent. & H. R. R. Co., 54 N. H. 235.....	827			
v. Riley, 46 N. H. 308.....	96			
Trader v. Chidester, 41 Ark. 242.....	143			
Trenton Comrs. v. McDaniel, 7 Jones, L. 107.....	204			



Trombly v. Clark, 18 Vt. 118, 123.	302
Trustees of the University of N. C. v. State Nat. Bank, 96 N. C. 284.	297
Tuck v. Olds, 29 Fed. Rep. 738.	679
Tucker v. Henniker, 41 N. H. 317.	451
Tudor Iron Works v. Weber, 129 Ill. 535.	615
Tulane, Re, 51 Hun, 213.	405
Tuller, Re, 79 Ill. 99.	538
Tunison v. Chamblin, 88 Ill. 378.	139
Turley v. Tucker, 6 Mo. 583.	586
Turnbull v. Bowyer, 40 N. Y. 456.	797
Turner v. Bachelder, 17 Me. 257.	851
v. Kelly, 70 Ala. 85.	887
v. Maryland, 107 U. S. 38, 27 L. ed. 370.	690
Tutwiler v. Tuscaloosa C. I. & L. Co., 89 Ala. 391.	310
Tyson v. South & North Ala. R. Co., 61 Ala. 554.	234

## U.

Uddermook's Case, 76 Pa. 340.	658
Union Bank v. Ezell, 10 Humph. 386.	731, 734
v. Middlebrook, 33 Conn. 95.	144
Union Mut. Asso. of Battle Creek v. Montgomery, 14 West. Rep. 877, 70 Mich. 587.	213, 215
Union Mut. L. Ins. Co. v. Slee, 10 West. Rep. 154, 123 Ill. 57.	35, 96
v. Wilkinson, 80 U. S. 18 Wall. 222, 20 L. ed. 617.	317
Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 25 L. ed. 185.	171
Union Pac. R. Co. v. United States, 99 U. S. 700, 718, 25 L. ed. 496, 504.	696
United States v. Dewitt, 76 U. S. 9 Wall. 41, 19 L. ed. 598.	659, 660
v. Duncan, 4 McLean, 99.	692
v. Great Falls Mfg. Co., 112 U. S. 647, 28 L. ed. 847.	690
v. Heth, 7 U. S. 3 Cranch. 418, 2 L. ed. 483.	52
v. Hill, 120 U. S. 182, 30 L. ed. 632.	598
v. Johnston, 124 U. S. 238, 31 L. ed. 398.	597
v. Kane, 23 Fed. Rep. 743.	200
v. New Orleans, 98 U. S. 381-392, 25 L. ed. 225.	293
v. Pacheco, 69 U. S. 3 Wall. 587, 17 L. ed. 865.	681
v. Payne, 8 Fed. Rep. 892.	598
v. Philbrick, 120 U. S. 59, 30 L. ed. 561.	598
v. Planters Bank, 22 U. S. 9 Wheat. 907, 6 L. ed. 244.	695
v. Rauscher, 119 U. S. 411, 412, 30 L. ed. 429.	596
v. Schurz, 102 U. S. 373, 26 L. ed. 167.	645
v. Walker, 109 U. S. 258, 27 L. ed. 927.	687
v. Watts, 14 Fed. Rep. 130.	594
United States Bank v. Bank of Washington, 31 U. S. 6 Pet. 8, 8 L. ed. 296.	697
v. Donnelly, 33 U. S. 8 Pet. 561, 8 L. ed. 974.	696
v. Goddard, 5 Mason, 363.	728
v. Moss, 47 U. S. 6 How. 31, 12 L. ed. 331.	687
United States Exp. Co. v. Backman, 28 Ohio St. 144.	607
United States Trust Co. v. Lee, 73 Ill. 144.	368
Upton v. Prince, Cas. & Talb. 71.	599

## V.

Vagliani v. Bank of England, L. R. 22 Q. B. Div. 163.	797, 798, 799
Vail v. Hamilton, 85 N. Y. 453.	785
Valleau v. Valleau, 6 Paige, 307, 3 L. ed. 967.	262
Valdez v. Ohio & M. R. Co., 85 Ill. 500.	101
Vance v. Little Rock, 30 Ark. 439.	490
Van Cleave v. Burns, 118 N. Y. 549.	392
Van Cott v. Van Brunt, 82 N. Y. 535.	811
Vanderbilt v. Schreyer, 91 N. Y. 382.	471
Vandeventer v. Ford, 60 Ala. 610.	145
Van Dolsen v. New York, 17 Fed. Rep. 317.	651
Van Duyn v. Vreeland, 12 N. J. Eq. 146.	124
Van Hoesen v. Van Alstyne, 3 Wend. 79.	738
Van Norden v. Morton, 99 U. S. 380, 25 L. ed. 454.	688
Van Nuyse v. Terhune, 3 Johns. Cas. 82.	839
Van Tine v. Van Tine (N. J.), 1 L. R. A. 155.	124
Van Storch v. Griffin, 71 Pa. 240.	863
Van Voorhis v. Brintnall, 88 N. Y. 18.	863
Van Wickle v. Manhattan R. Co., 22 Fed. Rep. 278.	101
Van Wycklen v. Brooklyn, 118 N. Y. 424, 429.	480
Vanzant v. Waddel, 2 Yerg. 270, 271.	78
Vaughan v. Menlove, 3 Bing. N. C. 468.	548
Veale v. Boston, 135 Mass. 187.	161
Venzie v. China, 50 Me. 518.	356
Vincennes University v. Indiana, 55 U. S. 14 How. 233, 14 L. ed. 418.	696
Vinton v. Peck, 14 Mich. 287-290.	451

12 L. R. A.

Von Avery v. Union Pac. R. Co., 35 Fed. Rep. 40.	101
Vowell v. Thompson, 8 Cranch. C. C. 423.	787, 788
Vowles v. Young, 13 Ves. Jr. 140.	841

## W.

Wabash R. Co., Re, 24 Fed. Rep. 217.	200
Wadleigh v. Gilman, 12 Me. 403.	152
Wadsworth v. Sharpsteen, 8 N. Y. 388.	105
Wait v. Wait, 4 N. Y. 95.	361, 362
Walcott v. Swampscott, 1 Allen, 101.	422
Waldron v. Haverhill, 3 New Eng. Rep. 683, 143 Mass. 582.	161
Walker v. Bank of State, 9 N. Y. 582.	350
v. Crews, 73 Ala. 412.	507
v. Douglas, 70 Ill. 445.	214
v. Fawcett, 7 Ired. L. 44.	327
v. Hill, 22 N. J. Eq. 514-530.	63
v. Hunter, 17 Ga. 384.	345
v. Tucker, 70 Ill. 527.	572
Wallace v. Jewell, 21 Ohio St. 170.	143
v. Long, 3 West. Rep. 370, 105 Ind. 523.	124
v. Straus, 113 N. Y. 238.	840
Walley v. Kennedy, 2 Yerg. 554, 555, 557.	76, 78, 80
Walling v. Michigan, 118 U. S. 448, 29 L. ed. 691.	661, 663
Walter v. Selfe, 4 DeG. & S. 815.	56
Walton v. Wilson, 30 Miss. 576.	243
Wanstead Local Board v. Hill, 12 C. B. N. S. 479.	126
Ward v. Farwell, 97 Ill. 598.	321
v. Maryland, 79 U. S. 12 Wall. 418, 20 L. ed. 449.	637
v. Sea Ins. Co., 7 Paige, 294, 4 L. ed. 162.	118
Wardell's Estate, Re, 57 Cal. 489.	48
Ware v. Barataria & L. Canal Co., 15 La. 160.	339
v. Stephenson, 10 Leigh, 155.	505
Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924.	412
Warren v. Pant, 79 Ky. 1.	144
v. Geer, 9 Cent. Rep. 307, 117 Pa. 207.	623
Washington First Nat. Bank v. Whitman, 94 U. S. 347, 24 L. ed. 231.	798
Washington Mut. F. Ins. Co. v. St. Mary's Sem., 52 Mo. 480.	719
Wason v. Rowe, 16 Vt. 535.	697
Waterhouse v. Jamieson, 2 Paters. (Scotch) 1512, L. R. 2 H. L. 29.	384
Watson v. Floral College, 2 Jones, L. 211.	83
v. Mahan, 20 Ind. 223.	125
v. Milwaukee & W. R. Co., 57 Wis. 382.	614
Watt v. Scofield, 76 Ill. 251.	606, 607
Way v. Richardson, 3 Gray, 412.	44
Weare v. Gove, 44 N. H. 136.	350
Webb v. Richmond & D. R. Co., 97 N. C. 387.	109
Webber v. Virginia, 103 U. S. 350, 26 L. ed. 508.	600
Weber v. Board of Harbor Comrs., 85 U. S. 13 Wall. 57, 65, 21 L. ed. 798, 801.	637, 640, 645, 646
Webster v. Gilmore, 91 Ill. 324.	226
Weed v. Carpenter, 10 Wend. 403.	144
Weeks v. New York, N. H. & H. R. R. Co., 9 Hun, 698.	319
v. Prescott, 53 Vt. 57.	601
Weiller v. Pennsylvania R. Co., 184 Pa. 310.	806
Weisser v. Denison, 10 N. Y. 68.	796
Weich v. Cook, 97 U. S. 542, 24 L. ed. 1112.	625
Weid v. Oliver, 21 Pick. 563.	297
Wells v. Brigham, 6 Cush. 6.	843
v. Caldan, 107 Mass. 514, 517.	179, 572, 573
v. Glieseke, 27 Minn. 478.	745
Welsh v. German American Bank, 73 N. Y. 424, 796.	797
v. State, 9 L. R. A. 604, 126 Ind. 71.	656
Welton v. Missouri, 91 U. S. 275, 281, 282, 23 L. ed. 347, 349, 350.	623, 627, 629, 631, 632
Wentworth v. Bullen, 9 Barn. & C. 840.	280
West v. Bancroft, 32 Vt. 357.	250
v. Platt, 120 Mass. 421.	577
v. Ward, 7 Iowa, 322.	452
Westchester & P. R. Co. v. McElwee, 67 Pa. 511.	557
Westchester F. Ins. Co. v. Barie, 33 Mich. 143.	817
Westcott v. Fargo, 6 Lans. 823.	562
West Cumberland I. & S. Co. v. Kenyon, L. R. 6 Ch. Div. 773.	550
Western U. Telegr. Co. v. Crall, 88 Kan. 679.	806
v. Pendleton, 122 U. S. 847, 30 L. ed. 1187.	657
Westfield v. Warren, 8 N. J. L. 808.	842
West Mahanoy Twp. v. Watson, 3 Cent. Rep. 243, 112 Pa. 574, 8 Cent. Rep. 543, 118 Pa. 344.	299
Westmoreland v. Wooten, 51 Miss. 825.	607
West Roxbury v. Minot, 114 Mass. 546.	638
v. Stoddard, 7 Allen, 158.	588
West Virginia Transp. Co. v. Volcanic O. & C. Co., 5 W. Va. 382.	662
Weston v. Bear River & A. W. Min. Co., 5 Cal. 186.	757

Wetherbee v. Baker, 35 N. J. Eq. 501.....	313	Wilson v. Powers, 151 Mass. 539.....	328
Wetherill v. Neilson, 20 Pa. 448.....	697	v. Robertson, 21 N. Y. 587.....	148
Wetmore v. Mad River, 21 N. J. Eq. 242.....	64	v. Welch, 12 Or. 353.....	651
Wetsel v. Mayers, 91 Ill. 497.....	606	Wilson Sewing Mach. Co. v. Moreno, 7 Fed. Rep. 303.....	143
Weyer v. Franklin Second Nat. Bank, 57 Ind. 198.....	500, 501	Windsor v. McVeigh, 98 U. S. 274, 282, 23 L. ed. 914, 917.....	639
Weymouth & B. F. Dist. v. Norfolk County Courts, 108 Mass. 142.....	421	Wingfield v. Crenshaw, 4 Hen. & M. 474.....	54
Whaalan v. Mad River & L. E. R. Co., 8 Ohio St. 249.....	101	Winner v. Penniman, 35 Md. 163.....	267
Whall v. Converse, 5 New Eng. Rep. 823, 146 Mass. 345.....	724	Winterbottom v. Wright, 10 Mees. & W. 109, 115.....	749
Wheatley v. Baugh, 25 Pa. 528.....	693	Winthrop v. Carlton, 8 Mass. 456.....	302
Wheeler v. Walker, 45 N. H. 355.....	475	Wisconsin Teleph. Co. v. Oakknob, 63 Wis. 82.....	546
Wheelock v. Kost, 77 Ill. 296.....	784	Witbeck v. Van Rensselaer, 64 N. Y. 27.....	82
Whincup v. Hughes, L. R. 6 C. P. 78.....	573	Witherell v. Maine Ins. Co., 49 Me. 200.....	317
Whipple v. Robbins, 97 Mass. 107.....	362	Wixon v. Newport, 13 R. I. 454.....	161
Whitaker v. Morrison, 1 Fla. 25.....	738	Womack v. Circle, 29 Gratt. 192.....	761
White v. Cotzhausen, 129 U. S. 329, 32 L. ed. 677, 812, 813.....	110	Womrath v. McCormick, 51 Pa. 504.....	213
v. Dunbar, 119 U. S. 47, 30 L. ed. 303.....	139	Wood v. Bullard, 7 L. B. A. 304, 151 Mass. 325, 335.....	724
v. Flora, 2 Overt. (Tenn.) 426.....	139	v. Dummer, 3 Mason, 306.....	311
v. Fulghum, 87 Tenn. 281, 284, 290, 515, 517, 523.....	472	v. Fowler, 26 Kan. 682.....	586
v. Hoyt, 73 N. Y. 505, 511.....	362	v. Graves, 144 Mass. 365.....	290
v. Lowe, 1 Redf. 376.....	350, 352	v. McGuire, 15 Ga. 203.....	153
v. Madison, 26 N. Y. 117.....	724	v. McGuffey, 2 Sm. & G. 115, on appeal 5 De G. M. & G. 41.....	561
v. Stanfield, 6 New Eng. Rep. 56, 146 Mass. 424.....	41	v. North, 84 Pa. 407.....	142
v. Thomas, 8 Bush, 661.....	198	v. Northwestern Ins. Co. 46 N. Y. 421.....	655
Whitehead v. Kitson, 119 Mass. 484.....	823	v. Reynolds, 7 Watts & S. 406.....	59, 60
Whiteside v. Brawley, 152 Mass. 133.....	614	Woodard v. Brien, 14 Lea. 522, 523.....	76, 78
Whitman v. Boston & M. R. Co., 7 Allen, 313-318.....	762	Woodman v. Pitman, 79 Me. 456, 4 New Eng. Rep. 690, 27 Am. L. Reg. 240, notes.....	598
Whitney v. Peckham, 15 Mass. 243.....	209	Woodruff v. Parham, 75 U. S. 8 Wall. 123, 19 L. ed. 887.....	631
Whitsell v. Mebane, 64 N. C. 345.....	842	Woodstock v. Roberts, 37 Ala. 436.....	145
Whittuck v. Waters, 4 Car. & P. 375.....	213	Woolfolk v. State, 31 Ga. 551.....	451
Wiggin v. Knights of Pythias, 31 Fed. Rep. 122.....	288	Wooster v. Sugar River V. R. Co., 57 Wis. 311.....	88
v. Sweet, 6 Met. 194.....	132, 133	Worcester County v. Worcester, 116 Mass. 198.....	855
Wilbur v. Warren, 6 Cent. Rep. 214, 104 N. Y. 192.....	686	Workman v. Worcester, 118 Mass. 168, 177.....	425
Wilcox v. Fairhaven Bank, 7 Allen, 270.....	277	Worley v. Waldran, 3 Sneed, 549.....	738
v. Hunt, 38 U. S. 13 Pet. 378, 10 L. ed. 209.....	813	Wrigglesworth v. Wrigglesworth, 45 Wis. 255-257.....	180
v. Lucas, 121 Mass. 25.....	158, 159	Wright v. Bundy, 11 Ind. 308.....	367, 370
v. Payne, 28 N. Y. 712.....	92	v. Cumpsty, 41 Pa. 102.....	323
Wild's Case, 6 Coke, 17.....	671	v. Ditzler, 54 Iowa, 620.....	481
Wilde v. Clarkson, 6 T. R. 303.....	56	v. Hunter, 46 N. Y. 409.....	845
Wilder v. Whittemore, 15 Mass. 262.....	158, 159	v. Pipe Line Co., 101 Pa. 204.....	170
Wiley v. Elwood (Ill.), 25 N. E. Rep. 570.....	384	Wulff v. Aldrich, 14 West. Rep. 545, 124 Ill. 591.....	123
v. Smith, 3 Ga. 551.....	345	Wully v. Collins, 9 Ga. 224.....	158
Wilkins v. Earle, 44 N. Y. 172.....	180	Wyman v. Eastern R. Co., 123 Mass. 346.....	423
v. Maddrey, 67 Ga. 766.....	123	Wynne v. State, 56 Ga. 113.....	615
Wilkinson v. Wilkinson, 59 Wis. 557, 560.....	686		
Wilkesbarre Twp. School Directors, <i>etc.</i> , 6 Phila. 437.....	783		
Willard v. Wood, 135 U. S. 309-314, 34 L. ed. 210-214.....	293		
Willcocks, <i>Ex parte</i> , 7 Cow. 410.....	411		
Williams v. Bruffy, 96 U. S. 176-183, 24 L. ed. 716, 717.....	310		
v. Carr, 80 N. C. 295.....	508		
v. Evans, 6 L. R. A. 218, 87 Ala. 725.....	501		
v. Forbes, 114 Ill. 167.....	540, 501		
v. Perrin, 73 Ind. 57.....	720		
v. Pullman Palace Car Co., 40 La. Ann. 88.....	209		
v. Robbins, 16 Gray, 77.....	180		
v. Springs, 7 Ired. L. 384.....	740		
v. Stevens Point Lumber Co., 72 Wis. 487.....	708		
v. Tennessee Union Bank, 9 Heisk. 441.....	774		
v. Western U. Teleg. Co., 93 N. Y. 188.....	361		
v. Whedon, 12 Cent. Rep. 227, 109 N. Y. 533.....	293		
Williamson v. Farrow, 1 Bailey, L. 611.....	124		
v. Parisien, 1 Johns. Ch. 389, 1 L. ed. 182.....	696		
Willis v. Branch, 94 N. C. 142.....	649		
Willis v. Manufacturers Nat. Gas. Co., 5 L. R. A. 603, 130 Pa. 222.....	86		
v. Rose, 77 Ind. 1.....	320		
Willmot v. Hurd, 11 Wend. 585.....	144		
Wilson v. Black Bird Creek Marsh Co., 27 U. S. 2 Pet. 245, 7 L. ed. 412.....	788		
v. European & N. A. R. Co., 67 Me. 358.....	690		
v. Grand Trunk R. Co., 56 Me. 62.....	487		
v. Hayes, 4 L. R. A. 196, 40 Minn. 531.....	681		
v. Little, 2 N. Y. 448.....			
v. McNamee, 102 U. S. 572, 26 L. ed. 234.....			
v. Mineral Point, 39 Wis. 164.....			
v. Myers, 4 Hawks, 73.....			

## STATUTES AND CONSTITUTIONS CITED, CONSTRUED, ETC.

## England.

## Statutes.

23 Edw. I. Revival of judgment.....	82
chap. 24. View by jury.....	65
30 Edw. III. View by jury.....	616
3 Hen. VI. View by jury.....	616
29 Car. II. Statute of Frauds.....	208
1 James II., chap. 2. Marriage after absence of spouse for seven years.....	361
3 & 9 Wm. III., chap. 11, § 8. Damages for breach of covenant.....	91
3 & 4 Anne, chap. 9. Payee of notes.....	847
4 & 5 Anne, chap. 16, § 8. View by jury.....	616
6 Geo. IV., chap. 50, § 23. View by jury.....	616
3 & 4 Wm. IV., chap. 42, § 26. Using record of evidence for or against witness.....	630
6 & 7 Vict. chap. 85. Exclusion of witness for interest.....	630
35 & 36 Vict. chap. 61, § 7. Paper payable to fictitious person.....	798

## France.

## Code Napoleon.

§ 2148. Right of succession to set aside illegal transfer.....	307
--	-----

## United States.

## Constitution.

Art. 1, § 8, cl. 3. Regulation of commerce.....	440
8th Amend. Compensation for property taken.....	677
7th Amend. Judicial power.....	680
14th Amend. Privileges and immunities of citizens.....	440

## Statutes.

1780. Gradual abolition of slaves.....	774
1830. Pre-emption Law.....	888
1842, Aug. 12. Giving effect to treaty stipulations.....	598
1867, March 2. Regulating sale of petroleum.....	680
1867, March 8. Compensation for injuries caused by harbor improvements.....	675
1890, July 2. To protect trade against monopolists.....	754

## Revised Statutes.

§ 7048, 649. Judicial power.....	680
§ 1781. Raising questions.....	591
3244. Peddlers of tobacco.....	625
5270. Extradition.....	592

## Statutes at Large.

Vol. 9, p. 302. Giving effect to treaty stipulations.....	598
12, p. 1199. Treaty with Mexico.....	591
24, p. 832. Interstate Commerce Act.....	726
p. 806. Compensation for injuries caused by harbor improvements.....	675

## Treaties.

1793. With Great Britain.....	598
1842. With Great Britain.....	598
1843. With France; extradition.....	598
1849. Hawaiian Islands; extradition.....	598
1850. Swiss confederation; extradition.....	598
1852. Prussia; extradition.....	598
1853. Bremen; extradition.....	598
Bavaria; extradition.....	598
Wurtemberg; extradition.....	598
Mecklenburg-Schwerin; extradition.....	598
Mecklenburg-Strelitz; extradition.....	598
Oldenburg; extradition.....	598
1854. Schaumburg-Lippe; extradition.....	597
1855. Hanover; extradition.....	597
Sicilia; extradition.....	597
1856. Austria; extradition.....	597
1857. Baden; extradition.....	597
1860. Sweden and Norway; extradition.....	597
Venezuela; extradition.....	597
1861, Dec. 11. Mexico; extradition.....	591, 597
1864. Hayti; extradition.....	597
1867. Dominican Republic; extradition.....	597
1868. Italy; extradition.....	597

12 L. R. A.

1870. Republic of Salvador; extradition.....	597
Nicaragua; extradition.....	597
Peru; extradition.....	597
1871. Orange Free State; extradition.....	597
1872. Ecuador; extradition.....	597
1874. Ottoman Empire; extradition.....	597
1877. Spain; extradition.....	597
1880. Netherlands; extradition.....	597
1882. Belgium; extradition.....	597
1883. Luxemburg; extradition.....	597
1886. Japan; extradition.....	597

## Alabama.

## Constitution, 1868.

Art. 13, § 3. Liability for corporate debts.....	309
--	-----

## Constitution, 1875.

Art. 1, § 24. Eminent domain.....	335
4, § 2. Title of Acts.....	333
14, § 6. Issuance of corporate stock.....	309
§ 18. Liability for corporate debts.....	309

## Statutes.

1853. Issuance of full-paid stock.....	313
1854, Feb. 6. Duties of engineers.....	884
1864, Dec. 10. Stopping railroad trains at crossings.....	883
1868, Dec. 29. Duty to stop trains at stations; signs at railroad crossings.....	884
1881, Feb. 26. Railroad commission.....	884
1886, Dec. 10. Right of street railway company to condemn property.....	835
1887, Feb. 26. Incorporation of street railway.....	832, 835
Feb. 28. Incorporators of street railway company.....	835
1889, Feb. 28. Ensley Railway Company.....	832

## Session Acts.

1865-66, p. 77. Stopping railroad trains at crossings.....	883
1882-83, p. 154. Depot accommodations.....	884
1886-87, p. 74. Depot accommodations.....	884

## Code, 1867.

§ 1369. Duties of engineers.....	884
1403. Stopping trains at crossings.....	884
1406. Duty to instruct engineers and conductors.....	884
1780. Liability for corporate debts.....	309

## Code, 1876.

§ 1154. Depot accommodations.....	884
1659. Duties of engineers.....	884
1702. Stopping trains at crossings.....	884
1703. Duty to instruct engineers and conductors.....	884
1721. Duty to stop trains at stations.....	884
1722. Signs at railroad crossings.....	884
1806. Subscriptions to corporate stock.....	309
§§ 1917-1929. Street railway companies.....	831, 835
§ 2023. Liability of stockholders.....	314
2094. Commercial paper.....	143
2112. Commercial paper.....	143
2118. Commercial paper.....	143

## Code, 1886.

P. 49, § 24. Street railway companies.....	831
§ 494. Assessment of railroad property.....	834
§§ 1120-1143. Railroad commission.....	834
§ 1144. Duties of engineers.....	884
1145. Stopping railroad trains at crossings.....	880, 883
1146. Signs at railroad crossings.....	884
1157. Duty to stop trains at stations.....	884
1173. Railroad companies.....	831
1573. Incorporation of railroads.....	835
1574. Filing declaration of incorporation.....	835
1578. Issuance of commission to open books.....	835
1579. Record of commission.....	835
§§ 1580, 1583. Railroad companies.....	835
§ 1586. Railroad companies.....	835
1588. Railroad companies.....	835
1594. Railroad companies.....	835
1608. Street railway companies.....	835



§ 1604. Number incorporated.....	885
1605. Subscription books.....	885
1607. Record of proceedings.....	885
1608. Powers of railway company.....	885
1609. Issuance of corporate stock.....	810
1758. Commercial paper.....	143
1778. Commercial paper.....	143
1817. Rights of purchaser.....	704
2500. Master's liability for injury to servant.....	108, 228

### Arkansas.

#### Acts.

1842, pp. 172, 173. Van Buren Incorporation Act.....	490
1842-45, p. 138. Van Buren Incorporation Act.....	490

#### Statutes.

1869, April 2. Organization of municipal corporations.....	490
1875, March 2. Organization of municipal corporations.....	490

#### Gantt & Caldwell's Digest.

§§ 3201, 3202. Organization of municipal corporations.....	491
--	-----

#### Manfield's Digest.

§§ 726, 730. Organization of municipal corporations.....	491
§ 806. Right of municipality to levy taxes.....	490

### California.

#### Constitution, 1879.

Art. 6, § 5. Quo warranto.....	119
--------------------------------	-----

#### Statutes.

1876, March 6. Management of Napa state asylum.....	106
1885, March 2. Improper commitment to insane asylum.....	106

#### Civil Code.

§ 40. Effect of discharge from asylum.....	106
1806. Shares of child not named in will.....	48
1807. Rights of child not named in will.....	47
1885-1886. Descent of intestate property.....	48
1402. Descent of intestate property.....	48
§§ 3500, 4610. Rule should not be applied where reason ceases.....	510

#### Code Civil Procedure, 1872.

§ 802. Abolishing <i>acts factas</i> and quo warranto.....	119
§§ 803-809. Action against intruder into office.....	119

#### Code Civil Procedure, 1880.

§ 76. Quo warranto.....	119
1536. Sale of community property.....	48
1561. Execution of power of sale under will.....	47
1764. Guardian for insane person.....	106
1766. Conclusiveness of commitment to asylum.....	106

#### Political Code.

§ 2197. Discharge from custody of insane persons.....	106
2217. Commitments to insane asylums.....	106, 108

#### Probate Code.

§ 178. Execution of power of sale under will.....	47
---	----

#### Hittell's General Laws.

P. 323. Descent and distribution.....	48
1086. Wills.....	48

#### Deering's Political Code.

P. 342. Application for removal from custody of insane person.....	106
860. Improper commitment to insane asylum.....	106

### Connecticut.

#### Public Acts.

1890, chap. 151. Town officers.....	558
chap. 547, § 12. Alteration of ballots.....	552
12 L. R. A.....	

### General Statutes.

§ 58. Contested elections.....	551
93. Town registrars.....	553
436. Collateral attack of probate decree.....	359
569. Survival of right of action.....	228
673. Action in case of disqualification of justice.....	357
745. Action in case of disqualification judge.....	357
877. Legal and equitable remedies.....	275

### District of Columbia.

#### Statutes.

1871, chap. 69, § 24. License tax on commercial agents.....	626
1872, chap. 49. License tax on commercial agents.....	626

### Florida.

#### Statutes.

1828, Nov. 7. Publication and notice.....	772
---	-----

#### McClellan's Digest.

P. 154, § 2. Publication and notice.....	772
--	-----

#### Thompson's Digest.

P. 462, § 2. Publication and notice.....	772
--	-----

### Georgia.

#### Constitution.

Art. 7, § 4. Judgment without verdict.....	685
--	-----

#### Statutes.

1881, Sept. 3. Charter of Atlanta.....	852
1887. Uniformity of pleading.....	157

#### Code.

§ 4. Rules of construction.....	853
798. Exemption of church property.....	854
§§ 1935, 1970. Conveyance to secure debt.....	635
§ 2260. Estates tail.....	159
2332. Protection from freshets.....	620
2335. Waiver of service.....	155
3456. Dilatory plea must be sworn to.....	156
3479. Amendment of defects.....	156
3504. Judgment of court without jurisdiction.....	688
3654. To enforce lien.....	687
3822. Attacking void judgment.....	688
4181. Bringing in matter by amendment.....	156
5006. Church and State.....	854
§§ 5181-5184. Uniformity of taxation.....	854

### Illinois.

#### Constitution.

Art. 9, § 1. Revenue.....	249
---------------------------	-----

#### Statutes.

1872, April 3. Elections.....	126
1874, § 1. Restraining insolvent insurance companies.....	231
§ 5. Receiver of insolvent insurance company.....	321
6. Payment of debts of insolvent insurance company.....	226
1877, July 1. Sale of crops by tenant.....	608
1880, May 21. Free schools.....	125, 127

#### Revised Laws, 1833.

P. 590. Platted streets.....	327
------------------------------	-----

#### Revised Statutes, 1845.

P. 115. Platted streets.....	327
------------------------------	-----

#### Revised Statutes, 1874.

Chap. 24, § 62. Control of streets.....	327
105, § 3. Platted streets.....	327

#### Revised Statutes, 1889.

Chap. 20, §§ 2, 3. Execution of decedent's contract to sell.....	497
41, § 16. Depriving widow of dower.....	497
45, § 42. Writ of possession.....	628
§ 10. Pleading and practice in ejectment.....	83
34. Judgment in ejectment.....	81

Chap. 46. Elections.....	126
47, § 2. View by jury.....	617
72, § 107. Receiver of insolvent insurance company.....	381
§ 108. Payment of debts of insolvent insurance company.....	385
73, § 108. Restraining insolvent insurance companies.....	381
77. Enforcing decrees.....	82
80, § 81. Landlord's lien.....	606
120, § 4. Valuation of property for taxation.....	247
122. Free schools.....	127

*Starr & Curtis Statutes.*

Vol. 1, p. 566. Execution of decedent's contract to sell.....	497
---	-----

**Indiana.***Constitution, 1816.*

Art. 2, § 1. Encouragement of improvements.....	665
---	-----

*Constitution.*

Art. 2, § 13. Elections by ballot.....	236
§ 2. Election of officers.....	237

*Statutes.*

1806. Vincennes' University.....	666
1807. Vincennes' University.....	666
1851, Feb. 14. For encouragement of agriculture.....	664
1877. Loan to state board of agriculture.....	667
1891, March 4. Board of agriculture.....	664
Transportation of natural gas.....	668

*Revised Statutes, 1876.*

Vol. 1, § 10. Corporate stock, personal property.....	500
§ 4152. Corporate stock, personal property.....	500
2, § 43. Selling decedent's property.....	500
§ 60. Selling decedent's property.....	500

*Revised Statutes, 1881.*

§ 557-560. Corporate stock, personal property.....	500
2275-2280. Selling decedent's property.....	500
§ 4248. Plans for public buildings.....	503
4736. Election, the vote.....	236

**Iowa.***Constitution.*

Art. 1, § 1. Property rights.....	439
§ 2. Due process of law.....	439
§ 17. Excessive fines.....	440
§ 6. Unlawful deprivation of property.....	440

*Statutes.*

1874. Compensation to riparian owners for cutting off access to water.....	641
22d Gen. Assem., chap. 22. Freight charges.....	434
23d Gen. Assem., chap. 17. Railroad rates.....	440

*Code.*

§ 456. Power of municipality over markets, weights, and measures.....	116
524. Duty to keep street free from obstruction.....	116
2062. Negotiable notes.....	494
2065. Negotiable notes.....	494
2405. Special proceedings.....	443
2648. Demurrer.....	586

**Louisiana.***Revised Statutes.*

§ 1791. Passing of property to succession.....	305
Art. 871. Passing of property to succession.....	305
§ 2642. Transfer of credits.....	304
2642. Notice to complete transfer of credit.....	304

*Revised Civil Code.*

Art. 2448. Giving in payment.....	304
2655. Giving in payment.....	304
2656. Delivery to effect gift.....	304
3220. Master's liability for acts of servant.....	309
3222, 3253. Right of succession to set aside transfer.....	306

**Maine.***Revised Statutes.*

Chap. 62, § 82. Damages for breach of covenant.....	91
---	----

**Maryland.***Statutes.*

1745. Riparian rights.....	650
1838, chap. 480. Gift enterprise.....	90, 426
1890, chap. 538. Ballots.....	538

*Code, Public General Laws.*

Art. 27, § 185. Gift enterprise.....	90, 426
33, § 128. Ballots.....	538
§ 129. Nomination of candidates.....	537
§ 130. Certification and nomination.....	537
§ 131. Independent nominations.....	537

**Massachusetts.***Province Statutes.*

1693-94, chap. 22. Repairing bridge.....	430
--	-----

*Province Laws (State Ed.)*

Vol. 1, p. 135. Burden of local improvements.....	421
p. 158. Repairing bridge.....	430
p. 238. Repairing bridge; burden of local improvements.....	420, 421
p. 405. Burden of local improvements.....	421
p. 419. Burden of local improvements.....	421
p. 506. Delegation of power to apportion the cost of local improvements; basis of assessment for.....	422, 424
2, p. 44. Delegation of power to apportion the cost of local improvements; assessment for.....	423, 424
p. 795. Burden of local improvements.....	421
3, p. 608. Appropriations for relief fund.....	421
4, p. 235. Delegation of power to apportion the cost of local improvements.....	422
p. 440. Appropriations for relief fund.....	421
p. 740. Delegation of power to apportion the cost of local improvements; assessment for.....	422, 424
p. 1023. Assessment for local improvement.....	422, 424
5, p. 133. Burden of local improvements.....	421

*Statutes.*

1732, May 7. Burden of local improvements; delegation of power to apportion the cost of local improvements.....	421, 423
1738, March 15. Burden of local improvements.....	421
1743, Feb. 10. Burden of local improvements.....	421
1808, chap. 15. Wharf rights.....	618
1820, chap. 59. Delegation of power to apportion the cost of local improvements; assessment for.....	422, 424
1831, chap. 41. Burden of local improvements.....	421
1832, chap. 114. Burden of local improvements.....	421
1834, chap. 15. Delegation of power to apportion the cost of local improvements; assessing cost of, upon county.....	422, 424
1835, chap. 33. Burden of local improvements.....	421
1835, chap. 58. Delegation of power to apportion the cost of local improvements; assessing costs of, upon county.....	422, 424
1836, chap. 131. Aid to railroad.....	420
1838, chap. 169. Burden of local improvements.....	421
1840, chap. 52. Burden of local improvements.....	421
1841, chap. 108. Delegation of power to apportion the cost of local improvements.....	422
1850, chap. 215. Burden of local improvements; Delegation of power to apportion the cost of local improvements.....	422
1854, chap. 183. Delegation of power to apportion the cost of local improvements.....	422
chap. 225. Aid to railroad.....	420
233. Burden of local improvement.....	421
408, § 1. Giving widow life estate.....	726
1880, chap. 95. Varying burden of local improvements.....	421
chap. 140. Burden of local improvements.....	421



1862, chap. 65. Burden of local improvements	421	1874, chap. 189. Burden of local improvements	423
chap. 177. Delegation of power to apportion the cost of local improvements	422	chap. 240. Burden of local improvements	421
177. Providing for making a turnpike and bridges a highway; assessment for local improvement	424	250. Burden of local improvements	421
1863, chap. 88. Delegation of power to apportion the cost of local improvements; assessment for	422, 424	265. Delegation of power to apportion the cost of local improvements; assessment for	422, 424
chap. 107. Delegation of power to apportion the cost of local improvements	422, 424	280. Delegation of power to apportion the cost of local improvements	422, 424
107. Authorizing municipality to construct drains	425	325. Rebuilding roads and bridges	421
191. Delegation of power to apportion cost of local improvements; assessment for	422, 424	Delegation of power to apportion the cost of local improvements	422
1864, chap. 188. Delegation of power to apportion the cost of local improvements	422	1875, chap. 175. Delegation of power to apportion the cost of local improvements; assessment for	422, 424
1865, chap. 88. Assessment for local improvement	424	chap. 193. Burden of local improvements	421
chap. 159. Assessing expense of widening street	424	Delegation of power to apportion the cost of local improvements; assessment for	422, 424
1866, chap. 142. Aid to railroad	420	300. Delegation of power to apportion the cost of local improvements	422, 424
chap. 149. Jurisdiction of harbor commissioners	618	1876, chap. 51. Burden of local improvements	421
265. Delegation of power to apportion the cost of local improvements; assessment for	422, 424	1878, chap. 110. Assessment for local improvement	424
1867, chap. 296. Delegation of power to apportion the cost of local improvements	422, 424	1880, chap. 159. Burden of local improvements	421
chap. 321. Aid to railroad	420	chap. 211. Giving widow fee	725
1868, chap. 80. Delegation of power to apportion the cost of local improvements; assessment for	422, 424	226. Varying burden of local improvements; delegation of power to apportion the cost of	422
chap. 294. Burden of local improvements	421	1882, chap. 38. Notice of accident	251
309. Delegation of power to apportion the cost of local improvements; assessment for	422, 424	1887, chap. 270, § 2. Employer's Liability Act.	556
313. Aid to railroad	420	§ 3. Amount of compensation	559
322. Delegation of power to apportion the cost of local improvements; assessment for	422, 424	1888, chap. 114. Notice of accident	251
1869, chap. 142. Delegation of power to apportion the cost of local improvements; basis of assessment for	422, 424	1890, chap. 439. Disposal of sewage	420
chap. 161. Delegation of power to apportion the cost of local improvements; assessment for	422, 424	<i>General Statutes.</i>	
244. Delegation of power to apportion the cost of local improvements	422, 424	Chap. 68, § 323. Creditor's lien	743
266. Delegation of power to apportion the cost of local improvements	422, 424	51, § 16. Creditor's lien	743
353. Assessment for local improvements	424	90, § 15. Giving widow life estate	725
372. Delegation of power to apportion the cost of local improvements	422	<i>Public Statutes.</i>	
373. Delegation of power to apportion the cost of local improvements; assessment for local improvement	422, 424	Chap. 88, § 19. Notice of accident	251
378. Delegation of power to apportion the cost of local improvements	422	76, § 1. Statute of Frauds	561
403. Delegation of power to apportion the cost of local improvements	422	124, § 1. Curtesy	725
1870, chap. 182. Delegation of power to apportion the cost of local improvements; assessment for	422, 424	§ 2. Widow as heir	724
chap. 219. Delegation of power to apportion the cost of local improvements	422, 424	§ 10. Widow contrasted with heirs	725
231. Burden of local improvements	421	207, § 9. Extradition	323
237. Delegation of power to apportion the cost of local improvements; assessment for	422, 424	<i>Michigan.</i>	
265. Varying burden of local improvements	422	<i>Hovell's Statutes.</i>	
266. Delegation of power to apportion the cost of local improvements; assessment for	422, 424	§ 1296. Private roads	607
302, 303. Delegation of power to apportion the cost of local improvements	422, 424	<i>Minnesota.</i>	
1871, chap. 38. Delegation of power to apportion the cost of local improvements; assessment for	422, 424	<i>Statutes.</i>	
chap. 177. Delegation of power to apportion the cost of local improvements	422, 424	1858, chap. 60. Redemption	744
199. Delegation of power to apportion the cost of local improvements	422, 424	1862, chap. 19. Redemption	744
275. Burden of local improvements	421	§ 5. Proof required from redemptioner	744
1872, chaps. 129, 130, 181. Delegation of power to apportion the cost of local improvements; assessment for	422, 424	1877, chap. 128, § 2. Exemption of benefit fund from execution	374
chap. 295. Delegation of power to apportion the cost of public improvements	422, 424	1885, chap. 184, §§ 5, 6. Regulation of life insurance companies	374
1873, chap. 200. Delegation of power to apportion the cost of local improvements	422, 424	<i>Revised Statutes, 1851.</i>	
12 L. R. A.		Chap. 71, §§ 112-117. Creditor's exemption	744
		86, § 11. Mortgage sale	744
		§ 12. Sale to mortgagees	744
		<i>Compiled Statutes, 1858.</i>	
		P. 646. Redemption	744
		<i>General Statutes, 1878.</i>	
		Tit. 3, chap. 84. Corporations	374
		§ 336. Mutual life insurance company	374
		Chap. 45, §§ 12, 38. Classification of bankrupts' estates	743
		66, § 277. Judgment lien	743
		§ 323. Redemption	744
		81, § 16. Redemption	744
		<i>Missouri.</i>	
		<i>Statutes.</i>	
		1879, § 3117. Enacting the common law	189
		<i>Revised Statutes.</i>	
		§ 183. Classification of demands against decedent's estate	255
		209. Classification of demands against decedent's estate	255
		2384. Joint contracts	254

**Nebraska.***Statutes.*

1887. Disabilities of foreign corporation..... 582

**New Jersey.***Public Laws.*

1861, p. 226. Mortgages..... 586

*Revision.*

P. 122. Conveyances..... 586

**New York.***Session Acts.*

1822, chap. 262. Taxation of corporations..... 765

1823, chap. 254. Assessment of corporations..... 765

1840. Interference with riparian rights..... 643

1848, § 17. Right to vote stock..... 786

1867. Tax assessment..... 764

1860, chap. 245. Divorce, rights of wife in husband's estate..... 861

1861, chap. 587. Taxation of telegraph companies..... 262

chap. 351. Taxation of corporations..... 262

1864, chap. 238. Preference of employé's wages..... 811

1865, chap. 453. Collateral inheritance tax..... 402

1866, chap. 263. Preference of employé's wages..... 811

chap. 559. Taxation of telegraph companies..... 262

1867, chap. 503. Assignment Act..... 811

chap. 712. Collateral inheritance tax..... 402

*Jones & Varick's Laws.*

Vol. 2, p. 214. Marriage after absence of spouse for five years..... 861

*Revised Laws, 1801.*

Vol. 1, p. 122. Marriage after absence of spouse for five years..... 861

*Revised Laws, 1813.*

Vol. 1. Marriage after absence of spouse for five years..... 861

*Revised Statutes.*

Chap. 3, art. 2, part 2. Annulment of marriage for incapacity..... 862

Arts. 3, 4. Annulment of marriage for fault of parties..... 862

Vol. 1, p. 369. Assessment of real estate..... 262

p. 741, § 8. Divorce, putting off dower right..... 861

768. Paper payable to fictitious person..... 707

2, p. 129, § 5. Second marriage during life of former spouse..... 861

p. 142, § 20. Declaring nullity of marriage..... 861

§ 22. Legitimacy of children..... 861

p. 144, § 37. Judgment annulling marriage..... 862

144, § 48. Divorce, rights of wife in husband's estate..... 861

667. Marriage after absence of spouse for five years..... 861

*Code Civil Procedure.*

Tit. 1, chap. 15. Annulment of marriage..... 862

§ 829. Evidence of transactions with deceased..... 838

1022. Finding of facts, and conclusions of law..... 812

1730. Action against foreign corporation..... 236

1764. Dower upon divorce for husband's fault..... 862

1765. Divorce, rights of wife in husband's estate..... 861

2606. Ancillary administration..... 238

§§ 2700, 2701. Distribution of foreign estate..... 238

§ 2702. Powers of ancillary administrator..... 238

*Penal Code.*

§§ 296, 299. Marriage after absence of spouse for five years..... 861

**North Carolina.***Code.*

§ 1251. Evidence of deed..... 207

1554. Instruments to be in writing..... 207

1963. Running of railroad trains..... 113

12 L. R. A.

**North Dakota.***Compiled Laws.*

§ 2915. Transfer of corporate stock..... 787

2924. Term of office of director..... 791

2925. Election of directors..... 787

2926. Qualification of director..... 789

2981. Stockholder's right to vote..... 728

2983. Rights of pledgee of stock..... 795

3753. Master and servant..... 108

4573. Interest as damages..... 108

**Ohio.***Constitution.*

Art. 1, § 2. Control over corporate franchises..... 549

12, § 2. Repeal or alteration of laws..... 549

*Statutes.*

1820, Feb. 25. Defenses to suit on note..... 44

1852, May 1. Creation and regulation of corporations..... 347, 526

1867, April 15. Impending watercourse..... 526

1867, April 12. Creation and regulation of corporations..... 347

1874, April 30. Creation and regulation of corporations..... 347

1876, March 27. Foully waters..... 526

April 11. Creation and regulation of corporations..... 347

1877, March 12. Creation and regulation of corporations..... 347

March 30. Street railways..... 526

1878, March 23. Creation and regulation of corporations..... 347

*Laws.*

Vol. 73, p. 87. Foully water..... 526

74, p. 264. Foully water..... 526

*Revised Statutes.*

§ 3171. Suit on note..... 44

3172. Suit by indorsee of note..... 44

3306. Extension of street railways..... 526

2454. Telegraph companies..... 526

3471. Telephone companies..... 526

4908. Actions to be prosecuted by real party in interest..... 44

4994. Plaintiff in suit..... 44

4995. Plaintiff in suit..... 44

6026. Foully water..... 526

*Swan & Oritchfield's Revised Statutes.*

Vol. 1, p. 832. Defenses to suit on note..... 44

p. 830. Obstructing watercourse..... 526

**Oregon.***Hill's Code.*

§ 845. Preponderance of evidence..... 829

**Pennsylvania.***Constitution.*

Art. 14, § 5. Compensation of county officers..... 192

16, § 7. Issuance of corporate stock..... 192

*Statutes.*

1824, Feb. 3. Tax lien..... 709

1836, July 16, § 72. *Mort facias*..... 325

§ 73. Sequestration..... 325

1845. Tax lien..... 709

1849. Sale of land subject to judgment lien..... 58

1849. Acts necessary to vest title to roadway in corporation..... 221

1855, April 26. Rights of foreign corporation..... 581

1856. Tax sales..... 619

1870, April 7. Sale of corporate property upon *Mort facias*..... 325

1772. Date of judgment..... 58

1874, April 18. Authorization of corporate indebtedness..... 171

April 29. Incorporation Act..... 325

1876, March 31. Compensation of county auditors..... 192

1887, May 12. Compensation of county auditors..... 192

*Public Laws.*

1870, p. 58. Sale of corporate property on *Mort facias*..... 325

1874, p. 93. Incorporation Act.....	385
1876, p. 13. Compensation of county auditors.....	192
1897, p. 95. Compensation of county auditors.....	192

**Rhode Island.***Public Statutes.*

Chap. 182, § 14. Rights of heir of deceased legatee.....	417
--	-----

**South Carolina.***Statutes.*

1785. Recording marriage contracts.....	774
---	-----

**South Dakota.***Statutes.*

1890, chap. 84, § 26. Election contests.....	706
§ 1464. Canvassing votes.....	707
1471. Election contests.....	707

*Compiled Laws.*

§ 1489. Election contests; notice.....	706
1491. Right to contest election.....	712

**Tennessee.***Constitution.*

Art. 1, § 8. Property rights.....	74
§ 80. Hereditary honors.....	79
8. Privileges and immunities.....	77
11. Homestead exemption.....	517

*Statutes.*

1827. Judicial sale.....	77
1856. Title to slave.....	77
1870. Homestead exemption.....	517, 519
1879. Homestead Law.....	518, 519
1885, chap. 88. Descent of lunatic's property.....	72
Telegraph companies.....	544
1887, March 21. Incorporation Laws.....	544
1890, Feb. 28. Electrical street railways.....	544

*Code, 1858.*

§§ 2420-2430. Descent and distribution.....	72, 79
---	--------

*Code.*

§ 1166. Precautions in moving trains.....	185
---	-----

*Milliken & Vertrees' Code.*

§ 1535. Telegraph companies.....	544
2935. Exemption of homestead.....	515
2936. Election of homestead right.....	515
§§ 2937, 2938. To what property homestead attaches.....	515
2940, 2941, 2944. Homestead.....	523
2946. Disposition of homestead on divorce.....	515
3273. Statute of Distribution.....	72
3593. Partition.....	523
4024. Partition.....	523

**Texas.***Constitution, 1869.*

Art. 3, § 14. Eligibility to office.....	365
--	-----

*Constitution, 1876.*

Art. 12, § 1. Creation of corporation.....	368
--	-----

*Statutes.*

1885, p. 59. Creation of corporations.....	368
1887, p. 113. Permits required of foreign corporations.....	368

12 L. R. A.

*Revised Statutes, 1879.*

Art. 506, subd. 27. Creation of corporation....	368
---	-----

**Utah.***Code.*

§ 4310. Punishment for illegal liquor selling...	434
4543. Sale of liquors to minors.....	434

**Vermont.***Statutes.*

1884, No. 140. Married women's contracts.....	601
---	-----

**Virginia.***Code, 1860.*

Chap. 109, § 1. Prohibited marriage.....	51
§ 4. Right to decree of nullity.....	51
§§ 6, 7. Divorce from bed and board.....	51
12. Alimony.....	51

**Washington.***Constitution.*

Art. 15. Harbor lines.....	640
17, § 1. Ownership of navigable waters.....	638
§ 2. Invalidity of Act granting shore rights.....	638
27, § 2. Continuing laws in force.....	643

*Statutes.*

1854. Granting riparian rights.....	642
1877, Nov. 9, § 4. Recording Act.....	391
1890, March 28. Riparian rights.....	642

*Session Laws.*

1899, pp. 812, 814, 815. Registration of instruments.....	399
---	-----

*Code.*

§ 3271. Granting riparian rights.....	646
541. Improvements on land held adversely.....	645

**West Virginia.***Code, 1868.*

Chap. 64, § 1. Void marriages.....	52
§ 4. Suit to annul marriage.....	52
§§ 5, 6. Suits for divorce.....	52
§ 12. Maintenance.....	52
166, §§ 1, 2. Repeal of laws.....	52

*Code.*

Chap. 32, § 18, p. 237. Intoxicating liquors.....	54
39, § 25, p. 285. Power of county court to abate nuisance.....	54
44, p. 350. Dams.....	54
47, § 23, p. 415. Powers of municipality to abate nuisance.....	54
65. Married Women's Act.....	779
113, § 30, p. 760. View by jury.....	55
150, § 20a, p. 916. Power of justices of the peace.....	54

**Wisconsin.***Statutes.*

1881, chap. 198. Fencing railroads.....	183
---	-----

*Revised Statutes.*

§ 1310. Fencing railroads.....	183
1312. Farm crossings.....	183

# LAWYERS' REPORTS,

ANNOTATED.

## NEBRASKA SUPREME COURT.

BOHN MANUFACTURING CO. *et al.*,  
*Appts.*,  
*v.*  
Herman KOUNTZE *et al.*

(.....Neb.....)

\* In a contract for the sale of land, it was stipulated that the purchaser should erect a dwelling upon the premises within a stated time. The building was erected, but the labor performed and material furnished were not fully paid for. *Held*, in an action to foreclose the mechanics' lien, that the liens of the mechanic and materialman have priority over the lien of the vendor for unpaid purchase money.

(November 11, 1890.)

\*Head note by NORVAL, J.

**NOTE.—Mechanics' liens; priority over subsequent liens.**

The lien of a mechanic or materialman begins with the commencement of the work or furnishing of material under his express or implied contract, and attaches upon whatever estate the employer may have at that time. *Tritch v. Norton*, 10 Colo. 337.

A prior lien is entitled to prior satisfaction out of the thing it binds, unless the lien be intrinsically defective, or is displaced by some act of the party holding it. *Rankin v. Scott*, 25 U. S. 12 Wheat. 177, 6 L. ed. 562.

A person who has contracted to sell lands must be deemed the owner for all purposes contemplated by the Statute in regard to the protection of mechanics and others for labor and materials, where the title to the property has not passed. *Schmalz v. Mead*, 34 N. Y. S. R. 779.

*Rule in various States.*

*California.*

A contractor cannot object to the legality of any incumbrance created prior to his lien, by the person with whom, as owner, he contracts. *Ferguson v. Miller*, 6 Cal. 404.

But those who purchase after the lien attaches take subject to the lien. *McGreary v. Osborne*, 9 Cal. 121; *Crowell v. Gilmore*, 13 Cal. 56; *Soule v. Dawes*, 7 Cal. 578, 14 Cal. 248.

The lien is deemed to have accrued at the time of the commencement of the work or furnishing of the materials. *McCrea v. Craig*, 23 Cal. 525; *Tuttle v. Montford*, 7 Cal. 358; *Soule v. Dawes*, *Id.* 575; *Crowell v. Gilmore*, 13 Cal. 54; *Germania Bldg. & L. Assn. v. Wagner*, 61 Cal. 349. *Andee Barbor v. Reynolds*, 44 Cal. 520.

To protect a materialman against a prior mortgage, the want of notice must be expressly found. *Root v. Bryant*, 57 Cal. 48.

12 L. R. A.

**A** PPEAL by materialmen from a decree of the District Court for Douglas County postponing their liens for materials and labor furnished in erecting a building upon land held under a contract of purchase to the vendor's lien for unpaid purchase money. *Reversed*.

The facts are stated in the opinion.

*Messrs. B. G. Burbank and A. C. Troup*, for appellants:

In the contract between Kountze and Berlin, Kountze authorized Berlin to contract for the erection of a dwelling-house upon the lot. This is sufficient to subject the interest of Kountze to the liens of the mechanic, materialman and laborer, and entitle them to priority.

*Henderson v. Connelly*, 11 West. Rep. 729, 123 Ill. 98, 5 Am. St. Rep. 490; *Hill v. Gill*, 40 Minn. 441; *Hilton v. Merrill*, 106 Mass. 528; *Paulsen v. Manske*, 126 Ill. 72; *Savoy v. Jones*,

*Colorado.*

A mechanics' lien is superior to all after-created liens and any prior liens or incumbrances of which the mechanic or materialman had no actual or constructive notice when he began to work or to furnish materials. *Tritch v. Norton*, 10 Colo. 337.

*Iowa.*

A mortgage taken for a valid consideration, more than ninety days after the last item in an account for a mechanics' lien, and before the statement for the lien is filed, is an incumbrance in good faith, without notice, and is superior to the lien. *Gilbert v. Tharp*, 72 Iowa, 714.

A mortgage on a farm on which a stone dwelling-house is securely built after the mortgage is given and recorded is a first lien on the whole property, and cannot be defeated by a mechanics' lien on the house. *Miller v. Seal*, 71 Iowa, 302, citing *Bank v. Scholth*, 59 Iowa, 816, and *Curtis v. Broadwell*, 68 Iowa, 662.

Where, upon the date of the conveyance of premises in pursuance of the contract therefor, the purchaser executed a mortgage of said premises, which was duly recorded, the mortgagees having no notice of a prior contract for lumber with which to repair, the mortgage takes precedence of the mechanics' lien. *Ryder v. Cobb*, 68 Iowa, 235.

A materialman furnishing materials to the grantee for the erection of a house upon the land has no mechanics' lien superior to an unrecorded mortgage given prior to the execution of the deed. *Moody v. Dryden*, 72 Iowa, 461.

Where all the lumber for a building was furnished under one contract, and a statement for a mechanics' lien was filed within ninety days from the furnishing of the last item, a mortgage upon the property, made after that date, was inferior to the mechanics'

2 Rawle, 348; *Black v. James*, 7 Watts, 9; *Woodward v. Leidy*, 86 Pa. 487; *Rollin v. Cross*, 45 N. Y. 770; *Hackett v. Badeau*, 68 N. Y. 476.

An equitable estate or interest in premises is also subject to a mechanic, and the lien follows it into whatsoever hands it may pass. This holds Berlin's interest, and also that of Kountze.

*Clark v. Parker*, 58 Iowa, 509; *Keeler v. Denmark*, 68 Pa. 449; *Botsford v. New Haven, M. & W. R. Co.* 41 Conn. 464; *Seitz v. Union Pac. R. Co.* 16 Kan. 183; *Atkins v. Little*, 17 Minn. 242.

*Messrs. Congdon, Clarkson & Hunt*, for appellee, Kountze:

A vendor's lien takes precedence as against lien claimants with actual or constructive notice of lien.

Phillips, Mechanics' Liens, 2d ed. § 248; *Nell v. Kinney*, 11 Ohio St. 58; *Logan v. Taylor*, 20 Iowa, 297; *Cochran v. Wimberly*, 44 Miss. 508; *Zeigler's App.* 69 Pa. 471; *Hickox v. Greenwood*, 94 Ill. 266; *Mills v. Matthews*, 7 Md. 317; *Kline v. Lewis*, 1 Ashm. 31; *Brooks v. Lester*, 36 Md. 65; *Walker v. Burt*, 57 Ga. 20; *Holmes v. Ferguson*, 1 Or. 230; *Gillespie v. Bradford*, 7 Yerg. 168; *Scales v. Griffin*, 2 Doug. (Mich.) 64; *Burbridge v. Marcy*, 54 How. Pr. 446; *Knapp v. Brown*, 45 N. Y. 207.

It is a mechanic's duty to know of prior liens.

Phillips, Mechanics' Liens, § 244; *Oliver v. Davy*, 84 Minn. 292.

His lien extends only to the interest of the one contracting for the improvement, and a mechanic can occupy no better position than his employer.

lien, though filed before the statement for the lien. *Iowa Mortg. Co. v. Shanquest*, 70 Iowa, 124.

#### Illinois.

Where the lien for work and machinery in a mill attached June 30, 1883,—the time of making the contract,—it had priority over a trust deed executed by the defendants July 2, 1883, and recorded July 7, 1883. *Paddock v. Stout*, 11 West. Rep. 55, 121 Ill. 571; *Clark v. Moore*, 64 Ill. 273; *Thilman v. Carr*, 75 Ill. 385.

#### Kansas.

The provisions of Comp. Laws 1879, art. 27, chap. 80, that the lien of a mechanic shall have preference over all other liens and incumbrances, includes conveyances as to the doctrine of notice. *Warden v. Sabina*, 36 Kan. 165, citing *Austin v. Wohler*, 5 Ill. App. 300; *Gault v. Deming*, 3 Phila. 337; *Hahn's App.* 39 Pa. 409.

#### Minnesota.

Where, subsequent to the contract for materials to be furnished, the vendee received a deed and executed a purchase-money mortgage, the mortgage was superior to such lien for materials, notwithstanding the failure of vendee to record it until the deed was recorded, the materialman having notice of the execution of the deed, but not of the mortgage. *Oliver v. Davy*, 84 Minn. 292.

A Statute giving a mechanic's lien precedence over all other incumbrances created before or after such lien is unconstitutional as taking a man's property away without his consent and without process of law. *Meyer v. Berliandi*, 1 L. R. A. 777, 36 Minn. 433.

#### Mississippi.

It is no defense to a suit to enforce a mechanic's lien for materials and work, that defendant has ac-

Phillips, Mechanics' Liens, § 244; *Orr v. Patterson*, 14 B. Mon. 81; *Millard v. West*, 50 Iowa, 616; *Thaxter v. Williams*, 14 Pick. 58; *Rees v. Ludington*, 18 Wis. 276; *Jessup v. Stone*, Id. 466.

Without contract of purchase and sale, Berlin could never have had any interest in the premises, to which lien could attach, and his creditors have no right to be placed in a better position than he was.

Phillips, Mechanics' Liens, § 246, p. 415; *Perkins v. Davis*, 120 Mass. 408; *Wood v. Rawlings*, 76 Ill. 206.

That Kountze had knowledge of improvements and contracted that they should be made, and advanced money for the making of them, is immaterial.

Phillips, Mechanics' Liens, § 78, p. 181; *McGinnis v. Purrington*, 43 Conn. 148; *Seales v. Griffin*, *Holmes v. Ferguson*, *Mills v. Matthews* and *Kline v. Lewis*, *supra*; *Callaway v. Freeman*, 29 Ga. 403; *Burbridge v. Marcy* and *Knapp v. Brown*, *supra*; *Seitz v. Union Pac. R. Co.* 16 Kan. 183; *Trustees of Caldwell Ind. v. Young*, 2 Duval, 593.

In the absence of statute a vendee under a land contract can certainly neither incur nor sell a greater interest than he possesses.

Phillips, Mechanics' Liens, § 71, p. 126; *Burbridge v. Marcy*, *McGinnis v. Purrington*, *Scales v. Griffin* and *Walker v. Burt*, *supra*.

Kountze's consent to liens cannot be implied against the express terms of contract.

*McOintock v. Orinell*, 67 Pa. 153; *Hersey v. Gay*, 43 N. J. L. 168.

His agreement to advance money toward the

quired title under a deed of trust executed since the institution of the suit. *Buntyn v. Shippers Compress Co.* 68 Miss. 94.

The lien may be enforced by sale subject to a paramount lien. *Ibid.*

#### Missouri.

The liens of mechanics and materialmen, whether as contractors or sub-contractors, take priority over other incumbrances placed upon the real estate subsequent to the commencement of the building. *Mo. Rev. Stat. 1879, § 3173*; *Douglas v. St. Louis Zinc Co.* 56 Mo. 388; *Allen v. Frumet Min. & S. Co.* 73 Mo. 688; *M'Kim v. Mason*, 3 Md. Ch. 188; *Reading v. Hopeon*, 90 Pa. 494; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057; *Davis v. Bilsland*, 85 U. S. 13 Wall. 652, 31 L. ed. 939; *Taylor v. Burlington, C. R. & M. R. Co.* 4 Dill. 570; *Neilson v. Iowa Eastern R. Co.* 44 Iowa, 71; *Manhattan I. Ins. Co. v. Paulson*, 28 N. J. Eq. 304; *Hydraulic P. B. Co. v. Bormans*, 2 West. Rep. 435, 19 Mo. App. 634; *Great West P. M. Co. v. Bormans*, 2 West. Rep. 423, 19 Mo. App. 671; *Reilly v. Hudson*, 63 Mo. 333; *Welch v. Porter*, 63 Ala. 232.

The lien of the sub-contractor relates back to the date of commencement of the work. *Hydraulic P. B. Co. v. Bormans*, *supra*.

Whoever takes a mortgage upon a building in the course of erection should assume that the mechanics' work is to go forward, and is charged with notice that there may be a lien. *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057; *Hydraulic P. B. Co. v. Bormans* and *Welch v. Porter*, *supra*.

#### Montana.

By the Law of Montana, liens secured to mechanics and materialmen have precedence over all other incumbrances put upon the property after

erection of the building does not amount to consent to attaching of lien.

Philips, *Mechanics' Liens*, pp. 180, 181; *McGinnis v. Purrington*, 48 Conn. 148; *Burbridge v. Marcy*, 54 How. Pr. 446; *Craig v. Swinerton*, 8 Hun. 144; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 18; *Stuyvesant v. Browning*, 1 Jones & S. 208; *Wilkerson v. Rust*, 57 Ind. 173; *Hervey v. Gay*, 42 N. J. L. 168; *Gay v. Hervey*, 41 N. J. L. 39; *Muldoon v. Pitt*, 54 N. Y. 269; *Trustees of Caldwell Inst. v. Young and Setts v. Union Pac. R. Co. supra*.

**Norval, J.**, delivered the opinion of the court:

The Bohn Manufacturing Company brought suit in the District Court of Douglas County to foreclose a mechanics' lien upon certain premises in the City of Omaha. Herman Kountze, the owner of the fee, Z. B. Berlin, the equitable owner in possession, under a contract of purchase with Kountze, and various mechanic lienholders were made defendants. Afterwards, Robert G. King was made a party defendant. On the 7th day of September, 1887, the defendant Herman Kountze, being the owner of lot 4, block 15, Kountze place, City of Omaha, contracted in writing to convey, by warranty deed, said lot to the defendant Z. B. Berlin, in case Berlin should perform his part of the contract. The contract price was \$2,500; the purchaser paid \$100 cash down, and agreed to pay \$100 January 7, 1888; \$50 September 7, 1888; and \$50 on the 1st day of each month thereafter, until the whole sum was paid. All deferred payments were to bear 8 per cent in-

terest from date of sale. The contract contained, among others, this provision: "And it is hereby expressly understood and agreed, and is a part of the consideration for the sale of said lot to Z. B. Berlin, that the said Z. B. Berlin agrees and binds himself, his heirs, executors or assigns, to build, or cause to be built, on said lot a good, substantial new dwelling-house costing not less than \$2,500, and, if more than one dwelling is erected on said lot, then each such dwelling shall cost not less than \$2,500, exclusive of all the other improvements that may be put on said lot, such house or houses to be built on good, substantial brick or stone foundations. The said dwelling shall be commenced within eight months from the date hereof, and be fully completed within twelve months from the date hereof, time being of the essence of this contract, and the improvements provided for being part of the consideration to be paid for said lot. Therefore, should said Z. B. Berlin for any reason fail or neglect to build such building as herein provided for, and within the time specified, then, at the option of said first party, and for the reason that said improvements have not been made as stipulated, this contract may be declared forfeited by said first party, with all the penalties herein provided for." The contract also contained this stipulation: "And said party of the first part shall have the right, immediately upon the failure on the part of the second party to comply with the stipulations of the contract, or any part thereof, to enter upon the land aforesaid, and take immediate possession thereof, without process of law, together with the improve-

the commencement of the building. *Davis v. Bilsland*, 85 U. S. 18 Wall. 690, 21 L. ed. 909.

A mortgage filed after commencement of work by the contractor is subsequent to the lien of a subcontractor although the latter did not commence work until after the filing of the mortgage. *Merrigan v. English*, 5 L. R. A. 387, 9 Mont. 118.

#### Pennsylvania.

For the purpose of determining the priority of a mechanics' lien, the commencement of a building is the first labor done on the ground which is made the foundation of the building. *Griell's App. (Pa.)* 3 Cent. Rep. 869.

All mechanics' liens take effect from the date of commencement of the work. *Denkel's Estate*, 1 Pearson, 313.

But where work upon a building had been abandoned and not resumed for six months, and then under a new contract, it broke the continuity so as to prevent the lien for the original work from taking priority over a mortgage subsequently recorded. *Kelly's App. (Pa.)* 3 Cent. Rep. 78; *Fordham's App.* 73 Pa. 120.

A mechanics' lien superior to a mortgage, but inferior to a widow's exemption claim, will be preferred to both, in the distribution of proceeds of a decedent's real property, where the mortgage is superior to the exemption. *Miller's App.* 123 Pa. 951; *Thomas's App.* 69 Pa. 120.

By the Joint Resolution of January 21, 1848, the Legislature of Pennsylvania intended to give to an unpaid contractor a priority of lien on the property of a railroad company over a mortgage made after the debt to the contractor was incurred. *Fox v. Seal*, 89 U. S. 22 Wall. 424, 22 L. ed. 774.

An unrecorded mortgage is good and effectual as a lien against a subsequent lien creditor who had actual notice of the true state of the case. *Manu-* 12 L. R. A.

facturers & M. Bank v. Bank of Pennsylvania, 7 Watts & S. 385; *Britton's App.* 45 Pa. 173; *Kelly's App. supra*; *Nixon v. Coffin*, 6 W. N. C. 439; *Moroney's App.* 24 Pa. 372; *Stoner v. Neff*, 50 Pa. 268. And see *Jaques v. Weeks*, 7 Watts, 201; *Park v. Neeley*, 90 Pa. 52; *Butcher v. Yocum*, 61 Pa. 168; *Mulliken v. Graham*, 73 Pa. 484; *Appeal of Phillipsburgh Sav. Bank*, 10 W. N. C. 205; *Steckel v. Deah*, 2 Pennyp. 808.

The lien of a mortgage is not divested by a sale under subsequent mechanics' liens. *Gill v. Weston*, 1 Cent. Rep. 370, 110 Pa. 312.

#### Tennessee.

Where the vendor or mortgagee is not made a party to the suit to enforce the mechanics' lien the rights enforced will be in subordination to their liens. *Case Mfg. Co. v. Smith*, 5 L. R. A. 231, 40 Fed. Rep. 339. See *Gillespie v. Bradford*, 7 Yerg. 163; *Rhea v. Allison*, 3 Head, 180.

#### Wisconsin.

A mortgage to secure future advances to pay for labor and materials on a building, recorded before the commencement of the building, although the advances are not made until after the building is commenced, has priority over a mechanics' lien. *Wisconsin P. Mill Co. v. Schuda*, 72 Wis. 277, citing *Moroney's App.* 24 Pa. 372; *Platt v. Griffith*, 27 N. J. Eq. 207.

This rule accords with the rule of the civil law. See *Domat*, pt. 1, book 3, title 1, § 5, art. 2, § 1744, p. 684.

So the privilege was extended to him who lends money to the undertaker of a work. *Id.* § 1745.

The rule is not so extended in Maine. See *Pearson v. Tinker*, 36 Me. 384.

See *notes to Ballew v. Boler (Ind.)* 9 L. R. A. 451; *Schroeder v. Galland (Pa.)* 7 L. R. A. 71.

ments and appurtenances thereunto belonging." Upon the back of the contract was indorsed this memorandum, which was duly signed and witnessed: "It is hereby understood and agreed that, if so requested by the within-named Z. B. Berlin, the within-named H. Kountze shall advance to the within-named Z. B. Berlin any sum of money desired, not exceeding \$2,200, said money so advanced to be used in paying for workmanship and material for building the house within required to be built. Said money so to be advanced shall be placed in the First National Bank of Omaha, subject to check, at the date when said Kountze is notified that work will commence on said building. But nothing herein shall be construed to mean that any money shall be advanced, unless work is commenced on said building within the time fixed by the within agreement for the commencement of work on said building. And the money so deposited shall be paid on checks of said Z. B. Berlin, accompanied by the estimates of the architect actually in charge of said building; and not to exceed 80 per cent of the amount due for work done, and material actually furnished, shall be paid on any estimate, and the remaining 20 per cent shall not be paid until the building is fully completed, and not then until ninety days have first elapsed, and proper proof is furnished that the building is clear of mechanic and other liens. All checks for the payment of money must bear the countersign of Herman Kountze before the same shall be paid by said bank, and duplicates of all contracts, bonds and vouchers shall be filed with the said Herman Kountze. No contract for work shall be let to irresponsible parties, and all contractors shall furnish good and sufficient security, in adequate amounts, for the faithful performance of their contracts; and that no mechanic or other liens will be allowed to go on said property; and that said property shall be clear of all liens or claims by reason of improvements put upon the same. At the option of said Kountze, party of the first part, this contract shall be surrendered to him when the money for the building is advanced, and a new contract entered into, and the consideration therein named to be the amount of money advanced by him, and the balance then unpaid on the lot herein referred to; and, if no new contract is executed, then all money advanced by said Kountze on this contract, to be used in building, shall be considered as part of the purchase money for said property."

On April 24, 1888, Kountze placed with the First National Bank of Omaha, to the credit of Berlin, \$2,200, to be used in building the house provided for in the contract; and on June 7, 1888, for a like purpose, the further sum of \$225 was deposited by him in said bank. Peterson & Co. contracted with Berlin to put up the building for \$2,944. The house was erected, the extras on the job amounting to \$249. The other lienholders were sub-contractors. The moneys placed in the bank were paid out for labor and materials on the architect's estimates, by the checks of Berlin, countersigned by Kountze. The decree of the district court gave Kountze a first lien for \$5,009.72, the same being the unpaid purchase price, and the \$2,200 first advanced for the

construction of the house, with interest on the amounts. The mechanic lienholders were given liens for the amounts due them respectively, but junior to the above lien of Kountze for \$5,009.72. Kountze was also given a lien for the amount of his second advancement, which was made junior to all other liens. The case is here on appeal from that part of the decree giving Kountze the prior lien.

Section 1 of the Mechanics' Lien Law provides that "any person who shall perform any labor, or furnish any material or machinery or fixtures, for the erection, preparation or removal of any house, mill, manufactory or building, or appurtenances, by virtue of a contract or agreement expressed or implied with the owner thereof, or his agents, shall have a lien to secure the payment of the same upon such house, mill, manufactory, building or appurtenance, and the lot of land upon which the same shall stand." The word "owner" as used in this section is not limited in its meaning to the one who holds the legal title, but embraces the equitable owner as well. Ordinarily, the lien of the mechanic attaches only to the interest of the one who causes the improvement to be made. The correct rule doubtless is where one holding land under a contract of purchase causes a building to be erected thereon, and the contract of sale contains no provision for the erection of a building, that the mechanics' lien is confined to the interest of the purchaser in the premises, and is subordinate to that of the vendor of the land, for unpaid purchase money. It is insisted by the appellants that, when the contract of sale of real estate stipulates that the purchaser shall erect on the land a building within a specified time, the mechanic who performs the labor, or furnishes the material, for the making of the improvement, is entitled to a lien against the interest of the vendor in the premises, as well as that of the vendee. The contract of sale in the case at bar not only authorized, but made it obligatory upon, the purchaser to erect a dwelling on the premises, of a certain value, within a fixed time. Further than that, Kountze stipulated to furnish not to exceed \$2,200 towards the erection of the building. The proof shows that Kountze advanced that amount, and more, and that he approved the expenditure of the money. This is additional proof of the authority of the vendee to contract for the erection of the house, Kountze having, in the contract of sale, authorized his vendee to make the improvements; and, in pursuance of that authority, Berlin procured the labor to be performed, and the materials to be furnished, the vendor thereby subjecting his lien for the unpaid purchase money to the liens that might be acquired by the laborer and materialman for making the improvement. Where a vendee, owning the equitable title, contracts for the erection of a building, upon the express authority of the owner of the legal title, it is but just that the lien of the mechanic should attach to the interest of both vendor and vendee in the premises, and be paramount to the lien of the vendor; and this rule does not in any manner contravene any statutory provision. If any authority is necessary to support this construction it is not wanting. The case of *Henderson v. Connolly*, 123 Ill. 98,

11 West. Rep. 729, is similar in its facts to the one at bar. C. M. and W. S. Henderson sold certain real estate to one Sharp for \$2,150. Part of the consideration was paid down, and the balance was to be paid in monthly payments. The contract of sale contained this clause: "And said Hendersons agree that, when said Sharp shall have expended \$325 in the erection of a suitable dwelling-house upon said premises, they will advance him, as the progress of the building justifies, in their opinion, the further sum of \$875, to aid in the completion thereof." J. G. Sharp, the vendee, subsequently employed Connelly to do the excavating, stone and brick work, and plastering for a house he proposed to erect on the premises. Connelly performed the labor, and furnished the material, according to his contract, amounting to \$465.58, and filed his lien for the same. The Hendersons, during the progress of the work, advanced Sharp \$700. Sharp having failed to make his payments to the Hendersons, the latter took possession of the property, and completed the house. Connelly brought suit to enforce a lien for labor and materials furnished under the contract with Sharp. *Mr. Justice Craig*, in delivering the opinion of the court, says: "The only reasonable and fair construction to be placed on this clause of the contract is that the purchaser was authorized and empowered by the vendors to enter into contracts with the builders to furnish material, and erect a building on the premises to which they hold the legal title. If, therefore, the Hendersons authorized and empowered Sharp, the purchaser, to cause a building to be erected on the property where the legal title was in them, upon what ground can

they now, after the labor has been expended, and materials furnished, claim that the mechanic who furnished the labor and materials which they, by contract, authorized, shall look alone to the title held by the purchaser? Certainly no principle of equity or fair dealing would sanction a precedent of that character.

... The vendors, by their contract, have subjected their title to the property to the lien of the petitioner, and the decree properly, in our opinion, authorized a sale of the legal title, and a priority of payment to the petitioner." This case was afterwards approved by the same court in *Paulsen v. Manake*, 126 Ill. 72.

In May, 1889, the Supreme Court of Minnesota, in *Hill v. Gill*, 40 Minn. 441, upon similar facts, held that the lien of the mechanic attached to the interest of the vendor. The statutory provisions in Illinois and Minnesota relating to mechanics' liens are substantially the same as those in this State, and the decisions from those States are entitled to much weight. There are cases holding a contrary doctrine, some of which are cited in the brief of appellees; but, as they are contrary to the liberal rule of construction that has always prevailed in this State in construing the Mechanics' Lien Law, we do not follow them. The rule we adopt is the most just and equitable.

*The decree of the District Court, in so far as it awarded the appellee Kountze the paramount lien on the premises, is reversed, and the decree will be modified in this court making his lien junior to that of the mechanic lienholders. In all other respects the decree is affirmed. Decree accordingly.*

The other Judges concur.

Petition for rehearing denied.

## KENTUCKY COURT OF APPEALS.

Edward BULL *et al.*, Appts.,

v.

KENTUCKY NATIONAL BANK.

(...Ky....)

**Under a statute providing for the subjection of beneficial interests to the payment of the beneficiary's debts, if a fund is devised to trustees with directions to pay the income to testator's son during his life, free from the claims of creditors, and with further directions that if a court of last resort shall at any time determine that the income is liable to be subjected to the payment of the son's debts, then the trustees shall pay it to the son's wife for her separate use, income which accrues prior to a decision by a court of last resort authorizing the application is applicable to the payment of the son's debts, but not that which accrues after such decision.**

(December 18, 1890.)\*

\*A decision was reached and an opinion handed down in this case on September 30, 1890. A petition for rehearing was subsequently filed, in response to which the court extended the original opinion, so that the final opinion is as given herewith. [Rep.]

NOTE.—Spendthrift trusts. See *Billings v. Marsh* (Mass.) 10 L. R. A. 764; *Haycraft v. Bland* (Ky.) 9 L. R. A. 590; *Battery v. Wason*, 7 L. R. A. 308, and note, 151 Mass. 203.  
13 L. R. A.

**A**PPEAL by defendants from a judgment of the Louisville Chancery Court in favor of plaintiff in an action brought to recover the amount alleged to be due on certain promissory notes. *Reversed in part.*

December 17, 1887, appellee held a number of promissory notes signed by Edward and Robert F. Bull. On that day the notes were divided up and three separate suits in as many courts were instituted on them. The suits were subsequently all transferred to the Louisville Chancery Court, where, on March 8, 1889, they were consolidated and a judgment rendered in favor of plaintiff on the notes to the payment of which the court subjected the income of a certain fund held in trust for defendants under the will of their father.

Further facts appear in the opinion.

*Messrs. Cary & Spindle, Richards & Harris and John C. Russell*, for appellants:

The creator of an estate may, by a condition or limitation, take it away from the donee in the event of alienation or subjection to debts, and give it to somebody else.

Story, Eq. Jur. 9th ed. § 974; Lewin, Tr. chap. 7, § 2, p. 190, ed. 1888; Jarman, Wills, ed. 1858, \*185; Perry, Tr. § 888; *White v. Thomas*, 8 Bush, 661; *Marshall v. Rash*, 87 Ky. 119.



Inasmuch as it could not benefit the creditor to put in operation a limitation over to another person, the only proper decree was to dismiss the petition.

*Bramhall v. Ferris*, 14 N. Y. 41.

Where property is limited over in the event of voluntary alienation or bankruptcy, any attempt at alienation or assignment in bankruptcy is held to take the property out of the debtor and vest the title in the remainderman.

*Oldham v. Oldham*, L. R. 8 Eq. Cas. 404; *Bilson v. Crofts*, L. R. 15 Eq. Cas. 814; *Nixon v. Verry*, L. R. 29 Ch. Div. 196.

Upon an attempted alienation where there is a clause of *cesser*, the estate will terminate in the donee, even though there be no limitation over, or it be not ready to vest.

*Hurst v. Hurst*, L. R. 21 Ch. Div. 278.

*Mr. H. L. Stone*, with *Messrs. Hargis & Eastin* and *P. B. Muir*, for appellee:

A testator cannot, nor can anyone, according to our laws, vest property or funds in trustees for the use of another, without subjecting it to the debts of the *cestui que trust*.

*Marshall v. Rash*, 87 Ky. 119; *Samuel v. Ellis*, 12 B. Mon. 479.

A provision in a will purporting to prevent alienation, incumbrance or assignment, or the subjection by his creditors of a beneficiary's life estate, is of no force whatever; and such restrictions do not limit the power of alienation or destroy the incidents which belong to the ownership of property.

*Shaw v. Ford*, L. R. 7 Ch. Div. 669; *Rochford v. Hackman*, 9 Hare, 475; *Hardenburgh v. Blair*, 30 N. J. Eq. 48; *Samuel v. Ellis*, *supra*; 1 Jarman, Wills, p. 684; *Brandon v. Robinson*, 18 Ves. Jr. 429; *Perry*, Tr. § 886; *Story*, Eq. Jur. § 974a; 3 Wms. Exrs. 1874; *Mandlebaum v. McDonnell*, 29 Mich. 78; *Wilkinson v. Wilkinson*, 3 Swanst. 515, Coop. 259.

Until the alleged subsequent condition shall happen, and until the wives shall claim that the condition is broken and show the same to be true in law, there can be no question as to the continuation of the life estate of Robert and Edward Bull.

2 Bl. Com. p. 156; 4 Kent, Com. p. 128; *Kenner v. American Contract Co.* 9 Bush, 202.

If the condition subsequent be possible at the time of making, and becomes impossible to be complied with, either by the act of God or of the law or of the grantor; or if it be impossible at the time of making it, or against law, the estate of the grantee, being once vested, is not thereby divested, but becomes absolute.

4 Kent, Com. p. 130; *Mitchel v. Reynolds*, 1 P. Wms. 189; *Cary v. Bertie*, 2 Vern. 359; *Taylor v. Sutton*, 15 Ga. 103; *Martin v. Ballou*, 18 Barb. 119; *Merrifield v. Cobleigh*, 4 Cush. 178; *Gadberry v. Sheppard*, 27 Miss. 208.

If the prohibition against alienation does not include a forfeiture of the estate as its consequence, the *cestui que trust* may assign his interest.

*Dick v. Pitchford*, 1 Dev. & B. Eq. 480; *Palmer v. Stevens*, 15 Gray, 348; *Mandlebaum v. McDonnell*, 29 Mich. 78; *Hardenburgh v. Blair*, 30 N. J. Eq. 48.

A condition, the effect of which is to defeat or determine an estate to which it is annexed, must defeat the whole of such estate, not determine it in part only, leaving it good for the residue. 12 L. R. A.

*Jermin v. Arcot*, Rot. 1578, cited in *Corbet's Case*, 1 Coke, 88; 2 Sharswood, Bl. Com. p. 152, and note by Mr. Chitty.

The absolute power of disposition of the whole of the life estate of Edward and Robert F. Bull is reposed in them by the will.

The testator, it is true, does say in the will that they shall not alienate, incumber or charge the estate, but he fails to provide that if they do so the estate shall go to someone else, or they shall forfeit their interest, and therefore the power of alienation stands unrestrained, and they can alienate as they choose, without danger of forfeiting their estate or of someone else taking it under the will, because the inhibition against alienation is void, being contrary to public policy.

1 Perry, Tr. §§ 336, 386a; *Jones v. Bacon*, 68 Me. 34; *McKenzie's App.* 41 Conn. 607; *Rona v. Meier*, 47 Iowa, 607; *Kelley v. Meins*, 185 Mass. 281; *Howard v. Carusi*, 109 U. S. 725, 27 L. ed. 1069; *Atty-Gen. v. Hall*, Fitzg. 314; *Ross v. Ross*, 1 Jac. & W. 154; *Jackson v. Bull*, 10 Johns. 18; *Nelson v. Cooper*, 4 Leigh, 406; *Gifford v. Choate*, 100 Mass. 343, 468; *Ramsdell v. Ramsdell*, 21 Me. 288.

*Pryor, J.*, delivered the opinion of the court:

These consolidated actions were heard together, and a judgment rendered for the Bank.

The defense relied on by the appellants is, that the Bank (appellee) agreed that new notes should be executed for the old notes then owing, and that William Cromey's name as an individual indorser should be substituted in lieu of his name as executor and trustee of Bull's estate, thereby releasing the estate of Bull from any and all responsibility upon the paper.

This new paper was executed in January, of the year 1886, and was given, as defendants allege, for the purpose of releasing the liability of the trust property, and making Cromey individually liable, when in fact the defendants say the Bank, in violation of its agreement, entered into an arrangement with the trustee, unknown to them, by which his liability as such was still continued regardless of the arrangement under which the new notes were executed, — the same now in controversy; they therefore deny the right of recovery.

The agreement or consideration for the renewal of these notes is established by Mrs. Bull and her sons, but denied by both Fetter, the president of the Bank, and by Cromey, the trustee, who in substance say that the entire arrangement, including that fixing the liability of the trustee, was made at the instance of the appellants. The appellants were the principal obligors in the greater part of this large indebtedness, and it is unreasonable to believe that the Bank would release solvent parties, to obtain, as an indorser or security, one who was insolvent. The evidence, however, is conflicting; and the chancellor in our opinion ruled properly on this branch of the case. The testimony shows that the notes originally discounted by the Bank were for the benefit of one or the other of the parties to them. The Bank parted with its money in good faith, and to those who are now parties to the renewal paper.

The loans may have been large and unusual, but, in the absence of fraud or bad faith on the part of the appellee, the liability of the

parties to the paper cannot be questioned, and the right of the appellee to come into a court of equity, after exhausting the remedy at law for the purpose of obtaining relief, is equally plain.

The important question, and the only one necessary to be considered, arises from the will of John Bull, in that part of the devise to each of his sons by which it is provided that the rents and profits of the estate devised shall not be subject to the claims of any creditor.

Under our Statute construed by repeated decisions of this court, it has been held that where there is a beneficial interest in property, that interest may be subjected to the payment of the debts of the beneficiary. In the recent case of *Bland's Admr. v. E. W. Bland*, decided at the present term [*Haycraft v. Bland*, 9 L. R. A. 599], the interest of the devisee was held to be liable upon the ground that the provisions of the will attempted to exempt the estate, or its rents and profits, from being subjected to the payment of the debts of the devisee, and at the same time vesting in the devisee the absolute power of disposing of the whole estate as he might deem proper. That was a case in which the benefits of the rents and issues were taken from the devisee and added to the principal with the power given to the devisee to dispose of it by will as he pleased.

It is said in the opinion in that case that the profits or income of the estate were not in fact forfeited by reason of the attempt by the creditor to subject it, but only added to the principal, thus enlarging the estate the disposition of which was left alone to the beneficiary, if he saw proper to devise it. That being invested with such a title to hold that the devisee has no interest, is contrary to the plain provisions of the will. In the case before us the testator devised certain specified property to his two sons, to be held in trust by his executor, and to be controlled by him, during the lifetime of Edward and Robert (the sons), the executor to pay, in quarterly payments, the net proceeds of the rents and profits to the beneficiary. Following this devise to Edward, and a like devise to Robert, is this provision: "The said property shall not be in any manner incumbered by, nor shall it, or its rents or profits, be in any way anticipated by, or in any way subjected to, the debts of my son Edward, either by process of law, or by any order, assignment or contract he may make; and should it at any time be held by a court of last resort that said rents and profits are liable to be subjected to the debts of Edward, or liable to be anticipated or incumbered by him, then, in that event, I direct that my executor shall thenceforth pay the rents and profits of the said property to the wife of said Edward, for separate use, free from the debts or control of her said husband."

The feature distinguishing this case from that of *Bland's Admr. v. Bland* is that in the case of *Bland* the devisee was never divested of his interest, or deprived of his title, but was in fact given such an absolute estate as to exclude the idea that he was not in any sense a beneficiary.

Here the use, and, we might say, the life estate, ceases in Edward and becomes vested in his wife, so there is no estate in Edward for either himself or his creditors, and as the devisor (his father) had the power to make such

a limitation, or create the defeasance, when disposing of his own estate, neither Edward nor his creditor can complain.

Equitable life estates, or a beneficial interest in the debtor, cannot escape subjection to the payment of his debts, but here he has no estate because the devise becomes diverted by the very terms of the will, that neither misleads nor deceives the creditor, who is trusting the beneficiary in the business transaction. It is said, however, the *corpus* of the estate is in Edward, and the rents or profits vested in his wife.

The estate is in the trustee with the right of Edward to the rents, to be paid him by the trustee as they become due and upon the condition expressed in the will of his father.

When you take from the principal devisee the use or enjoyment of the income, and this is all he is entitled to, nothing remains of the estate for him. There is no estate left in Edward that a chancellor can reach, or to which Edward could assert any right, after the happening of the event by which he is divested of title; and his wife becomes entitled to the rents and profits.

It is argued that this is a mere evasion of the Statute by which it is provided that "estates of every kind, held or possessed in trust, shall be subject to the debts and charges of the persons to whose use, or for whose benefit, they shall be respectively held or possessed, etc.—and that no such devise should receive the sanction of this court. That it was the purpose of the testator that his sons should use and enjoy the property devised to them unmolested by any creditor is apparent, but this affords no reason for disturbing the provisions of his will on this subject if by its terms their equitable interest was passed to others. It is a mistaken idea to say that the devise gave to the sons an equitable life estate in this property or in the rents and profits, as by the provisions of the will under which this title is passed to the sons they are to become divested of the title upon a certain contingency. The testator was not required to anticipate the extravagance of the beneficiaries of his bounty so as to provide for those who might thereafter become their creditors, but, on the contrary, the property devised belonging to him, he had the right, and it was his duty, to secure the sons, and particularly their families, against such a reckless use of their property as might reduce them to want. There is nothing in such a provision as affects a sound public policy, or makes this devise of the testator superior to the law of the land. The testator might as readily have devised the estate in the first place to the wives of his two sons or any they might thereafter have, in order to preserve it for their families, and the argument would then be used that this was done merely to enable the wives to hold the property that the sons might enjoy it and still the devise would be upheld.

Counsel seem to have overlooked the fact that this was the testator's own property he was disposing of, and not his sons', and argue as if the testator had no power to annex a condition to the devise that might terminate at once all interest the sons had in the property. It is said that there is no authority or precedent to be followed in this case, but after a

careful examination of a number of cases we find the right of a testator to make such a disposition of his estate fully sustained, and have failed by reference to the authorities referred to by counsel for the appellees to find any single case in which their view of this question is maintained. Some of the authorities go to the extent of holding that the interest and dividends of real or personal property held in trust may be enjoyed by the beneficiary without liability for his debts. *Nichols v. Eaton*, 91 U. S. 716, 28 L. ed. 254.

This court has held the contrary doctrine, but has never gone so far as to adjudge that the beneficiary might not lose his estate upon the happening of a contingency provided by the terms of the trust. A testator cannot vest the title in a trustee for the use of another, and permit its enjoyment by the *cestui que trust*, without subjecting it to the debts of the latter. Thus is the rule in this State, and the doctrine recognized in this case is not inconsistent with it.

While the trustee holds the property for the use of the debtor he holds it subject to the claims of his creditors, but when the property or its profits is to be applied to the use of the beneficiary (the debtor) for a limited period, or until the happening of a certain event, when the title or the entire profit is to vest in another, then the right of the creditor to subject it for the debt of the first taker is gone. The testator provides "that if at any time it should be held by a court of last resort that said rents and profits are liable to be subjected to the debts of Edward, or liable to be anticipated or incumbered by him, then and in that event I direct my executor to pay the rents and profits of said property to the wife of Edward for her separate use free from the debts or control of her husband." Why should the executor hold the rents and profits any longer than the event contemplated by the testator? The will provides that he shall not, and the credit given the devisee is based on the title acquired under the will of his father. If he had a life estate, or was entitled to the rents and profits for life without any condition or limitation as to his right, the property could be subjected and the claim of the creditor enforced; or if any income was in the hands of the trustee that the beneficiary could demand paid over to him as a matter of right, to that extent the creditors would obtain relief, as in this case the income and profits were due and payable to the appellant up to the time he was divested of title, and the chancellor could subject it. It may be proper to consider the authorities, English and American, on this subject. In *Lowes v. Lowes*, 6 Sim. 304, the testator devised certain lands to trustees to receive rents and to pay a certain sum for the benefit of his son's family and the residue for the use of his son with no power on the part of his son to change or alienate it, and that it should not be subject to the claims of creditors. The will also provided that if the son violated the provisions of the trust, the residue should not be paid to him, but should be accumulated. The trustee conveyed the property for creditors and it was held that his interest in the residue ceased.

In *Brandon v. Robinson*, 18 Ves. Jr. 429, Lord Eldon said: "There is no doubt that property may be given to a man until he shall

become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents of a life estate. If a condition is so expressed as to amount to a limitation reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited." This statement of the Lord Chancellor embraces the whole law in this class of cases.

In the case of *Oldham v. Oldham*, reported in L. R. 3 Eq. Cas. 404, before the master of the rolls, the question was whether Oldham had been divested of his life interest in an annuity by entering into a composition with creditors, the annuity to pass to the wife in the event he should anticipate or dispose of the fund or should have a fiat in bankruptcy duly issued against him. He pledged this future income, and in a contest between the creditors of Oldham and the trustees it was adjudged that the stipulations of the trust should be executed and that his life interest was gone.

In the case of *Shes v. Hale*, 18 Ves. Jr. 404, John Morthan by his will bequeathed to his son, through trustees, an annuity of £200 during his life with the condition that it was to fall into the residuum of the estate in the event his son should sell, assign or part with the same as a security for money to be advanced, or should anticipate the same by pledging, etc., except only as to the then next annual quarterly payment. The son took the benefit of the Insolvent Act, and, his assignees claiming the annuity, it was held that the assignees could not take the fund but that it passed as directed by the will.

The doctrine of the English courts is well settled on the point involved, and the courts of this country have followed it, and in *Nichols v. Eaton*, 91 U. S. 716, 28 L. ed. 254, were not disposed to accept the doctrine in so far as it restricted the power of testamentary disposition so as to prevent the beneficiary from using and enjoying the benefits of the devise against the claims of creditors. In that case the bankruptcy of the devisee was by the will to terminate all his interest in the estate, and his creditors were denied the right to the estate or its profits after the act of bankruptcy. Where the debtor who is the beneficiary has any substantial right in the property that a chancellor can enforce, then, so long as that right continues, his interest is liable for his debts, but no longer. The event happening upon which the interest passes to another, the creditor is without remedy.

Nor are we without precedent establishing the doctrine that the event upon which the beneficiary may be divested of title may be the decision of a chancellor subjecting the interest or income to the payment of the debts of the *cestui que trust*.

Joshua Ferris died in 1848, leaving this codicil to his will: "I hereby declare in making provision in my will that the income of one third of my estate upon payment of debts and legacies should be paid to my son Myron H. Ferris it was my design to make provision for the support of himself and family which could not be taken from them by his creditors, and, for the purpose of making myself more plainly understood on this point and to carry out said

design, it is my will that in case creditors' bill shall be filed or any proceedings instituted against my son Myron for the purpose of reaching the interest or income so provided for him and diverting it from the object intended by me, and a decree or judgment obtained for that purpose, that then, from that period, the said interest or income shall cease; and I direct my executors from thenceforth to expend the said interest or income for the support of the family of the said Myron H. Ferris, either by paying the same to his wife, or in any other practicable way in their discretion."

The controversy was in that case between the creditors of the son and the devisees over or the executors. The New York Court of Appeals was then presided over by Denio as chief justice with three associates, and the supreme court judges, five in number, *ex officio* members of the court of appeals at the time that case was decided. Separate opinions were delivered from each court holding without dissent the provision of the will of Ferris that the interest of the devisees should cease on the recovery of a judgment by creditors was valid.

In the case of *White v. Thomas*, 8 Bush, 661, the will provided that the right of another to use the property devised should not be subject

to alienation or sale, and that the right to the use should terminate upon an attempt to do so by the beneficiary or his creditors. This provision was upheld on the ground that Mr. White had no interest in the property.

These cases, it seems to us, should be conclusive of the question raised, and in no wise subvert the rule of law that one vested with an interest in property cannot use or enjoy it to the exclusion of creditors. Nor can the deviser, who has attempted to secure an estate for the benefit of those who are to take under him, be charged with fraud in endeavoring to anticipate the wants of his sons or their families, or liable to the charge of contriving, in violation of law, to place the estate devised beyond the reach of his son's creditors. It was his estate. He had the right to place the limitation upon its duration, and the creditor dealing with the son knew the nature of his title.

A judgment subjecting the income due at the date this opinion was delivered should be entered and then all the interest of the sons ceases in the profits and income of the property. *Judgment below is reversed* that such a judgment may be entered; in all other respects it is affirmed.

## OHIO SUPREME COURT.

Robert KERNOHAN, *Plf. in Err.*,  
v.

Warren DURHAM *et al.*

(48 Ohio St.....)

\*1. Where there is an equity directly attaching to the bill or note itself, in the nature of a claim of right or title to the instru-

\*Head notes by the COURT.

### NOTE.—Constructive notice, when conclusive.

When a person has information or knowledge of certain extraneous facts sufficient to put a reasonably prudent person on inquiry, and the circumstances are such that inquiry, if pursued with reasonable care and diligence, would lead to a discovery of the truth, the party will be absolutely charged with such constructive notice as will raise a conclusive presumption of knowledge. *Chicago, R. I & P. R. Co. v. Kennedy*, 70 Ill. 360; *Paul v. Connorsville & N. J. R. Co.* 51 Ind. 527; *Loughridge v. Bowland*, 52 Miss. 546; *Baritan W. P. Co. v. Veghte*, 21 N. J. Eq. 466; *Hoy v. Bramhall*, 19 N. J. Eq. 553; *Maul v. Rider*, 59 Pa. 167; *Mulmon's Estate*, 68 Pa. 212; *Randall v. Silverthorn*, 4 Pa. 173; *Helms v. Chadbourne*, 45 Wis. 60; *Kennedy v. Green*, 3 Myl. & K. 699; *Hervey v. Smith*, 23 Beav. 299; *Davis v. Sear*, L. R. 7 Eq. 427; *Morland v. Cook*, L. R. 6 Eq. 232; *Starry v. Arden*, 1 Johns. Ch. 261, 1 L. ed. 123.

### Rule applied to commercial paper taken overdue.

It is an elementary principle of commercial law that negotiable paper overdue carries with it, on its very face, notice of defective title sufficient to put transferee on inquiry. *Hinckley v. Union Pac. R. Co.* 129 Mass. 60; *Fisher v. Leland*, 4 Cush. 456; *Gold v. Eddy*, 1 Mass. 1; *Barker v. Valentine*, 10 Gray, 341; *Flint v. Flint*, 6 Allen, 84; *Williamson v. Doby*, 12 L. R. A.

ment, such equity may be asserted by a third party, not a party to the instrument, against an indorsee after maturity.

2. The payee of a note secured by mortgage, being indebted to K., as collateral security, assigned and transferred to him, before the maturity of the note, the mortgage and what purported to be the note, but which proved to be a forgery of the note. The note was indorsed by the payee in blank, and the assignment on the mortgage was as follows: "For value received, I

36 Ark. 699; *Simpson v. Hall*, 47 Conn. 413; *Thomas v. Kinsey*, 8 Ga. 421; *Scott v. Kokomo First Nat. Bank*, 71 Ind. 445; *Henderson v. Case*, 31 La. Ann. 215; *Clarke v. Dederick*, 31 Md. 148; *Braynard v. Beavis*, 2 Mo. App. 490; *Livermore v. Blood*, 40 Mo. 48; *Kellogg v. Schnaake*, 56 Mo. 137; *Kittle v. DeLamater*, 3 Neb. 325; *Merrick v. Butler*, 2 Ians. 103; *Marsh v. Marshall*, 53 Pa. 399; *Fields v. Stunston*, 1 Coldw. 40; *Diamond v. Harris*, 33 Tex. 634; *Goodson v. Johnson*, 36 Tex. 622; *Murray v. Lardner*, 69 U. S. 2; *Wall*, 110, 17 L. ed. 857; *Foley v. Smith*, 73 U. S. 6; *Wall*, 492, 18 L. ed. 961; *Texas v. Hardenberg*, 77 U. S. 10; *Wall*, 68, 19 L. ed. 896; *Darling v. Osborne*, 51 Vt. 160; *Davis v. Miller*, 14 Gratt. 1; *Arents v. Com.* 18 Gratt. 750.

The transferee takes such paper subject to the defense, among others, that there had been a payment made on the paper. *Gordon v. Wansey*, 21 Cal. 77; *Elgin v. Hill*, 27 Cal. 373; *Bryan v. Primm*, 1 Ill. 33; *Stafford v. Fargo*, 35 Ill. 481; *Sawyer v. Hoovey*, 5 La. Ann. 153; *Whitwell v. Crehore*, 8 La. 540; *Butler v. Murison*, 13 La. Ann. 263; *Davis v. Bradley*, 26 La. Ann. 556; *Shipp v. Stacker*, 8 Mo. 145; *Kellogg v. Schnaake*, 56 Mo. 138; *Diamond v. Harris*, 33 Tex. 634; *Taylor v. Mather*, 3 T. R. 38, note; *Boehm v. Sterling*, 7 T. R. 423; *Brown v. Turner*, Id. 630; *Lazarus v. Cowie*, 3 Q. B. 459; *Tiedeman, Com. Paper*, § 235

assign and transfer the within mortgage and the note secured thereby to K., his representatives and assigns." Afterwards, the payee, being indebted to C. also, as collateral security indorsed and delivered to him the genuine note, after maturity, promising to deliver to him the mortgage. C. received the note, relying upon such promise, without any knowledge or information at the time as to the previous assignment of the mortgage to K. Held, (1) that C., as a transferee of the genuine note after maturity, took no better right or title to it than the payee had, from whom he received it; (2) that in a proceeding to foreclose the mortgage the lien of K. was paramount to that of C., and that K. was entitled to be paid before C. out of the proceeds of the sale of the mortgaged premises; (3) that K. was entitled to the genuine note, and to hold it free from the deduction of any payments thereon made by the maker, who neglected to have the amounts so paid by him noted or indorsed on the instrument.

(January 13, 1891.)

**ERROR** to the Circuit Court for Hamilton County to review a judgment reversing a judgment of the Court of Common Pleas allowing, in an action brought to foreclose a mortgage, the claim set up in a cross-petition to the effect that the cross petitioner was the rightful owner of the first lien on the mortgaged property, and that the whole of his claim was due and unpaid. *Reversed.*

**Statement by Dickman, J.:**

The original action was brought in the Court of Common Pleas of Hamilton County, by Joseph N. Kinney against Warren Durham, defendant in error, and his wife, and Robert Kernohan, the plaintiff in error, to foreclose a mortgage on 27½ acres of land in Anderson Township, Hamilton County, executed November 9, 1868, by Durham and his wife to William R. McGill, to secure the payment of two certain promissory notes of that date for \$1,000 each, signed by Durham, and made payable respectively to McGill or order in one and two years after date, Kinney claiming to hold and own the notes and mortgage, through indorsement and assignment by McGill, the payee and mortgagee. Stephen Coddington, defendant in error, who was made a party defendant, and Robert Kernohan, each filed an answer and cross-petition, setting up his interest in the real estate described in the petition, and denying that the plaintiff had any lien on said real estate by mortgage or otherwise. Answers of Durham and his wife and other pleadings were filed, and the action was tried to the court upon the following agreed statement of facts:

"The parties to this action agree that the following are all the facts of this case, and all the evidence of the parties to the action, viz.: Warren Durham was indebted to W. R. McGill on notes and mortgage executed November 9 1868, for \$2,000, payable one and two years after date, respectively. In November, 1879, Durham had a settlement with McGill of said mortgage debt then amounting to \$3,250, and on the 26th day of November, 1879, Durham gave to McGill a new note for that amount, payable one year after date, and to secure the payment of said last note of \$3,250 Durham at the same time executed and delivered his mort-

gage deed of the real estate described in the petition to said McGill. The old notes and mortgage paid by the execution of the new were not present at the place of settlement, but were to be returned by McGill to Durham as soon as he, McGill, returned to his home in Newton, the new note and mortgage being made in Cincinnati. In 1884 McGill gave to the plaintiff, Kinney, the paid notes and mortgage (never having returned them to Durham) as collateral security for a loan then made from Kinney, and they were so received by said Kinney, who was ignorant of the transactions between Durham and McGill. The said McGill being also indebted to the defendant Kernohan, as a collateral, he, McGill, assigned and transferred to Kernohan before the maturity of the \$3,250 note the mortgage given to secure said note, and also a note for \$3,250, or what purported to be Durham's note. The assignment on the mortgage is:

"For value received, I assign and transfer the within mortgage and the note secured thereby to Robert Kernohan, his representatives and assigns.

"July 21, 1880.

Wm. R. McGill.

"Entered April 5, 1884. George W. Rabenstein, Recorder."

"Afterwards, on the 22d of February, 1881, McGill being also indebted to the defendant Coddington in the sum of \$1,250 and interest, as a collateral, indorsed and delivered to Coddington the genuine note for \$3,250 aforesaid, secured by the mortgage aforesaid for that amount. Coddington received said note, and relied upon McGill's promise to deliver the mortgage in good faith and for value, and without any knowledge or information as to the previous assignment of the mortgage until proved on the trial. It is agreed the note given to Kernohan of \$3,250 is a forgery, and that the mortgage given to him was the genuine mortgage, and that the note held by Coddington is the genuine note for \$3,250, secured by the mortgage. McGill promised Coddington to deliver him the mortgage also, which he never did do, but that Kernohan received said note and mortgage and contract of assignment thereof in good faith and for value, and without any knowledge or information as to said forgery until proven on said trial. Durham, the maker of the note, had no knowledge of these transactions by McGill, and afterwards McGill called upon him from time to time for payments on his note, stating to Durham he would credit the payments upon his note when he went to the safe deposit where the note was kept for safety. These payments made in good faith were as follows: March 1, 1880, \$200; October 2, 1880, \$200; December 27, 1881, \$165; October 10, 1882, \$150; December 25, 1882, \$50; in all, \$765."

Upon this state of facts the court found for the defendants as to the plaintiff, and ordered that the plaintiff's petition be dismissed, and, as to him, that the defendants go hence without day, and that the mortgage sued on by the plaintiff be canceled; and as to Coddington the court found for the defendants as to his cross-petition, and ordered that his cross-petition be dismissed, and that the defendants thereto go hence without day; and as to Kernohan the court found for him, and that the allegations



in his cross-petition were true; that the equity of the case was with him; that by assignment he became entitled to, and the owner before maturity and in good faith and for value of, the promissory note for \$3,250, described in his cross-petition, and the mortgage given November 26, 1879, to secure payment of the same; that said mortgage was duly recorded, and was the first and best lien on the real estate described in the plaintiff's petition and in the cross-petition of Kernohan; that Durham was not, as against Kernohan, entitled to credits for the sums paid by him to McGill; and that there was due to Kernohan from Warren Durham on the note for \$3,250 and the mortgage to secure payment of the same, with 8 per cent interest from November 26, 1879, the sum of \$4,741.75. Judgment was entered for Kernohan in accordance with the above findings, to which Warren Durham and Stephen Coddington duly excepted. On petition in error by Durham and Coddington the circuit court held that the court of common pleas erred in finding that Durham was not entitled to credit for the payments made by him upon the mortgage note; that said court erred in finding that the lien of Coddington was a junior lien to that of Robert Kernohan; and that said court erred in finding that Kernohan was entitled to be first paid his claim out of the proceeds of the mortgaged premises. It was therefore ordered and adjudged that the findings, judgment and decree, and orders of the court of common pleas, be set aside, reversed and held for naught; that the cause be remanded to the court of common pleas for a new trial, with instructions to said court to allow to Durham, upon such new trial, a credit for all the payments upon the note and mortgage made to McGill; and that the liens, as between Coddington and Kernohan, upon the mortgaged premises be found as follows, viz.: Coddington's debt to be a valid lien, and the first lien thereon, and Kernohan's debt to be a valid lien, and the second lien thereon. To which judgment of the circuit court Kernohan excepted, and asks this court to reverse the same.

**Messrs. Wulsin & Perkins and Frank O. Squire**, for plaintiff in error:

Coddington never became the owner of the debt secured by the mortgage, nor of the note evidencing such debt. It is the debt as such, and not the note as such, which is secured by the mortgage.

*Fisher v. Mossman*, 11 Ohio St. 42; *Nebbit v. Worts*, 37 Ohio St. 378; *Kuhns v. McGeah*, 88 Ohio St. 468.

By the transfer of the securities Kernohan became the owner of the note, and had he known the fraud he could have compelled its delivery.

After this transaction, McGill no longer had any interest in either note, mortgage or debt.

Daniel, Neg. Inst. §§ 748, 748a; Jones, Mort. §§ 805, 834.

The holder of a promissory note, who took it after maturity, holds it subject to every objection, including equitable set-off, to which it was subject in the hands of his assignor.

*Baker v. Kinsey*, 41 Ohio St. 404.

Coddington took the note for Kernohan, and 12 L. R. A.

Kernohan is entitled to it from him. There is no estoppel, no equity in Coddington's favor.

*Re European Bank*, L. R. 5 Ch. App. 359; *Osborn v. McClelland*, 1 West. Rep. 221, 43 Ohio St. 284; *Greenwell v. Haydon*, 78 Ky. 332, cited in 43 Ohio St. 304; *Timberman v. Hawley*, 2 Circuit Ct. Rep. 37; *Bush v. Lathrop*, 23 N. Y. 535; *Trustees of Union College v. Wheeler*, 61 N. Y. 121; *Greene v. Warnick*, 64 N. Y. 220; *Schafer v. Reilly*, 50 N. Y. 67.

Durham is not entitled to payments made to McGill.

Daniel, Neg. Inst. §§ 725, 748, 748a, 1233, 1233a; 1 Chitty, Bills and Notes, 10th ed. 167; *Smith v. Pickering*, Peake, N. P. 50; *Arden v. Watkins*, 8 East, 317; *Ex parte Greening*, 13 Ves. Jr. 206; *Ex parte Moubray*, 1 Jac. & W. 428; *Ex parte Hall*, 1 Rose, 14; *Anonymous*, 1 Campb. 492, note; *Watkins v. Maule*, 2 Jac. & W. 237; *Baggarly v. Gaither*, 2 Jones, Eq. 80; *Osborn v. McClelland*, *Timberman v. Hawley*, *Bush v. Lathrop*, *Trustees of Union College v. Wheeler*, *Schafer v. Reilly* and *Greene v. Warnick*, *supra*.

A note can be paid before it is due only at the peril of the party paying it.

2 Parsons, Notes and Bills, 214; *De Silva v. Fuller*, cited in Chitty, Bills, chap. 6, p. 536; Story, Prom. Notes, § 384; *Coffman v. Bank of Kentucky*, 41 Miss. 212; *Brayley v. Ellis*, 71 Iowa, 155; Jones, Mort. § 956; *Wheeler v. Guild*, 20 Pick. 545; *Clark v. Igelstrom*, 51 How. Pr. 407; *Brown v. Blydenburgh*, 7 N. Y. 143; *Holliger v. Bates*, 1 West. Rep. 516, 43 Ohio St. 487.

**Messrs. S. B. Deal and Mallon & Coffee** for defendants in error.

**Dickman, J.**, delivered the opinion of the court:

The petition of Kinney, the plaintiff in the original action, having been dismissed, and judgment rendered against him, to which he took no exception, and instituted no proceeding in error, the only questions which we need consider are: (1) Whether Kernohan, as against Coddington, is entitled to be first paid his lien out of the proceeds of the sale of the mortgaged premises; and (2) whether Durham is entitled to credit for his payments, or any portion thereof, upon the note of \$3,250, executed by him to McGill or order, on November 26, 1879, made payable one year after date, and secured by mortgage on real estate.

1. As conceded in the agreed statement of facts, McGill, being indebted to Kernohan, assigned and transferred to him, as collateral security, before the maturity of Durham's note for the above-named amount, the mortgage executed to secure the payment of the same and what purported to be the genuine note itself, but which proved to be a forgery of the note. The assignment on the mortgage reads as follows: "For value received I assign and transfer the within mortgage and the note secured thereby to Robert Kernohan, his representatives and assigns. July 21, 1880. Wm. R. McGill."

After the maturity of the note, to wit, on February 22, 1881, McGill, being also indebted to Coddington, indorsed and delivered to him as collateral security the genuine note. Coddington, relying upon the promise of McGill

to deliver to him the mortgage,—which he never did deliver,—received the note in good faith and for value, and without any knowledge or information as to the previous assignment of the mortgage to Kernohan, until proved on the trial; and Kernohan received the forged note and mortgage and contract of assignment thereof in good faith, and for value, and without any knowledge or information as to the forgery, until the forgery was proven on the trial. Prior to the adoption of the Code of Civil Procedure, in an action at law by the indorsee and holder of a promissory note, payable to any person or order, against the maker, the maker could not, when he did not deny the signature and indorsement, defend against the indorsee on the ground that he was not the owner of the paper; nor could a third party, except in equity, intervene and claim the note. Sections 1, 2, Act Feb. 25, 1820 (1 Swan & C. 862); sections 8171, 8172, Rev. Stat.; *Way v. Richardson*, 3 Gray, 412. Section 8172 of the Revised Statutes provides that an indorsee, to whom such note is made payable by indorsement, may in his own name institute and maintain an action thereon against the maker. But by section 4993 of the Revised Statutes (formerly sections 25 and 26 of the Code) all actions must be prosecuted in the name of the real party in interest, except as provided in sections 4994 and 4995. This provision of the Code applies to negotiable paper. If, therefore, the note is not transferred to the indorsee in good faith and upon good consideration, before maturity, it is a good defense for the maker to show that the indorsee is not the real party in interest, unless he is authorized to sue under section 4994 or 4995; and the real owner may intervene and by cross-petition obtain the relief to which he is entitled as against the indorsee or holder, who is the apparent owner. Kernohan accordingly, in his cross-petition, claims that the note for \$3,250 was never lawfully assigned to or held by Coddington; that the mortgage security was never owned or held by Coddington, and that he has no lien on or interest in the mortgaged premises; and that he, Kernohan, is the owner of the note and mortgage, and has the first and best lien on the real estate in the mortgage described. An issue of ownership is thus presented between the two claimants of the note and mortgage, both claiming to derive a good title from McGill, the payee. As between Kernohan and McGill, the ownership beyond dispute passed from the payee to Kernohan. Before the maturity of the note the payee, for value, assigned and transferred to Kernohan, in writing, the mortgage and the note thereby secured. The mortgage was delivered at the time of the assignment, and by the simultaneous indorsement and delivery of the forged note, as evidence of the debt secured, Kernohan became the holder and owner of the equitable title to the genuine note. It was negotiable paper, to which he acquired title before it fell due, for a good consideration, and without notice of any defect in the instrument that was delivered. While McGill, by retaining the genuine note, may have been its apparent owner, he was as to Kernohan a fraudulent holder, and the latter, had he discovered the fraud, might have compelled McGill to deliver to him the genuine paper. As

to legal obligation, the position of McGill was not very different from what it would have been had he delivered the genuine note to Kernohan and afterwards stolen it from him. McGill, after the transfer, had no longer any interest in the note or mortgage, and at most was only a trustee for Kernohan.

What now are the rights of Coddington? The genuine note, indorsed by the payee in blank, was indorsed and delivered to him when overdue. It came to him dishonored, for the fact that it was unpaid after maturity was a circumstance of suspicion. Such a note, past due, no longer represented a distinct and definite credit, or money to be paid at a certain period. Coddington, in taking the paper, was thus put upon inquiry. He knew that the note was secured by mortgage, and was put upon his guard when the mortgage, his main security, was not produced at the time the note was indorsed and delivered. McGill at the time promised to deliver to him the mortgage, but he never did deliver it. Coddington relied upon the promise, and took the risk. Had he exercised the requisite care and diligence, he might have found that the mortgage was no longer in the possession of McGill, but had, seven months before, been assigned and transferred to Kernohan. Coddington, we think, should be held as having constructive notice of the rights of Kernohan in the note and mortgage. In *Sterry v. Arden*, 1 Johns. Ch. 261, 1 L. ed. 183, *Chancellor Kent* uses the language: "I hold him chargeable with constructive notice, or notice in law; because he had information sufficient to put him upon inquiry." Whenever a party has information or knowledge of certain extraneous facts, which of themselves do not amount to nor tend to show an actual notice, but which are sufficient to put a reasonably prudent man upon inquiry respecting a conflicting interest, claim or right, and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to a discovery of the truth,—to a knowledge of the interest, claim or right which really exists,—the party is absolutely charged with a constructive notice of such interest, claim or right. The presumption of knowledge is then conclusive. 2 Pom. Eq. Jur. § 608. Coming into possession of the note as he did, Coddington should be in no better position than McGill, so far as Kernohan is concerned, and should stand in the relation of a trustee for Kernohan. Negotiable paper, not paid at maturity, being regarded as dishonored, that fact is equivalent to notice that there is something wrong with it; and he who purchases it when so overdue obtains only such title and rights as were had by his vendor. 1 Edwards, Bills and Notes, § 517, and cases cited.

In *Crossley v. Ham*, 18 East, 498, the rule is laid down that one who acquires the bill or note after maturity is chargeable with constructive notice of any flaw in the right or title of his transferrer. And in *Angle v. Northwestern Mut. L. Ins. Co.*, 92 U. S. 841, 23 L. ed. 560, it is held that a person who takes a bill which, upon the face of it, was dishonored, cannot be allowed to claim the privileges which belong to a bona fide holder. If he chooses to receive it under the circumstances, he takes it

with all the infirmities belonging to it, and is in no better condition than the person from whom he received it. The authorities are numerous to the effect that the purchaser of an overdue or dishonored bill, who buys it from one who is not the owner, and who is not authorized to sell, acquires no title as against the true owner.

Spencer, J., in *Henderson v. Case*, 81 La. Ann. 215, applying to negotiable instruments the general principle that governs the transfer of personal property, says that after dishonor the bill or note falls under the dominion of that fundamental rule of property that "the sale of the thing of another is void." "Purchasers of notes or bonds past due take nothing but the actual right and title of the vendors." Chase, Ch. J., in *Texas v. White*, 74 U. S. 7 Wall. 785, 19 L. ed. 240.

This species of property, when purchased overdue from one who is not the real owner and has no authority to sell, is thus placed in the same class with other goods and made subject to the well-recognized rule that if the seller was not the owner, and had no authority from the owner to sell, the buyer will have no title whatever to the property he has bought as against the true owner, although purchased in the ordinary course of trade. *Roland v. Grady*, 5 Ohio, 299.

Buying the paper after it is dishonored, the purchaser who, when put on his guard, does not seek the knowledge which he might obtain by using reasonable diligence, cannot complain if the law charges him with constructive notice of such infirmity of title as attaches to the instrument in the hands of him from whom he acquired it, and permits him only to stand in the shoes of his vendor or indorser. Nor is the indorsee or purchaser after maturity placed in such situation only as regards equities that may exist between the maker of the note and the payee, who indorsed or transferred the instrument.

It is held in England that, if there be an equity attaching directly to the bill or note itself, it may be asserted against an indorsee after maturity by a third party who claims the right to follow the bill. And Mr. Daniel, in his work on Negotiable Instruments, says: "If the equity be a claim of some right to the instrument directly attached to it, we perceive no good reason why it may not be asserted against an indorsee after maturity by any party whatsoever." Section 726b.

In the case at bar the outstanding equitable title in Kernohan to the note in question was an equity attaching to the instrument itself, which he might assert against Coddington, the indorsee, after maturity.

This doctrine is well illustrated in the case *Re European Bank*, L. R. 5 Ch. App. 858, where bills transferred after maturity were purchased with money stolen from one who claimed the bills as owner. Demetrio Papa, the manager of the Oriental Bank, abstracted moneys of that bank, and with them bought certain overdue bills of exchange. In April, 1867, the Eastern Bank, promoted by Papa, was registered, of which, until the following July, Papa was the sole director. These bills Papa sold to the Eastern Bank, and paid himself for them out of its funds. The Eastern Bank, as the holder,

having proved the bills against the company on which they were drawn and accepted, to wit, the European Bank, it was held that the claim of the Oriental Bank to the bills, as having been purchased with its money, was an equity attaching to the bills; that the Eastern Bank, having purchased them overdue, took subject to this equity. "The bills," said Sir G. M. Giffard, L. J., "were overdue when the Eastern Bank took them. There were equities affecting the bills; and the Eastern Bank has no better title, either legal or equitable, than Demetrio Papa." In this case the court followed the rights of third parties, although their connection with the bills or title to the same was only an equitable one founded upon the doctrine of resulting or presumptive trusts. That Coddington, as indorsee of the note after maturity, acquired no better title to it than McGill had as against Kernohan, finds ample support in the case of *Osborn v. McClelland*, 43 Ohio St. 284, 1 West. Rep. 221. Mrs. Osborn, for value received, made and delivered to Mrs. Faxon her negotiable note, payable to the order of Mrs. Faxon in five years, secured by mortgage. Two years before the same became due, Mrs. Faxon, without consideration, and solely for the accommodation of Bartlit & Smith, bankers, loaned the same temporarily to them, to enable them to use the same as collaterals for a loan to meet a present emergency, Bartlit & Smith promising to safely keep and return them. Bartlit & Smith did not use them, but they were suffered to remain in their custody until after the note became due, when Smith, the survivor of Bartlit & Smith, without the knowledge of Mrs. Faxon, or without authority from her, hypothecated them to McClelland by delivery, merely saying the note would be paid. McClelland took the same in good faith, and for full value, but without inquiry, guaranty or indorsement by Smith, relying solely on his possession and the blank indorsement of Mrs. Faxon that Smith was the owner. It was held that McClelland, having acquired the note after due, and without inquiry, acquired no better title than Smith had; and, as Smith had neither title nor interest which was good against Mrs. Faxon, he transferred none to McClelland that in equity gave him the right to foreclose the mortgage as against the real owner. Smith was, in fact, a mere bailee or custodian, with no interest in the note. He was, however, lawfully in possession of it as legal holder, which, with the indorsement in blank by Mrs. Faxon, were badges of ownership. The mortgage was hypothecated, and delivered, with the note, to McClelland, and its absence, therefore, could not, as in the case at bar, excite suspicion, and prompt inquiry. But, the note being past due and discredited when transferred to McClelland, he was not permitted to divest Mrs. Faxon of the true ownership. If Smith, into whose custody the note had lawfully come, could confer upon his transferee no better right or title than he himself had, still less could McGill, who held the genuine note through gross fraud practiced upon Kernohan, give a better right or title to it than he himself had.

In the case of *Greenwell v. Haydon*, 78 Ky. 832, there was a contention between the appellant and appellee as to the ownership of a

coupon bond. Cofer, *J.*, in delivering the opinion of the court, said: "There is another class of cases in which the title to the obligation was involved. The case at bar belongs to that class. There is no question here between the holder and the maker. It is a question as to the right to receive whatever sum the maker may owe, and not as to whether the maker shall pay his obligation in whole or in part. This distinction seems not to have been always kept in view, and, as a natural result, the authorities are in some confusion, decisions in one class of cases being often quoted in the discussion of cases belonging to another class." But the conclusion reached in the opinion was that whoever takes a bill or negotiable note after maturity takes it, so far as the title to and integrity of the paper is concerned, upon the credit of the person from whom he receives it. He gets whatever right and title that person had, and no more.

2. Is Durham, the maker, entitled to credit, as against Kernohan, for the several sums paid by him to McGill on the note? Those payments were made in part before the transfer of the note and mortgage to Kernohan, and before the maturity of the note, and partly after the indorsement and delivery of the genuine note to Coddington, to wit, after its maturity. But when Durham made payments on his note from time to time to McGill the note was not produced, and no receipt or memorandum of payment was ever noted on the instrument except one indorsement of interest on the day of maturity, McGill stating to Durham that he would credit the payments upon his note when he went to the safe deposit, where the note was kept for safety, and Durham relying upon the statement, without seeing that the credit was actually given. The rule is well established that part payment made on a negotiable instrument should be minuted or entered on the paper itself; and when the instrument comes into the hands of a bona fide holder for value before maturity, with no memorandum or other notice of part payment thereon, it cannot be set up as a defense against him. 3 Randolph, Com. Paper, § 1414.

In *Brayley v. Ellis*, 71 Iowa, 155, it is said that ordinarily the maker of a note, when he makes a partial payment thereon, sees that it is properly indorsed on the note. In that case, where the mortgagee of land sold and assigned the secured notes before maturity, and afterwards fraudulently, and without the knowledge of his assignee, received from the mortgagor, who was led to believe that he still owned the notes, a partial payment thereon, taking only a receipt therefor, and the mortgagor afterwards sold the land to another, it was held, in an action by the assignee to foreclose the

mortgage, that he was entitled to recover, as against the mortgagor and the land, the whole amount of the notes, regardless of the partial payment so negligently made by the mortgagor. See also *Clark v. Igelstrom*, 51 How. Pr. 407; *Chitty, Bills*, 428; *Cooper v. Davies*, 1 Esp. 463; 2 Edwards, Bills and Notes, § 783; *Brown v. Blydenburgh*, 7 N. Y. 141; 1 Jones, Mort. § 956.

Five several payments were made, in good faith, by Durham to the payee, of which there was no memorandum on the note. The non-production of the paper at the time was sufficient to awaken inquiry, and did draw from the payee a promise that he would give the proper credits. Had the genuine, instead of the spurious, note been transferred to Kernohan, unquestionably he would have held it free from any deduction of payments by Durham that were not apparent on the paper itself. He would not have been subject to other equities between the maker and payee. It is true, McGill did not transfer to Kernohan the genuine note, but a forged note in its stead. Yet Durham permitted the genuine note, notwithstanding his payments, to continue in all respects as when it first left his hands, with no mark or acknowledgment upon it of the payment of the several sums he paid from time to time; and when McGill transferred the forged instrument to Kernohan it was the counterfeit presentment of the note as Durham had negligently suffered it to remain, with nothing thereon to indicate a reduction of the amount called for on its face. If Durham had demanded that the note and mortgage be exhibited in order that his payments might be indorsed on the note, he would have discovered that on July 21, 1880, the mortgage was transferred to Kernohan, and might also have discovered by due investigation the fraud of McGill, and the situation and true ownership of the note. Under the circumstances we think that Durham failed to exercise the ordinary care in having the amounts paid by him properly credited on his note; and, as against Kernohan, no allowance should be made to him for any portion of those amounts out of the proceeds of the sale of the mortgaged premises. As to Coddington, an indorsee after maturity, he took the note subject to all payments that had been made by Durham at the time he received the instrument, but free from any of the payments made by Durham to McGill after he received the note.

From the foregoing considerations our conclusion is that the judgment of the Circuit Court should be reversed, and that of the Court of Common Pleas affirmed.

Judgment accordingly.

#### CALIFORNIA SUPREME COURT.

Kirk E. SMITH *et al.*, by P. M. Scott,  
Their Guardian, *Repts.*,

v.

Eliza J. OLMSTEAD *et al.*, *Appts.*

(....Cal....)

The shares of children who are not men-  
12 L. R. A.

tioned in the will of their father, and who are entitled by statute to the same shares in his estate "as if he had died intestate," are not affected by a power of sale contained in the will.

(April 3, 1891.)

APPEAL by defendants from a judgment  
of the Superior Court for Los Angeles

County, in favor of plaintiffs in an action brought to quiet title to certain real estate.

*Affirmed.*

The facts are stated in the opinions.

*Messrs. Chapman & Hendrick* for appellants.

*Messrs. E. Edgar Galbreth and Anderson, Fitzgerald & Anderson* for respondents.

The case was originally heard in Department 1, where on January 25, 1890, *Hayne, C.* filed the following opinion:

Suit to quiet title. Judgment for plaintiffs. Defendants appeal. In 1880 the owner of the property died leaving a will by which the whole property was devised to the widow, who was made sole executrix without bonds, and it was provided that "she have absolute power to sell any or all of said real and personal property at public or private sale, with or without advertisement, and without application to any court, and without approval or authority of any court whatever." The will was admitted to probate, and letters testamentary were issued to the widow. Acting under the power contained in the will, she sold the property to the defendant Eliza J. Olmstead without obtaining an order of sale from the probate court. She reported her proceedings to the court, however, and an order confirming the sale was made, and a conveyance executed. The plaintiffs are the four minor children of the testator. They were not mentioned or in any way referred to in the will, and claim as pretermitted heirs. The main question argued is whether the power of sale given by the will authorized a sale of the children's interests without the previous sanction of the probate court required by the Code of Civil Procedure in ordinary cases. This seems to us to be a question of construction. The provision of the Civil Code in relation to a child of whom no mention is made in a will is that he "must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." Civil Code, § 1807. The "preceding section" is in relation to children born after the making of the will, either during the lifetime of the testator or after his death, and provides that such a child "succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate." So far as the question in hand is concerned these provisions are in substance the same as those of the Statute of Wills previously in force. The provision of the Code of Civil Procedure in relation to powers of sale is substantially the same as section 178 of the old Probate Act, as amended in 1861, and is as follows: "Sec. 1561. When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine, but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case, no

title passes unless the sale be confirmed by the court."

We do not find that the cases in this State cited by counsel determine the question presented.

In *Delaney's Estate*, 49 Cal. 76, it was held that where the legal title is devised to the executor the provisions requiring order of sale, confirmation, etc., do not apply.

In *Durham's Estate*, Id. 495, it was held that where the legal title is not devised to the executor, and he has a naked power of sale, the provision requiring a confirmation applies, and that such confirmation must be according to prescribed formalities. The latter decision is not in point, because here there was a confirmation, to which no objection is taken. And the former decision is not in point, because it is settled that the legal title descends to and vests in the pretermitted heir, who becomes a tenant in common with the devisees, if there are any valid devisees. *Pearson v. Pearson*, 46 Cal. 627. This latter case, however, while it shows that the rule laid down in *Delaney's Estate* has no application, does not determine the question involved here, which is whether the omitted child takes the title subject to the power of sale or not.

In Oregon it has been held that a power of sale in a will does not cover the interest of a posthumous child not mentioned in the will. *Northrop v. Marquam*, 16 Or. 173. In that State, however, the Statute provided that so far as such child was concerned the testator "shall be deemed to die intestate," which is somewhat broader language than that of our Statute.

In New York the Statute is substantially the same as ours. And in that State it is held that the share of a child born between the making of the will and the death of the testator, and not mentioned in the will, is not affected by a power of sale contained in the will. *Smith v. Robertson*, 89 N. Y. 558.

The argument in favor of the omitted child seems to be that if the testator had died intestate the interest of such child could only be sold in certain cases, and after certain formalities, and that the Statute provides, in substance, that the omitted child shall inherit from the testator "as if he had died intestate." The argument, on the other side, is that the Statute only provides that the omitted child shall inherit "the same share" as if the testator had died intestate, and that while such share goes to the child it is subject to the other provisions of the will. Each of these arguments seems to us to assume the real question in dispute. And the case is such that no satisfactory conclusion can be reached from a consideration of the mere language of the Statute. But we think that a due regard for the interests of pretermitted heirs requires that the safeguards provided by law against improper sales of their property should only be dispensed with in a clear case; that this cannot be said to be a clear case, because the law presumes that the omission of all mention of a child was from accident, misapprehension or forgetfulness, and it cannot be concluded with any degree of certainty that the testator would have given a power of sale of the child's interest if



the fact that it would have an interest had been present to his mind. If, for example, a testator supposes that his child is dead, and under that belief devises his whole property to one not of his blood, it is very natural that he should make such devisee sole executor, and give him unrestricted power of sale. But would he have given such power to the devisee if he had known that his child was alive, and would inherit the whole estate? Upon the whole, though the matter is not free from doubt, we think it better that the rule laid down by the New York case should be followed, viz.: that, inasmuch as the devise of the child's interest is inoperative, the power of sale of his interest should be construed not to apply to it. The order of confirmation was not conclusive of the legality of the sale. We therefore advise that the judgment appealed from be affirmed.

We concur: **Belcher, C. C.; Gibson, C.**

**Per Curiam:**

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

A rehearing was subsequently granted and on April 3, 1891, **DeHaven, J.**, delivered the opinion of the court:

This is an action for the purpose of determining conflicting claims to real property. The record shows that one Z. B. Smith, now deceased, in his lifetime made his last will, by which, after directing the payment of his debts, he in terms gave to his wife all of his property, with "absolute power to sell any or all of said real and personal property, at public or private sale with or without advertisement, and without any application to any court, and without approval or authority of any court whatever." In a subsequent clause the wife was also named as executrix of the will. She duly qualified as such, and sold to the defendants the property described in the complaint. Such sale was made without any previous order therefor, but was afterwards confirmed by the court in which the administration of her deceased husband's estate was pending. The land was community property. The record does not show that the sale was necessary for any of the reasons stated in section 1536 of the Code of Civil Procedure; that is, in order "to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses or charges of administration, or legacies." The plaintiffs are minor children of the said Z. B. Smith, deceased, and are not provided for in said will; nor does the will show that the omission to provide for them was intentional. There has never been any distribution of this property, and the administration of the estate of said Smith is still pending. The judgment of the court below was in favor of plaintiffs, and the defendants appeal. This judgment was affirmed by Department 1 of this court, on January 25, 1890, but a rehearing was granted, and the case is now before the court in bank for determination.

The question for decision is whether, upon the facts as here stated, the power of sale contained in the will is so far operative against the plaintiffs that a sale made under it, and confirmed by the court, transferred to the defend-

ants the title to the land in controversy. To determine this, a brief reference to the plain language of the law, relating to wills, and the right to succession of property of a decedent in the absence of a will disposing of it, is necessary. By section 1907 of the Civil Code it is provided that where a testator omits to provide in his will for any of his children, unless it appears that such omission was intentional, such child "must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto, as provided in the preceding section." That is, "the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate." Civil Code, § 1906.

We are unable to construe these sections otherwise than as declaring that the pretermitted child succeeds immediately, by operation of law, to the same portion of the testator's real property as if no will had been made; that as to such portion the testator is to be regarded as dying intestate, and its succession is directed by law, and not by the will. And, as a necessary legal consequence of this construction, it would follow that every provision in the will, directly or indirectly attempting to dispose of such portion of the estate, except for the discharge of the decedent's debts, or other charges accruing in due course of administration, is inoperative as against such child. As to the rights of a pretermitted child, under these sections, this court has heretofore held: "In other words, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate." *Wardell's Estate*, 57 Cal. 489. Sections 16 and 17 of the Act concerning wills, (Hit. Gen. Laws, p. 1086), and section 1 of the Statute of Descents and Distributions (Id. p. 823), are substantially the same as the provisions of our Civil Code relating to the same subjects; and this court in *Pearson v. Pearson*, 46 Cal. 609, basing its decision on these Statutes, held, explicitly, that the pretermitted child takes the same share in the estate, and holds by the same title, as though the testator had died intestate.

Now, in the case of a person dying intestate, his estate descends and vests immediately in his heirs, subject only to the payment of the debts of decedent, the expenses of administration and the family allowance. This is not only clear from sections 1838, 1834, 1886 and 1403 of the Civil Code, but was so expressly held by this court in *Brenham v. Story*, 39 Cal. 168, under statutes substantially the same, the court saying: "Upon the death of the ancestor, the heir becomes vested at once with the full property, subject to the liens we have mentioned; and, subject to these liens and the temporary right of possession of the administrator, he may at once sell and dispose of the property, and has the same right to judge for himself of the relative advantages of selling or holding that any other owner has." The respondents in this case were, immediately upon the death of their father, clothed by operation of law with such a title to the property in controversy, and, this being its nature and extent, it is clear that such title was not divested by the sale made by the executrix of their father's

will, under the circumstances disclosed by the record in this case. A title to property, which is so full and complete that its possessor has "the same right to judge for himself of the relative advantages of selling or holding that any other owner has," cannot co-exist with the right of another to transfer such property at discretion, and the power exercised by the executrix in this case, being inconsistent with the title which the law vested in the respondents upon the death of the father, cannot be upheld. These views are in harmony with the decisions of other States where statutes relating to wills and right of succession are similar to our own. See *Northrop v. Marquam*, 16 Or. 173; *Smith v. Robertson*, 59 N. Y. 558.

But it is urged by appellant that these cases are not in point, because in neither of the States in which the decisions were made was there a Statute similar to section 1561 of the Code of Civil Procedure, which provides that when "authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine," but that "no title passes unless the sale be confirmed by the court." And it is claimed that the sale here, having been confirmed by the court, is valid under that section. But we think it is manifest that in determining the question whether, in judgment of law, authority to sell has in fact been given to an executor, the section can have no application. It is equally clear that the authority to sell therein referred to must be held to include only such a one as is operative and binding upon the person against whom it is asserted; and unless such an authority can be found in the will, when such will is read and construed with reference to the law which determines its meaning and legal effect, it must be held that it does not exist; and in that case there is nothing upon which this section of the Code can act.

The case of *Coates v. Hughes*, 3 Binn. 498, cited and relied on by appellants, is not in conflict with the views we have announced. The power under consideration there was confined to a sale for the payment of the debts of the testator, and it appeared that there was a necessity for the sale for such purpose, and the court held, and we think rightly, that such a power was operative. The reason why, in such a case, the power of sale would be operative, is apparent. The child who succeeds to the estate of his ancestor by inheritance takes it subject to the payment of the debts of such ancestor, and his right of succession is in no wise affected by a provision in a will which goes no further than to authorize what the law would in any event direct to be done, if necessary to discharge such lien. In such a case the executor is only clothed with the ordinary powers incident to the administration of the estate, in fact, the precise power which the law gives an administrator of the estate of an intestate. The order of confirmation imparted no validity to the sale in this case; it only adjudicates that the power contained in the will had been followed, and that the sale was for a fair price. We are satisfied with the con-

clusion reached in Department 1. Judgment affirmed.

We concur: *Garoutte, J.; McFarland, J.; Sharpstein, J.; Paterson, J.*

#### *Harrison, J.:*

I concur in the order affirming the judgment, both for the reasons expressed in the opinion of *Mr. Justice De Haven*, and also upon the following considerations: Section 1403 of the Civil Code provides that "upon the death of the husband one half of the community property goes to the surviving wife, and the other half . . . goes to his descendants, . . . subject to his debts, the family allowance and expenses of administration." These are the "purposes of administration" referred to in section 1884, Civil Code, and are also the objects for which the court is authorized under section 1536, Code Civil Proc., to direct a sale of the property of the decedent. The right of the children and the right of the surviving wife to the community property exist by virtue of the same section of the Code, and are declared in identical words, and, inasmuch as it is the settled rule that the right of the surviving wife to her half of the community property vests in her immediately upon the death of the husband (*Silvey's Estate*, 42 Cal. 210), it must also be held that the right of the children to their half of the same property vests in them at the same time.

In *King v. Lagrange*, 50 Cal. 328, it was held that a power of sale in the will did not authorize a conveyance by the executor of the wife's share of the community property, and that a conveyance by the executor, under such power, of the real estate of the deceased, did not have the effect to transfer the interest of the wife as the survivor of the community. It is true that the conveyance in that case was only of the "right, title and interest" of the decedent in the property, but the decision in the case does not turn upon this distinction, and in reality such a distinction does not exist. At the date of the conveyance, the testator, being dead, had, of course, no "right, title or interest" in the property; and the conveyance by the executor under the power contained in the will, being like a conveyance under any other power of attorney (*Larco v. Casanueva*, 30 Cal. 551), would necessarily be limited to such right, title and interest as existed in his constituent at the date of his death, the point of time when the authority of the executor came into existence. If a conveyance under a power of sale given in the will is inoperative to transfer the interest of the wife, it must be equally inoperative to transfer the interest of the children. In accordance with the principles established by the decision in *King v. Lagrange*, it is the usual, if not the invariable, custom of conveyancers in this State, when community property of a decedent is sold by the executor under a power given by the will, to require a release or conveyance of the same property from the surviving wife. This rule or custom was followed in the present case, since it appears from the record that the purchaser took a deed of the land in question from the surviving wife individually as well as in her representative capacity.

## WEST VIRGINIA SUPREME COURT OF APPEALS.

William N. STEWART, *Appt.*,  
v.

Rebecca J. VANDERVORT.

(....W. Va....)

\*1. A marriage occurring while section 1, chap. 109, Va. Code 1860, was in force, between persons, one of whom had a husband then living, is absolutely void, without decree. It conferred no right to alimony. Though the parties cohabited since the Code of 1868 took effect, and though a suit to declare the nullity of such marriage was brought under the Code of 1868, no alimony can be decreed therein to the woman.

2. Such marriage, as to the question of its validity or legal character, and on the question of alimony, is to be tested by the law in force when it was celebrated.

3. A cardinal rule in interpreting statutes is to construe them as prospective in operation in every instance, except where the intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied from the language of the statute, which would be inoperative otherwise than retrospectively. In doubt, it should be

\*Head notes by BRANNON, J.

NOTE.—Second marriage, when void, ab initio.

A marriage by a person whose former spouse is living is void. *Martin v. Martin*, 22 Ala. 86; *Janes v. Janes*, 5 Blackf. 141; *Drummond v. Irish*, 52 Iowa, 41; *Summerlin v. Livingston*, 15 La. Ann. 519; *Harrison v. Lincoln*, 48 Me. 206; *Fenton v. Reed*, 4 Johns. 52; *Appleton v. Warner*, 51 Barb. 270; *O'Dea v. O'Dea*, 1 Cent. Rep. 785, 101 N. Y. 40; *Hefner v. Hefner*, 23 Pa. 104; *Sellers v. Davis*, 4 Verg. 508.

In North Carolina the Statute expressly makes it a felony for the offending party to marry after a divorce granted, in such cases, and makes the second marriage void. *Calloway v. Bryan*, 6 Jones, L. 569.

In Massachusetts such marriages are invalid unless leave of court has been obtained. *White v. White*, 105 Mass. 325; *Com. v. Lane*, 113 Mass. 458; *West Cambridge v. Lexington*, 1 Pick. 508; *Putnam v. Putnam*, 8 Pick. 448.

In New York such marriages are prohibited. *Van Voorhis v. Brintnall*, 36 N. Y. 18; *Smith v. Woodworth*, 44 Barb. 126.

Statutes are prospective in operation.

Statutes are to be considered as prospective only in their operation, unless they are expressly made retroactive, or unless it is necessary to construe them as retroactive in order to give effect to their provisions. *North Bridgewater Bank v. Copeland*, 7 Allen, 139; *Abington v. Duxbury*, 106 Mass. 287; *Shallow v. Salem*, 136 Mass. 186; *Com. v. Hayes*, 149 Mass. 34; *Somersett v. Dighton*, 12 Mass. 383; *Phillips v. New Buffalo (Mich.)*, 12 West. Rep. 558; *Hunt v. State*, 7 Cent. Rep. 114, 48 N. J. L. 613; *Osborne v. Detroit*, 32 Fed. Rep. 36; *Russell & A. Drainage Dist. v. Benson*, 125 Ill. 490; *Deake's App.* 5 New Eng. Rep. 870, 80 Me. 51; *Reed v. His Creditors*, 30 La. Ann. 115; *Maxwell v. Fulton County*, 119 Ind. 23; *McMillan v. McCormick*, 4 West. Rep. 212, 117 Ill. 79; *Englehardt v. State*, 88 Ala. 100; *Niklaus v. Conkling*, 118 Ind. 289; *Twenty Per Cent Cases*, 87 U. S. 20 Wall. 187, 22 L. ed. 841.

This rule is very general. *Parsons v. Paine*, 23 Ark. 124; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; 12 L. R. A.

resolved against rather than in favor of its retroactive operation.

(December 16, 1890.)

APPEAL by plaintiff from so much of a decree of the Circuit Court for Monongalia County, annulling a marriage, as directed him to pay alimony to defendant. *Reversed.*

Mr. P. H. Keck for appellant.

Messrs. Berkshire & Sturgiss for appellee.

BRANNON, J., delivered the opinion of the court:

On May 4, 1848, Asbury Vandervort and Rebecca Jane McClaskey were married in Monongalia County, and in 1856 removed to the then far west, to Iowa, there living together until 1860, when one morning before day-break he arose from his bed, and abandoning his wife and only child, a daughter then about eight years of age, without intimation to either of them of any intention to desert them, went to Illinois, where he remained, moving to several different points, until September, 1888, when he returned to Monongalia County, in this State. In all the twenty-eight years from his desertion to August, 1888, there was no com-

*Perkins v. Perkins*, Id. 558; *Goshen v. Stonington*, 4 Conn. 209; *State v. Bradford*, 36 Ga. 422; *Garrett v. Wiggins*, 2 Ill. 335; *Re Tuller*, 79 Ill. 99; *Aurora & L. Turnp. Co. v. Holthouse*, 7 Ind. 59; *Lucas v. Tucker*, 17 Ind. 41; *Hopkins v. Jones*, 22 Ind. 310; *Knoulton v. Redenbaugh*, 40 Iowa, 114; *Bartruff v. Remey*, 15 Iowa, 257; *State v. Crawford*, 11 Kan. 32; *Eugenie v. Preval*, 2 La. Ann. 181; *Rogers v. Greenbush*, 58 Me. 395; *State v. Bermudez*, 12 La. 353; *Torrey v. Corliss*, 38 Me. 838; *Preston v. Drew*, Id. 556; *State v. Norwood*, 12 Md. 195; *Williar v. Baltimore B. L. & A. Asso.* 45 Md. 546; *Baughner v. Nelson*, 9 Gill, 299; *Clark v. Baltimore*, 29 Md. 233; *Davis v. Clabaugh*, 30 Md. 508; *State v. Thompson*, 41 Mo. 25; *Herbert v. Gray*, 38 Md. 525; *Williams v. Johnson*, 30 Md. 500; *Elizabeth v. Hill*, 39 N. J. L. 555; *Williamson v. New Jersey S. R. Co.* 20 N. J. Eq. 311; *Amsbury v. Hinds*, 48 N. Y. 57; *Johnson v. Burrell*, 2 Hill, 238; *Fairbank v. Wood*, 17 Wend. 322; *Wood v. Oakley*, 11 Paige, 400, 5 L. ed. 178; *Quinn v. New York*, 68 Barb. 595; *Wilson v. Baptist Education Soc.* 10 Barb. 306; *Quackenbush v. Danks*, 1 N. Y. 129; *Re Protestant Epis. School*, 58 Barb. 161; *Price v. Mott*, 52 Pa. 315; *Eliet v. Parson*, 2 Watts & S. 418; *State v. Roosa*, 11 Ohio St. 16; *Taylor v. Mitchell*, 57 Pa. 209; *Dewart v. Purdy*, 29 Pa. 113; *Jordan v. Gower*, 1 Bart. 108; *Collins v. East Tennessee & V. R. Co.* 9 Heisk. 841; *Orr v. Rhine*, 45 Tex. 345; *Finney v. Ackerman*, 21 Wis. 269; *Seamans v. Carter*, 15 Wis. 548, cited in *Wade, Retroactive Laws*, § 84.

Courts uniformly refuse to give to statutes a retroactive operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the Legislature. *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770; *United States v. Heth*, 7 U. S. 8 Cranch, 399, 2 L. ed. 475; *Murray v. Gibson*, 58 U. S. 15 How. 421, 14 L. ed. 778; *McEwen v. Den*, 65 U. S. 24 How. 242, 16 L. ed. 672; *Harvey v. Tyler*, 69 U. S. 2 Wall. 823, 17 L. ed. 871; *Sohn v. Waterson*, 84 U. S. 17 Wall. 596, 21 L. ed. 737; *Twenty Per Cent Cases*, 87 U. S. 20 Wall. 179, 22 L. ed. 839; *Aufm'ordt v. Rasin*, 102 U. S. 620, 26 L. ed. 282.

munication between him and his wife and child; no tidings whatever came to him of them, nor to them of him; their existence was as if blotted out to him, and his to them. His family, as his brother says, regarded him dead. She states that he had been sick for two years, had not worked any for two months, had taken a great deal of quinine for ague, and his mind was weak, but he was not a maniac; that the same week he left she heard he had gone towards the Mississippi River; that she wrote to Virginia to know if he had come here, but his friends had heard nothing of him; that she advertised for him in two or three papers. In 1864 the wife and child returned from Iowa to Monongalia County, and on October 1, 1867, after a few months courtship, she and William N. Stewart were married in Monongalia County. Stewart and she cohabited as man and wife until August, 1868. While she was absent visiting in a neighboring county a letter came from the first husband to Monongalia County to his brother, informing the latter that he would soon visit him; and when she reached the depot at Morgantown, on her return home, she was informed reliably of this fact, and advised not to return to Stewart's house; and she and Stewart never afterwards lived together. Early in September, 1868, the first husband appeared in Monongalia. It clearly appears that Stewart believed the first husband, Vandervort, dead when he married Mrs. Vandervort. He says that he stated to her before the marriage that he had heard some doubts expressed whether Vandervort was dead, and she replied that he was dead, and that he had taken quinine and lost his reason, had wandered away and was found dead on the prairie thirty or thirty-five miles away; that the body was badly decayed; that she did not go to see him, but the evidences from the hair and clothing was that of her husband; and that this statement allayed his fear. She says that she got a lady friend to tell him about her husband's death; that before the marriage he said to her that his brother had said there was a probability that her first husband might be living, and she then asked him if this lady had not told him the circumstance, and he said she had told him about the disappearance, and some clothes being found; and that she herself then told him that the clothes were found, and a man answering his description found dead in a cornfield twenty miles from where they lived; and that, still later, Stewart still mentioning the subject, she said to him, "Mr. Stewart, I have told you all I know about him, and if you are not satisfied, it is all right;" and he never mentioned it afterwards. It may be said that she might have had more definite information by tracing her husband up, or at least going to the place where the dead man spoken of by hearsay was. But he had been long gone without a syllable from him, and she living close to his kindred, and hearing nothing, it is probable that she believed him dead, and, acting on the legal presumption of death, from seven years' absence without information of his continued life, she married the second time under honest conviction of his death. When she married Stewart he had seven children aged from two months to thirteen years. She says she took charge of his household affairs

and children, and discharged her duties faithfully as a wife for Stewart. She says: "I worked, I washed, churned, milked and cooked through the day. At night I would sit and sew, patch and darn till 12, 1 and 2 o'clock." Having doubt about his legal status, especially in view of the change in the law below spoken of, Stewart brought this suit to have a judicial sentence of the nullity of the second marriage, and a decree was rendered declaring its nullity, but requiring him to pay her \$500 alimony; and to get relief from this alimony he appeals to this court.

To constitute a valid marriage, the parties must not only be willing to marry, but they must not labor under any legal disability. Prior marriage was not, at common law, a canonical disability rendering the contract merely voidable, but it was a civil or legal disability, rendering the second marriage void absolutely to all intents and purposes, being condemned by the New Testament (Matt. xix. 4-9; 1 Cor. vii. 4) and by the laws of most States. 1 Tucker, Bl. Com. 93; 1 Minor, Inst. 287; 1 Bishop, Mar. and Div. § 300. By the Statute Law in force when this second marriage was solemnized (Va. Code, ed. 1860, chap. 109, § 1), it was absolutely void, for it provided that all marriages prohibited by law on account of either of the parties having a former wife or husband then living should "be absolutely void, without any decree of divorce or other legal process." But though such a marriage is void without judicial sentence of its nullity, for obvious reasons such sentence is prudent and advisable, and the same Statute in section 4 gave either party right to sue to obtain such a decree. Then the question arises whether, in granting a decree of the nullity of such a marriage, alimony could be given the woman. Here it is very clear that, without authority of statute, alimony could not be decreed, for it never was a marriage,—the woman never was a wife. 2 Bishop, Mar. and Div. § 376; Schouler, Husb. and W. § 553.

Then is there any statute conferring power on a court to give alimony in such case? Suppose the suit brought before our Code of 1868. Section 12, chap. 109, Code 1860, provides that upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, the court shall make such further decree as it shall deem expedient concerning the estate and maintenance of the parties or either of them. Now, this is not a suit for divorce from the bond of matrimony or from bed and board, under sections 6 and 7, for causes therein specified, but it is a suit to declare the nullity of the marriage under section 4; and therefore this case could not fall under those words of section 12, "and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board;" and, if it falls under that section at all, it must be under the words, "upon decreeing the dissolution of a marriage."

Here we must recall the fact that this is no marriage. Literally, the expression, "upon decreeing the dissolution of marriage," would call for a marriage, not a nullity; for it is a contradiction in terms to talk about decreeing the dissolution of a marriage when that

with which we are dealing is not the shadow of a marriage. But though, strictly speaking, this is so, the question occurred to me whether, for the purposes or within the meaning of the language, "upon decreeing the dissolution of a marriage," such a marriage could be regarded a marriage in the eye of this Code chapter, especially as it gives a suit to declare the nullity of a marriage, and then provides what may be done upon decree; in other words, would section 12, providing what courts might do as to maintenance upon decreeing, apply to all marriages as to which preceding sections allowed suit to be brought? What marriages do these words, "upon decreeing the dissolution of a marriage," relate to? Turning back to section 1, chap. 100, Code 1860, we find it providing for divers kinds of defective marriages, stamping some as void absolutely, others as void only from decree. It reads: "All marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, shall be absolutely void, without any decree of divorce or other legal process. All marriages which are prohibited by law on account of consanguinity or affinity between the parties, all marriages solemnized when either of the parties was insane, or incapable from physical causes of entering into the marriage state, shall, if solemnized within this State, be void from the time they shall be so declared by a decree of divorce or nullity, or from the time of the conviction of the parties under the third section of the 198th chapter" (that is, for marrying relatives). Now, as this covers two classes of defective marriages, that is, those void and those voidable only by judicial sentence, I would apply the words, "upon decreeing the dissolution of a marriage . . . the court may make such further decree as shall seem expedient concerning the estate and maintenance of the parties," not to the marriages declared by the first section absolutely void without decree, which never for a moment were marriages, but to those declared void from the time of decree, which until such decree are valid. Under this section 1 are marriages defective because of what at common law were regarded as canonical disabilities, which both at common law and under this section would be voidable only, and also marriages void both at common law and under the section because of legal disabilities; and, though we may say the Statute makes all the impediments now legal, yet it preserves the distinction aforesaid prevailing between the effect of canonical and legal disabilities,—that is, between marriages void and voidable; and I do not think the Code of 1860 intended to confer on courts power to allow alimony where the marriage was absolutely void. Thus tested by the Code of 1860 in force when this second marriage occurred, I conclude that no alimony could be given her.

But some complication is infused into the case by the change of the Statute made by the West Virginia Code of 1868, for its section 1, chap. 64, makes none of these marriages absolutely void without decree, but makes all void only from decree. It reads as follows: "All marriages between a white person and a negro;

all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living; all marriages which are prohibited by law on account of consanguinity or affinity between the parties; all marriages solemnized when either of the parties was insane, or incapable from physical causes of entering into the marriage state, or under the age of consent,—shall, if solemnized in this State, be void from the time they are so declared by a decree of divorce or nullity."

In the Code of 1868, section 4 gives a suit for annulling a marriage, sections 5 and 6 suits for the two kinds of divorce and section 11 is just the same as section 12 in the Code of 1860 relative to decreeing maintenance; so that, though the first section of this chapter in the Code of 1868 makes all marriages void only from decree, it leaves the provision as to decreeing maintenance the same. It may thus be, though we are not called on to say, that on decreeing the nullity of such a marriage as this, solemnized since the 1st day of April, 1869, when the Code of 1868 took effect, alimony might be decreed, as it might be said that under the Code of 1868 such a marriage is not a vanity, but a marriage, until a decree of dissolution. But suppose this were so, does this marriage, dating before this great change in the law, fall under the new law? Can this amendment have the effect to convert a marriage void under the law in force when it occurred into a legal marriage, and impart to it the right of alimony which it did not then possess? Can the amendment retroact and bind the man by an obligation, a proprietary obligation, not imposed on him by the law then in force,—that is, to give alimony? This is a proprietary obligation, for it would lay upon his property the burden of alimony. In the first place, one of the cardinal rules by which courts are governed in interpreting statutes is that they must be construed as prospective in every instance, except where the intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied from the language of the Act, which would be inoperative otherwise than retrospectively. It is not enough that the language is general enough to cover past transactions to justify a retroactive construction. Every reasonable doubt is resolved against a retroactive operation of the Statute. *Wade, Retroactive Laws*, §§ 84, 85; *Dual v. Malone*, 14 Gratt. 24; 1 Bishop, Mar. and Div. §§ 98-108; Bishop, Stat. Cr. § 82.

"Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied; and such is the settled doctrine of the court,"—is the language used twice, at least, by the United States Supreme Court as its rule in this matter. *United States v. Beth*, 7 U. S. 3 Cranch, 413, 2 L. ed. 483; *Oswo Hong v. United States*, 112 U. S. 559, 28 L. ed. 778.

This is a fundamental and salutary principle in the construction of statutes, and dates back to an ancient date in the English law, expressed in the rule and law of Parliament that *nota*



*constitutio futuris formam imponere debet non prateritis.* 6 Bacon, Abr. 270; Bracton, lib. 4, fol. 2; 2 Minor, Inst. 292.

Lord Coke lays down the rule, and I think his rule is applicable in this case, that Acts of Parliament are to be so construed as that no man shall by literal interpretation be punished or endamaged. 2 Co. Litt. 860a.

Blackstone, in 1 Com. 46, says, that all laws are to commence *in futuro*, and operate prospectively. A notable early instance of this rule of construction was under the Statute which broadly declared that, "from and after the twenty-fourth of June, 1677, no action should be brought to charge any person upon any agreement made in consideration of marriage, . . . unless such agreement be in writing;" and it was held in the court of king's bench not to apply to promises before the Act. *Helmore v. Shuter*, 2 Show. 17 [*Gillmore v. Shooter*], 2 Mod. 810, 2 Lev. 227, 1 T. Jones, 106. As Kent, Ch. J., says, when we consider that this decision was as early as the reign of Charles II., we are impressed with the spirit of equity and independence of the English courts. This principle was taken from the civil law. See case of *Dish v. Van Kleeck*, 7 Johns. 477, and *note*, where full discussion of this doctrine will be found.

In *Re Tuller*, 79 Ill. 99, it is held that "generally all laws are to be construed as prospective, and not to prejudice or affect past transactions of the citizen." A statute declared that a marriage shall be deemed a revocation of a prior will, and it was argued that as the will did not take effect, and no rights vested under it, until testatrix's death, its validity depended on the statute as it was at her death; but the court said not. In *Richmond v. Henry County Supra.*, 83 Va. 204, it is held that this rule applies to remedial statutes; and the quotation is made from Potter's Dwar. Stat., 164, *note*, that "even remedial statutes are to be deemed prospective in operation, and not to be applied to proceedings pending at the time of their enactment, unless a contrary intent appears."

In addition to this rule forbidding a retroactive operation to statutes by mere construction, it is to be noted that the Code of 1868 itself, which changed the law as above stated, in chapter 166, §§ 1, 2, provides that its adoption shall repeal all statutes of a general nature, but that their repeal shall not affect any act done, or any right established or accrued, before its adoption, save that proceedings thereafter had shall conform as nearly as practicable to the Code. I do not say that statutes merely regulating the conduct of legal proceedings in courts do not apply to past transactions, but when they touch the essential right of a party they cease to have that character. Here it is not a matter relating only to the remedy; it affects the right of the party essentially. See Potter's Dwar. Stat. 162, and *note 9*. Surely, under this rule, there is no call upon us to say that the new Statute makes that a marriage which till then was not, and imposes a pecuniary burden on the man charging his property not imposed on him by the law testing the transaction when it occurred. Were we, by plain language importing a retroactive intent in the Legislature, called on to give the Code of 1868 such effect, I should say that there was 1? L. R. A.

no power in the Legislature to enact such a statute affecting the personal rights of the citizen so seriously and gravely, by converting a union not matrimonial in legal aspect into a matrimonial relation, and imposing the burden of alimony where none was before, because it would in effect take one man's property, and give it to another, and violate that feature of our constitutional law which says that the citizen shall not be deprived of his property without due process of law. Statutes cannot validate deeds, wills and judicial proceedings, and thus divest vested rights of property from one and confer the same on another. Neither can they validate a marriage void *in toto* at the time when made, and thus impose the burden of alimony,—the burden of maintenance of a person as a wife who in law is no wife. See Wade, Retroactive Laws, § 156 *et seq.* "Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be deemed retrospective in operation, and opposed to those principles of jurisprudence which have been universally recognized as sound." Broom, Legal Maxims, 68.

Hard as may be the fate of the defendant, after living and laboring with the plaintiff twenty-one years, to be turned out upon the world penniless, in old age, the plaintiff objects to paying this alimony, and this court has but to apply the law as it sees it, and *reverse so much of the decree as requires the plaintiff to pay the defendant \$500*, and in all other respects affirm it.

LUCAS, P., and ENGLISH, J., concur; HOLT, J., absent.

Barna POWELL

v.

BENTLEY & GERWIG FURNITURE CO.,  
Appl.

(....W. Va....)

\*1. The noise of a factory, which materially interferes with and impairs the ordinary physical comfort of human existence, may be treated as a nuisance. But the standard as to the

\*Head notes by HOLT, J.

NOTE.—Nuisance; annoyance by noise.

A man is entitled to the comfort and enjoyment of his dwelling-house, and if his neighbor makes such a noise in even the reasonable use of his property, in the pursuit of his trade or occupation, as to cause serious annoyance and disturbance, he may be restrained. *Broder v. Saillard*, L. R. 2 Ch. Div. 692.

If houses adjoining each other are so built that it is manifest that it was the intent that each adjoining inhabitant should enjoy his property for the ordinary purposes for which it was constructed, so long as it is so used, nothing can be so regarded in law as a nuisance; but if either party uses his house for an unusual purpose to the injury of his neighbor, it is not a reasonable use and his neighbor is entitled to protection. *Ball v. Ray*, L. R. 8 Ch. App. 471; *Smith v. Phillips*, 3 Phila. 11; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 410.

effect must be the man of normal nervous sensibility and ordinary mode of living.

**8. But such cases depend in a peculiar degree upon their own facts and surrounding circumstances; so that courts of equity should proceed with great caution in abating or restraining such factory by injunction, and not enjoin unless the fact of nuisance is made in some way to appear clearly beyond all ground of fair questioning.**

(March 7, 1891.)

**A** PPEAL by defendant from decrees of the Circuit Court for Wood County enjoining it from running its factory in such a manner as to produce loud and injurious noises, interfering with plaintiff's physical comfort and the enjoyment by him of his house, lot and premises. *Reversed.*

The facts are stated in the opinion.

*Messrs. Van Winkle & Ambler and J. A. Hutchinson* for appellant.

*Mr. Okey Johnson* for appellee.

**Holt, J.**, delivered the opinion of the court: In the year 1888, Barna Powell, plaintiff below, brought his bill in the Circuit Court of Wood County against Bentley & Gerwig Furniture Company, a partnership, defendants below and appellants, to perpetually enjoin and restrain said Company from the use of their furniture factory as a nuisance to plaintiff in the use and enjoyment of his lot and dwelling-house thereon. Defendants filed a demurrer, which was overruled; then answered, to which plaintiff replied generally. The depositions of thirty-eight witnesses were taken to be read on behalf of the plaintiff, and of twenty-seven witnesses to be read on behalf of defendants. On the 12th of August, 1890, the cause came on to be heard, when the circuit court pronounced a final decree, by which defendants were perpetually enjoined and restrained from so operating their furniture factory, machines, engines, etc., as to produce loud, disagreeable, annoying and injurious noises, interfering with the ordinary use, physical comfort and enjoyment by plaintiff, his family, and other occupants of his house, lot and premises; from which decree defendants have appealed. The proof shows that on the 6th of June, 1889, plaintiff brought against defendants an action of trespass on the case for damages for the nuisance asked to be enjoined, which action at

law was pending in the same court, on the law side, when the decree complained of was pronounced.

**History of common-law nuisance:** The common-law doctrine of nuisance is as old as the common law itself. Our oldest law-writers treat of the subject. See citations from Glanvill and Bracton in Bigelow, Lead. Cas. Torts, 462.

**Its foundation:** It is founded on what we call the absolute rights of liberty and property. Each man has the right to that which he has made his own, and without control or diminution, save by the laws of the land. If each has it, all have it; so that it follows from this that each one must so use his property and rights as not to injure those of others. Each has his right for himself, and owes a corresponding duty to the other.

**Definition:** Some definitions are too broad to be useful; some too narrow to be true. The violation of this duty is the best general description of a nuisance.

**Common nuisance:** A common nuisance affects the people at large, and is an offense against the State, but an action may be brought in his own name by anyone who suffers damage peculiar in kind or degree beyond what is common to him and to others.

**Private nuisance:** A private nuisance affects one or more as private citizens, and not as a part of the public, and is ground for a civil suit only.

**Subject matter:** Generally it affects the use or enjoyment of real property, and, as we see by the old definitions, was confined to this; but modern law takes a wider range. It is closely related to the law of servitudes.

**Statute law:** Our statute law upon the subject relates to public nuisances, such as dams obstructing ordinary navigation or the passage of fish, etc. (W. Va. Code, chap. 44, p. 850); sale of intoxicating liquors (Id. § 18, chap. 32, p. 287); power of county court to abate nuisances (Id. § 25, chap. 89, p. 286); power of cities, towns and villages to abate (Id. § 28, chap. 47, p. 415); power of justices of the peace (Id. § 20c, chap. 150, p. 916).

Virginia and West Virginia cases on the subject: Our own cases on the subject are very few.

In *Wingfield v. Crenshaw*, 4 Hen. & M. 474 (*Chancellor Taylor*), it was held that a court of equity ought not to interpose in the case of a

Whatever annoys such part of the public as necessarily comes in contact with it is a nuisance. *Hackney v. State*, 8 Ind. 494.

Noises produced in instruction in metal chasing by a school of decorative art in a neighborhood of closely built houses, affecting the comfort of the occupants, will be restrained as a nuisance. *Ladies Dec. Art Club's App.* (Pa.) 12 Cent. Rep. 877.

Where noise of music and shouting in a circus erected near a dwelling-house could be heard above the conversation in the dwelling-house, though windows and shutters were closed, it was held a nuisance which equity will restrain. *Inchbald v. Robinson*, L. R. 4 Ch. 388, 20 L. T. N. S. 259.

The noise of a steam engine may become, under some circumstances, a private nuisance. *Davidson v. Itham*, 9 N. J. Eq. 188. Compare *Saltonstall v. Banker*, 8 Gray, 196.

A nuisance may consist in attaching steam power

to works already on the premises, causing such vibration and noise as to depreciate the value of adjoining premises. *McKeon v. See*, 4 Robt. 449.

The fact that noise and vibration from machinery have never been complained of for more than twenty years does not deprive a neighbor of his right to protection from increased noise. *Heather v. Pardon*, 37 L. T. N. S. 993.

No one can defend upon the ground that complainant's rightful alteration of his own property, or of its use, has made that a nuisance which was not before a nuisance. *Sturges v. Bridgman*, L. R. 11 Ch. Div. 652.

The amount of annoyance which will constitute a nuisance, being a question of degree, depends upon the varying circumstances of each case. *Columbus Gas Co. v. Freeland*, 12 Ohio St. 382. See note to *Bohan v. Port Jervis Gas Light Co.* (N. Y.) 9 L. R. A. 711.

12 L. R. A.

nuisance, except where the law would not afford an immediate nor an adequate remedy until irreparable injury might be done.

In *Miller v. Trueheart*, 4 Leigh, 569, plaintiff had secured judgment at law against owner of mill-dam which had been washed away, and which he was about to rebuild. It was held that the injunction should be granted unless it appears from the verdict of a jury, on an issue for that purpose, that the proposed expedient (to avoid the nuisance) would be effectual.

*Amick v. Tharp*, 18 Gratt. 564, relates to flooding back-water.

In *Snyder v. Cabell*, 29 W. Va. 48, a skating-rink was restrained as a nuisance. This case is much relied on by plaintiff.

*Medford v. Levy*, 31 W. Va. 649, holds that annoyances that in themselves would not amount to a private nuisance may become nuisances when done wantonly and maliciously; and I suppose the natural and ordinary use of property in so negligent a manner as to cause unnecessary harm and annoyance, not being reasonable, would be deemed a nuisance.

The old common-law remedies by action: These were two: (1) *Quod permittat proster-nere*. This was in the nature of a writ of right, and therefore subject to great delays. It commanded the defendant to permit the plaintiff to abate the nuisance, or show cause against the same; and plaintiff could have judgment to abate the nuisance, and for damages against the defendant. (2) An assize of nuisance, in which the sheriff was commanded to summon a jury to view the premises, and, if they found for the plaintiff, he had judgment to have the nuisance abated, and for damages. It is to be noticed that the jury were to view the premises. Both had long been out of use in Blackstone's day; with us they were never in use, as far as I know. The assize of nuisance lay only against the wrong-doer himself, but not against the alienee of the tenement wherein the nuisance was situated. This was the immediate reason for making that equitable provision in St. Westm. 2, 18 Edw I. chap. 24. This was in the year 1285 (8 Bl. Com. pp. 216, 222), and has been the occasion of our modern changes in common-law pleading. We see that in the assize of nuisance the jury were to view the premises; this may be done now in the case at law, at the request of either party. W. Va. Code, § 30, chap. 116, p. 760.

Modern remedies. The right to abate: This is treated of by Bracton, who wrote 628 years ago, and the remedy survives to the present time; but a party should not be advised to take the law into his own hands except in a case of great urgency, for he does so at his own risk, and at great hazard, should he be in the wrong, or go too far.

Things to be considered in determining what is a nuisance: Every man, as we have seen, has the exclusive dominion and the right to the full and exclusive enjoyment of his own property, to do with it as he pleases. His neighbor has the same right over his own property. Hence it follows, as the duty of each, to so use his own as not to injure that of the other, each one's duty qualifies his own right, and creates a corresponding right in the other.

Harm without legal injury: But this duty  
12 L. R. A.

must be taken with qualifications, for, in the nature of things and of society, it is not reasonable that every annoyance should constitute an injury such as the law will remedy or prevent. One may therefore make a reasonable use of his right, though it may create some annoyance or inconvenience to his neighbor. But, even in such case, an annoyance lawful in itself may become unlawful when done maliciously.

Useful or necessary trades: So, also, public policy and general convenience require that on this head something more shall be conceded to useful and beneficial work than to useless and idle amusements, but where this line of difference is to be drawn can only be determined by the facts of each particular case.

Homes and factories: According to our settled notions and habits, there are convenient places,—one for the home, one for the factory; but, as often happens, the two must be so near each other as to cause some inconvenience. The law cannot take notice of such inconvenience, if slight or reasonable, all things considered, but applies the common-sense doctrine that the parties must give and take, live and let live; for here extreme rights are not enforceable rights,—at any rate, not by injunction. See Bishop, Non-Cont. Law, § 418, and cases cited.

Convenient place: But the term "convenient place" does not mean the one best for the profit and convenience of the owner of the offensive factory, but the one where it shall cause no actionable injury to others. One nuisance does not justify another; still it may be taken as one of the surrounding circumstances to be considered in determining whether or not the other be a nuisance.

Idiosyncracies of the person annoyed: In fixing the standard by which to measure what shall be deemed a nuisance in the given case, the nature of the man offended, as well as the nature of the thing offending, must be considered. Daniel Boone, Kentucky's famous pioneer, represented the County of Kanawha in the Virginia Legislature about 100 years ago, and soon after left the county, in part, it is said, because the throng of incomers had become annoying. Some families, it is said, think of re-establishing their old homes on lower Broadway. Leaving these matters for local history, past and to come, to look after, we know that our people, in a steadily increasing ratio, are crowding into the centers of population, seeking the conveniences, comforts and amenities of town life, notwithstanding its noise and bustle and other annoyances. For such standard it will not do to take the man, who, by reason of his sensitive nature, inborn or acquired, or by reason of his habits or mode of living, is supersensitive to the annoyance complained of; nor, on the other hand, are we to take one who, by nature or habit, is abnormally insensible to such things. The idiosyncracies or peculiar habits or modes of living of neither class furnish the proper test: and this, not because the over-sensitive man or man in ill health has less right, but because it is impossible in practice for the law to extend to him exceptional immunity or protection. Therefore we must take as our standard the normal man: the one of ordinary sensibility; of ordinary

habits of living; the plain, well-to-do people, who make up the great mass of our busy world. If this should lead to hardship in particular cases, such as sickness, practical convenience makes it impossible to have any other criterion. In such cases we must appeal to the humanity and good will of our neighbor, rather than to any supposed enforceable right of our own.

So far the subject has been discussed on grounds common to a suit at law for damages, and a suit in equity to forbid, abate or restrain. But these remedies differ not less in the mode of relief than in effectiveness and in other important particulars. In the suit at law for damages, if the case is made out, damages, according to the injury proven, are awarded as matter of right, and not of discretion. But often this is only a half-way remedy, leading sometimes to endless litigation and to irreparable mischief. So that the remedy by injunction is sometimes the only one at all effective or complete, forbidding, preventing, stopping, abating the nuisance, exercising such restraint, and no more, as the exigencies of the particular case demand. And now, since the powers of man over the elements and forces of nature have become and are becoming so great and so far-reaching, this remedy grows in frequency and indispensability. Yet by reason in part of its very completeness and effectiveness, it is exercised, especially in cases like this, with great caution, and only after the fact of nuisance has been put beyond all ground for fair questioning. For although a court of equity in such cases follows precedent, and goes by rule, as far as it can, yet it follows its own rules,—and among them is the one that to abate or restrain in case of nuisance is not a matter of strict right, but of orderly and reasonable discretion, according to the right of the particular case,—and hence will refuse relief, and send the party to a court of law, when damages would be a fairer approximation to common justice, because to silence a useful and costly factory is often a matter of serious moment to the State and town, as well as to the owner. The matter here complained of as a nuisance is the noise of a furniture factory at the corner of Sixth and Ann Streets, causing personal annoyance to plaintiff and his family at his home opposite, across Ann Street, 80 feet from the factory, and thus indirectly impairing the value of his property. In such cases the question is, in its very nature, one of degree, and the evidence by which to determine it is matter of opinion, based on experience and observation of the thing itself. The rule to guide us in such cases is that the noise must be such as materially to interfere with and impair the ordinary comfort of existence on the part of ordinary people. *Snyder v. Cabell*, 29 W. Va. 48; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 817, 27 L. ed. 739. See also *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Walter v. Selfe*, 4 De Gex & S. 815; *Crump v. Lambert*, L. R. 8 Eq. 409; *Gaunt v. Fynney*, L. R. 8 Ch. 8; and the recent cases, *Bohan v. Port Jervis Gas-Light Co.* 122 N. Y. 18, 9 L. R. A. 711; and, on public nuisance, *People v. Detroit White Lead Works* (Mich.) 46 N. W. Rep. 735; *Wiley v. Elwood* (Ill.) 25 N. E. Rep. 570; and notes in *Bohan v. Port Jervis Gas Light Co. supra*.

Facts of the case: Six hundred pages of this 12 L. R. A.

record are taken up with the testimony of sixty-five witnesses—thirty-eight for plaintiff, twenty-seven for defendants—on the question of nuisance or no nuisance, with about 3,400 questions asked and answered. It is not unusual to observe or to fix some limit in the number of witnesses to be examined on such questions. In the view we take of this case it would answer no useful purpose to go into the evidence in detail. We can best express our view by comparing the facts of this case with the facts in the case of *Snyder v. Cabell*, 29 W. Va. 48, as that case is relied on and made the subject of extended comment by both sides. In that case the thing complained of as a nuisance was in the main noise, as it is here. There it was the noise of a skating rink, an unnecessary amusement; here the noise of a furniture factory, a trade of public utility, as well as of private benefit, costing more than \$30,000, and employing more than sixty people. That was located in a part of the town therefore devoted for the most part to residences; here it was on a street occupied overhead by the approach of the Baltimore & Ohio Railway to its bridge across the Ohio at Parkersburg, devoted to the noises of running trains, already paid for to be used for that purpose, and for that reason not generally highly valued as a place for homes. The factory was well equipped and well conducted, with as little of the noise and hum of machinery as could be had in such a work, the noise stopping at six in the evening and not starting again until seven in the morning. In the rink the noise disturbed rest and sleep, continuing far into the night. The three families complaining of the noise of the rink, we may infer, were people of normal nervous sensibility to noise. Here the plaintiff and his principal witnesses, living near the factory, seem to be, by reason of ill health or by nature, rather supersensitive to such things. On the question of nuisance, the evidence is conflicting; at any rate the plaintiff does not put his case high and dry, above all ground of fair questioning. There is enough, perhaps, for the chancellor to have directed an issue. But this issue, the plaintiff by his suit at law has already brought on and made up. Under such a conflict of evidence, the suit at law should have been tried first. The finding on such a question of fact of twelve good and lawful men, who, if deemed proper, may see and hear the thing for themselves, is still greatly relied on by the court. By such course we would avoid the possibility or likelihood of the awkward predicament that now confronts us, of a court of equity having silenced as a nuisance a factory of great cost and of general utility, which the jury in the suit at law should afterwards find to be, all things considered, no nuisance at all. Besides, if the jury should find it to be a nuisance by giving substantial damages, the chancellor would then have safer ground for his decree.

The decrees of the 12th and 14th August, 1890, must therefore be reversed, and the cause remanded, the further hearing to abide the determination of the issue of nuisance or no nuisance in the suit at law, or to be demurred to by plaintiff, according as he may be advised.

Lucas, P., and English and Brannon, JJ., concur.

## RHODE ISLAND SUPREME COURT.

Benjamin H. CHILD, Chief of Police,

Frederick BEMUS.

(.....R. L.....)

1. **Conferring upon the mayor power to revoke hackmen's licenses** does not exceed the authority given to a city council "to make laws, ordinances and regulations relative to hackney carriages."
2. **A vested right cannot be acquired** in a license granted under an ordinance that gives or reserves the power to revoke it.
3. **The power to revoke licenses** in his discretion, conferred on the mayor by the common council of a city, is not unreasonable or oppressive, though it may be exercised without his giving notice to the licensee.

(February 7, 1891.)

**EXCEPTIONS** by defendant to rulings of the Court of Common Pleas for Providence County made during the trial of a proceeding against defendant for driving a hackney carriage without a license, which resulted in a conviction and sentence imposing a fine. *Overruled.*

The facts sufficiently appear in the opinion. *Mr. Charles E. Gorman* for defendant. *Messrs. Nicholas Van Slyck, City Solicitor, and Cyrus M. Van Slyck, Asst. City Solicitor*, for plaintiff:

*Durfee, Ch. J.*, delivered the opinion of the court:

This is a complaint against the defendant for driving a hackney carriage without a license, in violation of an ordinance of the City of Providence. On trial thereof in the court of common pleas, on appeal from the police court, it appeared that July, A. D. 1890, a license was granted to the defendant for one year, and that September 16, A. D. 1890, it was revoked by the mayor on recommendation of the superintendent of hacks, representing that the defendant had refused to remove his carriage at the Boston depot when told to do so by the officer there. It was revoked without notice or hearing. The evidence in support of the complaint showed that the defendant was driving for hire September 22, A. D. 1890. The defense was that the revocation was void. The jury, under rulings by the court sustaining its validity, found the defendant guilty. The cause is before us on exceptions to said rulings. Power is given to the city council of the City of Providence by the city charter "to make laws, ordinances and regulations relative to . . . hackney carriages, trucks, carts and other vehicles, and licensing and regulating the same." Under this provision the city council passed an ordinance, forbidding any person to drive a hackney carriage in the city without license from the mayor and board of aldermen under penalty of a fine of

not less than \$10 nor more than \$20, making the licenses grantable by the mayor and aldermen, in their discretion, and giving the mayor power to revoke any license so granted.

The defendant's first point is that the city council, in conferring upon the mayor power to revoke, exceeded their authority under the charter. The authority given by the charter is expressed in broad terms. It is to make laws, ordinances and regulations relative to hackney carriages and licensing them. The language seems to us to be broad enough to authorize, not only the granting of licenses, but also the granting of them subject to a power of revocation; and we see no reason why such power may not be vested by ordinance in the mayor. It is argued that the licensee has a vested right in his license beyond the city council's power to forfeit. Assuming that this would be so if the power to revoke were not reserved, it seems to us that when, as here, the license is granted under an ordinance that gives or reserves the power, it is to be regarded as subject to the power, and terminable by its exercise. The license is in the nature of a privilege to perform a public service or function, for reward, which service or function, for the public good, and to secure its orderly and efficient performance, must be subjected to certain regulations. These regulations must be obeyed; and therefore the power to revoke the license is highly important, since the licensee may be not only disobedient, but obdurate or incorrigible. The cases cited for the defendant to show that a town or city cannot enforce its by-laws or ordinances by forfeitures of property where it is empowered to enforce them by fines, do not seem to us to be in point.

In *State v. Town Council of Columbia*, 6 Rich. L. 404, which at first view appears as if it might be so, it was decided that the town council had no power to subject a liquor license, granted by them, to forfeiture for breach thereof; but there the license was granted by the town council, acting under a statute of the State prescribing conditions and restrictions, and the court held that, the Legislature having prescribed them, the town council could not add to them. The case differs from this, for here the whole matter of licensing is left unrestrictedly to the city council.

The defendant contends that the city council, if it was authorized to confer the power, was not authorized to confer it to be exercised without first giving notice to the licensee, and allowing him an opportunity to be heard. We are free to say that an exercise after notice and hearing would better suit our notions of proper procedure than an exercise without them. The ordinance prescribes no procedure, but leaves the matter wholly to the mayor's discretion. Is the ordinance, on this account, so unreasonable or oppressive that it is void? The complainant cites *Com. v. Kinsley*, 138 Mass. 578. In that case it was decided that a Statute authorizing the selectmen in towns to grant licenses to keep tables for playing pool for hire, and providing that "such licenses may be revoked at the pleasure of the authority granting it," is constitutional. The license was

**NOTE.**—Municipal corporation; license. See notes to *Magenau v. Freeman* (Neb.) 9 L. R. A. 787; *State v. Robinson* (Minn.) 6 L. R. A. 330.  
12 L. R. A.

revoked there without notice. "A licensee," say the courts, "takes his license subject to such conditions as the Legislature sees fit to impose; and one of the statutory conditions of this license was that it might be revoked by the selectmen at their pleasure." The question of reasonableness did not arise, since a statute, if constitutional, is valid, whether reasonable or not. The reasonableness of an ordinance, even, it has been held, cannot be inquired into by the court if specifically authorized by the Legislature. In the case at bar we may inquire, the authority being general. But such an inquiry is a nice one, especially if it regards policy, rather than principle; and it seems to us that the court in making it should take care not to be influenced too much by its own judicial usages or predilections. Here especially it is to be remembered that the power was given for administrative, not judicial, purposes. While the mayor may revoke a license under the power, if it be valid, without notifying or hearing the licensee, there is, on the other hand, nothing

to prevent his giving a hearing first, if he sees fit; and the question is whether it is reasonable for him to be intrusted with such a discretion.

It appears from *Com. v. Kinsley, supra*, that the Legislature of Massachusetts considered the conferring of such a power not unreasonable; for otherwise, presumably, they would not have conferred it. The matter there was of no more urgency than the matter here. The reasons would be stronger here against the power if the licensee were required to pay heavily for his license, but he has to pay only a dollar's fee for it; and, if a license has been revoked unduly, there is nothing to prevent the board of aldermen from righting the wrong by granting a new one. We have come to the conclusion, after much consideration, that it is not sufficiently plain that the power, or the clause of the ordinance that grants the power, is unreasonable or oppressive, to make it our duty to declare it void.

*Exceptions overruled.*

## PENNSYLVANIA SUPREME COURT.

John CROUSE *et al.*

v.

Daniel MURPHY and Charles Roggenmoser, Terro-tenant and App't.

(....Pa....)

**The record of a judgment against Daniel Murphy** is not notice of the judgment to one who takes a conveyance of lands from the judgment debtor whose name appeared in the title deeds as Daniel J. Murphy.

(March 2, 1891.)

**A** PPEAL by Roggenmoser from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County in favor of plaintiffs in a *scire facias* proceeding to revive a judgment against Murphy so as to make it a lien on property which had been conveyed by Murphy to appellant. *Reversed.*

The facts are fully stated in the opinion.

*Messrs. J. B. Colahan, Jr., and John H. Johnson* for appellant.

*Messrs. Henry T. Dechert and Henry M. Dechert* for appellees.

**Williams, J.**, delivered the opinion of the court:

The intention to protect an innocent purchaser against secret liens and conveyances manifested itself very early in this State. An Act of the Colonial Legislature passed in 1772 made it the duty of "any judge or other officer of a court of record within this province, that shall sign any judgments," to enter the date of signing on the margin of the record, and de-

clared that the lien of the judgment thereafter begin at that date, instead of extending, by relation, to the first day of the term on the return of the original writ. Three years later it was made the duty of purchasers to record their deeds within six months, and, if they failed to do so, their unrecorded deeds were to be held fraudulent and void as against subsequent bona fide purchasers and mortgagees. Prior to 1775 there was no duty to record resting on purchasers, and one buying land was bound to investigate the title at his peril. *Macley v. Work*, 5 Binn. 154.

In 1798 the duration of the lien of a judgment upon the defendant's land was limited to five years, unless duly revived. The Act of 1849 made it the duty of the plaintiff to take notice of a sale of land by his debtor, and provided that, as to a purchaser, the lien of the judgment should be discharged, unless such purchaser was named by *scire facias* within five years after he placed his deed upon the record, notwithstanding the judgment may have been regularly revived against the defendant. To facilitate searches, separate judgment dockets were provided for in 1827, and our present system of lien dockets, as judgment indexes, was adopted in 1856. The Act provided "that the lien of a judgment shall not commence or be continued against any purchaser or mortgagee unless the same be entered in the county where the real estate is situated, in a book to be called the 'Judgment Index,' . . . and the plaintiff shall furnish the proper information to enable the prothonotary to prepare said entry." Among other things, the entry must show the names of the parties against whom a lien is entered. The purchaser

**NOTE.**—Notice by judgment entry.

An entry of a judgment in the "Index of All Liens," as against "J. H. Hesse," is not constructive notice of a judgment against "J. H. Hesser," *Etna L. Ins. Co. v. Hesser* (Iowa) 4 L. R. A. 122.

15 L. R. A.

But where writ, pleadings and contract speak only of Frederick D. Conrad, but the judgment is for the plaintiff against "Daniel Frederick Conrad, the defendant," the defect is cured by the Statute of Jeofails. *Conrad v. Griffey*, 52 U. S. 11 How. 480, 13 L. ed. 779.



is bound to take notice of liens appearing on the judgment index, but he is not bound to look beyond it, and, if his search discloses the existence of no lien entered there against his vendor, he may complete the transaction, and pay over the purchase money in safety. Upon this general proposition there is no difference of opinion. The question presented is, Through what modifications must one who proposes to become a purchaser pursue the name of his vendor?

In the case now before us one Daniel J. Murphy owned a lot of land at the corner of Myrtle and Holly Streets, in the City of Philadelphia. His deed for the same was regularly recorded, as was a mortgage given by him for part of the purchase money. He took and he incumbered the title in his proper name as Daniel J. Murphy. Roggenmoser desired to buy the lot. He found the title properly recorded, and incumbered by a mortgage. Turning from the recorder's office to that of the prothonotary, he caused search to be made for liens on the judgment index against Daniel J. Murphy, and found none. He then completed his purchase, settled the purchase price and received and recorded his deed. This was in 1888. In June of that year Murphy went to Chicago to reside. In 1889 the plaintiff, who had a judgment against Daniel Murphy, issued his writ of *sci. fa.*, and served Roggenmoser as terre-tenant.

Was the judgment against Daniel Murphy a lien on the lot? It is admitted that Daniel Murphy and Daniel J. Murphy are the same person. It is clear, therefore, that real estate in the hands of that person would be bound. Having signed his name in the form in which it appears on the judgment index, he could not object to the enforcement of the judgment against his property. As between him and his creditor, it is a question of personal identity. But the defendant is not objecting. It is a purchaser who bought after a search of the records, and with no actual notice of the existence of this judgment, who claims protection. If he did all the law required of him, he is entitled to protection against the judgment of the plaintiff. If he did not, then he must suffer for his want of care in making the search. The plaintiff contends that he was bound to take notice of this judgment, because it was a lien against his vendor, and could have been enforced against the land in his hands. It appears in the case stated that Murphy, in the transaction of his business, used his name in various forms. On his note it was D. Murphy. He gave some notes as Dan Murphy, some as Daniel Murphy, and it is clear that he took and conveyed title as Daniel J. Murphy. In the city directory it appeared, at and for years before the sale to Roggenmoser, as Daniel J. Murphy. If a judgment had been entered on a note signed "Dan Murphy," and on another signed "D. Murphy," there is no reason that can be urged in support of the lien now before us that could not, with equal force, be urged in support of the lien of both the others. All were signed by the same man and were for debts due by him. If the creditor has no duty resting on him, but is to be protected because Daniel J. Murphy was his debtor in fact, notwithstanding he did not put

his name correctly to the note, then all the forms of the name used in signing the notes stand on the same ground. In order to see the practical operation of such a holding, we have looked into the city directory, and find the name of Daniel Murphy, with various middle letters and without any, occurs twenty times. But "D" is the initial of David, Dennis and many other first names besides Daniel. To exhaust the possibilities as to D. Murphy would require searches running into the hundreds. But without laying too much stress on the argument *ab inconvenienti*, or the apparent legislative intent, let us glance at our cases bearing upon this question. In several cases, among which are *Ridgway's App.*, 15 Pa. 177; *York Bank's App.*, 36 Pa. 458, and *Smith's App.*, 47 Pa. 128,—it has been held that a lien entered in the last name of the defendant is not a lien on the real estate of the defendant in the hands of bona fide purchasers. For example, a lien entered against the firm of McFall & Martin does not bind the separate real estate of the partners in the hands of purchasers because of the absence of the first names of McFall and of Martin. Not only must the first name appear, but it must be correct; for in *Zimmerman v. Briggans*, 5 Watts, 186, the judgment was entered on a bond. The bond was signed, "Jacob Briggans," which was the true name of the obligor. The prothonotary made a mistake, and entered the name in the lien docket as John Briggans. An examination of the files would have shown the mistake, but this court held that subsequent creditors were not bound to go beyond the lien docket, and postponed the judgment, because of the mistake in the first name.

It is not enough that names are *idem sonans*. In *Hall's App.*, 40 Pa. 458, the true name of the defendant was George P. Yoest. It was entered on the index against George P. Joest. The first name was right. The last name was *idem sonans* with the right name of the defendant, but it was held that the purchaser had no notice of the lien from the record. The reason evidently is that the record addresses itself to the eye, and not to the ear alone. The purchaser was bound to look under the letter "Y," which was the initial letter of his vendor's name. Not finding a lien there, he was not bound to go further, and the lien was postponed. But in *Wood v. Reynolds*, 7 Watts & S. 406, our precise question was decided. A note was signed by John M. Grurer. By some oversight of the prothonotary the "M" was omitted, and the lien entered against John Grurer. A purchaser from John M. Grurer made search for liens against his vendor, but found none, and completed his purchase. We held that he had done all that was required of him, and that the judgment could not be enforced against the land in his hands. This case was followed in *Hutchinson's App.*, 92 Pa. 186, and the rule distinctly laid down that "the omission of the middle letter in a name on the judgment index is fatal to a lien" as against bona fide purchasers.

From this review of the case it will be seen that the rule was well settled in this State when the case of *Jenny v. Zehnder*, 101 Pa. 296, came before this court. In that case a different rule was adopted, which is wholly in-

consistent with *Wood v. Reynolds* and *Hutchinson's App.* and *Myer v. Fogaly*, 39 Pa. 429, cited as authority for it. An examination of the latter case will show that it does not sustain the rule laid down in *Jenny v. Zehnder*, nor afford it any aid whatever. The case was this: One John Bubb executed a judgment note. The prothonotary of Lancaster County entered judgment upon it against John Bobb. This judgment was held to be notice because the two names are identical. They are different modes of spelling the same name, and, as was said by the court, are *idem sonans*, at least in the German counties, of which Lancaster is one. The name was found under the proper title in the index, with the correct first name, and with a variation in spelling in the middle letter which made no change in the name as spoken. Similar instances are the names of Kopp and Kupf, and of Kolp and Kulp, which are merely different forms of the same name, with the same initial and the same pronunciation. It is to be regretted that *Wood v. Reynolds* and *Hutchinson's App.* had not been considered in *Jenny v. Zehnder*. The learned judge of the court below followed the last case faithfully, but we feel constrained to say what he could not, that we prefer and shall follow the old and well-settled line of cases to which we have referred. The rule of *Wood v. Reynolds* is not only most in harmony with the spirit of our legislation, and with

our own decided cases, but it is equitable in its operations. Murphy's title was on the record. Whoever dealt with him on the credit of his real estate was bound to know what appeared in his recorded title. It was as much the duty of one who was about to trust him with money or goods because of his ownership of land to know how and by what name he held it, as it was the duty of one about to purchase the land to make the same inquiries. If the creditor neglected his duty, he must lose in consequence. If the purchaser neglected his, he must lose. Because the creditor in this case did neglect to examine the record, he has a note signed with only part of the maker's name on which judgment has been entered. With no notice of the habit of his vendor to sign notes in several different ways, and with no means of notice of liens but the record, the purchaser examined, exhausted the means of knowledge within his reach, and, finding no lien against Daniel J. Murphy, or D. J. Murphy, settled with his vendor, and took his deed. If one of these parties must lose, in good conscience it should be he whose neglect to avail himself of the information which the record could have given him made the loss by one or the other inevitable.

The judgment is reversed, and judgment is now entered in favor of the defendant upon the case stated.

## NEW YORK COURT OF APPEALS.

Dwight B. BAKER *et al.*, *Appts.*,

v.

Charles HART *et al.*, *Respts.*

(.....N. Y. ....)

1. A lease giving the sole and exclusive right to quarry stone on certain lands for a term of years does not transfer the land, or make the lessees owners of any stone which they do not actually quarry out and sever from the land, or entitle them to recover as owners for the conversion of stone quarried and taken away by trespassers, although they are entitled to the damages sustained by invasion of their exclusive right.
2. Lessees, having a right merely to quarry stone on the premises which is a mere incorporeal hereditament, are under no implied obligation to protect the premises from trespassers, and are therefore not entitled on that ground to recover as owners for the conversion of the stone by trespassers.
3. The measure of damages for quarrying and carrying away stone by trespassers in a suit by lessees merely of the exclusive right to quarry the stone does not extend to the full value of the stone, but merely to the damages actually occasioned by the invasion of such exclusive right; in such case nominal damages at least should be granted.

(December 2, 1890.)

**A**PPEAL by defendants from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of 12 L. R. A.

the Rockland Circuit in favor of plaintiffs in an action brought to recover damages for the conversion of certain granite blocks. *Reversed.*

The facts are stated in the opinion.

*Mr. Jesse Johnson*, of *Messrs. Johnson & Lamb*, for appellants:

The lease did not give title; it merely gave a right to acquire title by quarrying and cutting; it gave what the books designate an incorporeal hereditament.

*Grubb v. Bayard*, 2 Wall. Jr. 81; 2 Washb. Real Prop. 4th ed. p. 376; *Doe v. Wood*, 2 Barn. & Ald. 724; *Clement v. Youngman*, 40 Pa. 341; *Bainbridge, Mines*, \*266; *Shep. Touch.* 96.

If the trespass of the defendants was accidental, inadvertent or anything less than the deliberate purpose to appropriate the property of another, the plaintiffs have no right to the value added by the labor of the defendants and the transportation of carloads of heavy granite from a mountain quarry to the City of New York.

*Lake Shore & M. S. R. Co. v. Hutchins*, 33 Ohio St. 571, 37 Ohio St. 282; *Lee v. Mathews*, 10 Ala. 682; *Whitney v. Beckford*, 105 Mass. 267; *Hilton v. Woods*, L. R. 4 Eq. 440; *Morgan v. Povel*, 8 Q. B. 278; *Wood v. Morewood*, Id. 441; *Martin v. Porter*, 5 Mees. & W. 351; *Herdie v. Young*, 55 Pa. 176; *Coleman's App.* 62 Pa. 252; *Barton Coal Co. v. Cox*, 39 Md. 1; *Stockbridge Iron Co. v. Cove Iron Works*, 102 Mass. 80; *United States v. Magoon*, 3 McLean, 171; *Heard v. James*, 49 Miss. 236; *Wetherbee v. Green*, 22 Mich. 311; *Hyde v. Cookson*, 21 Barb. 92; *Baker v. Wheeler*, 8 Wend. 505; *Bolles*

*Wooden Ware Co. v. United States*, 106 U. S. 432, 27 L. ed. 280; *Coal Creek Min. & Mfg. Co. v. Moses*, 15 Lea, 300, 54 Am. Rep. 415; *Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 280; *Emma Silver Min. Co. v. Parks*, 14 Blatchf. 411; *Single v. Schneider*, 30 Wis. 570; 8 Wait, Act. and Def. p. 394.

*Mr. C. P. Hoffman*, with *Mr. Alexander B. Butts*, for respondents:

The plaintiffs' title was based upon their lease, which "let" and "granted" to them the possession and the sole and exclusive right to enter into and upon the demised premises, and to cut, quarry and take away stone therefrom during the entire term of the lease.

This possession and these rights were wrongfully and unlawfully invaded by the defendants.

Under these circumstances the plaintiffs' right to bring and maintain this action was perfect.

*Austin v. Hudson River R. Co.* 25 N. Y. 340.

These acts of the defendants subjected the plaintiffs to an action for waste at the suit of the plaintiffs' lessor.

*Ibid.*; *Cook v. Champlain Transp. Co.* 1 Denio, 91, and cases cited.

It was proper to allow the plaintiffs to show the value of the stone after the defendants had taken them from the quarry and had taken them to the Harlem Bridge.

*Baker v. Wheeler*, 8 Wend. 505; *Brown v. Sax*, 7 Cow. 95; *Rice v. Hollenbeck*, 19 Barb. 664; *Silsbury v. McCoon*, 8 N. Y. 379.

*Finch, J.*, delivered the opinion of the court:

The complaint in this action alleged that the plaintiffs were the lessees of a lot of land containing twenty-five acres; that under said lease they had the sole and exclusive right of entering upon the leased lands for the purpose of quarrying, cutting, crushing and removing stone therefrom; that defendants wrongfully entered upon the premises and quarried stone belonging to the plaintiffs, and had converted the same to their own use; and that the plaintiffs had thereby suffered damage which they claimed to recover. Upon the trial the plaintiffs produced their lease from the owner of the land. It gave to them "the sole and exclusive right of entering in and upon the lands

for the purpose of quarrying, cutting, crushing and removing stone for the term of ten years, . . . but not to hold possession of any part of said lands for any other purposes." Other provisions were in accord with the right conveyed and limited, and bounded the plaintiffs' use. The lease, therefore, did not transfer the land, but gave to the plaintiffs an incorporeal hereditament, a right to take stone from the land, which became theirs only upon its actual severance. What they should quarry and remove within the restricted term became theirs, but what they did not quarry out and sever from the land remained the property of the owner of the fee. *Grubb v. Bayard*, 2 Wall. Jr. 81; *Doe v. Wood*, 2 Barn. & Ald. 724; *Olement v. Youngman*, 40 Pa. 841; *Caldwell v. Fulton*, 81 Pa. 480; *Arnold v. Stevens*, 24 Pick. 106.

A right to take all the stone on the land without restriction in time or quantity might

readily be held to transfer its ownership, but I have found no case which asserts such entire and complete title in the lessee where there was merely a right to mine or quarry restricted and limited by time or quantity. In such a case all of the stone on the premises does not pass to the lessee, but only such and so much as, within the boundaries of his right, he cuts and quarries. The defendants were of course trespassers. They entered upon the premises without right, and cut and carried away a quantity of stone. The plaintiffs, under objection, were allowed to prove the value of the stone, and to recover that value on the theory that they owned it. But they did not. Their lease gave them no title to it. They did not cut or quarry it, and the ownership remained in their lessor. Undoubtedly the act of the defendants was an infringement of their rights for which they could recover such damages as they in fact sustained. But they proved none. If the limits of their lease would have exhausted all the stone on the twenty-five acres, then certainly they would have lost the value of what was wrongfully removed; but if the supply was such that there remained for them all and more than they could quarry or remove, they at least lost no stone which they were entitled to have, for enough remained to fully satisfy their entire right. The injury in such case would fall upon the lessor whose property had been taken.

It may be that the lessees were in some manner or to some extent injured by the trespass of the defendants, although stone enough remained to satisfy the exigency of their contract. We do not know how that may be, in the absence of proof, and therefore may prudently refrain from any suggestions about it. It is enough for present purposes that the plaintiffs established no ownership of the stone, and no right to recover its value as owners, and so the judgment rendered was erroneous.

But it is sought to be sustained on another theory. The doctrine is invoked that a tenant for life or years is bound to answer to the owner for any waste committed, even though it be the act of a stranger. Such is undoubtedly the rule. *Cook v. Champlain Transp. Co.* 1 Denio, 91, 104. But it applies to the case of a tenancy. It proceeds upon the ground that the leased premises have passed into the possession of the tenant, so that an entry, unless under some special reservation, by the lessor himself would be a trespass. The latter cannot protect the premises, because for the time being he has parted with the possession, and intrusted it to the lessee, and the latter, having become the custodian and possessor of the land, comes under an implied obligation not to commit waste upon it, and not permit others to do so. But the rule and its reason are alike inapplicable where not an estate but a mere incorporeal hereditament is transferred. Here the owner remained in possession, and conveyed, not his land, but an easement in it, and could protect his own possession against trespassers like the defendant. The plaintiffs covenanted to conduct their operations in a workmanlike manner, and without needless waste or injury, and so became liable for their own acts; but beyond this they incurred no implied obligation to protect the premises from

trespassers, and were in no manner made its guardians. The lessor remained in possession, and had as clear a right to sue the defendants for their trespass as if he had never given an easement to the plaintiffs. And so I discover no ground upon which the plaintiffs can be deemed owners of the stone, and therefore entitled to its value. Their exclusive right has

been invaded, and if thereby they have suffered substantial damage, they must establish it by their proof. If they can show none, they may at least be entitled to nominal damages in vindication of their right.

*The judgment should be reversed, and a new trial granted, costs to abide the event.*  
All concur.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

Daniel P. MORSE, *Appt.*,

v.

HACKENSACK SAVINGS BANK, *Respnt.*

(.....N. J. Eq.....)

1. A sheriff's deed on the sale of lands under an execution takes effect as an actual conveyance from the date of the sale, and not from the date of the execution and delivery of the deed.
2. Where the will contains no devise of lands, but the testator has disposed of his entire estate by means of a power to sell and divide the proceeds of sale, the lands descend to his heir-at-law subject to the power of sale and the trusts declared thereon contained in the will.
3. The estate of the heir-at-law intermediate the testator's death and the exercise of the power of sale is an actual estate, which is alienable, devisable and descendible, and liable to seizure and sale as lands; but, when the power of sale is executed, the estate of the heir or his alienee is determined, and the purchaser under the power becomes seised under the devise by a title paramount to the title of the heir by descent.
4. Where a testator by his will directs the sale of his lands, and the division of the proceeds among his heirs-at-law, the latter may dispense with the sale, and elect to take the lands in lieu of the proceeds of sale.
5. The principle on which the doctrine of election rests is the identity of the interest the heirs take as heirs-at-law, and in the proceeds of the conversion. When the testator charges his estate, real and personal, with the payment of his debts, and directs his executors to sell his real and personal estate, and divide the proceeds between his two children, the latter cannot elect to take the lands as heirs-at-law, and by such election impair or defeat the rights of testator's creditors.
6. A direction that the executor pay the debts of the testator out of his real or personal estate is a charge of debts upon lands creating a trust which creditors can enforce by compelling the executor to execute the trust.
7. No limitation of time is imposed upon a power in the nature of a trust, not limited in terms, unless the rule against perpetuities is involved, or the power is controlled by an inherent quality in the nature of the trust, or in the object for which the power was granted.
8. There may be circumstances and conditions under which the default of creditors in not requiring the execution of a power of sale in their favor may amount to laches, which a court of equity will lay hold of as proof of fraud; but in such cases the ground of relief is fraud in

knowingly permitting a power of sale to be kept outstanding as a standing menace, with the intent to protect trust property from the creditors of the person ultimately entitled.

(January 5, 1891.)

**A**PPEAL by defendant, Morse, from a decree of the Chancery Court in favor of complainant in a suit brought to quiet plaintiff's alleged title to certain real estate, and to set aside a deed held by Morse, which was alleged to be a cloud on such title. *Reversed.*

Peter R. Terhune died seised of the land in controversy. Morse purchased the same at a sale made by the executor under a power given by Terhune's will. The Savings Bank derived its title through a sheriff's sale of the land under an execution against one Richard P. Terhune, an heir-at-law of the testator.

The further facts appear in the opinion.

*Mr. John Linn* for appellant.

*Mr. Charles H. Voorhis*, for respondent:

The will contained no direction to sell, and no devise of the lands; but a naked power of sale and a bequest of the proceeds equally to testator's two heirs-at-law. Hence the lands descended to R. P. Terhune and his sister, subject to be devested by execution of the power of sale.

*Brearley v. Brearley*, 9 N. J. Eq. 21; *Herbert v. Tuthill*, 1 N. J. Eq. 141; *Romaine v. Hendrickson*, 24 N. J. Eq. 282.

Such power of sale can be defeated by election of the legatees, who are also the heirs-at-law.

*Gest v. Flock*, 2 N. J. Eq. 115; *Craig v. Leslie*, 16 U. S. 3 Wheat. 563, 4 L. ed. 460; *Story*, Eq. Jur. § 798.

Presumption of election will arise from very slight circumstances. Thus, if a person keeps land for some length of time unsold, a presumption will arise that he elected to take it as land.

*Pulteney v. Darlington*, 1 Bro. Ch. 238; *Ashby v. Palmer*, 1 Meriv. 301; *Orabtree v. Bramble*, 3 Atk. 688.

Alienation by heir will amount to election.

*Gest v. Flock*, *supra*; *Scudder v. Stout*, 10 N. J. Eq. 377; *Fluke v. Fluke*, 16 N. J. Eq. 478.

The deed by the sheriff is Terhune's own deed and so an election.

Rev. p. 1043, § 7; *Den v. Winans*, 14 N. J. L. 1; *Voorhis v. Westerfelt*, 11 Cent. Rep. 226, 48 N. J. Eq. 644.

In equity this deed takes effect from date of the sale.

*Haughwout v. Murphy*, 22 N. J. Eq. 531;

*Crawford v. Bertholf*, 1 N. J. Eq. 460; *Hoagland v. Labourette*, 2 N. J. Eq. 254; *Huffman v. Hummer*, 17 N. J. Eq. 264; *King v. Ruckman*, 21 N. J. Eq. 599.

*Depue, J.*, delivered the opinion of the court:

Peter R. Terhune died in January, 1879, seised of certain real estate in the County of Bergen. By his will, executed January 2, 1878, he provided as follows: "I order and direct my executor, hereinafter named, to pay all my just debts, funeral and testamentary charges, as soon as can be after my decease, out of my real or personal estate. I give and bequeath unto my wife, Mary Ann, the sum of five hundred dollars, to be paid to her after my decease, and I do direct that said legacy shall be in lieu of my wife's dower in my estate; also an annuity of one hundred and fifty dollars a year, to be paid in half-yearly payments, as long as she remains my widow. I hereby authorize and empower my executor to sell and dispose of all my real and personal estate of which I may die seised, either at public or private sale, for such price as he shall deem proper, and give to the purchaser of the same a good, valid and absolute title thereto. I give, bequeath and devise all the proceeds of my real and personal estate in manner following; that is to say, after paying the above-described legacy and annuity, one half to my son, Richard Paul Terhune, and one half to my daughter, Margaret, the wife of Garrit G. Oldis." Richard P. Terhune, the executor named in the will, duly proved the will, and letters of probate were issued thereon, January 29, 1879. Richard P. Terhune, the executor, and his sister, Margaret Oldis, to whom the proceeds of the sale of the testator's real and personal property, after satisfaction of the charges thereon, were given, were the only children and heirs-at-law of the deceased. On the 3d of November, 1880, the Hackensack Savings Bank, the complainant, recovered a judgment against Richard P. Terhune for \$3,450 damages, and \$14.50 costs, and on the 11th of May, 1888, execution was issued upon the judgment, and put in the hands of the sheriff of Bergen, and executed by a levy on all the right, title and interest of Richard P. Terhune in one of the tracts of land of which the testator died seised. The sale having been duly advertised, the premises were set up and sold on the 29th of August, 1888, to the complainant, for the sum of \$50. The sheriff's deed was not delivered until the 27th of September, 1888.

The date of the delivery of the sheriff's deed is a circumstance of no importance. A purchaser at a sheriff's sale acquires, by the act of purchase, a right to a conveyance of the premises in pursuance of the sale. The delivery by the officer of a deed is a mere ministerial act which the officer is required to perform to consummate the sale and vest in the purchaser a title in compliance with the law under which the sale was made. *Walker v. Hill*, 23 N. J. Eq. 514-580. The sheriff's deed, when delivered, has relation back to the time of the sale of which it is the consummation. *Jacobus v. Mutual Ben. L. Ins. Co.* 27 N. J. Eq. 605-608.

At a public sale on the 22d of September, 12 L. R. A.

1888, Richard P. Terhune, as executor of his father, sold the lands of which his father died seised, under the power of sale contained in the will, to Daniel P. Morse, for the sum of \$1,000, and duly made a deed of conveyance therefor. The deed of Morse is dated September 22, 1888, and was recorded in the clerk's office on the same day. As a conveyance of the property, the executor's deed was, in legal effect, subsequent in point of time to the sheriff's deed to the complainant. The complainant's bill was filed to set aside and annul the Morse deed in favor of the complainant's title under its deed from the sheriff. The charge in the bill is that Terhune, as executor of his father, made sale and conveyance to Morse under the powers contained in the will, to hinder and delay the complainant, a creditor of the said Richard P. Terhune, and to defeat the judgment the complainant had against him, and that the deed to Morse was fraudulent and void as against the complainant. The prayer for relief is that the deed to Morse be declared fraudulent and void, and that it be decreed that the complainant is seised of and entitled to the one equal undivided part of the tracts of land, etc., wholly unaffected by the executor's deed. To this bill Richard P. Terhune, individually and as executor, and Daniel P. Morse, alone were made parties. An answer under oath was called for. Both defendants answer, and in their answers under oath severally deny that the said sale and purchase were made to hinder or delay the complainant, or to defeat its judgment, or for any fraudulent purpose. Terhune in his answer sets out that, for the purpose of settling up the testator's estate, it was necessary to make sale of all the real estate whereof the testator died seised; that the property was sold for the purpose of enabling him to pay debts of the deceased, and distribute the proceeds of the sale according to the directions of the will, in case more was realized than was sufficient to pay the testator's debts; and that the said sale was made by him in good faith, without any fraudulent intent or purpose. It is not disputed that the testator was indebted to one Richard Romaine on a promissory note for \$1,995, made April 1, 1877, payable twelve months after date. At the time of the sale by the executor, \$1,000 were due on the note, which was paid by the executor, September 22, 1888, by the check he received of Morse for purchase money, and the note was taken up. That Romaine's debt was due from the estate of the deceased, and that \$1,000 of that indebtedness was unpaid when the executor made sale, and that that indebtedness was satisfied by the proceeds of the sale are undisputed. Nor is there any contention in allegation or fact that the executor's sale was a fraud upon the power of sale, either in the manner of advertisement, or in the conduct of the sale, or in the price realized. The property brought \$1,000 at the sale, the one-half interest in which the complainant bought at his sheriff's sale for the sum of \$50. The bill is not framed in that aspect. The object of the suit is to appropriate to the payment of Richard's debt property of the testator put in trust by him for the payment of his own debts, to the exclusion of the testator's creditors. In such a contest as this, Morse, as purchaser at the executor's sale, must

be regarded as succeeding to the rights of Romaine as a creditor of the testator. The testator by his will made disposition of his entire estate, to be wrought out by the intervention of the power conferred upon his executor. He directed that his whole estate, real and personal, should be converted into money, and after making provision for debts, funeral and testamentary expenses, and an annuity to his widow, he gave the residue of the proceeds of his estate in equal shares to his two children. The will containing no actual devise of lands, the title and usufruct of the lands descended to his heirs-at-law, subject, nevertheless, to the power of sale and the trusts declared thereon contained in the will.

The estate which the heirs took at the testator's death was an actual estate, which was alienable, devisable and descendible, and liable to be seized and sold as lands; but, when the power of sale was exercised, the estate of the heirs or his alienee was determined, and the purchaser under the power became seised under the deviser by a title paramount to the title of the heir by descent. *Herbert v. Tuthill*, 1 N. J. Eq. 141; *Den v. Snowhill*, 28 N. J. L. 448; *Gest v. Flock*, 2 N. J. Eq. 108; *Fluke v. Fluke*, 16 N. J. Eq. 478; *Wetmore v. Midmer*, 21 N. J. Eq. 242; *Leggett v. Doremus*, 25 N. J. Eq. 122; *Hollman v. Tigges*, 42 N. J. Eq. 127-131, 5 Cent. Rep. 638; *Moores v. Moores*, 41 N. J. L. 441; *Doe v. Jones*, 10 Barn. & C. 459; *Anonymous*, Jenk. 184.

By the purchase at the sheriff's sale the complainant acquired only Richard's estate as an heir-at-law, subject to the trusts and power of sale contained in the testator's will. If the power of sale subsisted and was capable of being executed at the time of the sheriff's sale, the purchaser at the executor's sale took a title under the testator's will paramount to any estate derived from or through Richard. To prevail in this suit the complainant must show, either that the power had then expired or was extinguished, or present some equitable grounds on which, in a court of equity, creditors of the testator would be postponed in favor of the creditors of Richard.

It is insisted, in the first place, that Richard and his sister had elected to hold the lands as heirs-at-law of their father, and not have them converted into money, under the will, and the proceeds divided between them; and that the complainant is entitled to have Richard abide by his election. Where a testator by his will directs the sale of lands, and the division of the proceeds among his heirs-at-law, the latter may dispense with the sale, and elect to take the lands in lieu of the proceeds of the sale. The bill does not charge an election, and the proof of an election in fact is very meager. The only evidence on the subject is the testimony of Morse. He testified "that the tenant on the farm when he bought did not have the whole farm the last year. He rented the house for \$60 a year, and part of the ground for a certain sum, which, if I knew, I have forgotten. The balance of the farm was rented to different persons. The gross sum which Mr. Terhune received for it was not more than \$5 or \$10 difference from the price I obtained letting it all to one person."

This evidence was brought out in the exam-

ination of the witness touching the value of the property. Morse rented the property for \$125. There was a mortgage on it for \$2,000, and the annual taxes were \$86. The interest and taxes were paid up to the last due-day. For how long a time Richard received the rents, and in what capacity, and what disposition he made of them, whether he applied them to keep down the interest on incumbrances, to pay taxes and repairs for the benefit of the trust estate or for his individual benefit, does not appear. Mrs. Oldis never had possession or exercised control over the property. An election may be inferred from the conduct of the party whose province it is to elect, his acts, omissions and his mode of dealing with the property; but, in order that an election may be inferred from conduct, the acts done must be shown to have been done with the intent to elect, and to be quite decisive. 1 Pom. Eq. Jur. § 515. The burden of proof is on the complainant, and the evidence adduced is insufficient to establish an election in fact by the heirs-at-law. The principle on which the doctrine of election rests is the identity of the interest the heirs take as heirs-at-law and in the proceeds of the conversion into money. Where the whole beneficial interest in the land directed to be converted belongs to the person for whose use it is given, equity will not compel or allow the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the land if he elect to do so; but where there are several *cestuis que trust* taking different interests under the will from what they would do as heirs-at-law, there is no case for the application of the doctrine of election, and the executor must perform the trust created by the will. *Fluke v. Fluke*, 16 N. J. Eq. 479. Under the testator's will the creditors of the testator and his wife were interested in the trusts created by it as well as his heirs-at-law, and the interests of the former had priority over those of the latter. If Richard and his sister as heirs-at-law had made an election, and sufficiently manifested their purpose to do so, they would take as lands only the interest in the realty that was represented by the residuary devise, subject to the prior trusts with which the lands were charged. By no election or act of their own had they power to impair or discharge the rights of the other beneficiaries. In addition to this, Richard, whose estate is in controversy, was under a disability which excluded him from making election. He was the executor, and proved the will, and accepted the trusts created by it. He had not the capacity to do any act, in relation to the trust property, which would inure to his own benefit, and operate to impair or defeat the trusts he undertook to perform.

It was contended, in the next place, that the exercise of the power was not in good faith for any legitimate purpose under the will, but simply for the purpose of hindering and delaying the complainant in the collection of its debt. The charge in the testator's will of his debts upon his estate created a trust which creditors could enforce *ex debito justicie* by compelling the executor to execute the trust. It created also an obligation on the part of the executor to protect the trust estate to answer



the objects of the trust; and it is no impeachment of his conduct towards his own creditors that of his own volition he took steps to execute the trust. If he had stood by and suffered the trust estate to be applied to the payment of his own debts, his conduct would have been a breach of trust. The only act indicative of fraud upon the creditors of the executor charged in the bill is that he induced the sheriff to adjourn the sale, and to postpone delivery of the deed, and hastened a sale under his power, that the deed he might make should be executed and delivered before the sheriff's deed. The utmost effect that can be given to that transaction would be to estop the purchaser from any advantage arising from mere priority of his deed in point of time. It could not avail to extinguish the power or defeat its execution, which would be equally efficacious whether the executor's deed was made after or before the sheriff's deed. In fact the complainant suffered no injury by the postponement of the delivery of the sheriff's deed. The deed operated when delivered as of the date of the sheriff's sale. If the court should be constrained to set aside the executor's deed on that ground, the power would remain to make a new sale in the interests of the testator's creditors with precisely the same consequences. Under this head it was insisted that the creditors of the testator by delay had lost the right to have the trust executed, the creditors of Richard having in the mean time acquired rights which a court of equity would protect against the execution of the power.

The testator died in January, 1879. The executor's sale was made in September, 1888, upwards of nine years after the testator's death. There is no Statute of Limitation applicable to a trust of this character. No limitation can be implied from the limitation imposed by the Statute making lands liable to be sold for the payment of the debts of a decedent. The power to sell to pay debts when the testator charges his real estate with the payment of debts is derived from the will; the title derived under such a power is title under the devise. So favorably does the law regard a charge of debts upon lands that the struggle has been with respect to the application of the Statute of Limitations to the debts so charged. There are cases where an unlimited power of sale will be restrained by the courts. Thus the courts will not permit the execution of a power where the effect will be to create an estate obnoxious to the rule against perpetuities. 1 Lewin, Tr. 605; *Re Cotton's Trustees*, L. R. 19 Ch. Div. 624. So also the court will not allow a power to be executed where, in the interval of time that has elapsed, the object for which the power of sale was created has been substantially accomplished.

In *Peters v. Lewis & E. G. R. Co.*, L. R. 16 Ch. Div. 708, the testator devised his residuary estate to trustees, in trust for his wife for life, and, after her death, to pay and assure the same to his two unmarried daughters in equal shares for their separate use, "and, for the purpose of division," he empowered his trustees to sell his residuary estate. *Vice Chancellor Hall* held that the power of sale determined on the death of the widow, because the daughters as *tenes coheredes* then became abso-

lutely entitled for their use, and the property was "at home." On appeal (L. R. 18 Ch. Div. 430) *Jessel, M. R.*, said: "No doubt you cannot have a power of sale to change the nature of the interests limited by the instrument so as to exceed the limit of time prescribed by the rule against remoteness or perpetuity; . . . and the courts have decided that the powers, although framed in general terms, are limited by the nature of the limitations contained in the settlement or will; so that when, by reason of the expiration or cesser of the limitations, . . . the absolute interests come into existence, then the power is considered to be at an end." He dissented from the view of the vice-chancellor that the power of sale terminated on the death of the tenant for life, and held that, inasmuch as the power was not to be exercised until after the death of the widow, it might be exercised "within a reasonable time after her death occurred." It is manifest that the remarks of the master of the rolls, with respect to reasonable time, had reference to the rule against perpetuities; for the only observation he makes with respect to an interval of time being "reasonable" is that "no one would say that twenty-one years was a reasonable time." The learned master of the rolls was dealing with the validity of the power itself, and there is no indication in the opinion that he entertained the view that a power, in terms unlimited and uncontrolled by an inherent quality in the nature of the power with respect to the purpose for which it was granted, must be executed in a reasonable time or it will become inefficacious.

In *Humble v. Humble*, 2 Jur. 696, the testator devised his real estate to trustees for a term in trust, by a mortgage or sale of all or any part thereof, or out of the rents and profits, to levy and raise a sum or sums as should be necessary to pay debts and legacies, if his personal estate should fall short or be insufficient to pay the same; and, subject to the said term and the trusts thereof, the testator devised his lands to his three sons, Joseph, John and Thomas, and appointed them his executors. The testator died in 1798. The executors proved the will, and possessed themselves of personal estate more than sufficient to pay all the debts and legacies; but the personal estate was wasted and misappropriated, leaving certain legacies unpaid. In 1808, Joseph died insolvent, and in November, 1809, the surviving trustees under the testator's will filed a bill for payment of their legacies out of the real estate by a sale. *Lord Langdale, M. R.*, held that the legatees were entitled to the benefit of the term in priority to the claims of the creditors of the executor. In delivering his judgment, *Lord Langdale* said: "It is not easy to find any distinct equitable ground on which to maintain the claim set up by the creditors against the legatees. Joseph was entitled to one third of the residuary personal estate of the testator, and also to one third of the real estate, subject to the legacies. He was also an executor, whose duty was to see that the legacies were paid, the personal estate being sufficient. Now, it must be said that the legatees ought to have seen that the personal estate was duly applied, and that this was so entirely their duty that, not having done it, they are not to have the benefit of the trust created in their favor in

the real estate. That is a proposition which I think cannot be maintained. The testator intended the legacies to be paid. He gave the residue of his real and personal estate to three persons whom he appointed to be his executors; but he did not leave it in their option out of which fund the legacies should be paid, but created a term, which he vested in trustees for the purpose of raising the legacies if the personal estate should fall deficient to pay them. The personal estate did not fall deficient in consequence of the testator not leaving a sufficiency, but it did fall deficient in consequence of the misappropriation of it by the executors. Are the legatees, then, to be disappointed for the benefit of those who have done the wrong, or can the creditors of the devisees claim that which the devisee was not entitled to? The devisee was only entitled to the share of the reversion after the term should be satisfied. I am of opinion that the legatees are entitled to the benefit of this term."

In *Howard v. Chaffer*, 9 Jur. N. S. 767, the testator devised real estate to trustees for a term to raise money sufficient for the payment of such of his debts as his personal estate should be insufficient to pay. Subject to the term he gave the real estate to his sons, B. and T., whom he appointed executors. The testator's personal estate was sufficient at his death to pay all the debts and legacies. The debts and all but two of the legacies were paid, but the executors spent the rest of the personal estate, and became bankrupts, and had made several mortgages on the real estate for money loaned to them. The testator died in 1846. The bill to charge the unpaid legacies was filed in 1857. *Vice-Chancellor Kindersley*, following *Humble v. Humble*, decreed that the real estate, as against the mortgagees, was subject to the two unpaid legacies.

I have cited these cases because of the similarity of the facts upon which they were decided with those in the case in hand. They are illustrations of the extent to which courts of equity will go to protect beneficiaries under trusts created by a testator from the acts of the trustee, who, at the same time, is executor and an heir-at-law or residuary devisee. Those suits were brought in behalf of legatees. In the settlement of the estates of decedents, creditors always have a preference over legatees; and, in the administration of trust property, creditors of the testator, for whose benefit the trust was created, have a vantage ground vastly superior to that of creditors of the trustee.

No case has come under my observation in which a limitation of time has been imposed upon a power in the nature of a trust not limited in terms, unless where the rule against perpetuities is involved, or the power is controlled by an inherent quality in the nature of the trust or in the object for which the power was granted. In *Souder v. Stout*, 10 N. J. Eq. 377, *Chancellor Williamson* upheld a conveyance made by trustees under a power seventeen years after the power had accrued. In *Moore v. Moore*, 41 N. J. L. 444, the testator by his will directed that his debts should be paid out of his estate, real and personal, and empowered his executrix to sell and convey the real estate to enable her to carry the direction into effect. The testator died in 1884, and in

1886 the executrix settled her accounts in the orphans' court. In January, 1878, the executrix sold and conveyed the lands under the power granted in the will. To overthrow this conveyance the supreme court resorted to a presumption that the debts had been paid, and the power had ceased to have any legal existence, arising from the fact that the power had not been executed until more than forty years had elapsed after the settlement of the testator's estate. *Pearce v. Gardner*, 10 Hare, 287; *Coff v. Hall*, 1 Jur. N. S. 973; *Marsh v. Love*, 42 N. J. Eq. 113, 4 Cent. Rep. 867,—are cases holding that time limited in the power, unless it be made the essence of the power, is directory only, and that a sale may be made after the expiration of the specified time, the court having regard to the substance of the trust for which the power of sale was given. There may be circumstances and conditions under which the default of creditors, in not requiring the execution of a power in their favor, may amount to laches which a court of equity will lay hold of as proof of fraud; as where creditors, with the intent to protect trust property from the creditors of the person ultimately entitled, knowingly permit power of sale to be kept outstanding as a menace to those creditors. The ground of relief in such cases is fraud. But no case of this significance is made in the bill or established by the evidence.

Richard, in his answer, which is responsive to the bill, and uncontradicted, says that he had, for several years, from time to time, made effort to dispose of the testator's real estate at private sale, but was unable to do so. All that appears with regard to his conduct in delaying the sale is that he was holding the property for a market. Romaine duly presented his claim to the executor under oath, which gave him a status to entitle him to have his debt paid out of the assets provided for the payment of debts. He received from the executor substantial payments on account: in April, 1883, \$400; October 16, 1883, \$200; May 15, 1884, \$200; and May 19, 1885, in sums paid at various times, \$200 was credited on the note. In 1884 or 1885, he brought suit on the note, and on receiving a payment, June 30, 1886, \$85, on account, did nothing after that except soliciting payment of the balance at different times. His debt was a bona fide debt. He had ample security for its payment in the charge upon lands by the will, which was on record, and notice to Richard's creditors that the lands were liable for the payment of the testator's debts in priority of any estate or right of Richard therein. In these facts I see no evidence of fraudulent conduct on the part of Romaine towards Richard's creditors which should deprive him of his rights as a creditor of the testator to have his debt paid out of the assets the testator provided for the payment of his debts.

The debt of Richard, for which the complainants' judgment was entered, was contracted in January, 1878, a year before the testator's death. The complainants did not give credit to Richard upon the faith of his ownership of these lands; nor were the complainants hindered or delayed in the collection of their debt by Richard's delay in executing the trust. They recovered their judgment in November, 1880, and might have proceeded at once to sell

the estate of Richard as heir-at-law, subject to the power of sale conferred by the will, and might have gone into possession, and had the receipt of the rents and profits until a sale under the power was effected, and also would thereby have been in position to coerce a speedy settlement of the estate. The execution under which the levy and sheriff's sale were made was not issued until the 11th of May, 1888. By the supineness of all concerned,—Richard, the executor, who, as one of the residuary devisees, was interested in procuring a good market for the premises, Romaine, the creditor, whose debt was amply secured, Mrs. Oldis, who was interested with Richard in the residuary estate, and the complainants, who might have sold

immediately upon the recovery of their judgment in 1880,—the power of sale was suffered to remain unexecuted until the sheriff's sale in September, 1888, precipitated the action of the executor in looking after the threatened diversion of the trust property from the purposes of the trust to the payment of his own debts. Upon the case made by the bill, and the facts appearing in the record, I am unable to agree with the views of the learned vice-chancellor that the title of the complainants under the sheriff's sale was superior to that of the purchaser at the executor's sale, and shall vote to reverse and dismiss the bill.

*Unanimously reversed.*

### NEW MEXICO SUPREME COURT.

William B. CHILDERS, Trustee, etc., *Appt.*,  
John A. LEE, Exr., etc., of William E. Talbott, Deceased.

(....N. M. ....)

1. The words "two-thirds part at least of the thing demised," which designate the rent to be reserved, in the exception in the Statute of Frauds as to leases for not more than three years, mean two-thirds part of the rental value of the demised premises, and not of the value of the fee.
2. An entry under a parol agreement for a written lease of a room for a year provided the lessor obtains a renewal of the ground lease does not create a tenancy from year to year, but only a tenancy at will, although the ground lease is obtained, where no written lease of the room is accepted or tendered.

(January Term, 1891.)

**A** PPEAL by plaintiff from a judgment of the District Court for Bernalillo County in favor of defendant in an action brought to recover rent alleged to be due and unpaid. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. William B. Childers, in propria persona, and Needham C. Collier, for appellant:*

The parol letting shown by the evidence in this case was a lease not exceeding the term of three years from the making thereof, and the rent reserved to the landlord during the term amounted to two-thirds part at the least of the full improved value of the demised premises. It therefore comes within the exception in the second section of the Statute of Frauds, and was good under the Statute.

*Childers v. Talbott*, 4 N. M. 168; *Browne*, Stat. Fr. 89, chap. 3 *et seq.*; *Wood*, Stat. Fr. §§ 1, 2; 1 Washb. Real Prop. 298, 391; *Taylor, Land. and T.* §§ 27, 30; 6 *Jacobs' Fisher's*

- *NOTE*.—Lease for not more than three years; Statute of Frauds construed.

*Putnam, J.*, said, in an opinion rendered in the case of *Ellis v. Paige*, 1 Pick. 47, published as a note to *Coffin v. Lunt*, 2 Pick. 70, that the constructions which had been given by the English courts to the exception in the Statute of Frauds as to parol leases which did not exceed three years, and which reserved a rent amounting "unto two-thirds part at least of the full improved value of the thing demised," contained no reference to the clause as to the rent reserved, and that the exception as to the matter was practically useless.

Some of the American courts, however, recognize the rent clause and enforce it. *Gano v. Vanderveer*, 34 N. J. L. 203; *Cody v. Quarterman*, 13 Ga. 386.

The New Jersey court requires one suing on a parol lease to show, in the first instance, that the rent reserved is sufficient to bring the case within the exception, and will nonsuit in the absence of such proof. *Gano v. Vanderveer, supra*.

The Georgia court holds that the fact that the lease is within the Statute is a matter of defense, which must be pleaded before plaintiff is compelled to show that his case is within the exception. *McDougald v. Banks*, 13 Ga. 451.

The authority seems unanimous, so far as it goes, that the clause means two thirds the full rental value of the property. *Union Bkg. Co. v. Gittings*, 45 Md. 181.

12 L. R. A.

The English Statute of Frauds expressly limits parol leases to those not exceeding three years from the making thereof; and this rule is followed in some of the States (2 *Reed*, Stat. Fr. § 818) and in Canada. See *Kaatz v. White*, 19 U. C. C. P. 36; *Brewing v. Berryman*, 3 *Pugs.* (N. B.) 115; *Hurley v. McDonnell*, 11 U. C. Q. B. 208, cited in *Woodfall, Land. and T.* § 127, note.

Where the clause "from the making thereof" is omitted from the Statute, the number of years is generally considered "solely with reference to the duration of the term." *Woodfall, Land. and T.* § 127; 2 *Reed*, Stat. Fr. § 814, citing *Sears v. Smith*, 3 *Colo.* 290; *Sobey v. Briscoe*, 20 *Iowa*, 105; *Jones v. Marcy*, 49 *Iowa*, 188; *Steininger v. Williams*, 63 *Ga.* 475; *Taggard v. Roosevelt*, 2 *E. D. Smith*, 100; *Young v. Dake*, 5 *N. Y.* 465; *Beac v. Flues*, 64 *N. Y.* 518. See *Boiton v. Tomlin*, 5 *Ad. & El.* 856.

Under the English Statute, if the rent reserved does not amount unto two-thirds parts at the least of the full value of the thing demised, it is void at law as a lease, but may operate as an agreement for a lease. *Parker v. Taswell*, 2 *De G. & J.* 559, 27 *L. J. Ch.* 812; *Cowen v. Phillips*, 38 *Beav.* 18; *Bond v. Rosling*, 1 *Best & S.* 371; *Rollason v. Leon*, 7 *Hurlst. & N.* 73; *Tidey v. Mollett*, 16 *C. B. N. S.* 298; *Hayne v. Cummings*, *Id.* 421, cited in *Woodfall, Land. and T.* § 127,

Dig. 8189, citing English cases; *Crosby v. Wadsworth*, 6 East, 602; *Huffman v. Starks*, 81 Ind. 474; *Union Bkg. Co. v. Gittings*, 45 Md. 180; *Birkhead v. Cummins*, 88 N. J. L. 44; *Edge v. Strafford*, 1 Cromp. & J. 891; *Shepherd v. Cummings*, 1 Coldw. 854; *Gano v. Vanderveer*, 84 N. J. L. 298; *McDougald v. Banks*, 18 Ga. 451; *Cody v. Quarterman*, 12 Ga. 386.

Although the agreement might be void under the Statute of Frauds, yet when a party enters under an agreement for a lease for years he becomes, by the payment of rent, a tenant from year to year.

Wood, Stat. Fr. § 19, p. 47, §§ 31 *et seq.* p. 55; Browne, Stat. Fr. § 88, p. 46; Taylor, Land. and T. § 2, chap. 2, p. 44; 4 Kent, Com. 114; 1 Washb. Real Prop. 891; *Stedman v. McIntosh*, 4 Ired. L. 291, 42 Am. Dec. 123, 182, and note; *People v. Rickert*, 8 Cow. 225; *Schuyler v. Leggett*, 2 Cow. 660; *Jackson v. Wisley*, 9 Johns. 267, 4 N. Y. L. ed. 758, note; *Scully v. Murray*, 84 Mo. 484; *Hammon v. Douglas*, 50 Mo. 430; *Kerr v. Clark*, 19 Mo. 132; *Lounsbury v. Snyder*, 81 N. Y. 514; *Laughran v. Smith*, 75 N. Y. 205; *Coffin v. Lunt*, 2 Pick. 71, and note, with opinion of Putnam, J., in *Ellis v. Page*, 1 Pick. 47; *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 616; *Drake v. Newton*, 28 N. J. L. 111; *Lockwood v. Lockwood*, 22 Conn. 425; *Coan v. Mole*, 89 Mich. 454; *Kopitz v. Gustavus*, 48 Wis. 48; *Williams v. Ackerman*, 8 Or. 405; *Waring v. Louisville & N. R. Co.* 19 Fed. Rep. 863. See also *Lyon v. Cunningham*, 186 Mass. 540, showing that the law in Massachusetts differs from that in England and the States generally.

An agreement for a lease, under which the lessee goes into possession and pays rent, will be construed to be a present demise.

Taylor, Land. and T. §§ 41, 43, 44, pp. 34, 36; *Stedman v. McIntosh*, 4 Ired. L. 291, 42 Am. Dec. 123, note; Wood, Stat. Fr. § 19, p. 47; *Curling v. Mills*, 6 Man. & G. 173; *Jenkins v. Eldredge*, 3 Story, 325; *Mason v. Clifford*, 4 Rep. 180.

Nor would the failure of the lessor to tender a written lease justify the lessee in repudiating the contract. He should demand the lease.

*Fuller v. Hubbard*, 6 Cow. 18; Taylor, Land. and T. p. 41, note; *Goodfellow v. Noble*, 25 Mo. 60.

And although a parol lease, or agreement for a lease, be void under the Statute of Frauds, yet if the lessee enters under it the contract will be enforced.

*Grant v. Ramsay*, 7 Ohio St. 165; *Jones v. Peterman*, 8 Serg. & R. 548.

This tenancy, having commenced by defendant's taking possession and paying rent, cannot be ended by abandonment, without notice. That would be to hold the tenancy one of sufferance, and no authority sustains this. A tenancy at will could not be ended without notice, and such estates have become almost extinct.

4 Kent, Com. 12th ed. 118, 114, 115; Taylor, Land. and T. p. 48, §§ 59 *et seq.*; 1 Washb. Real Prop. 89; *Lyon v. Cunningham*, *supra*; *Emmons v. Scudder*, 115 Mass. 367.

*Mr. Neill B. Field*, for appellee:

The exception in the Statute of Frauds does not save all leases for less than three years, but only such whereupon the rent reserved to the landlord during such term shall amount to 12 L. R. A.

two-thirds part at the least of the full improved value of the thing demised. The rent for the term must be equal to two thirds of the full improved value of the fee.

*Gano v. Vanderveer*, 84 N. J. L. 298; Taylor, Land. and T. § 28, and note; Browne, Stat. Fr. § 82; *Cody v. Quarterman*, 12 Ga. 386; *Birkhead v. Cummins*, 88 N. J. L. 44; Smith, Cont. 4th Am. ed. 139.

The contract disclosed by the evidence is void under the fourth section of the Statute of Frauds, being a contract not to be performed within a year.

*Delano v. Montague*, 4 Cuah. 42; Taylor, Land. and T. § 80, and cases cited; *Parker v. Hollis*, 50 Ala. 411; *Cronwell v. Crane*, 7 Barb. 191; *Wheeler v. Frankenthal*, 78 Ill. 124; *Porter v. Gordon*, 5 Yerg. 100; *Ragsdale v. Lander*, 80 Ky. 61.

The Statute of Frauds is an obstacle to the recovery upon any contract which is verbal and by its terms not to be performed within one year from its being made; that it has been in part performed will make no difference.

*Davenport v. Gentry*, 9 B. Mon. 428; *Montague v. Garnett*, 3 Bush, 298; *Kieeman v. Collins*, 9 Bush, 460.

An instrument (or contract) will be construed a lease or only an agreement for a lease, according to what appears to have been the paramount intention of the parties, as such intent may be collected from the whole tenor and effect of the instrument.

Taylor, Land. and T. § 88, and cases cited; *Porter v. Mercer*, 58 Cal. 667; *Jenkins v. Eldredge*, 3 Story, 325; 1 Washb. Real Prop. 301; *Lyon v. Cunningham*, 186 Mass. 532.

Where rent is to be paid on a parol contract for lands at periods less than a year a tenancy is held to run accordingly.

*Prindle v. Anderson*, 19 Wend. 391, 23 Wend. 616; *Hollis v. Burns*, 100 Pa. 208; Taylor, Land. and T. § 57, and cases cited; *Hart v. Lindley*, 50 Mich. 20.

A party who goes into possession of lands under an agreement to take a lease becomes, after his refusal to do so, a tenant at will.

*Dunne v. Trustees of Schools*, 39 Ill. 578.

The parol agreement could only be validated by the lessee's acceptance of a valid lease.

*Cronwell v. Crane*, 7 Barb. 191.

**Seeds, J.**, delivered the opinion of the court:

This is the second time that this case has been in this court. It is reported in 4 N. M. 168, as *Childers v. Talbott*. The defendant, Talbott, having died since the first hearing, his executor, John A. Lee, was substituted in his place upon the record. There was a retrial before a jury, and, upon motion of the defendant, the court instructed the jury to find for him. It is an action in assumpsit against the executor, Lee, for an alleged balance due upon a parol lease. The appellee contends (1) that the lease was void, as being within the Statute of Frauds, in that it was not to be performed within a year from its agreement; (2) that it did not come under the exception mentioned in section 2 of said Statute, which provides, "except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to

the landlord during such term shall amount to two-thirds part at the least of the thing demised," because the amount in value reserved as rent herein means two thirds of the value of the fee, not the rental value; and (3) that the contract testified to was a mere executory agreement for a lease in writing upon certain conditions, which were never fulfilled, and that notwithstanding the entry and payment of rent, it was never anything more than an agreement for a future lease, and the occupancy was simply a tenancy at will. The appellant contends, upon the other hand, (1) that the oral lease is good under the second section of the Statute of Frauds; (2) that, even if it were not, when a party enters under an agreement for a lease for years he becomes, by the payment of rent, a tenant from year to year; (3) an agreement for a lease, under which the lessee goes into possession and pays rent, will be construed to be a present demise; (4) a failure of the lessor to tender a written lease will not justify the lessee in repudiating the contract, — he should demand the lease; (5) though a parol lease, or an agreement for a lease, be void under the Statute of Frauds, yet if the lessee enters under it the contract will be enforced. He assigns as error therefore (1) the directing of a verdict for the defendant; (2) in overruling the plaintiff's motion for a new trial; (3) in giving judgment for the defendant.

As to the first two contentions of the defendant there is not now room for argument, for while the contract was not to be performed within a year, yet it was a lease for less than three years, upon which the rent reserved was at least two-thirds part of the thing demised; and it is now held in this Territory, and is the general holding of the courts of the country, that this means two-thirds part of the rental value of the demised premises. *Childers v. Talbott*, 4 N. M. 168. Whether or not the contention of the appellant is correct depends entirely upon the nature of the holding by Talbott. Was he holding under the oral lease which was to be afterwards simply put into writing? All the testimony was introduced by the plaintiff. The testimony of the defendant, Talbott, taken upon the previous hearing, was introduced by the plaintiff. The evidence was practically unanimous that Mr. Talbott was to have the lease of the room for one year at a monthly rental of \$60 from April 1, 1888, provided that the plaintiff could secure a renewal of the ground lease, which terminated about June 1, 1888; that Talbott went into possession April 1, 1888; that no lease in writing was ever tendered to the defendant; that he objected to the closing of a certain door between his room and an adjoining one used as an opera house; that upon the failure of the plaintiff to open said door he returned the keys to the plaintiff's *cestui que trust*, and tendered the balance of rent up to the time of leaving, which was declined, though the keys were retained. Whether or not this oral agreement between Childers and Talbott was a lease, or only an agreement for a lease, depends upon the terms thereof, and the action of the parties under it.

If there is a condition attached to the granting of the lease, and it is to be subsequently executed, it operates only as an agreement for a lease. Taylor, Land, and T. 5th ed. § 89.

"Whenever, therefore, the instrument makes the demise dependent on a condition or stipulation yet to be performed, it operates as an agreement only." Id. § 40.

It is quite certain, then, that the agreement testified to was an agreement for a lease, and until Talbott obtained a written lease, or was entitled to one under this contract, that his holding, whatever its character and consequences, depended entirely upon the oral agreement for a lease. He entered under that. It is contended, therefore, that, as the agreement was for a year, the law contemplates the taking possession and paying the rent as a present demise, and that the tenancy is one from year to year. To this proposition the appellant cites an array of authorities which, if in point, would be absolutely decisive of the question. The cases of *Kerr v. Clark*, 19 Mo. 182; *Laughran v. Smith*, 75 N. Y. 206, and *Kopitz v. Gustavus*, 48 Wis. 48, are typical of the doctrine contended for, yet in each case the contract was an oral agreement for a term of years, upon which term the tenant had entered and occupied over one year. It was held in these cases that the terms of the agreement and the acts of the parties conclusively showed that it was an agreement for a lease from year to year. In all these cases where there was an agreement for a lease, and an entry under that agreement, and the courts have held the tenancy to be in accordance with the oral contract, it was possible for the tenant at any time to demand the written lease, and for the landlord to give it. In the case at bar that rule would not hold. At any time before the renewal of the ground lease by the plaintiff it would have been impossible for the landlord to have given a written lease which would have then and there invested the tenant with a term for a year. Yet the contention is that what the landlord could not do the law by implication will do; for the argument is that, when the tenant entered under the oral agreement, he at once entered upon a tenancy from year to year; not when the ground lease was obtained, but upon April 1. All the rights of such a tenancy then attached as against the tenant, and, as the rights of the landlord and tenant are reciprocal, against the landlord. Put the position to the test. If, now, the plaintiff had failed to obtain the ground lease, could Talbott have sued Childers for damage for a failure to protect him in his yearly tenancy? Clearly not, under the lease agreed for, for that was a conditional lease; but if, in spite of that condition, he was in for a year under the oral agreement, then the landlord could have been held for damages for a failure to make the term good. This was not contemplated by either the terms of the agreement or acts of the parties. It is quite evident that, under the facts in this case, the tenancy here was not from year to year, but at most at will.

If the tenant had taken the written lease which had been agreed upon, when the plaintiff was in a position to give it, or if it had been tendered him, and without a legal reason he had refused it, there would then have been no question but that the term would have been changed into one from year to year. But there is no evidence whatever that a written lease was ever tendered him; such lease was to be

given when the plaintiff obtained a renewal of the ground lease. The presentation of such a lease may reasonably have been considered notice that the plaintiff had received the renewal lease. The fact that the plaintiff did receive the renewal lease did not raise any obligation upon the part of Talbott to demand that the plaintiff should do what he agreed to do. If the plaintiff sought to hold Talbott upon a contract which was to be in writing, and he was to place it in that form, it was his duty to do so, not Talbott's. The cases cited by the plaintiff, being *Fuller v. Hubbard*, 6 Cow. 1, and *Goodfellows v. Noble*, 25 Mo. 60, do not sustain the principle contended for. The fatal error upon which the plaintiff bases his whole case is in assuming that the agreement for a written lease upon conditions, and an entry thereunder, is the creation of a tenancy from year to year absolute in its character, which binds

the defendant to pay a year's rent, unless six months' notice of intention to vacate is given. The acts of Talbott in objecting to the closing of the door, and leaving because of the failure upon the part of the plaintiff to remedy it, must be considered in reference to the tenancy which he then had,—that at will. It was that tenancy which he terminated because of the alleged wrong of the plaintiff. If he had been tendered the lease agreed upon, and accepted it, or without legal reason had refused it, then possibly the reason given for abandoning the tenancy would have been fruitless. The plaintiff declared upon a contract which was only an executory agreement, and, failing to prove himself entitled to rent thereunder, the rulings of the court were proper, and the judgment is affirmed.

O'Brien, Ch. J., and Lee, Freeman and McFie, JJ., concur.

### TENNESSEE SUPREME COURT.

W. C. DIBRELL, Admr., etc., of Jane M. Morris, Deceased,

v.  
L. H. LANIER *et al.*

Madison STRATTON *et al.*

W. C. DIBRELL, Admr., etc., of Jane M. Morris, Deceased.

(....Tenn.....)

1. The words "lunatic or non compos mentis" in the Act of April 1, 1888, which provides that if personal estate of which a lunatic or non compos mentis dies seised intestate was derived from such person's intestate husband or wife it shall go to the next of kin of the person from whom it was derived, mean one who has not sufficient mental capacity to make a will.
2. The next of kin of a person are not deprived of any "property" by a statute which provides that on the death of such person his personal property shall go to persons other than his next of kin and therefore the constitutional provision as to depriving persons of "property" does not apply to the statute so far as it relates to them.
3. The right to transmit property by inheritance to one's descendants or next of kin is "property," within the meaning of the constitutional provision that a person shall not be deprived of property except by judgment of his peers or by the law of the land.
4. A statute providing that the personal estate of an intestate lunatic, if derived from an intestate husband or wife, shall go to the latter's next of kin, is unconstitutional, because the classification of persons thereby made is unnatural, arbitrary and capricious, in consequence of which the statute is not a "law of the land" within the meaning of the Constitution.

(January 18, 1891.)

**A**PPEAL by the next of kin of K. J. Morris, deceased, from a decree of the Chancery Court for Davidson County, which awarded

personal property, of which Morris' widow died seised intestate, and which she derived from him, to her next of kin rather than to appellants. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Vertrees & Vertrees, for the administrator:

Class legislation which is inconsistent with the laws of the land is void. A law which makes an arbitrary classification, and which is against the plain and obvious dictates of reason, is void.

See *Calder v. Bull*, 3 U. S. 8 Dall. 386, 1 L. ed. 648; *Bank of the State v. Cooper*, 2 Yerg. 603, 24 Am. Dec. 517; *Lynn v. Polk*, 8 Lea, 169.

There must be a substantial difference, having reference to the purpose or object of the Act, between the persons included within, and excluded from, the Act.

*Atlantic City W. W. Co. v. Consumers Water Co.* 44 N. J. Eq. 486; *State v. Hammer*, 42 N. J. L. 440; *Cooley*, Const. Lim. 4th ed. 492; *Anderson v. Trenton*, 42 N. J. L. 488; *Ayars' App.* 2 L. R. A. 577, 123 Pa. 266; *Allen v. Pioneer Press Co.* 3 L. R. A. 532, 40 Minn. 117, 12 Am. St. Rep. 709; *Memphis v. Fisher*, 9 Bart. 239; *Hatcher v. Lea*, 12 Lea, 868; *Raglo v. State*, 56 Tenn. 276; *Parks v. Parks*, 12 Helak. 633; *Demoville v. Davidson County*, 87 Tenn. 218; *Dickson v. Carson*, Nashville, March 7, 1888.

Mr. Albert D. Marks, for the Morris heirs, appellants:

So far as the opinions of this court are concerned, there are only three limitations upon the discretion of the Legislature in its enactments affecting classes.

The first is that laid down by Judge Freeman in his dissenting opinion in the case of *Luckrman v. Shelby County Taxing Dist.*, 2 Lea, 425, which, in effect, holds that the Legislature cannot create and legislate for a class whose members are to be ascertained by a test or characteristic existent at a certain fixed period, which designation or characteristic can never be attained to or had by any person or locality that may thereafter exist in this State.

See *Brown v. Haywood*, 4 Helak. 363; *Mem*



*this v. Fisher*, 9 Baxt. 239; *Woodard v. Brien*, 14 Lea, 520.

The next is in *Demoville v. Davidson County*, 87 Tenn. 214, to the effect that the class affected by the legislation must be a natural and not an arbitrary one.

See *Hatcher v. State*, 12 Lea, 368.

The other is to be found in *Dickson v. Carson*, *supra*, that the courts will interfere when the Legislature goes to the extent of caprice or folly in naming the attributes to mark the class.

From the decisions of this court, these rules for determining the constitutionality of Acts are fairly deducible:

1. Class legislation is permitted; but legislative Acts relating to classes must be general laws.

*Davis v. State*, 8 Lea, 376; *Manley v. State*, 6 Lea, 231; *Theilan v. Porter*, 14 Lea, 622.

2. A general law is one embracing and affecting all persons in general, or all persons who exist in the same State and are surrounded by like circumstances.

*Hatcher v. State*, *supra*; *State v. Schlier*, 8 Heisk. 281; *Parks v. Parks*, 12 Heisk. 683; *State v. Rauscher*, 1 Lea, 96; *Fulgum v. Nashville*, 8 Lea, 635; *Robbins v. Tazewell Dist.* 13 Lea, 303.

3. A law embracing only a portion of those who exist in the same State and are surrounded by like circumstances is a partial law and void.

*Hatcher v. State*, *supra*; *Daly v. State*, 13 Lea, 228; *Green v. State*, 15 Lea, 708; *Raglo v. State*, 86 Tenn. 272.

4. It is not competent for the Legislature, in defining those to whom a law shall apply, to use some characteristic existent at a certain fixed period, which can never be attained to by any other person.

*Luehrman v. Shelby County Tax. Dist.* 2 Lea, 463; *Brown v. Haywood*, 4 Heisk. 368; *Memphis v. Fisher*, 9 Baxt. 239; *Woodard v. Brien*, 14 Lea, 520; *Burkholtz v. State*, 16 Lea, 71.

5. The classes legislated for must be natural, not arbitrary.

*Demoville v. Davidson County*, 87 Tenn. 214.

6. It matters not how few the persons are, if all who are or may come into like circumstances be embraced, the law is a general and not a partial law.

*Budd v. State*, 3 Hun, 492.

Applying these tests to the Act of 1885, it is clearly good.

*Messrs. East & Fogg, Hill & Granberry and John Lillywell, Sr.*, also for the Morris Heirs, appellants.

*Messrs. H. D. Malone, Demoss & Malone, Thayer L. Kennedy, Sleyer & Washington and Breen & Taylor*, for the Stratton Heirs, appellees:

This Act is unconstitutional.

No man shall be deprived of his life, liberty or property but by the judgment of his peers or the law of the land.

Tenn. Const. art. 1, § 8.

The clause "law of the land" means a general and public law equally binding upon every member of the community.

*Vansant v. Waddel*, 2 Yerg. 270; 2 Coke, Inst. 51; *Bank of the State v. Cooper*, 2 Yerg. 605.

It is not true that every Act passed by the 12 J. R. A.

Legislature is valid unless a specific inhibition is pointed out in the Constitution. Such Act is not the law if it violates "the established principles of private rights and distributive justice."

*Bank of the State v. Cooper*, *supra*; *Ottions Sav. & L. Asso. of Cleveland v. Topeka*, 87 U. S. 20 Wall. 662, 663, 22 L. ed. 460, 461; *Taylor, Corp.* § 456.

To be valid this Act should have applied to all intestates receiving personalty from a deceased intestate husband or wife, "and because it has not done so, it is not the law of the land."

See *Bank of the State v. Cooper*, *supra*; *Cooley*, Const. Lim. 5th ed. 208, 209.

If this Act be valid, our Statute of Distribution would in effect declare: "The property which every widow receives from the estate of her deceased intestate husband is hers absolutely, and if she dies intestate her children or collateral kin shall inherit it; but lunatics shall not have the benefit of this Statute. They shall hold such property for life, and upon their death their children or collateral kin shall not inherit it—it shall go to the heirs of the party from whom derived." That this is unconstitutional and void seems evident.

*Raglo v. State*, 86 Tenn. 272; *Hatcher v. State*, 12 Lea, 368; *Burkholtz v. State*, 16 Lea, 71; *Green v. State*, 15 Lea, 708; *Woodard v. Brien*, 14 Lea, 520.

Infants constitute a proper class for legislation, but no one will contend that the Legislature would have the power to deny to them the benefit of the Statute of Descent and Distribution.

*Cochran v. Van Surlay*, 20 Wend. 365; 373, cited and quoted by *Cooley*, as part of his text, *Cooley*, Const. Lim. 5th ed. 121, 122. See also *Woodard v. Brien*, *Burkholtz v. State*, *Green v. State* and *Hatcher v. State*, *supra*.

*Baxter, Sp. J.*, delivered the opinion of the court:

K. J. Morris, when about sixteen or seventeen years old, began mercantile life as a clerk in a store in Nashville. He was very poor, but, being industrious and economical, he saved money from his salary. In 1842 he married Jane M. Stratton. In 1845, he became a member of the partnership of Lanier, Morris & Co., and he contributed \$4,000 as his share of the capital of that firm. About one month before the formation of said partnership, he and his wife sold a negro woman and three children for \$1,175. The negro woman had been bequeathed to Mrs. Morris by her aunt, but there is nothing to show that Morris used the proceeds of the sale in contributing his share to the capital of said firm, except the fact that his financial condition at the time renders it probable that he was compelled to do so. His connection with that firm was the foundation of his success, which, while slow, was steady and sure. His estate at his death was valued at over \$200,000. The early years of his married life were as happy as they were prosperous. His wife was a home-staying, husband-loving woman. She was quiet and retiring in her disposition, industrious and economical in her habits. She made most of her own clothing, and much of her husband's underwear. She

was an excellent housekeeper and a fine manager. How much her wise and economical management of their household affairs may have contributed to her husband's financial success in life, we have no means of knowing. She had but one child, a son, and he was her idol. In 1861, when he was about seventeen years old, he was accidentally killed, and she was never the same woman afterwards. She withdrew from society, became gloomy and melancholy in her disposition, and would frequently fall into spells of uncontrollable weeping. In 1882, she was fearfully afflicted with carbuncles. The disease finally merged into cataplexy, and her mind became visibly and seriously impaired. On April 19, 1884, her husband died intestate, and without issue, leaving his wife surviving him. His real estate was valued at \$100,000, and his personal estate at \$120,000. According to the Statutes of Descent and Distribution then in force his real estate went to his heirs-at-law, and his personal estate went to his widow, and, if those Statutes had remained in force and she had died intestate, unmarried and without issue, the personal estate inherited by her from her husband would have gone to her next of kin. On April 24, 1884, just five days after her husband's death, her brother Madison Stratton, who is one of the complainants, filed a petition against Mrs. Morris, in the County Court of Davidson County, in which petition he averred that she was then "a lunatic, or a person of unsound mind," and had been for nearly or quite two years, and that, by reason of her mental infirmities, as aforesaid, she was "entirely incapable of managing, or in any way controlling, her said property and estate, or of taking care of her own person." Mr. Kennedy, one of the solicitors who signed the petition, is the husband of one of the nieces of Mrs. Morris. A guardian *ad litem* was appointed for Mrs. Morris, testimony was taken and the jury of inquest found that she was a person of unsound mind, so that she had not capacity sufficient for the government of herself and her property; that the said unsoundness of mind and mental incapacity had "existed for about eighteen months, and that it resulted principally, if not wholly, from physical afflictions, and from physical causes." The verdict of the jury was made the judgment of the court on the 1st day of May, 1884, and a guardian of her person and property was appointed, who is the husband of one of her nieces. She remained under said guardianship until her death. At the first session of the Legislature which met after she had been declared a lunatic, Mr. Robert L. Morris, a nephew of her husband, prepared a bill, which was passed by the Legislature April 1, 1885, as chapter 88 of the Acts of 1885, the effect of which, if constitutional, will be to give the personal estate which Mrs. Morris inherited from her husband to her husband's next of kin, instead of to her own, provided it shall be found that she was "a lunatic, or *non compos mentis*." Mr. Morris says that he spoke to five members of the Legislature regarding the passage of the law, explaining to them its scope and bearing, and its effect upon the estate of K. J. Morris. He spoke to them of the hardship of the existing Statute of Descent and Distribution, as

illustrated by this estate, and that there was a chance to modify one of its defects, namely, that which gave all of an intestate husband's personal property to his widow, in the absence of children. Mr. Morris also talked with Gov. Bate about the law, explaining to him, among other things, what effect it would have upon the estate of Mrs. Morris. The governor said that he was equally friendly with the Stratton and Morris families, but would approve the law on its merits, as he regarded it a good law. Mr. Morris says that he did not speak to any member of the Morris family about the introduction of the law, nor communicate with them in any way concerning it; but, after its passage had been recommended by the judiciary committee, he mentioned it to several persons who were members of, or connected with, that family. Mr. Morris charged no fee for anything done in connection with the passage of the Act, and he never received any compensation for his services. There is nothing whatever in the record to even intimate that he resorted to any sinister methods to influence the action of the members of the Legislature. On the other hand, there is nothing to show that any member of the Stratton family had any notice that such a bill had been introduced into the Legislature until after the Legislature had adjourned. Mr. Kennedy states that Mr. Morris never told him of the law until Mr. Kennedy found it in the published Acts of 1885, and called his attention to it.

Mrs. Morris continued under guardianship until December 19, 1888, when she died, intestate, unmarried and without issue. On December 20, 1888, Mr. Dibrell was appointed her administrator, and, on January 10, 1889, he filed a bill in the nature of a bill of interpleader, against the next of kin of K. J. Morris, and the next of kin of his widow, to settle the question as to which of them are entitled to the personal estate which the widow inherited from her husband. The next of kin of the widow (who, for brevity, will be hereafter styled the "Stratton claimants") insist that they are entitled to said personal estate, under the general Statute of Distribution of the State contained in section 2429 of the Code of 1858. The next of kin of K. J. Morris (who, for brevity, will be hereafter styled the "Morris claimants") insist that they are entitled to said estate, under said Act of April 1, 1885, which is as follows: "An Act to Amend Section 3278 of the Code of Tennessee, by Milliken and Vertrees (section 2429 of the Code). Section 1. Be it enacted by the General Assembly of the State of Tennessee that section 3278 of the Code of Tennessee, by Milliken & Vertrees, be amended as follows: If the personal estate, as to which any person dies intestate, and who was a lunatic, or *non compos mentis*, was derived, in whole or in part, from an intestate husband or wife, then, in that event, so much of the personal estate as was so derived, and remains unexpended, or in the possession of any guardian or custodian of the estate of said lunatic or *non compos mentis*, shall go to the next of kin of the person from whom it was so derived, said next of kin to take in the order named in said section in the case of the personal estate of intestates. Sec. 2. Be it further enacted that this Act take effect

from and after its passage, the public welfare requiring it. Passed April 1, 1885. Approved April 6, 1885."

The Stratton claimants insist that said Act has no application to the estate of Mrs. Morris, because, as they say, she was not a "lunatic, or *non compos mentis*," within the meaning of those terms, as used in said Act; and they further insist that said Act is in violation of several provisions of the Constitution of the State of Tennessee. We think that the Legislature used the words "lunatic or *non compos mentis*," in the Act, to denote a person who has not sufficient mental capacity to make a will, and therefore the first question is whether Mrs. Morris, at the time of her death, was possessed of "a sound and disposing mind and memory." Since the passage of the Act of 1885, a bitter controversy has arisen between the Morris family and the Stratton family, and most of the witnesses belong to, or are allied with, one or the other of those families. The testimony of all such witnesses, taken since the passage of said Act, is subject to criticism, as being affected, more or less, by interest or prejudice. But the testimony taken upon the inquisition of lunacy in 1884, before said Act of the Legislature was passed, is subject to no such criticism. The inquisition was instituted and prosecuted by the Stratton family, and, though certain members of the Morris family were examined as witnesses before the jury, they were doubtless introduced by the petitioner, Madison Stratton, who was a brother of Mrs. Morris, and, at the time they gave their testimony, they had no idea that they would ever be interested in the estate of Mrs. Morris. At the inquisition, Dr. Thomas L. Maddin testified that he had been her husband's family physician for twenty-five years. He says: "I think she is a person of unsound mind, to the degree that she is not capable of governing herself or her property. Her mind is impaired by this disease. At times she has lucid intervals, in this sense: She recognizes her friends, and sometimes speaks in monosyllables of three or four words. I do not think she could give directions about her estate. If asked to sell a piece of property, she could not do so. She has not sufficient mind to make negotiations concerning property. She has not sufficient mind to govern herself or property." "She has not sufficient capacity to care for herself or property, and has not had, for eighteen months or more, except for minor physical wants." Dr. John H. Callender, superintendent of the Tennessee Asylum for the Insane, testifies as follows: "Her physician and nurse described to me her disease and accompanying symptoms, and the nature of her attacks. My opinion from these, and my observation and diagnosis of her case, was that her insanity and imbecility were progressive in character, and that it would end in final dementia." "At the time of my visits, she was so unsound in mind as to be wholly incapacitated to govern herself in person or property." All of the non-expert witnesses examined at the inquisition expressed the opinion that she was of unsound mind, and they stated the facts upon which their opinions were based. It is true that, after she was placed under guardianship, there was a steady and marked improvement in her condition, both

physical and mental, and it is barely possible that, if she had lived a few years longer, her mind might have been completely restored. But we do not think that her mental condition ever improved, in fact, sufficiently to have enabled her to make a valid will. Mr. Dibrell, who was her guardian, and the husband of one of her nieces, testifies that she was not capable of managing her affairs, or of comprehending her property, or her property rights; that he did not think she had the capacity to make a will; that she had no conception of her estate, and never asked about it, or how it was being used or disposed of; and that he did not think she could have been intrusted to buy a calico dress. When Dr. Thomas L. Maddin was cross-examined in this cause, he was asked whether Mrs. Morris, to the close of her life, ever became mentally competent to buy and sell property, make a will and transact business, without the aid of a guardian. His answer was: "She was absolutely unable to do or say anything, or to communicate her wishes, and therefore, as regards her mental state, it was impossible to know either its range of subjective capacity or wish." Dr. Callender, when examined in this cause, said: "At no period of my observation of her, after Mr. Morris' death, did I regard her as capable, mentally, of taking care of her person, or managing her property or affairs, or of fully comprehending any but the simplest current events in her presence, and, at all times, not even then, and during all of the period of my visitation, though her physical health was sometimes quite improved, she was invalid in body, as well as mentally incompetent, personally, for the performance of any civil act. I saw her the last time about two weeks before her death."

A significant circumstance connected with the question of mental capacity, after the passage of the Act of 1885, is the fact that, though she lived more than three years after that Act was passed, neither she nor any of the Stratton claimants ever suggested the propriety of her making a will. If she had made a valid will, it would have at once taken the case out of the Act of 1885, and the fact that no one ever suggested the idea of her making a will is persuasive evidence that the Stratton claimants did not believe that she had the mental capacity to do so. We agree with the chancellor that Mrs. Morris was, at the time of her death, a lunatic, or person *non compos mentis*, within the purview and meaning of chapter 88 of the Acts of Tennessee of 1885.

The second question is as to the constitutionality of said Act. It was said by Judge Green, in *Bank of the State v. Cooper*, 2 Yerg. 608, that "there are certain eternal principles of justice which no government has a right to disregard. It does not follow, therefore, because there may be no restriction in the Constitution prohibiting a particular Act of the Legislature, that such Act is therefore constitutional." Mr. Justice Miller said that "it must be conceded that there are such rights in every free government, beyond the control of the State." *Citizens Sav. & L. Assn. of Cleveland v. Topinka*, 87 U. S. 20 Wall. 662, 22 L. ed. 460. And Judge Cooley says that "there was never a written republican Constitution which delegat-

ed to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent, and incapable of definition." Cooley, Const. Lim. p. 87 (175). The doctrine of this court, however, is that "the legislative power of the General Assembly of this State extends to every subject, except in so far as it is prohibited, either by the delegated powers of the federal government or by the restrictions of our own Constitution. He who would show the unconstitutionality of an Act of the Legislature must be able to put his finger upon the provision of the Constitution violated." *Demoville v. Davidson County*, 87 Tenn. 220; *Davis v. State*, 8 Lea, 377; *Luehrman v. Shelby County Tax. Dist.* 3 Lea, 438; *Hope v. Dead-erick*, 8 Humph. 8; *Bell v. Bank of Nashville*, Peck (Tenn.) 268, 270. See also Cooley, Const. Lim. p. 178.

"A statute cannot be annulled upon supposed natural equity, the inherent rights of freemen or any general and vague interpretation of a provision of the Constitution beyond its plain and obvious import." *Davis v. State*, 8 Lea, 378.

"The courts are not at liberty to declare an Act void because it is, in their opinion, opposed to a spirit supposed to pervade the Constitution, but not expressed in words." *Luehrman v. Shelby County Tax. Dist. supra*; Cooley, Const. Lim. p. 171.

But, "in considering State Constitutions, we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. A Constitution is not the beginning of a community, nor the origin of private rights. It is not the foundation of law, nor the incipient state of government. It is not the cause, but the consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made. It is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits and modes of thought." Cooley, Const. Lim. p. 86 (87).

"The right to private property is a sacred right. It was not introduced as the result of princes' edicts, concessions and charters, but it was the old fundamental law, springing from the original frame and Constitution of the realm." Id. p. 358. "The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from its feeble force in the savage state, to its full vigor and maturity among polished nations, forms a very instructive portion of the history of civil society. The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself." 2 Kent, Com. p. 818 (820).

"The power of alienation of property is a necessary incident to the right of property, and was dictated by mutual convenience and mutual

ual wants." 2 Kent, Com. p. 826; Cooley, Const. Lim. 4th ed. top p. 498, note 1.

"The right to transmit property by descent to one's own offspring is dictated by the voice of nature. The universality of the sense of a rule or obligation is pretty good evidence that it has its foundation in natural law." 2 Kent, Com. p. 826.

"In the early periods of the English law, a man was never permitted totally to disinherit his children, or leave his widow without provision. The Roman law would not allow a man to disinherit his own issue without some just cause assigned in his will. The reason of the rule in the civil law was that the children were considered as having a property in the effects of the father." Id. p. 827.

One of the provisions of Magna Charta was "that the goods of every freeman should be disposed of according to his will, or, if he died intestate, that his heirs should succeed to them." 1 Craik & Macfarl. Hist. Eng. p. 558; Bl. Com. bk. 4, p. 424.

"In America, the right to acquire, to hold, to enjoy, to alien, to devise and to transmit property by inheritance to our descendants, in regular order and succession, is enjoyed to the fullness and perfection of absolute right." 2 Kent, Com. p. 827 (828).

"In ancient times, if a man died without making any disposition of his goods and chattels, the king, as *parens patriæ*, seized them; but not for his own use. He seized them to the intent that they should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and, if not, then those of his blood." *Hughlett v. Hughlett*, 5 Humph. 454.

Having ascertained how the rights of property existed in this State when the Constitution was formed, and that one of the objects of the Constitution was to protect and preserve those rights, we will next proceed to examine whether the Act of 1885 violates any of the provisions of that Constitution. It is insisted that it violates so much of article 1, § 8, as provides that no man shall be deprived of his "property, but by the judgment of his peers or the law of the land." It is not contended that the Act of 1885 has deprived anyone of the right of trial by jury, and therefore said Act cannot be shown to violate that provision of the Constitution, unless it can be established —first, that it has deprived someone of "property;" and, second, that it is not the "law of the land." Any citizen may be deprived of his property by a statute, provided the statute is what is known as the "law of the land." It is when a statute is not the "law of the land" that a citizen cannot be deprived of his property under it. The first inquiry then is as to whether anyone has been deprived of property by the Act of 1885. It is insisted that the next of kin of Mrs. Morris were not deprived of any property, because the personal property which she inherited from her husband did not belong to them, and they, at most, had a mere expectancy in regard to it. The law upon this point is thus stated by Judge Cooley: "A right cannot be considered a vested right, unless it is something more than such a mere expectation

as may be based upon an anticipated continuance of the present general laws. It must have become a title, legal or equitable, to the present or future enjoyment of property. . . . And it is because the mere expectation of property in the future is not considered a vested right that the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living, and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the Statute of Descents. But this promise is no more than a declaration of the Legislature as to its present view of public policy as regards the proper order of succession,—a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property. It cannot be sold or mortgaged. It is not subject to debts, and it is not, in any manner, taken notice of by the law until the moment of the ancestor's death, when the Statute of Descents comes in, and, for reasons of general public policy, transfers the estate to persons occupying particular relations to the deceased, in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir to be protected by the Constitution. An anticipated interest in property cannot be said to be vested in any person, so long as the owner of the interest in possession has full power, by virtue of his ownership, to cut off the expectant right by grant or devise." Cooley, Const. Lim. pp. 859, 860.

It seems that, under the civil law, the children were considered "as having a property in the effects of the father," because, under that law "he could not disinherit his own issue, without some just cause assigned in his will" (2 Kent, Com. p. 827); while, at common law, the children were not considered as having a property in the effects of the father, because, under that law, he could disinherit his own issue without assigning any cause therefor in his will. But, where the father becomes hopelessly insane before making his will, and so remains until his death, he practically has no more power to disinherit his children, under the common law, than he would have had under the civil law. And, if children are considered as having a property in the effects of a sane father, under the civil law, it is difficult, at first blush, to see why the children of an insane father would not have a property in his effects, under the common law. The reason, however, is that, however hopeless the insanity may appear to be, there is always a possibility of recovery, and the ever presence of that possibility prevents the expectations of the children from being recognized as vested rights of property. We are therefore of opinion that the personal property which Mrs. Morris inherited from her husband was not the property of her next of kin, and therefore that they were not deprived of it by the Act of 1886.

It is next insisted that Mrs. Morris was not deprived of said property. It is conceded that it became her property at the death of her husband, and that it remained her property up to the time of her death. It is said, however, that the Act of 1886 did not interfere in the least

with her possession or enjoyment of the property during her life, and, as her title and ownership were extinguished by her death, she could not have been deprived of it, by the Act of 1886, at any time. The argument is that the death of the owner extinguished her title and ownership; that the dead can have no vested property rights; that the power of the State to take the property of decedents, and dispose of it as it chooses, is unqualified; and therefore that the State had the right to take the property, at the death of Mrs. Morris, and make "a gift" of it to persons who were strangers to her in blood. We cannot assent to this argument. Ordinarily, no one can make a complete and valid gift of property, unless he be the full, legal and equitable owner thereof, and it is not shown when or how the State ever acquired any such ownership of the property here in controversy. Was it by gift, or purchase, or bequest from Mrs. Morris? If so, where is the evidence of any such change of title? Was it by escheat, or under the Statute of Distribution? If so, where is the Statute under which the State derived its title, either by way of escheat or as a distributee of Mrs. Morris? The contention must necessarily be that the State, while having no beneficial ownership in the property, had an absolute power of disposition over it. But this power of disposition must have been conferred upon the State, either by Mrs. Morris, who was the owner of the property, or by the Constitution, or by the common law. It is not pretended that Mrs. Morris ever invested the State, as trustee, or otherwise, with any such power of disposition over her property. No provision can be found in the Constitution authorizing the State to make any disposition of the property of an intestate citizen, who leaves next of kin capable of inheriting. The only remaining source of power must be the common law, and we do not understand that any such power was ever conferred, by that law, upon the king. On the contrary, so far from the king having the unqualified power to take and dispose of the property of intestates, the power, if it had ever been exercised, was, as we have shown above, surrendered by King John in Magna Charta, and, at the time the Constitution of Tennessee was adopted, the right of an intestate to transmit his property by inheritance to his own descendants was enjoyed, as *Chancellor Kent* says, "in the fullness and perfection of the absolute right." 2 Kent, Com. p. 828.

It is true that, in ancient times, the king, as *parens patriæ*, took into his possession the goods of intestates, but he took them not for his own use, and still less to "make a gift" of them to strangers. He took them, as said by this court in the case above cited, "to the intent that they should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and, if not, then those of his blood." *Hughlett v. Hughlett*, 5 Humph. 464.

If the State had the right to take the property of Mrs. Morris, and make a gift of it to strangers, the State had the right to keep it, and appropriate it to her own use; but we suspect that no one will maintain, at this day, that the State has the right to confiscate the prop-

erty of citizens who are guilty of no crime, whether such citizens be testate or intestate, sane or insane, living or dead. It is certainly true "that the death of the owner extinguishes his title and ownership, and that the dead can have no vested property rights." The complaint in this case is, however, not that the State despoiled Mrs. Morris of any of her property after her death, but that, during her life, it deprived her of the right "to transmit her property by inheritance to her own descendants, or next of kin." The court is of the opinion that such a right is property; that Mrs. Morris was deprived of that property by the Act of 1885; and therefore that said Act is unconstitutional, unless it can be shown that it is "the law of the land."

The clause "law of the land" was defined in our earlier cases to mean "a general and public law, equally binding upon every member of the community;" but, by our later cases, it is defined to mean a law "which embraces all persons who are or may come into like situation and circumstances." *Vansant v. Waddel*, 2 Yerg. 270, 271; *Walley v. Kennedy*, Id. 555; *Bank of the State v. Cooper*, Id. 605; *Jones v. Perry*, 10 Yerg. 71, 72; *Sheppard v. Johnson*, 2 Humph. 295; *Budd v. State*, 8 Humph. 491; *State v. Burnett*, 6 Heisk. 189; *McKinney v. Memphis O. Hotel Co.* 12 Heisk. 107; *Alexandria v. Dearmon*, 2 Sneed, 122; *State v. Rauscher*, 1 Lea, 97; *Davis v. State*, 8 Lea, 378; *Maney v. State*, 6 Lea, 221; *Hatcher v. State*, 12 Lea, 870, 871; *Woodard v. Brien*, 14 Lea, 523.

Laws, public in their character, and otherwise unobjectionable, may extend to all citizens, or be confined to particular classes. Cooley, Const. Lim. p. 890. And it matters not how few the persons are who may be included in a class. If all who are or may come into the like situation and circumstances be embraced in the class, the law is general, and not partial. *Budd v. State*, 8 Humph. 492.

Citizens may be classified under article 1, § 8, of the Constitution, when the object of the Legislature is to subject them to the burden of certain disabilities, duties or obligations, not imposed upon the community at large. And citizens may be classified under article 11, § 8, of the Constitution, when the object of the Legislature is to confer upon them certain rights, privileges, immunities or exemptions not enjoyed by the community at large. If the classification is made under article 1, § 8, everyone who is in, or may come into, the situation and circumstances which constitute the reason for, and the basis of, the classification, must be subjected to the disabilities, duties, obligations and burdens imposed by the Statute, or it will be partial and void. And, if the classification is made under article 11, § 8, everyone who is in, or may come into, the situation and circumstances which constitute the reasons for, and basis of, the classification, must be entitled to the rights, privileges, immunities and exemptions conferred by the Statute, or it will be partial and void. It follows that the cases which have been decided upon section 8 of either of said articles are of equal value in arriving at the meaning of the expression "all who are or may come into the like situation and circumstances," and counsel in argument have properly referred to cases decided upon 12 L. R. A.

each of said articles. Before proceeding to examine those cases, it is proper to notice another limitation which is imposed upon the Legislature in making classifications of citizens. The limitation is stated by Judge Cooley, as follows: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character and restricting their rights, privileges or legal capacities, in a manner before unknown to the law, would be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons, and, if the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the Act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would conflict. To forbid to a class the right to the acquisition or enjoyment of property in such a manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness, and those who claim the right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived." Cooley, Const. Lim. p. 893 (890).

That statutory classifications should be "natural, and not arbitrary," was recognized by this court in *Demoville v. Davidson County*, 87 Tenn. 218-223.

It is believed that an examination of the reported cases will show that none of the legislative classifications of citizens which have been sustained by this court were arbitrary in their character. It will also be seen that all of them were made for one or the other of the following purposes, viz.: *first*, for the purpose of taxation; *second*, for police purposes; *third*, for the necessary protection of the particular class; *fourth*, for the release of a class from some particular obligation or liability.

In the case of *State v. Schlier*, 8 Heisk. 281, the classification was made for the purpose of taxation. The Legislature imposed a privilege tax upon photographers, which was graded according to the size of the town in which the privilege was exercised. There was nothing arbitrary in such a classification. On the contrary, it was natural and just that the classification should be based upon the idea that the profits of the business would be proportioned to the size of the town, and that the tax should be proportioned to the profits. Every member of the community was at liberty to engage in the business, and to exercise his art, either in a city, in a town or in the country as he might elect. In the case of *Fulgun v. Nashville*, 8 Lea, 685, the classification was made for the purpose of taxation. A license tax was imposed for the privilege of keeping an hotel; but there was a proviso that hotels having less than ten rooms should pay no privilege tax. There was nothing arbitrary in such a classifica-



cation. It was natural and right that the tax should be graded according to the earning capacity of the hotel, and every member of the community was at liberty to engage in the business, and to elect whether he would keep a hotel of ten rooms or less.

In the case of *Robbins v. Taxing Dist.*, 18 Lea, 308, the classification was made for the purpose of taxation. A law provided that drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale, or selling goods by sample, should pay a special privilege tax. The classification in that case was not arbitrary. Before the law was passed, resident merchants were required to pay a regular occupation tax, while traveling salesmen, or drummers, paid no tax. It was natural that the law should remedy this inequality by requiring drummers to pay a privilege tax. Every member of the community was at liberty to engage in the mercantile business and to elect whether he would be a resident merchant or a drummer.

In the case of *State v. Rauscher*, 1 Lea, 96, the classification was made for police purposes, as a regulation of the sale of intoxicating liquors. The sale of intoxicating liquors within four miles of an incorporated institution of learning was prohibited by a certain law; but there was a proviso in it that the law should not apply to the sale of such liquors within an incorporated town. The classification in that case was by no means arbitrary. It was supposed that the injurious consequences resulting from the sale of liquor near incorporated institutions of learning would be much reduced by restricting such sales to incorporated towns, where adequate police force is usually maintained. It was therefore natural and right to restrict the sales to such towns. Every member of the community was at liberty to engage in the business, and to elect whether he would sell within an incorporated town or not, and every incorporated town was allowed the privilege of having such sales made within its limits. Afterwards, the law was amended so as to divide the incorporated towns of the State into two classes, and to prohibit such sales in those towns which were organized under the Act of 1882; while the privilege of allowing such sales within their limits was continued to the other towns of the State. This classification was purely arbitrary. The efficacy of the police of a town was in no way dependent upon whether it was organized under the Act of 1882 or not, and, accordingly, this court held that the attempted discrimination between the different towns of the State was unconstitutional and void. *Hatcher v. State*, 12 Lea, 370, 371.

In the case of *Theilan v. Porter*, 14 Lea, 627, the classification was made for police purposes, to abate nuisances. An Act authorized "the several communities embraced in the territorial limits of all such municipal corporations in the State as have had, or may have, their charters abolished," etc., to condemn and abate as nuisances all houses which should be found to be in an unsanitary condition. The classification in that case was not arbitrary, but based upon the natural distinction between houses in a sanitary and houses in an unsanitary 12 L. R. A.

condition, and every community whose charter had been, or might be, abolished, was entitled to the benefit of the police power conferred by the Act.

In the case of *Parks v. Parks*, 12 Heisk. 684, the classification was made for the necessary protection of a class known as "cotton merchants, factors and brokers," by giving them a lien for the purchase money for cotton sold. The classification was by no means arbitrary. The business in which those persons were engaged had a special need for such a lien. Every citizen of the State could engage in the business, and thus become entitled to the benefits of the lien. The liens given to mechanics, landlords, carriers and others are all supported upon the same considerations. *Davis v. State*, 8 Lea, 880; *Demoville v. Davidson County*, 87 Tenn. 217.

In the case of *Davis v. State*, 8 Lea, 880, the classification was made for the necessary protection of witnesses from the rapacity of speculators; the speculation in witness' fees being deemed by the Legislature detrimental to the public service. Every citizen of the State, who should become a witness, would be entitled to the benefit of the protection afforded by the Act. The Act did not deprive the witness of the power of free disposition of his fees as property; because the claim of a witness for fees, being only a chose in action, was not assignable at common law, and, as the Legislature first made such claims assignable, it was equally within its competency to take away that quality. Upon the same principle, the Legislature may classify minors, married women, lunatics and other persons under disability, and enact statutes "for their assistance, comfort and support." *Cooley*, Const. Lim. 391 (389), (390). But in this State, while it is recognized as the duty of the government "to protect and provide for those who are incapable of taking care of themselves, it is a duty of the Legislature to pass general laws whereby this may be done." *Jones v. Perry*, 10 Yerg. 75. The fact that it is the duty of the State to "protect and provide for those who are incapable of taking care of themselves" proves that the State cannot legislate to deprive them of their property rights.

In the case of *Demoville v. Davidson County*, 87 Tenn. 218, the classification was made for the purpose of releasing all druggists from liquor dealers' privilege taxes incurred by them, where the liquors were sold in good faith, for medical uses only, and the druggist's license was not used by them as a blind to sell liquors as a beverage. It was held by this court that the class of druggists thus described by the Act form "a natural, and not an arbitrary, class," and were properly distinguished in their treatment by the State from those who had been guilty of selling liquor under the guise of doing a regular druggist's business.

We will now refer to those cases where the Legislature has attempted to make certain classifications among citizens, which classifications this court has held were not within the constitutional power of the Legislature to make.

In the case of *Morgan v. Reed*, 2 Head, 276, an Act of 1856 declared that the title of all persons to any slave sold under judicial proceedings, under the Act of 1827, and to which

the heirs, distributees, etc., were not made parties, should be forever barred, unless suit should be brought within six months after the passage of the Act of 1853. It was held that the Act of 1856 was unconstitutional. The Act may in fact have embraced a large number of cases in which very many persons may have been interested,—in fact it was sought to be justified as a "relief measure,"—but there were no reasons why the Statute of Limitations should be reduced to six months, in order to meet the exigencies of those cases, that were not equally applicable to all other cases where void or irregular sales of slaves had been made.

In the case of *Memphis v. Fisher*, 9 Baxt. 239, an Act provided that municipal corporations with a population of 35,000 or more might prosecute suits without giving bond for costs. It was held to be unconstitutional; for, though municipal corporations possess some power pertaining to sovereignty, yet when they become suitors they stand as individuals, and there were no reasons why they should be exempted from giving bond for costs that would not be equally applicable to an individual.

In the case of *Brown v. Haywood*, 4 Heisk. 360, an Act provided that, in any county of the State where civil suits had been removed from the county in which they had been originally brought, they should be transferred back to the original county, upon affidavit of three unconditional Union men of the original county that justice could be done all parties. The Act was held to be unconstitutional. There were no reasons why suits already transferred should be sent back that were not equally applicable to suits that might afterwards be transferred, and there were no reasons why the affidavits of Union men should have any more weight than the affidavits of other men.

In the case of *Wally v. Kennedy*, 2 Yerg. 554, an Act provided that any suit, brought in the name of an Indian reservee, to recover certain lands, should be dismissed, if it were shown that it was being prosecuted for the benefit of any person other than the one in whose name suit was brought. The Act was held to be unconstitutional. There were no reasons why a suit prosecuted in the name of an Indian reservee, for the use of another, should be dismissed, that were not equally applicable to every case where the equitable owner of real estate sued in the name of the person holding the legal title.

In *Bank of the State v. Cooper*, 2 Yerg. 599, an Act of the Legislature undertook to deprive the debtors of the Bank of the State of Tennessee of the right of trial by jury, and of the right of appeal. It was held to be unconstitutional. There were no reasons why the debtors of that bank should be deprived of their rights that were not equally applicable to all other debtors where the debts arose from similar contracts.

In the case of *Budd v. State*, 8 Humph. 492, an Act created a new felony in relation to the officers, agents and servants of the Union Bank. This court held that it was unconstitutional. There were no reasons why the officers, agents and servants of that bank should be subjected to the felony in question, that were not equally

applicable to the officers, agents and servants of all other banks.

In the case of *McKinney v. Memphis O. Hotel Co.*, 12 Heisk. 104, an Act authorized a certain hotel company to contract to pay interest at the rate of 10 per cent per annum upon a loan of \$100,000. The Act was held to be unconstitutional. There were no reasons why that company should be allowed to contract to pay 10 per cent interest that were not equally applicable to all other companies or individuals who might wish to borrow money; and there were no reasons why those who loaned money to that company should be allowed to charge 10 per cent that were not equally applicable to all the money-lenders of the State.

In *Daly v. State*, 18 Lea, 282, an Act, in effect, created, as a new privilege, the right to sell pools on horse-races, and to limit the exercise of the privilege to a certain class of private corporations. This court held the Act to be unconstitutional. There were no reasons why those corporations should be allowed the privilege of selling pools that were not equally applicable to all other corporations or individuals in the State, who might wish to exercise that privilege.

In *Burkholls v. State*, 16 Lea, 72, 73, an Act made it lawful to sell pools under certain circumstances; but it contained a proviso that it should not apply to counties having a population of not less than 75,000 inhabitants, by the United States census last taken just preceding the date of the offense. Davidson and Shelby were the only counties in the State which had 75,000 inhabitants by the last United States census. It was held that the Act was unconstitutional. There were no reasons why pool selling should be made unlawful in Davidson and Shelby Counties that were not equally applicable to all the other counties of the State.

In the case of *Woodard v. Brien*, 14 Lea, 522, 523, an Act declared that real estate should not be affected by the lien of a judgment, until an abstract of the judgment was recorded in the register's office; but it contained a proviso that it should apply only to counties that had, by the census of 1870, a population of not less than 40,000 inhabitants. Davidson and Shelby were the only counties in the State to which the Act could apply. It was held to be unconstitutional. There were no reasons why judgment liens should be recorded in those counties that were not equally applicable to all the other counties of the State.

In *Neely v. State*, 4 Lea, 316, the charter of a railroad company exempted its directors from jury duty. The exemption was held to be unconstitutional. There were no reasons why the directors of that company should be exempted from jury duty that were not equally applicable to all the citizens of the State.

In *Green v. State*, 15 Lea, 708-710, an Act provided that 15 per cent of the voting population of a county might organize into militia, and be exempt from jury duty. It was held that the exemption was unconstitutional. There were no reasons why those who organized as militia should be exempt from jury duty that were not equally applicable to all the other citizens of the State.

In *Ragio v. State*, 86 Tenn. 272, an Act made

it a misdemeanor for anyone engaged in the business of a barber to keep open bath-rooms on Sunday. It was held that the Act was unconstitutional. There were no reasons why barbers should be prohibited from keeping bath-rooms open on Sunday that were not equally applicable to innkeepers, and all other persons who kept and used bath-rooms for profit.

We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary.

If the classification is made under article 11, § 8, of the Constitution, for the purpose of conferring upon a class the benefit of some special right, privilege, immunity or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit. If the classification is made under article 1, § 8, of the Constitution, for the purpose of subjecting a class to the burden of some special disability, duty or obligation, there must be some good and valid reason why that particular class should alone be subjected to the burden. Another essential to the validity of every legislative classification, whether it be made under article 11, § 8, or under article 1, § 8, is that it must not violate any other provision of the Constitution, whether such provision be expressed or implied. Article 1, § 80, of the Constitution expressly provides that no hereditary emoluments, privileges or honors shall be granted or conferred in this State; and therefore the Legislature cannot, under article 11, § 8, grant any hereditary privileges or honors upon a class, however meritorious or large the class may be. Though the Constitution does not expressly prohibit the taking of private property for private use, yet it has been held to do so by implication (*Harding v. Goodlett*, 3 Yerg. 52; *Clack v. White*, 2 Swan, 549; *Memphis Freight Co. v. Memphis*, 4 Coldw. 425); and therefore the Legislature cannot, under article 1, § 8, deprive one class of citizens of their property to "give" it to another, however small or odious the class may be from which the property is taken, or however large and meritorious the class may be to which it is given. Under article 1, § 8, an individual may be deprived of his property in many instances, where the action of the Legislature would be clearly constitutional. The property of an individual may be taken by summary proceedings for the payment of his taxes, or, by judicial proceedings, to compel the performance of his contracts, or to recover damages for the breach of his contracts, or for tort committed by him, or it may be taken as a punishment for his crimes. But the property of an individual cannot be taken under that section, or any other section, of the Constitution, when it is taken from him merely to give it to another. A law which violates any provision of the Constitution, whether the provision be expressed or implied, cannot be the "law of the land," because an unconstitutional law is, in fact, "no law at all." *Cooley*, Const. Lim. p. 3.

The general Statutes of Descent and Distribution of this State, as contained in the Code of 1858, §§ 2420-2490, classify the citizens of this State into those who die testate, and those who die intestate. Any person, who has capacity in the law to make a last will and testament can select the class to which he will belong. He may make his own will, if he prefers to die testate; and, if he prefers to die intestate, he can adopt the disposition of his estate provided for in the Statutes of Descent and Distribution. If he from infancy, lunacy or other disability, has not capacity in the law to make a will, he cannot select the class to which he will belong. He is forced into the class of intestates, and the disposition of his estate is necessarily controlled by the Statutes of Descent and Distribution. Those Statutes direct that the land of an intestate owner shall descend to his heirs, and that his personal property, after payment of debts, shall go to his next of kin. In no instance do they direct that any part of his estate shall go to those who are strangers in blood to him. They are in full accord with the principle announced by this court that it is the duty of the State, by general laws, "to protect and provide for those who are incapable of taking care of themselves." *Jones v. Perry*, 10 Yerg. 75. They do not proceed upon the novel idea that the State has the right to seize upon the property of an intestate minor, or lunatic, and appropriate it to the State's own use, or give it away to strangers. On the contrary, they proceed upon the ancient doctrine that the king took the custody of intestate property, "not for his own use," but "to the intent that it should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and, if not, then those of his blood." *Hughlett v. Hughlett*, 5 Humph. 464. They fully recognize that "the right to transmit property by descent to one's own offspring is dictated by the voice of nature." 2 Kent, Com. p. 826.

In their main features, those Statutes have stood as the laws of this State from the time of its admission into the Union down to the present time, and, though various changes have been made in them from time to time, the principle that a man's intestate property shall go to his own heirs, or next of kin, has been at all times recognized and preserved, until the passage of the Act of April 1, 1885, which is the Act in controversy in this case. The Act, in brief, provides that, if the personal estate of an intestate lunatic was derived from an intestate husband or wife, it shall go, not to the next of kin of the lunatic, but to the next of kin of the person from whom it was so derived. It is said, though incorrectly, that the Act of 1885 was modeled upon paragraph 3 of section 2420 of the Code of 1858, which provides that, where land came to the intestate by gift, devise or descent, from a parent, or the ancestor of a parent, and the intestate die without issue, if he have brothers or sisters of the paternal line of half-blood, and brothers and sisters of the maternal line, also of the half-blood, then the land shall be inherited by such brothers and sisters on part of the parent from whom the estate came, in the same manner as by brothers and sisters of the whole blood, until the line of such parent is exhausted

12 L. R. A.

of the half-blood, to the exclusion of the other line. If the intestate have no brothers or sisters, then it shall be inherited by the parent, if living, from whom, or whose ancestors, it came, in preference to the other parent. If both parents be dead, then by the heirs of the parent from whom, or whose ancestors, it came. It will be seen that paragraph 8 of section 2420 of the Code applies impartially to all intestates; while the Act of 1885 applies only to lunatic intestates. It is said that the proportion of lunatics to sane persons is as but one to a thousand. One objection to special laws is that they single out one or a few odious or helpless individuals, and undertake to regulate his or their rights by a rule different from that which is applicable to the community at large, and by which the great body of the people, or the legislators themselves, would not be willing to be bound. *Wally v. Kennedy*, 2 Yerg. 557; *Cooley*, Const. Lim. 391.

There are no reasons why lunatics should be deprived of the right to transmit their property by inheritance to their heirs or next of kin that do not apply equally to persons who are sane. Suppose Mrs. Gee, who was a sister of Mrs. Morris, had derived personal property from an intestate husband, then, upon her death, as she was sane, the property would go, under the general law, to her next of kin; but, under the Act of 1885, the property which Mrs. Morris derived from her husband must go to those who are strangers in blood to her. Why should so important a distinction be made between two sisters? The only answer which we have heard is that one of them was sane, and the other insane. It will be seen that paragraph 8 of section 2420 of the Code applies impartially, whether the property came to the intestate by gift, devise or descent; while the Act of 1885 applies only to property which came from an intestate husband or wife. There are no reasons why an intestate widow should be deprived of the right to transmit to her own next of kin property inherited by her from her husband that do not apply equally to property which she may have derived from him by gift or bequest. If K. J. Morris had bequeathed the property in controversy to his widow, the Act of 1885 would not have applied; and the property would have gone to her next of kin, under the general law. But, instead of making a written will, he seems to have preferred to die intestate, and thus adopt the will which the State suggested for him in its General Statute of Distribution; and yet, merely because he left the property to his wife in the one way rather than in the other, she is to be deprived of the right to transmit it to her own next of kin. It will be seen that paragraph 8 of section 2420 of the Code does not apply except where the intestate dies without issue, and yet the Act of 1885 would have deprived Mrs. Morris of the right to transmit her own property to her own children. Her children by a marriage prior or subsequent to

her marriage with K. J. Morris would have been disinherited, and even her children by him would have taken her property, not as her next of kin, but as his. It will be seen that, while paragraph 8 of section 2420 of the Code establishes a certain preference as between the heirs of an intestate, it does not direct that any part of his estate shall go to those who are strangers in blood to him. It does not deprive him of the right to transmit his own estate by inheritance to his own blood kin. But the Act of 1885 deprives a lunatic widow of all power to transmit to any of her blood kin any of the personal property which she may have derived from her intestate husband, and directs that the whole of it shall go to those who have not a drop of her blood in their veins. The minute classification and subclassification adopted by the Act of 1885 first forced Mrs. Morris into the class known as "lunatics," where the majority against her at once became a thousand to one. It then forced her into a subclass composed of only those lunatics who had derived property from a husband or wife. It then forced her into a still smaller subclass comprising only those lunatics who had derived property from an intestate husband or wife. The probability is that there are very few persons in the State who would answer the description of the subclass into which Mrs. Morris was finally forced by the Act of 1885. Assuming, however, that the Legislature has the power, in a proper case, to make its classification as minute as it sees proper, yet we hold that the classification must "be natural, not arbitrary." We think that the classification made by the Act of 1885 is unnatural, arbitrary and capricious, and, for that reason, we hold it to be unconstitutional. We are also of the opinion that it deprived Mrs. Morris of the right to transmit her estate to her own next of kin; that such a right is property; that the Legislature undertook, in effect, to take her property away from her, and give it to those who were strangers in blood to her, and, as the Legislature cannot take private property for private use, the Act violates the Constitution, and, for that reason, it is not the "law of the land." This conclusion renders it unnecessary to examine the constitutional question, as to whether the substance of the Act was sufficiently expressed in its title, or whether it sufficiently recites the law which it was intended to repeal or amend. This case, however, serves well to show that those requirements of the Constitution may have been intended to notify persons who may have an interest in opposing such legislation, as well as to inform the members of the Legislature of the true character of the legislation proposed to be enacted.

Upon the grounds above stated, *we affirm the decree of the chancellor.*

The costs of this court will be paid by the appellants, the next of kin of K. J. Morris, deceased, and the costs of the court below will be paid as adjudged by the chancellor.

## ILLINOIS SUPREME COURT.

Elizabeth BOWAR, *Appl.*,

CHICAGO WEST DIVISION R. CO.

(....Ill....)

1. The common-law rule that a writ of possession cannot be issued to enforce a judgment in ejectment after the lapse of a year and a day is abrogated in Illinois by the Statute which, though making no express provision as to writs of possession, provides that execution may issue upon a judgment at any time within seven years, especially when construed with another Statute providing that rules of pleading and practice in other actions are applied to actions of ejectment.
2. A writ of possession which has been executed will not be quashed unless a writ of restitution should be granted, as the quashal would otherwise do no good.
3. A writ of restitution will not be granted to restore to a defendant in ejectment the possession of property taken under a writ of possession merely because the latter was not issued within a year and a day after the rendition of the judgment.
4. A freehold is involved so as to give jurisdiction to the Supreme Court of Illinois of an appeal from an order of the superior court overruling a motion to quash a writ of possession in aid of a judgment in ejectment.

(January 23, 1891.)

**A**PPPEAL by defendant from an order of the Supreme Court for Cook County overruling her motion to quash a writ of possession which had been issued for the purpose of executing a judgment which had been recovered against her in ejectment. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Duncan & Gilbert* for appellant.

*Messrs. Goudy, Green & Goudy*, for appellee:

A writ of possession irregularly issued will not be quashed, and a writ of restitution awarded, unless the defendant shows on his part some right to the possession.

*Oetgen v. Ross*, 47 Ill. 142; *Coleman v. Henderson*, 8 Ill. 251; *Jackson v. Hasbrouck*, 5 Johns. 366; *Doe v. Roe*, 4 Burr. 1996; *Watson v. Trustees of Floral College*, 2 Jones, L. 211; *Doe v. Shail*, 18 L. J. Q. B. 321.

The judgment in the case at bar is conclusive of the title of the appellee to the premises in question and of its right to the possession.

*Taylor v. Hords*, 1 Burr. 60; Ill. Rev. Stat. (1 Starr & C. 969).

The appellee had the right to take possession of the premises by virtue of the judgment without any writ.

2 Sellon, Pr. 202; *Witbeck v. Van Benschlaer*, 64 N. Y. 27; *People v. Cooper*, 20 Hun, 486.

Under the old common law in England, a judgment became dormant unless execution was issued within a year and a day, because that was the general limitation after which laches anciently attached. When the action of ejectment was invented, the practice, in regard to writs of execution upon judgments in ejectment, followed the practice in that regard already established in other cases.

2 Tidd, Pr. 1108, 1108, 1248; *Runnington, Ejectment*, 428.

In this State the practice in regard to writs of execution upon judgments has been changed by statute from time to time and judgments in ejectment have been subject to such changes.

Ill. Laws 1824, 1825, 150; Laws 1839, 220; Rev. Stat. 1845, *Judgments and Executions*.

The Statute now provides that writs of execution may be issued at any time within seven years. This Statute applies to and governs writs of execution upon all judgments, including judgments in ejectment.

Rev. Stat. chap. 77, *Judgments*; Rev. Stat. chap. 45, *Ejectment*.

*Shope, J.*, delivered the opinion of the court:

The judgment of ejectment, remaining unreversed, is conclusive of the title of appellee, and of its right to possession of the premises recovered, without regard to the mode of executing the judgment. Rev. Stat. chap. 45, § 34.

It is contended that the writ of possession issued March 24, 1890, was irregular, and should have been quashed. The judgment was rendered May 9, 1888, finding the appellee the owner in fee simple of the premises in controversy, and awarding a writ of possession. No writ, however, was issued until the 23d of May, 1884,—more than a year and a day after the rendition of the judgment. It is therefore said that the judgment became dormant, and that no writ of possession could issue thereon without a revival of the judgment by *scire facias*. And such seems to have been the rule of common law. 2 Tidd, Pr. 1000-1007; 8 Bacon, Abr. title *Ejectment*; *Oetgen v. Ross*, 47 Ill. 147.

In the case cited it was said: "Where a plaintiff in ejectment fails to take out his writ of possession within a year after the judgment, it is doubtful if he is entitled to it without a special order." If a writ of possession issued within a year and a day, and was returned not executed, an *alias* might issue at any time thereafter; and if the plaintiff was prevented from taking his writ by injunction, or if it was stayed by agreement of parties, he might have

NOTE.—Writ of possession, under judgment.

If a party under a writ of possession should take possession of more land than was recovered by the verdict, or should attempt to disturb the possession of another not a party to the suit, the court in a summary manner will inquire into the facts and award a writ of restitution. *Coleman v. Henderson*, 8 Ill. 251.

It is doubtful if plaintiff can have a writ of possession issued more than a year after judgment, without a special order. *Oetgen v. Ross*, 47 Ill. 142.

To assign error upon defects in a writ of possession they must be urged by motion to quash. *Parr v. Van Horn*, 86 Ill. 228.

If defendant enters and removes growing crops after plaintiff has been put in possession plaintiff may have his action of trover. *Altes v. Hinokler*, 86 Ill. 275.

his writ within the same period after the dissolution of the injunction, or expiration of the time for which it was stayed, without *scire facias*. Tidd, Pr. 1005-1006; Freem. Executions, §§ 27a, 470, and cases cited; Adams, Ejectment, \*346.

This same rule was applied to executions upon money judgments, and the rule in respect of writs of possession seems to have been adopted in analogy to the limitation upon writs of *fiert facias*. Tidd (2 Pr. 1103) gives the reason for the rule that the plaintiff is put to his *scire facias* after the year, as follows: "The reason why the plaintiff is put to his *scire facias* after the year is because, when he lies by so long after the judgment, it should be presumed that he hath released the execution, and therefore the defendant shall not be disturbed without being called upon, and having opportunity in court of pleading release, or showing cause, if he can, why the execution should not go. When the action of ejectment was introduced, it was doubted whether the Statute 18 Edw. I. (Westm. 2), which gave a *scire facias* to the plaintiff in personal actions to revive the judgment when he had omitted to sue out execution within a year from the rendition of judgment, applied to this action." It seems to have been settled that *scire facias* would lie on a judgment in ejectment, not because there was any such rule of practice specially provided for in ejectment cases, or because it fell within the Statute, but because such was the practice in similar actions. 2 Tidd, Pr. 1248. That is to say, the practice in actions of ejectment was made to conform to the existing practice in personal actions.

Without pausing to discuss or determine whether the time should begin to run from the 9th of May, the day of the rendition of the judgment, or from the 2d day of June, 1883, upon which latter day the term of court ended at which the judgment was rendered, it may be remarked that, if the latter date is to control, the writ was issued within a year from the entry of the judgment. It is probably held by the weight of authority that the time would commence to run from the day of the rendition. The Statutes of this State do not now, and never did, so far as we have been able to discover, contain any provision as to the time within which writs of possession shall issue in ejectment. If the reason for the adoption of the rule at common law is to prevail, a moment's consideration will show that such writs are not limited as at common law. Chapter 77 of the Revised Statutes is entitled "An Act in Regard to Judgments and Decrees, and the Manner of Enforcing the Same by Execution, and to Provide for the Redemption of Real Estate Sold under Execution or Decree." By section 1 of that Act, judgments of courts of record are made liens for a period of seven years, provided execution be issued within a year from the rendition of such judgments, and if not so issued they cease to be liens; "but execution may issue upon such judgment at any time within seven years," and then become liens from the time the writ is delivered to the proper officer to execute. By section 6, it is provided that no execution shall issue upon any judgment after the expiration of seven years from the time the same becomes a lien, except

upon the revival of the same by *scire facias*. The Act is general in its terms, and would seem to apply to all judgments and decrees. The form of the writ of possession is given in section 43, chap. 45, Rev. Stat., and provides, not only for the delivery of the premises adjudged to the plaintiff, but provides that a clause may be inserted for the collection of the costs of the suit. It is apparent that, if the time within which writs of possession may issue in ejectment is to be determined by analogy to the rule applied in respect to the issuance of final process in other cases in this State, the limitation is seven years, and not one year.

By the Statute of this State, the common law of England, so far as applicable and of a general nature, etc., shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority; and it would follow that the common-law rule being considered must be held in force unless changed by the Legislature. It is conceded by counsel, as it must be, that the repeal or change of the law contemplated by this Statute may be either by express enactment, or by implication from inconsistent legislative provisions. Section 10, chap. 45, Rev. Stat., provides: "The rules of pleading and practice in other actions shall apply to actions of ejectment, so far as they are applicable, and except as otherwise provided." It may very properly be said that this clause of the Statute applies more especially to practice in the trial of such causes; but it is not perceived why it does not require the practice in respect to the issuance and return of final process in other cases to be applied to the issuance and return of final process in ejectment cases, unless otherwise provided by statute. The term "practice," in its larger sense, is defined to be "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or declares the right." Anderson, Law Dict. The rules of practice in other actions, applicable to actions of ejectment, which shall be applied, are those legal rules which direct the course of proceedings in acquiring jurisdiction of parties, and the course adopted by the court whereby rights are effectuated by the application of the proper remedies, and where it is not otherwise provided in actions of ejectment. *Fleischman v. Walker*, 91 Ill. 818, and cases there cited.

By section 10 of the Statute before quoted, it is expressly provided that so far as applicable to the action of ejectment, and in case it is not otherwise provided by statute, the practice in other cases is to be applied in such actions; and, if practice in other cases can be said to extend to the final process by which the judgment of the courts is to be carried into effect, it is obvious that such practice, whether controlled by statute in such other cases, by rule of court, or at common law, must, if not otherwise provided by statute, be held to apply in actions of ejectment. And by clear implication, at least, the common-law rule inconsistent with such practice would be repealed. We are of opinion that the common-law rule relied upon is not in force in this State. The reason for its adoption has ceased to exist, and the rule must fail. It is more logical, and more in consonance with the spirit of our laws, to apply and continue the principle upon which the rule



applicable to ejectment was originally adopted, —that of analogy to the practice in similar cases,—and to hold that the judgment does not become dormant until after the lapse of seven years from its entry, and may be executed within that period without being revived. It ought, perhaps, to be further remarked, here, that the Statute now in force in respect of the issuance of final process generally is radically different from the Statute in force when the doubt was expressed in *Oetgen v. Ross*, *supra*.

If, however, the common-law rule prevailed, it must be conceded that the issuance of a writ of possession after the lapse of a year and a day would be irregular, except in cases where it had been enjoined, stayed by agreement, appeal or writ of error; but if issued after the expiration of that time it would not be void, but voidable only. *Oakes v. Williams*, 107 Ill. 154; *Morgan v. Evans*, 72 Ill. 586; *Hernandez v. Drake*, 81 Ill. 84.

Upon proper application before execution, the writ might have been quashed for such irregularity. After the writ was executed, its quashal could have done appellant no good, unless a writ of restitution had been awarded.

It was said in *Oetgen v. Ross*, *supra*: "It is to be remarked that in an action of ejectment the court that renders the judgment exercises a species of equitable jurisdiction over the writ of possession, recalling it if justice requires, and sometimes, after it has been executed, awarding a writ of restitution,"—citing *Coleman v. Henderson*, 8 Ill. 251; *Ex parte Reynolds*, 1 Cal. 500; *Jackson v. Hasbrouck*, 5 Johns. 366; *Doe v. Roe*, 4 Burr. 1996. In the case of *Coleman v. Henderson*, *supra*, it was held that where the party under his writ of *habere facias possessionem* had taken more land than was recovered, or disturbed the possession of a person not a party to the suit, the court would, in a summary manner, inquire into the facts, and award a writ of restitution. The current of authority in this country and in England seems to be that the right to award the writ of restitution in cases like the one at bar, not falling within any express statute authorizing such writs, arises by equitable construction by the courts, to prevent wrong and injury to a party who has been wrongfully dispossessed of the premises. Upon an application, as here, for a writ of restitution, it is not demandable as a matter of right, but as a matter of justice only. *Watson v. Trustees of Floral College*, 2 Jones, L. 211; *Perry v. Tupper*, 70 N. C. 538; *Doe v. Shatt*, 18 L. J. Q. B. 821.

If, therefore, the judgment in ejectment was conclusive against the right of appellant, both as to the title and right of possession, there could be nothing, even if the writ of possession had been quashed, to call into activity the power to award a writ of restitution. That the appellant could not demand the writ of restitution as a matter of absolute right, follows necessarily from the fact that the authority to award the writ in cases other than those provided for by statute is based upon equitable considerations. Here the law gave to appellee the title and right of possession; and

there is no equitable principle apparent which would deprive it of that possession, and deliver the premises to appellant. For aught here shown, the court must, upon *scire facias*, revive this judgment, if dormant, and thereupon, by its process, put the plaintiff into possession, as he now is, in all respects. If possession had been taken of more land than that recovered, or the judgment itself had been attacked, or the party applying for the writ had shown meritorious reasons for granting it, or there had been improper use of the process of the court, the power might well be exercised; and many cases will be found where the writ has been granted under such circumstances. We have been referred to no case where it has been granted in the face of a judgment, conclusive not only as to the right of possession, but also as to the title, merely because the possession was obtained under irregular process. The plaintiff, having recovered, had a right of entry without the writ. In 2 Sellon's Practice, 202, it is said: "If the plaintiff has judgment to recover his term, he may enter without suing out an *habere facias possessionem*; for, where the land recovered is certain, the recoverer may enter at his own peril, and the assistance of the sheriff is only to preserve the peace." See also *Witbeck v. Van Rensselaer*, 64 N. Y. 27; *People v. Cooper*, 20 Hun, 486; *Taylor v. Horde*, 1 Burr. 60.

Finding the property unoccupied, the successful party may enter peacefully into possession, but he may not enter with force, and such possession would not be disturbed by writ of restitution while the judgment remained in full force and effect. If it be conceded that the writ of possession was irregularly issued, the same, being regular on its face and upon a valid judgment, would protect the officer in its execution, and the plaintiff would be in no worse position than if he had entered without process. It follows that we are of opinion that, if the court below was in error in not quashing the writ of possession, it is an error which cannot avail appellant against the force and effect of appellee's judgment.

A motion has been made in this court to dismiss the appeal for want of jurisdiction; no freehold, as it is said, being involved. The original action involved a freehold, and the matter here at issue is so far germane and pertinent, and so involves the recovery in the case, that we are of opinion the jurisdiction may be sustained. The object of this proceeding was to restore appellant to the possession of the land, notwithstanding the freehold interest recovered by appellee. To restore appellant, it necessarily followed that the judgment in ejectment must be set aside or disregarded. It is true, as we have seen, that this could not be done in this way; but that did not prevent appellant from seeking that relief. If the relief sought involved the right of the plaintiff in ejectment to his freehold, although it be found it could not be disturbed therein, a freehold was necessarily involved in the litigation.

*Affirmed.*

CALUMET RIVER R. CO., *Appt.*,

John B. BROWN *et al.*, and George R. Davis,  
*Appt.*

(....Ill....)

1. Money in the hands of a county treasurer for a person entitled to the compensation paid in condemnation proceedings may, at the suit of its depositor, be withheld by injunction from the owner of the premises where a mortgagee has been omitted by mistake from the condemnation proceedings, and a decree may be made for the application thereof upon the mortgage saving the mortgagee's right to contest the sufficiency of the amount.
2. The principle that a person having two funds to satisfy his demand should not by his election disappoint a party having but one fund applies to a mortgagee omitted by mistake from condemnation proceedings, and who has a right either to foreclose upon the land or take the money paid for condemnation; and while the money is in the hands of the court, he may be compelled to accept it before resorting to the land, where his right is saved to contest the sufficiency of the compensation assessed in the condemnation proceedings to which he was not a party.
3. A court of equity may, in an action to foreclose a mortgage upon lands, part of which have been taken by right of eminent domain for railroad purposes, direct an issue to be tried at law to determine the value of the lands so taken, where the mortgagee was, by mistake, omitted from the foreclosure proceedings and is consequently not bound thereby and the railroad has been built and put in operation so that it would be against public policy to permit the lands to be sold to satisfy the mortgage while the remaining lands are not sufficient for that purpose and the mortgagor is insolvent.

(January 22, 1891.)

**A** PPEALS by plaintiff and by defendant Davis from a judgment of the Appellate Court, First District, reversing a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to restrain Davis from paying money in his hands as the price paid for land condemned for railway purposes to the owner of the land, and to compel its payment to the mortgagee. *Reversed.*

**NOTE.—Eminent domain; rights of mortgagee.**

Where land is taken for public use the damages awarded take the place of the land so far as the rights of the mortgagee are concerned. *Utter v. Richmond*, 112 N. Y. 613, citing *Auburn Bank v. Roberts*, 44 N. Y. 192; *Re Eleventh Ave.* 81 N. Y. 436; *Sherwood v. Lafayette*, 7 West. Rep. 523, 109 Ind. 411, citing *Severin v. Cole*, 38 Iowa, 463; *Parks v. Boston*, 15 Pick. 203; *Baltimore & O. R. Co. v. Thompson*, 10 Md. 76; *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479; *White v. Rittenmyer*, 30 Iowa, 268; *Choteau v. Thompson*, 2 Ohio St. 114; *Kennedy v. Milwaukee & St. P. R. Co.* 23 Wis. 531; *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. 108; *Astor v. Hoyt*, 5 Wend. 603; *Re John and Cherry Sts.* 19 Wend. 659; 1 Jones, Mort. § 708.

The mortgagee's right to have such damages applied to the liquidation of his debt is not taken away by Mass. Act 1881, chap. 110, providing a statutory proceeding by either or both the mortgagor

The facts are stated in the opinion.

*Messrs. Frank J. Loesch and Charles A. Allen*, for Calumet River Railway Company, appellant:

Mistakes of fact, whether made by the court or by one of the parties, have been successfully employed as grounds for obtaining the interposition of courts of equity and securing the relief of the party injured by the mistake.

*Freem. Judgm. 3d ed. § 500; 2 Pom. Eq. Jur. § 856; Wilson v. Broughton*, 50 Mo. 17.

Equity will not permit the just rights of parties to be lost through mistake or ignorance of fact when such relief is not prejudicial to the rights of others.

*Fears v. Albee*, 69 Tex. 437, 5 Am. St. Rep. 78; *Weyant v. Murphy*, 73 Cal. 273, 12 Am. St. Rep. 50.

The award stands as an equivalent of the land condemned, and the condemning party has a right to come into a court of equity and ask that such award shall be so distributed to protect its interests.

All persons interested in the premises, and particularly mortgagees, are regarded as "owners," and an award in condemnation proceedings is for the entire value of the land, however numerous the owners or parties in interest may be.

*Mills, Em. Dom. § 65; Sherwood v. Lafayette*, 7 West. Rep. 524, 109 Ind. 411; *Watson v. New York Cent. R. Co.* 47 N. Y. 163.

The mortgagee, whether made a party defendant to a condemnation suit or not, is entitled to the award.

*South Park Omrs. v. Todd*, 112 Ill. 379; *Mills, Em. Dom. § 74; Bank of Auburn v. Roberts*, 44 N. Y. 192; *Astor v. Hoyt*, 5 Wend. 603; *Union Mutual L. Ins. Co. v. Slee*, 10 West. Rep. 154, 123 Ill. 95; *Chicago, B. & Q. R. Co. v. Chamberlain*, 84 Ill. 347; *Platt v. Bright*, 29 N. J. Eq. 128; *Platt v. Bright*, 81 N. J. Eq. 81; *Bright v. Platt*, 83 N. J. Eq. 362; *Wooster v. Sugar River Valley R. Co.* 57 Wis. 311.

In *Platt v. Bright*, *supra*, the chancellor held that it was the duty of the mortgagee to apply for the award so as to protect the railroad company. It seems very strange that if a duty is imposed on the mortgagee, and he is unwilling to perform it, others must suffer from that neglect and have no redress.

and mortgagee, unless he has been made a party to the proceeding by which the damages have been appropriated to the mortgagor. *Wood v. Westborough*, 1 New Eng. Rep. 593, 140 Mass. 403.

Where a mortgagee in possession at the time of the location of a railroad through the mortgaged premises takes from the railroad company a bond for damages, and afterwards buys the land and has the right to damages assigned to him, the company cannot refuse to pay him the damages on the ground that he was not the owner when the road was located. *State Line R. Co. v. Playford (Pa.)* May 21, 1888.

A mortgagee cannot recover for consequential injuries to the mortgaged property from the construction of a railroad, where the mortgagor has without fraud made an amicable settlement for such damages with the company. He has no right to damages as mortgagee as distinguished from the damages of the owner. *Knoll v. New York, C. & St. L. R. Co.* 1 L. R. A. 393, 121 Pa. 437.

See *Chicago & W. I. R. Co. v. Prussing*, 96 Ill. 208; *Kennedy v. Milwaukee & St. P. R. Co.* 22 Wis. 58.

*Messrs. Forrest O. Murdock and Sidney Smith* for appellant Davis.

*Messrs. Osborn & Lynde* for appellee.

**Magruder, J.**, delivered the opinion of the court:

In this case the appellant Railway Company instituted the proceeding for condemnation of land against the owner of the equity of redemption, and omitted to make the mortgagee a party to the proceeding. This omission was not due to the carelessness or negligence of the Railway Company, but was the result of a mistake. Section 2 of the Eminent Domain Act provides that the petition shall state the names of "all persons interested, as owners or otherwise," in the property to be taken or damaged. The holder of a mortgage upon the property is such an owner or interested party as should be made a party defendant. Here the mortgage to Dale was upon record when the petition was filed, and the name of the mortgagee thus appearing of record should have been stated in the petition for condemnation. In order to ascertain what persons were interested in or held liens upon the property, the Company applied to a firm of abstract makers and conveyancers, whose business it was to furnish information upon such subjects, and received from such firm a report as to the title, which failed to give the name of Dale, or to show the existence of the Dale mortgage. The Company was thus misled without fault of its own. It paid the whole amount of the condemnation money into the hands of the county treasurer before it learned that there was a mortgage upon the property condemned. The mortgagee Dale, and Drexel & Co., who were interested with him, must have known of the proceeding to condemn, because their agent and attorney was present at the trial of the condemnation suit. They did not, however, become parties by filing a cross-petition, as provided for in section 11 of said Act. The appellee Brown, the owner of the equity of redemption, and the only defendant in the condemnation proceeding, communicated no information as to the existence of the mortgage. Still, neither Brown nor the mortgagees were responsible for the failure of the Company to make the mortgagees parties. It remains true, nevertheless, that the payment of the money to the county treasurer would not have taken place but for the mistake of the abstract makers as to the condition of the record. Why should not equity relieve the Company from the consequences of such mistake?

Let us see what consequences might follow. The sum of \$17,500 paid to Davis, the county treasurer, was not the value of Brown's equity of redemption only. It represented the full value of the property taken, and damages to the portion of block B not taken, the former being \$4,600, and the latter \$12,900. Brown insists upon the payment of all the money to him, and, if such payment should be made to him, he would be receiving more than the value of his interest in the property. Indeed, it is questionable if his interest is worth anything. The amount of the mortgage is \$150,000, and the proof shows that it exceeds the value of all the

property subject to it. The proof also shows that Brown's indebtedness is not less than \$500,000. The mortgagees not having been made parties to the condemnation suit, their rights were not cut off by that suit. They are still entitled to foreclose their mortgage against the land condemned. If, therefore, the money is paid to Brown, the Company may be compelled to pay for the land a second time by the foreclosure of the mortgage. Such a result as this would be inequitable in the extreme.

Where the power of eminent domain is exercised, the fund paid stands in the place of the land condemned; the lien attaches to the fund; "the rights of the mortgagee remain unaltered, and he is entitled to have the money in place of the land applied to the payment of his claim." 1 Jones, Mort. § 706; *Chicago, B. & Q. R. Co. v. Chamberlain*, 84 Ill. 338; *South Park Comrs. v. Todd*, 112 Ill. 379; *Union Mut. L. Ins. Co. v. Sles*, 128 Ill. 57, 10 West. Rep. 154.

It is true that Dale and Drexel & Co. have not filed a bill to foreclose the mortgage, although it is overdue; they have made no application to Davis to have the money paid to them, and have made no opposition to the payment of it to Brown, not being willing, according to the proof, to "make an enemy of Brown by doing it." But at the same time they are entitled to have the money as an equivalent of the land; their lien in equity follows the fund, which is a substitute for the land. *Sherwood v. Lafayette*, 109 Ind. 411, 7 West. Rep. 524.

This being so, there is reason here for the application of the well-known principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. 8 Pom. Eq. Jur. § 1414.

Upon the assumption that the verdict and judgment would not have been more than \$17,500, if the mortgagees had been parties, and subject to the other qualifications hereafter stated, the mortgagees may either take the money and apply it on their debt, or resort to a foreclosure of their mortgage against the land condemned and damaged. They have two funds,—the money and the land. The appellant Company has but one fund,—the land condemned,—and in equity may require the application of the money to the debt before resort is had to the land.

Section 14 of the Eminent Domain Act provides that the compensation may in all cases be paid to the county treasurer, who shall, on demand, pay it to the party thereto entitled. The judgment in this case orders that the "petitioner pay to the county treasurer of Cook County, for the benefit of the owner, or to John B. Brown, claimed to be such owner, the sum of \$17,500." There is here no absolute direction to pay the money to Brown. The language is in the alternative, and contemplates that some other person than Brown may be the owner. Surely a court of chancery may determine who is the owner,—for whose benefit the money was paid. As between the mortgagors and mortgagee, the fund belongs to the latter to the extent of the mortgage debt. As between Brown and Dale or Drexel & Co., the fund belongs to the latter, inasmuch as the mortgage debt exceeds the fund. There can be no injustice in this view, as the appellee receives the benefit of the money when it is credited upon

his debt. *South Park Comrs. v. Todd and Union Mut. L. Ins. Co. v. Slee, supra.*

It is said, however, that the mortgagees, not having been made parties to the condemnation proceeding, did not have their day in court, and had no hearing upon the question as to what was a just compensation to be paid by the Railroad Company. This is true, and the mortgagees are still entitled to such hearing; they are not bound to accept \$17,500 as the exact and whole amount to be paid by the Company without a chance to be heard upon that subject, either in a proceeding by the Company to condemn their interest or otherwise. *Mills, Em. Dom. § 74; Lewis, Em. Dom. § 324; Wilson v. European & N. A. R. Co. 67 Me. 858.*

But are they not fully protected in this regard by the decree of the circuit court? By the terms of that decree they are authorized to receive the \$17,500, and have it credited upon their debt, and, if the balance of the debt is not paid, and they are obliged to resort to a foreclosure, they are further authorized to have a revaluation of the land taken, and a redetermination of the damages to the land not taken, either by an issue out of chancery, or by some proceeding of their own selection; and, should the amount of a just compensation be thereby found to exceed \$17,500, to have the excess applied upon the mortgage. It is claimed, however, that the decree is erroneous, under the doctrine laid down in *Union Mut. L. Ins. Co. v. Slee, supra*, where it was said that proceedings to condemn property under the Eminent Domain Act are legal, and not equitable, and that it would be inconvenient for a court of equity to remit the matter of condemnation to a court of law for trial according to the rules and practice in trials at law. The statement thus made in the *Slee Case* is correct as a general proposition, and as applicable to the facts of that case; but it can have no application to the circumstances of the present case, as will appear from a brief examination thereof. Here the decree directs that, in case of a foreclosure of the mortgage, the property mortgaged shall be sold in the inverse order of alienation, treating the taking of the strip of land condemned by the Company as an alienation. It is certainly in accordance with equitable principles that the balance of the mortgaged land be sold first, before resorting to the strip taken for railroad purposes. But it appears from the evidence in this case that the appellant Company has taken possession of the strip of land condemned by it, and has improved it, and built its right of way upon it, and is using the improvements. If upon foreclosure the debt is not paid by the sale of the rest of the mortgaged land, how is the lien to be enforced against the strip thus taken and improved? Shall the right of way be sold with the railroad tracks and other improvements upon it? Ordinarily, fixtures placed upon mortgaged premises by the mortgagor become a part of the realty, and inure to the benefit of the mortgagee by increasing his security. But it has been held that, in such a foreclosure as that now under consideration, the holder of the mortgage ought not to be allowed to sell the road, track, superstructure and fixtures, placed upon the land at great expense

12 L. R. A.

by the Railroad Company, for the reason that the public has an interest in the successful operation of the road, and that, therefore, equity only requires the Company to make compensation by paying the value of the land at the time it was taken, and interest on that amount. *Kennedy v. Milwaukee & St. P. R. Co. 22 Wis. 581; Aspinwall v. Chicago & N. W. R. Co. 41 Wis. 474; Wooster v. Sugar River V. R. Co. 57 Wis. 811; Wilson v. European & N. A. R. Co. supra.*

Hence some method must be adopted of ascertaining what the value of the land condemned was at the time when it was taken, exclusive of the value of the improvements placed upon it by the Railroad Company since that time. It would seem that the proper method to be adopted for such purpose is the statutory method, or that prescribed by the Eminent Domain Act for ascertaining the amount of compensation. *Kennedy v. Milwaukee & St. P. R. Co. supra.*

The decree of the circuit court in the case at bar conforms to the rule thus laid down in the Wisconsin cases, and may be regarded as correct, so far as it has reference to the value of the strip of land taken. To what extent is it correct in requiring the amount of damages to the portion of block B not taken to be ascertained, and the excess thereof, if any, over the damages found by the jury in the condemnation proceeding, to be applied upon the mortgage debt? The verdict in that proceeding showed, separately, the value of the part of the block which was taken, and the damages to the part thereof not taken. The judgment also refers to the total amount as being for both value and damages. After the court of chancery has directed an issue at law to be tried to ascertain the value of the land taken exclusive of the improvements upon it, it could easily be determined at the same time, as an incident to such issue, what were the damages to the land not taken at the time of the condemnation. As such damages had the effect of lessening the value of the land subject to the security of the mortgage, it would be equitable to credit them upon the mortgage debt. But if the decree is erroneous in directing such damages to be ascertained, and the money now in the hands of the county treasurer is paid to the appellee, Brown, how are the mortgagees to receive the benefit of the damages in the event of a foreclosure? This is not a case where the condemnation money has already been paid to the mortgagor. The present bill was filed, and an injunction was obtained, while the money was yet in the hands of the county treasurer. If the money is paid to Brown, then when the foreclosure takes place the mortgagees will sell the land damaged, but not taken, at its reduced value. If there is no way under the foreclosure proceeding to ascertain the damages, and require the payment of the same, then the mortgagees will be remitted to their action at law against the Railway Company or Brown, the mortgagor.

In *Wilson v. European & N. A. R. Co., supra*, where the mortgagee was not made a party to the condemnation proceeding and the condemnation money was paid to the mortgagor, the mortgagee was allowed to maintain trespass against the railroad company. Consequently

if the decree of the circuit court is erroneous in the particular now under discussion, it is difficult to understand why Dale or Drexel & Co. should object to it. It is favorable to them, in that it gives them a chance to show, if they can, that the value of the land taken was greater than \$4,600, and that the damages to the land not taken were more than \$12,900, and gives them the benefit of the excess, if excess there is. The mortgagees, however, are not objecting to the decree. Decree *pro confesso* was rendered against them. They assigned no errors in the appellate court. They have assigned no cross-errors here. It does not lie in the mouth of the appellee Brown to object to the decree, so far as it provides for the proceedings under the foreclosure hereafter to be had. The judgment already rendered in the condemnation suit is binding upon him.

He was a party to that suit, and introduced evidence upon the trial of it. He is estopped from denying that the sum of \$17,500 is just compensation for the value and the damages. His assignments of error merely question the justice of the decree, in so far as it orders the money now in the county treasurer's hands to be paid to the mortgagees, and not to himself. As we hold that the money should be applied upon the mortgage debt which he owes, it is unnecessary to indulge in any further discussion as to those features of the decree which concern the mortgagees only.

It follows from the views here expressed that the judgment of the Appellate Court must be reversed, and the decree of the Circuit Court affirmed.

It is accordingly so ordered.

Petition for rehearing denied.

## ARKANSAS SUPREME COURT.

Josiah W. DEMBY, *Appt.*,

v.

Mary A. PARSE *et al.*

(....Ark....)

**Buildings erected by a third person on land in the possession of a life tenant cannot be removed against the objection of the remainderman if they are not within any of the exceptions to the rule against the removal of fixtures by a tenant, although they were erected under an agreement with the life tenant that they should remain chattels and be removable by their builder.**

(November 16, 1890.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendants in an action brought to recover *inter alia* the value of certain buildings which had been removed from plaintiff's land. *Reversed.*

The facts are stated in the opinion.

**Messrs. U. M. Rose, G. B. Rose and Charles D. Greaves**, for appellant:

Where the permission to remove a building is accorded by a life tenant, the removal must be made during his life, or within a reasonable time after his death, and any unnecessary delay vests the ownership in the remainderman.

1 Washb. Real Prop. chap. 1, par. 80a; Wood, Land, and T. 907.

A reasonable time means that it shall be removed with all convenient dispatch.

*Burk v. Hollis*, 98 Mass. 55.

The agreement between Parse, the life tenant, and Elliott, his lessee, for a license to remove buildings placed by the lessee on the lands held by Parse as tenant for life is not binding on the remainderman.

*Haflick v. Stober*, 11 Ohio St. 482; *White v. Arndt*, 1 Whart. 91; *Oakley v. Monck*, L. R. 1 Exch. 159; *Ewell, Fixtures*, p. 154; *Austin v.*

**NOTE.**—As to conditions under which a tenant may remove improvements constructed by himself, see notes to *Overman v. Sasser* (N. C.) 10 L. R. A. 722; *Friedlander v. Hewitt* (Neb.) 9 L. R. A. 700; *Colamore v. Gills* (Mass.) 5 L. R. A. 150 12 L. R. A.

*Rutland R. Co.* 45 Vt. 215; *Merritt v. Scott*, 81 N. C. 385; *Corbett v. Laurens*, 5 Rich. Eq. 801; *Thurston v. Dickinson*, 2 Rich. Eq. 817; *Elam v. Parkhill*, 60 Tex. 581; *Datesman's App.* 127 Pa. 359; *Smalley v. Isaacson*, 40 Minn. 450; *Austin v. Stevens*, 24 Me. 528; *McCullough v. Irvine*, 18 Pa. 488.

Nowhere is it held that a dwelling-house erected for purposes of habitation is a removable fixture.

*Van Ness v. Pacard*, 27 U. S. 2 Pet. 137, 7 L. ed. 874.

**Mr. M. A. Austin**, for appellees:

The general rule that the right of removal must be exercised at or before the expiration of the tenancy, is necessarily subject to exception in case of tenancy at will or for life.

The law does not fix the precise time for the removal, and what is a reasonable time is, where there is no dispute as to the facts, a question for the trial court.

*Antoni v. Belknap*, 102 Mass. 193; *Ellis v. Paige*, 18 Mass. 49; *Doty v. Gorham*, 5 Pick. 490; *Martin v. Roe*, 7 El. & Bl. 237; *Whiting v. Brastow*, 4 Pick. 810, and note. See *Weston v. Woodcock*, 7 Mees. & W. 14.

Rightful permission was granted Elliott to occupy this ground with his buildings, and this right continued after the death of Parse, subject to the approval or disapproval of the appellant, and he had a reasonable time, after disapproval by appellant, in which to remove his buildings.

*Sullivan v. Carberry*, 67 Me. 582; *Bircher v. Parker*, 40 Mo. 118; *Howard v. Nessenden*, 14 Allen, 124; *Holmes v. Tremper*, 20 Johns. 29, 11 Am. Dec. 238, and note; *Thomas v. Crout*, 5 Bush, 37; *Crowis v. Hoover*, 40 Ind. 49; *King v. Wilcomb*, 7 Barb. 263; *Loughran v. Ross*, 45 N. Y. 792; *Ewell, Fixtures*, pp. 148, 149.

The removal was lawful.

*Penton v. Robart*, 2 East, 88; *Watriss v. National Bank of Cambridge*, 124 Mass. 576; *Roberts v. Kain*, 6 Robt. 354; *Keogh v. Danzell*, 12 Wis. 172; *Dubois v. Kelly*, 10 Barb. 509; *Ombony v. Jones*, 19 N. Y. 239; *Ewell, Fixtures*, p. 143

Parse contracted with Elliott that these buildings should be personal property removed or disposed of at the will of Elliott. By virtue of this agreement these buildings never became fixtures, but were integral chattels and governed by the rules of law applicable in such cases.

*Dame v. Dame*, 88 N. H. 429, and cases cited; *Ewell, Fixtures*, pp. 66, 148; *Hartwell v. Kelly*, 117 Mass. 235; *Feimster v. Johnson*, 64 N. C. 259; *Peck v. Knox*, 1 Sweeney, 311; *Northern Cent. R. Co. v. Canton County*, 80 Md. 847.

These houses were the personal property of Elliott.

*Ewell, Fixtures*, p. 140; *Witherspoon v. Nickels*, 27 Ark. 882; *Corey v. Bishop*, 43 N. H. 146; *Dame v. Dame*, 88 N. H. 429, and cases cited; *Donnell v. Hitchcock*, 118 Mass. 401; *Wall v. Hinds*, 4 Gray, 278; *Dubois v. Kelly*, 10 Barb. 496; *Mills v. Redick*, 1 Neb. 437; *Pennybecker v. McDougal*, 48 Cal. 160.

In such cases it is immaterial what is the purpose, size, material or mode of construction of such buildings.

*Van Ness v. Pacard*, 27 U. S. 2 Pet. 137, 7 L. ed. 374; Taylor, Land. and T. § 546.

The idea that removable fixtures are only such as refer to trade or tenant's fixtures, or ornamental works, is no longer tenable.

*Haven v. Emery*, 83 N. H. 66; *Dame v. Dame*, *supra*; *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Wagner v. Cleveland & T. R. Co.* 22 Ohio St. 563; *Hines v. Ament*, 43 Mo. 298; *Fuller v. Tabor*, 39 Me. 519; 8 Cent. L. J. pp. 616, 617.

Justice demands that the tenant should be allowed to remove the addition or improvements put up by him, unless the removal would operate to the prejudice of the inheritance by leaving it in a worse condition than when he took possession.

*Bircher v. Parker*, 40 Mo. 120, and cases cited; *Whiting v. Brastow*, 4 Pick. 310; Tyler, *Fixtures*, p. 492.

**Hughes, J.**, delivered the opinion of the court:

Appellant was the owner and entitled to the possession of a lot and a half of land, in the City of Pine Bluff, which is described in the complaint. He was the heir-at-law of his granddaughter Lizzie Parse, Jr., who had died without issue, leaving her mother surviving, who afterwards died leaving her husband, Melvin Parse, her surviving, and he thereupon became tenant by the curtesy of these lots. He afterwards intermarried with the appellee, and subsequently died, leaving appellee him surviving, as his widow, in possession of the lots, which she continued to occupy till this suit was commenced, living in the old residence, which was partly upon the lots, and partly upon a strip of land, owned by appellee, between the lots and Barraque Street, in said city. Melvin Parse, while tenant by the curtesy, gave John M. Elliott permission to erect a dwelling-house and some other buildings on the lots, and agreed that he might remove them, which were removed by the appellee and himself onto the land of appellee after Melvin Parse's death, and without consent of appellant. The circuit court awarded possession of the lots to appel-

lant, gave him judgment for one half the rents of the old residence, less the taxes, insurance and repairs, and awarded the remainder to appellee, but decreed that the buildings removed were the personal property of John M. Elliott. Appellant presented the case here by an appeal. Had the tenant for life, or those claiming under him, the right to remove the buildings erected within the life tenancy by John M. Elliott, under the agreement made with him by Melvin Parse, the tenant by the curtesy, that he might erect and remove them? The right of a tenant for years and of a life tenant to remove fixtures erected by the tenant within his term has been much discussed, but generally not very satisfactorily. But we are relieved of the necessity of an extended discussion of it by the researches and able consideration and discussion of the identical question by Chancellor Cooper in the case of *Cannon v. Hare*, 1 Tenn. Ch. 22, in which he said: "The law of fixtures, particularly in the form of actual buildings, seems to be in a distressing state of uncertainty." And, after a full and satisfactory review of the text-writers, and the leading cases upon this question, he thus sums up his conclusions: "(1) that the general rule is that everything affixed to the freehold passes with the freehold, and that the rigor of this rule is only relaxed in exceptional cases; (2) that this general rule will prevail, even between landlord and tenant for years, unless the circumstances are such as to create an exception; (3) that an exception does exist, in favor of tenant for years, in the case of buildings erected principally for the purpose of trade, or in the nature of trade, or outbuildings not attached to the soil; (4) that no exception exists in favor of such tenant, where the buildings are erected for use principally as dwelling-houses, or with a view of adding to the yearly income; (5) that it is doubtful how far a tenant for life is entitled to the exceptions in favor of a tenant for years, but it is certain that the rule of exceptions as to him is of more limited range; (6) that the decisions of late years lay little stress upon the mode of attachment to the soil, and more upon the relations of the parties, the intention with which the buildings are erected and the uses to which they are put. See *McDavid v. Wood*, 5 Helsk. 95."

Those who claim under the tenant for life in this case fail to bring themselves within any of the exceptions recognized by the authorities. It follows, therefore, that the appellant was entitled to recover possession of the lot and a half described in the complaint, with rents thereon from the date of the death of Melvin Parse, the life tenant, including rents upon the houses removed, and to recover the value of the houses removed therefrom, with interest upon said rents from the time they were due, and upon the value of said houses removed from the date of removal, allowing the appellee one half the rents of the old residence upon the line, after deducting sums expended by her for taxes, insurance and repairs.

The cause is reversed and remanded, with instructions to enter a decree as indicated herein.

**Hughes, J.:**

Upon the motion to modify the judgment of this court in this cause, we have care-



fully examined the evidence in the transcript, and the answer of the appellee to the complaint, and find that there is no sufficient evidence in the same to warrant the court in determining the situation of the four-room residence erected by John M. Elliott before its removal; that is, whether it was wholly on the lot and a half of appellant, or partly on the strip of land of appellee. Wherefore said judgment is modified, and the question as to the location of said residence before its removal is remitted to the Jefferson Circuit Court for examination and determination upon further evidence in relation thereto. That part of the

judgment of this court which awards the value of rents for said four-room residence to appellant to the time of its removal, and also the value of said building at the time of its removal, with interest on said amounts, is vacated. With the exception of the modification and change indicated, the motion to modify is overruled, and the judgment will stand as heretofore rendered, with direction to the circuit court to hear further testimony in relation to the location of the said four-room residence, and to proceed in relation thereto in accordance with the principles determined in this cause.

### MARYLAND COURT OF APPEALS.

Calvin LONG, *Appt.*,

STATE OF MARYLAND.

(.....Md.....)

**A sale of packages of coffee**, on each of which is a slip of paper to be torn off, having on the under side the name of some article of crockery that the buyer of the package is entitled to, is a violation of Code Pub. Gen. Laws, art. 27, §185, prohibiting gift enterprises.

(March 24, 1891.)

**APPEAL** by defendant from rulings of the Criminal Court of Baltimore City refusing to strike out certain testimony taken during the trial of an indictment charging defendant with a violation of the Statute prohibiting gift enterprises, and also refusing to acquit defendant. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. Benjamin Kurts*, for appellant:

The term "lottery" or "a scheme or device in the nature of a lottery" means "A distribution of prizes and blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value, either in money or other articles."

*Ballock v. State* (Md.) 8 L. R. A. 671; *United States v. Olney*, 1 Dedy, 461.

In this case it is conceded that the "Big Bo-

nanza Coffee," as put up in these pound packages, was worth twenty-five cents per pound, as compared to other coffee in the market of the same grade; and that this brand would bring that price at retail, without the gift of crockery ware made with the sale thereof. No consideration, therefore, was paid by the purchaser for the plate or saucer which he received from the defendant upon the coupons contained in packages of coffee purchased; in other words, these pieces of crockery were a pure gift or bounty bestowed by the seller upon the buyer, which he had a right to do as an advertisement for the sale of his goods.

*Yellowstone Kit v. State*, 7 L. R. A. 600, 88 Ala. 196.

By this scheme or device, the purchaser not only gets what he pays for, but, by the very terms of the contract, he has no chance to obtain anything more. In the purchase of the packages, he purchased the right to a certain article of crockery ware from a counter or assortment in full view, and he got no chance to obtain anything else.

*People v. Gillson*, 12 Cent. Rep. 616, 109 N. Y. 389.

There are no blanks in this scheme; purchasers are all placed on an equal footing; each one receives with his purchase a gift intended to be equal in value to any other article in the crockery collection.

#### NOTE.—Gift enterprise, a lottery.

A lottery is a scheme for the distribution of prizes by lot or chance. *Bouvier*, Law Dict. title *Lottery*. See *United States v. Olney*, Dedy, 461.

Any gift enterprise or raffle in which the public is invited to take shares for the distribution of prizes by chance is a lottery. *State v. Clarke*, 88 N. H. 329; *Dunn v. People*, 40 Ill. 465.

The fact that there are no blanks in the enterprise does not alter the rule. *Wooden v. Shotwell*, 23 N. J. L. 466; *Randle v. State*, 42 Tex. 580.

Gift enterprises or any scheme where tickets are distributed for prizes to be drawn thereon are prohibited by the Constitution. See *Ex parte Blanchard*, 9 Nev. 101.

See, as to requisites of indictment charging this offense and the evidence necessary to support the charge, 2 *Wharton*, Cr. L. 8th ed. § 1496; 2 *Archb.* Cr. Pl. 1775, 1776.

A scheme for the distribution of prizes by chance is a lottery. See notes to *State v. Kansas* 12 L. R. A.

*Mercantile Asso. (Kan.)* 11 L. R. A. 490; *State v. Boneil* (La.) 10 L. R. A. 60; *Yellowstone Kit v. State* (Ala.) 7 L. R. A. 599, 600; *Webster*, Dict; *Worcester*, Dict.

A gift enterprise is a lottery (see *Yellowstone Kit v. State*, 7 L. R. A. 600, and note, 88 Ala. 196), as a gift sale of books. *State v. Clarke*, 88 N. H. 329.

That a gift enterprise is a lottery, see *Dedy*, Cr. L. § 108 a.

That a gift enterprise is gambling, see *Bell v. State*, 5 Sneed, 507; *Dedy*, Cr. L. 101 a.

The following schemes are lotteries: prize concerts (*Com. v. Thacher*, 97 Mass. 583; *State v. Overton*, 16 Nev. 136); prize tickets to induce subscription to a newspaper (*State v. Mumford*, 73 Mo. 647); raffles at fairs (*Com. v. Manderfield*, 8 Phila. 450); drawing works of art (*Governors of Almsbouse v. American Art Union*, 7 N. Y. 228); drawing presents on ticket to public exhibitions (*State v. Shorts*, 23 N. J. L. 398); prizes offered as inducements to buy municipal bonds (*United States v. Zeisler*, 30 Fed. Rep. 490); playing policy. *Wilkinson v. Gill*, 74 N. Y. 63.

*Hull v. Ruggles*, 56 N. Y. 424; *Thomas v. People*, 59 Ill. 160.

The defendant's act, which goes no farther than to sell a poor man coffee and give him a cup or saucer out of which to drink it as an inducement to purchase the "Big Bonanza," in preference to some other brand of coffee offered in the market without this attraction, does not present a case which justifies the court in torturing out of the Statute under consideration a construction which will bring the defendant under its condemnation in order to avert the evils of the lottery so vividly described in 2 Wharton, C. R. § 1491.

In these days of sharp competition in trade, the scheme or device adopted by the manufacturers in this case is a perfectly legitimate and harmless method of advertising their goods and creating a successful market for them, and such commercial enterprise should be encouraged and protected by the law, and not hampered or prosecuted by it.

*Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 747, 28 L. ed. 585; *People v. Gillon*, *supra*.

*Messrs. William Pinkney Whyte, Atty-Gen., and Charles G. Kerr*, for the State.

Fowler, J., delivered the opinion of the court:

The appellant was indicted in the Criminal Court of Baltimore City for violating § 185, art. 27, of the Code of Public General Laws, which provides "that no person or body corporate shall be permitted, either directly or indirectly, by agent or otherwise, to barter, sell or trade, or to offer for barter, sale or trade, by any publication, or in any way, any wares, goods or merchandise of any description in package or bulk, holding out as an inducement for any such barter, sale or trade any scheme or device by way of gift enterprise of any kind or character whatever." The indictment contained two counts. In the first the appellant was charged with unlawfully selling merchandise in a package, to wit, coffee, holding out as an inducement for such sale a certain scheme or device by way of a gift enterprise; and the second count charges him with keeping a certain place or house for selling lottery tickets. To this indictment the appellant demurred, upon the ground that the Act of 1886, chap. 480, upon which the said indictment is based, is unconstitutional and void, and, the court having overruled this demurrer, the appellee abandoned the second count,

which related to the sale of lottery tickets, and elected to stand upon the first count. The case was tried before the court without a jury, and the appellant was found guilty on the first count; but as appears by the record, no final judgment has been entered, and, the demurrer not being before us, the only question presented is as to the admissibility of the testimony excepted to, which is as follows: "That the defendant, Long, kept a general grocery store at No. 1731 Pennsylvania Avenue, known as the 'Northern Central Supply Store;' that on the 19th day of September, 1890, the witness Reilly purchased at said store from the witness Clark [the latter being a clerk in the employ of the defendant], for the sum of twenty-five cents each, three one-pound packages of ground coffee, called the 'Big Bonanza Coffee;' that on each of said packages so purchased was pasted a blue slip of paper, about three quarters of an inch wide, and extending nearly around the package; that the outside of this slip was blank, but on the inside of each slip was printed, respectively, the following: '1 plate,' '1 plate,' '1 saucer,' and that said slips of paper were pasted at either end of said packages in such manner as to be easily torn off; that the witness Reilly tore said slips of paper from said packages, and presented them to the witness Clark, who thereupon presented him with three pieces of small crockery ware, consisting of two plates and one saucer, which were produced at the trial, and offered in evidence; that these pieces of crockery were obtained by the witness Clark from a collection or assortment of crockery ware on exhibition in said store, and in view of customers, and that there was also displayed in the show-window of said store a number of packages of said coffee, and pieces of said crockery ware, and a notice or card to this effect: 'A piece of this crockery ware given with each pound.'" If the scheme which is thus shown by the evidence to have been adopted by the appellant, and which certainly is not characterized by any originality, is not a gift enterprise, it would be difficult to find words to describe it. Without discussing the decisions of courts of other States referred to in the argument, we base our opinion upon our own Statute, which in express terms prohibits "any scheme or device by way of gift enterprise of any kind whatsoever." Finding no error, the ruling of the court below will be affirmed.

*Ruling affirmed, and cause remanded.*

## MAINE SUPREME JUDICIAL COURT.

Lucy A. CORSON, *per Pro. Amis*,

Ellsworth DUNLAP *et al.*

(....Maine....)

**A judgment for the penalty with an assessment of damages so far as they have accrued, leaving future damages to be recovered by after process of *scire facias*, is required in an action on a penal bond, by Rev. Stat., chap. 88, § 32, where the liability of the party in 12 L. R. A.**

the bond is a continuing liability, as in the case of a bond given in bastardy proceedings; but such a judgment is not required by that Act in an action on a bond conditioned to pay a single sum on a day certain, because in such case there can be but one breach and one assessment.

(June 12, 1890.)

**EXCEPTIONS** by plaintiff to a judgment of the Trial Term of the Supreme Judicial Court for Somerset assessing the damages for

breach of the condition of a bond given in bastardy proceedings. *Overruled.*

Suit was originally brought in this case in 1886, and defendant was adjudged the father of complainant's child and ordered to pay to complainant towards the support thereof \$1 a week to be paid at the end of each eight weeks. He was further directed to give to complainant a bond with sureties, in the penal sum of \$500, conditioned for the performance of the decree.

Suit was brought on this bond and the law court finally gave judgment for the penal sum of the bond, execution to issue for such damages as accrued under the order of the court.

At the September Term, 1888, the case came on for an assessment of damages before a single justice, and he made the following assessment:

"Heard in damages by the presiding justice, judgment for penalty of the bond, execution to issue for the amount assessed by the court in the original action, including all sums due under the decree to last day of this term, with costs of that suit, . . . and interest on said sums, amounting to, . . . with costs of this action."

To this assessment, and the rule of assessment, the plaintiff excepted.

*Messrs. J. F. Holman and Walton & Walton* for plaintiff.

*Messrs. Merrill & Coffin* for defendants.

*Peters, Ch. J.*, delivered the opinion of the court:

The question is whether, in an action on a penal bond given in bastardy proceedings, the judgment should be for the penalty, and damages be assessed so far as they have accrued at the time of the assessment, future damages to be recovered by after-process of *scire facias*, or whether judgment must be given, once for all, for all the damages that will ever be sustained, both past and prospective, where the liability of the principal in the bond is by the order of court a continuing liability.

We are of the opinion that the first named is the proper procedure. We are induced to give an explanation for such opinion, on account of some adverse expressions on the point, to be found in our own cases.

The decision of the question depends on the construction to be given to a section of our statutes, and upon the scope and effect of such section, in view of the equity powers anciently accorded to courts of law, in this branch of practice. The section referred to (Rev. Stat. chap. 82, § 82) is as follows: "In actions on bond or contract in a penal sum, for the performance of covenants or agreements, . . . when the jury finds the condition broken, they shall estimate the plaintiff's damages, and judgment shall be entered for the penal sum, and execution shall issue for such damages and costs."

This provision applies to actions on bonds containing a penal clause, where there may be breaches of the bond at different times. The portion of the section which requires a judgment for the penalty does not apply to a bond conditioned to pay a single sum on a day certain, because in such case there can be but one breach and one assessment, and no necessity

exists for retaining the penalty as a security for future breaches; but, even in such case, a judgment for the penalty would not be injurious to any party, and such (merely inaccurate) judgments are to be seen occasionally on our records.

Nor does the Statute extend to certain statutory bonds, bail-bonds, recognizances, bonds for good behavior, bonds to do or not to do some collateral act and the like. These bonds and some others are not money or business bonds, and are not conditioned for the security of covenants and agreements in the sense of the Statute, and can be chancery by the court with much more propriety than by a jury.

In *Philbrook v. Burgess*, 52 Me. 271, although the case was correctly decided, we think an erroneous opinion was expressed. That was an action of debt upon a bond which, by its terms, was to be void on condition that the defendant should maintain the plaintiff during her life. The jury were allowed to assess such damages as had accrued up to the date of the verdict, the defendant contending that damages should not have been assessed for any dereliction beyond the date of the writ. The defendant's exceptions were correctly overruled, but the court took occasion to say in the opinion that even more damages might have been legally assessed, and that all past and prospective damages should have been assessed, and that the bond did not come within the Statute, for the reason that the defendant was not a party to, and personally bound by, some agreement outside of and separate from the condition of the bond itself. The decisions do not sustain that position. Much reliance was placed in the opinion upon the reasoning of the court in *Hathaway v. Crosby*, 17 Me. 448. But in the latter case the argument of the court was merely to the effect that a poor debtor's bond was not a bond in any sense securing a covenant or agreement, and that the damages should be assessed by the court, instead of by the jury, for its forfeiture. That was undoubtedly a statutory bond which, at that day, belonged to a class of obligations not coming within the particular Statute in question.

No heed was paid in *Miller v. Miller*, 64 Me. 484, to the rule advocated in *Philbrook v. Burgess*, *supra*, and judgment was entered up for the penalty of a bond given by order of court for the support of certain parties, the support to be furnished by installments, although there was no covenant or agreement except the mere condition of the bond in common form.

The case of *Brett v. Murphy*, 80 Me. 358, 6 New Eng. Rep. 648, was an action on a bastardy bond, where judgment was entered for the past and estimated future damages, and not for the penal sum. But no attention was bestowed upon the point further than following without challenge the form of procedure indicated in *Philbrook v. Burgess*, *supra*. And the case now before us is also reported in the same volume (*Corson v. Dunlap*, 80 Me. 354, 6 New Eng. Rep. 718), where it was ordered that judgment be entered for the penal sum, the cases accidentally standing opposed to each other.

The original legislation on this form of procedure, from which our own Statute was in

great measure copied, was Stat. 8 and 9 Wm. III. chap. 11, § 8, passed nearly two centuries ago. The Act, a very long one, and in that respect within the fashion of its day, extends its provisions "in all actions upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements, in any indenture, deed or writing contained." In Tidd's Practice it is said, citing cases in approval of the statement, that this Statute was made in favor of defendants, was intended to be highly remedial and has received a very liberal construction. The author further says that where covenants or agreements are contained "in the condition of a bond,"—that is, implied by the condition,—they are held to be within the Statute, just as much as where they are in a different instrument. This construction was strongly maintained by Lord Mansfield, in 1759, in *Collins v. Collins*, 2 Burr. 820. In that case the penalty of the bond was to be forfeited if the defendant did not support the plaintiff and pay him a small sum annually during his life. There was no covenant or agreement outside of the bond, and none in it except such as was inferable from a penal clause and condition in ordinary form. There was no personal promise. It was there objected that the Statute of William did not apply, because the action was not brought upon a penalty for non-performance of an agreement or covenant contained in any indenture, deed or writing. Lord Mansfield is reported as making this reply: "This [bond] is an agreement between the parties, and an agreement in writing. The condition of the bond is an agreement in writing; and people have frequently gone into courts of equity, upon conditions of bonds, as being agreements in writing, to have a specific performance of them."

The law has ever since stood as Lord Mansfield enunciated it. We do not find that the Statute has been differently interpreted where the point has been directly presented for the decision of any court. Of course, there have been numerous cases where it has been controverted whether a particular bond involves the subject matter of an agreement or not, either expressly or by implication. But we think no modern case requires, in order to bring a bond within the Statute, such as our own is, that the covenant or agreement shall be an express personal obligation of the maker. The text-books, digests and law dictionaries seem uniformly to express the same view. In *Gainsford v. Griffith*, 1 Saund. 58, note, Mansfield's doctrine is accepted, and it is there said that the Statute was meant to meet cases where covenants are to be performed at different times, or moneys to be paid by installments. The question pending in the present case, though on different facts, arose in *Marvin v. Bell*, 41 Vt. 607, and it is there held in a clear and cogent discussion, that the condition in the bond, in its legal effect and operation, amounts to an agreement,—is its equivalent.

Mr. Bishop, in his work on Contracts, § 1458, aptly describes the English legislation, and its effect, in the following: "For shortening the processes of justice, in 1697, the English Statute of 8 and 9 Wm. III. chap. 11, § 8, provided that, on a recovery of judgment for a penal

sum in any court of record, inquiry should be made by a jury as to the amount of damages suffered from breaches which had already transpired, on payment whereof the judgment should simply remain a security against further breaches. And on there being such, the actual damage should, on *scire facias*, be in like manner ascertained. Then, in 1705, it was enacted by 4 Anne, chap. 16, § 18, that, in an action on a bond with a penalty for the payment of money, if the defendant shall bring into the court where the action shall be depending all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of said bond. The date of these Statutes is subsequent to the earliest settlements in this country; still, being highly remedial and beneficial, they were accepted as common law in Maryland and Pennsylvania and, it is believed, in nearly all of our other States. And there has been more or less American legislation to the like effect." *Massachusetts and Maine were governed by legislation of their own of similar effect. Bailey v. Rogers*, 1 Me. 186, 190.

But these Acts had been preceded by the judicial thought. The courts had in great measure adopted devices to the same end before these Acts were passed; and, although at first the practice was to invoke the aid of a chancery court for the purpose, courts of law had gradually taken the power to chancery bonds and relieve against penalties into their own hands. Though in ancient days judgment would go for the penalty of a bond, motions were resorted to, to restrain the collection of more money than a plaintiff was equitably entitled to. Many authorities illustrating the old practice are cited in Paine and Duer's Practice and in Tidd's Practice under the head of *Judgment*. Both before and after the Statute of Anne, the practice was to allow the defendant, on his motion, to bring the whole amount of the penalty into court, and the proceedings were thereupon stayed. The plaintiff would receive only the amount of the principal, interest and costs; and, if this did not consume the amount of the penalty, the defendant was allowed to take out the remainder. It was denominated "an equitable motion to be relieved against the penalty." *Gregg's Case*, 2 Salk. 596. And see cases cited in note in 3 Parsons, Cont. 6th ed. \*157.

And in no class of cases was the privileged proceeding more invoked than in instances of bonds given to a parent or a parish against the burden of a bastard child. In *Wilde v. Clarkson*, 6 T. R. 808, which was an action brought on a bond given for indemnity against expense that might be suffered by reason of the then expected birth of a bastard child, Lord Kenyon, *Ch. J.*, permitted the penalty to be paid into court, and, in the course of his opinion, remarked: "Suppose the plaintiff proceeds in this action, the judgment would be for the penalty of the bond, and one shilling nominal damages for the detention of the debt. In actions on bonds or on any penal sums for performance of covenants, etc., the Act of Parliament expressly says that there shall be judgment for

the penalty, and that the judgment shall stand as a security for further breaches." The only agreement in that case was the bond itself.

In Massachusetts, where the Statute is substantially like our own, the practice accords with our view on this question. *McGrath v. Conway*, 116 Mass. 860, and *Barnes v. Chase*, 128 Mass. 211, are cases where judgment was given for the penalty in bastardy bonds, and damages were assessed for so much as was due at the date of assessment under the order of court. See *Batley v. Holbrook*, 11 Gray, 212.

In *Sevey v. Blacklin*, 2 Mass. 541, the court used this language: "When it shall appear in the court that the penalty is forfeited, then the equity powers of the court commence, and the judges are authorized to enter judgment for so much money as in equity and good conscience the plaintiff can claim, unless the condition of the bond be such that further damages may arise to him by future breaches. In such case judgment is rendered for the penalty, and execution is awarded for the damages already accrued, and the judgment is to stand as a security for future damages to be recovered by *scire facias*." There could not be, in our judgment, a better statement of the law than the above. The procedure ordained or approved by the Statute should apply where it is fitting.

And such was the intention of the English Act, and of our own Act. Its meaning is greater than its words. The bond itself is a covenant or agreement in all cases where the procedure fittingly applies. The bond does, in effect, contain a covenant or agreement, though there be no remedy except by a suit on the bond; it implies an agreement, assumes one. It is the nature of the condition which decides whether the Statute attaches to the bond or not. Some judge has said, a promise may be considered as implied from the joint effect of condition and penalty. We are to look at the nature and reason of the thing. What difference of procedure should there be, in an action on the bond, whether it be conditioned to se-

cure a written promise or only an oral promise, as long as the penalty assures that the promise will be kept? The penalty is the effectual security, not the promise. What difference should it make, in assessing damages under a bond, whether the defendant is also liable for the same cause in some other form of action or not? What difference should there be, in assessing damages in a conditional judgment on mortgage, whether the mortgage secures written promises or merely certain sums named in the conditional clause? What difference can there be whether a penal bond be given to secure a judgment of court based on a promise or a judgment based on a tort? The judgment is as definite in the one case as the other. The Statute was intended to have a wide and beneficent, and not narrow, operation.

The rule we acted upon is not only the true exposition of the Statute, but is equitable and just for all cases, and especially beneficial to both parties in the present case. If the plaintiff have a full allowance at once, there are chances that it would be improvidently expended. If the assessment of prospective damages be made in advance of the needs of the plaintiff, the defendant may be required to pay a much larger sum than may turn out to be necessary. Payment of damages as often as damages accrue is in accordance with the original order of court, with the policy of the law, and adapted to the situation of the parties.

We regard this a suitable opportunity for changing the rule of practice followed in this State since the case of *Philbrook v. Burgess*, *supra*, so far as it is inconsistent with the present decision, inasmuch as no principle touching the title to property is affected by the change, and the ruling made below is not overruled thereby. After the present case has been published that case will not govern us as an authority on the point involved in this discussion.

*Exceptions overruled.*

Walton, Virgin, Libbey, Foster and Whitehouse, JJ., concur.

## TEXAS SUPREME COURT.

G. H. DUGAN *et al.*, Appts.,

v.  
C. W. LEWIS *et al.*

(....Tex....)

1. The rate of interest on a contract between citizens of different States may be fixed according to the law of either State.
2. The law of Texas governs the rate of interest on notes secured by a trust deed given for money borrowed in New York, where the bargain was made and the money and papers delivered to and by an agent on behalf of a citizen of Texas, who signed and dated the papers in the latter State, if the stipulated rate of interest would have been usurious in New York, but not in Texas, and the deed of trust provides that the

contract shall be construed according to the law of the State of Texas, where the same is made.

3. A stipulation in a deed of trust to secure notes and interest coupons, that in default of any payment the whole sum of money secured shall become due at the lender's option, is to be construed as a penalty, and will not be enforced except upon the cancellation of unearned interest notes, and therefore it does not make the contract usurious.

(January 12, 1891.)

**A**PPEAL by plaintiffs from a judgment of the District Court for Grayson County in favor of defendants in a suit brought to restrain the enforcement of a deed of trust for breach of the conditions of the contract, the performance of which it secured, upon the alleged ground that the contract was tainted with usury. *Affirmed.*

The facts are stated in the opinion.

Mr. J. W. Finley, for appellant Dugan:

NOTE.—As to law governing question of usury in contracts made in one State to be performed in another, see *Martin v. Johnson*, 8 L. R. A. 170, and note, 24 Ga. 421.

12 L. R. A.

The stipulations in the deed in trust authorizing the lender to declare the notes due on failure to pay installments of interest render the contract usurious.

*Hemp v. Garland*, 4 Q. B. 519; *Harrison Mach. Works v. Reigor*, 64 Tex. 89; *Palmer v. Palmer*, 38 Mich. 487, 24 Am. Rep. 605; *Fisher v. Anderson*, 25 Iowa, 28, 95 Am. Dec. 761; *Hunt v. Keech*, 3 Abb. Pr. 204; *Clague v. His Creditors*, 2 La. 114, 20 Am. Dec. 800; 7 Wait, Act. and Def. 602, 605; *Cleveland v. Loder*, 7 Paige, 557, 4 L. ed. 273; *Thomas v. Murray*, 84 Barb. 166; *Browne v. Vredenburg*, 43 N. Y. 197; *Buttrick v. Harris*, 1 Biss. 443; *Leavitt v. DeLavny*, 4 N. Y. 869.

**Messrs. Brown & Bliss and E. C. McLean**, for appellant the City Bank of Sherman:

The two notes aggregating \$750 payable to C. W. Lewis, although dated as in Texas, and signed in Texas, were under the facts in this case made in New York.

*Whiston v. Stodder*, 8 Mart. O. S. 95, 18 Am. Dec. 281; 1 Randolph, Com. Paper, § 24; *Parsons, Notes and Bills*, 324; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Cook v. Moffat*, 46 U. S. 5 How. 295, 12 L. ed. 159; *Boyce v. Edwards*, 29 U. S. 4 Pet. 111, 7 L. ed. 799; *Andrews v. Pond*, 38 U. S. 13 Pet. 78, 10 L. ed. 67; *Miliken v. Pratt*, 125 Mass. 374; *Kling v. Fries*, 33 Mich. 275; *Webber v. Donnelly*, Id. 469; *M'Intyre v. Parks*, 3 Met. 207.

Those notes, as well as the note for \$5,000 payable to the American Freehold Land & Mortgage Company, were New York contracts, governed and controlled by the law of New York as to usury, and each of said notes and the deed of trust to secure the same were by the laws of said State absolutely void.

*Story*, Conf. L. § 804; *Lockwood v. Mitchell*, 7 Ohio St. 887, 70 Am. Dec. 78; *De Wolf v. Johnson*, 23 U. S. 10 Wheat. 368, 6 L. ed. 848; *Sands v. Smith*, 1 Neb. 108, 98 Am. Dec. 381; *Jones*, Mort. § 657, and authorities cited; *Curtis v. Leavitt*, 15 N. Y. 228; 2 Kent, Com. §§ 460, 461; *Mills v. Wilson*, 88 Pa. 118; *Sherwood v. Roundtree*, 32 Fed. Rep. 113; *Martin v. Webb*, 110 U. S. 14, 28 L. ed. 52; *Bishop*, Cont. § 113; *Connor v. Donnell*, 55 Tex. 167; *Andrews v. Hoxie*, 5 Tex. 171; *Andrews v. Pond*, 38 U. S. 13 Pet. 78, 10 L. ed. 67; *Boyce v. Edwards*, 29 U. S. 4 Pet. 111, 7 L. ed. 799; *De Sobry v. DeLaitre*, 2 Harr. & J. 191, 3 Am. Dec. 536; *Dickinson v. Edwards*, 77 N. Y. 573; *Jewell v. Wright*, 80 N. Y. 259; *Lee v. Selleck*, 33 N. Y. 615; *Story*, Conf. L. 304a; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Lapice v. Smith*, 13 La. 91; *Clague v. His Creditors*, 2 La. 114, 20 Am. Dec. 800; note to *Arayo v. Currell* (La.) 20 Am. Dec. 293.

**Messrs. Brown & Hall and A. T. Watts** for appellees.

**Henry, J.**, delivered the opinion of the court:

G. H. Dugan, who at the time was a resident citizen of the State of Texas, acting through an agent in the State of New York, borrowed from the American Freehold Land & Mortgage Company, of London, Eng., the sum of \$5,000. Dugan executed his note in favor of the mortgage company for said sum, payable at the office of the Corbin Banking Company in New 12 L. R. A.

York City five years after date, with interest from date at the rate of 8 per cent per annum, for which five coupon notes were attached to said note. The note contained a stipulation for the payment of 10 per cent attorneys' fees if it should be collected by suit, and another making the principal of the note become due, at the option of the holder thereof, upon the failure to pay any installment within thirty days after it should become due. Dugan, to secure said note, executed a deed of trust upon land in Texas, in which one Sherwood, the agent in New York of the lender, was made trustee. The agreement to lend the money was made in the State of New York, and the deed of trust and the note were delivered to the lender in that State. The \$5,000 was paid to Dugan's agent in the State of New York. The note and coupons and the deed of trust were dated and signed by Dugan in the State of Texas. The deed of trust contained the following clauses:

"Upon the failure of the borrower to pay said note, or either of said coupons, or failure to comply with any of the stipulations contained in the said deed of trust, the whole sum of money secured thereby may without notice to the borrower, at the option of the lender or his assigns, and at his option only, be declared due and payable at once."

"The contracts embodied in this conveyance, and the notes secured hereby, shall in all other respects be construed according to the laws of the State of Texas, where the same is made."

At the date of these transactions the rate of interest in the State of New York was 6 per cent and the reservation of a greater rate rendered the contract void. Dugan made default in the payment of interest, and the whole amount was declared due. Out of the \$5,000 the sum of \$2,135.66 was used without its reaching Dugan's hands, to pay off a prior mortgage upon the land. For the purpose of paying the Corbin Banking Company for its services in procuring the loan, Dugan executed two other notes, and secured them by a second deed of trust upon the same land,—one for \$300, the other for \$450, both bearing 10 per cent interest from date. They were both executed and delivered in Texas. They were made payable to C. W. Lewis, who resided in Texas, at the office of the Corbin Banking Company in the State of New York. Lewis had no pecuniary interest in these notes, and he transferred them to the Corbin Banking Company. This suit was brought by appellants to restrain the enforcement of the deed of trust on the ground that the contracts are governed by the laws of the State of New York and are therefore usurious and void. The cause was tried without a jury; and the court, upon a finding of facts from which we have taken the foregoing statement, rendered judgment in favor of the defendants.

The subject of the conflict of laws of interest and usury as affecting the enforcement of contracts has been much discussed, and opinions have conflicted, sometimes as to the law, and at others as to the effect of different conditions of fact.

In the case of *Connor v. Donnell*, 55 Tex. 174, this court said: "If a note sued on be made in New York, and be also expressly



made payable at a point in that State, then the question of usury will be controlled by the law in New York. It is believed that no authority can be adduced to the contrary."

We find a very great number of authorities announcing the same doctrine upon a like state of facts. This case contains also the following language: "Although a note be actually made and indorsed by citizens of Texas in New York, and be there discounted by a citizen of New York at a rate lawful in Texas, but usurious in New York, if by the date and tenor of the note it appears that the parties intended to make it payable in Texas, and contracted with reference to the laws of Texas, the courts of this State follow the authorities which hold such a note valid."—citing *Bullard v. Thompson*, 35 Tex. 319; *Depau v. Humphreys*, 8 Mart. N. S. 1, and *Chapman v. Robertson*, 6 Paige, 627, 3 L. ed. 1128. The two cases last named have been much discussed and doubted and opposed by courts whose decisions would hold the contract now under consideration obnoxious to the charge of usury. Both cases are criticised, and their correctness questioned, by Story in his work on the Conflict of Laws. The Louisiana case is stated by him as follows: "The note was given in New Orleans, payable in New York, for a large sum of money, bearing an interest of 10 per cent, being the legal interest of Louisiana, the New York legal interest being 7 per cent only. The question was whether the note was tainted with usury, and therefore void, as it would be if made in New York. The Supreme Court of Louisiana decided that it was not usurious; and that, although the note was made payable at New York, yet the interest might be stipulated for, either according to the law of Louisiana, or according to that of New York." Page 407. The Supreme Court of the United States has approved this doctrine in the cases of *Miller v. Tiffany*, 66 U. S. 1 Wall. 298, 17 L. ed. 540, and *Cromwell v. Sac County*, 96 U. S. 62, 24 L. ed. 687. In the case last mentioned the opinion contains the following expression: "When the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern."—citing the above-named cases, and also *Peck v. Mayo*, 14 Vt. 38, and *Butters v. Olds*, 11 Iowa, 1.

In the case of *Bullard v. Thompson*, 35 Tex. 319, it was said by this court: "They [the notes] were dated at Matagorda, Tex., and, whether they were actually executed in New York or in Texas, it is evident that the parties intended them to be paid in accordance with the laws of Texas; otherwise it would seem that they had voluntarily entered into a contract within the State of New York to be executed in accordance with its laws, when the contract was within itself repugnant thereto."

The case of *Chapman v. Robertson*, as stated by Story, was as follows: "A citizen of New York applied in England to a British subject for a loan of money upon the security of a bond and mortgage upon land in New York at the legal rate of interest (7 per cent) of that State, and it was agreed that the borrower should, upon his return to New York, execute the bond and mortgage, and duly record the same, and upon the bond and mortgage being

received in England the lender agreed to deposit the money loaned at the bankers of the borrower in London for his use; and the bond and mortgage were executed and received, and the money paid accordingly to the bankers. The question arose whether the transaction was usurious or not, and that depended upon the law of the place by which it was to be governed, whether by the law of England (where interest is only 5 per cent) or by the law of New York. It was held by the court that the contract was to be construed according to the laws of New York, and therefore that a bill to foreclose the mortgage, filed in New York, was maintainable, and that the Law of Usury of England was no defense to the suit. On that occasion the learned chancellor said that, as no place of payment was mentioned in the bond or mortgage, the legal construction of the contract was that the money was to be paid where the obligee resided, or wherever he might be found; that, the residence of the obligee being in England at the time of the execution of the bond, that must be considered the place of payment, for the purpose of determining the question where that part of the contract was to be performed, and that the execution of the bond in New York did not make it a personal contract there, because it was inoperative until received in England, and the money deposited with the bankers for the borrower; and he concluded by saying: "Upon a full examination of all the cases to be found upon the subject, either in this country or in England, none of which, however, appear to have decided the precise question which arises in this cause, I have arrived at the conclusion that this mortgage, executed here, and upon property in this State, being valid by the *lex situs*, which is also the law of domicile of the mortgagor, it is the duty of this court to give full effect to the security, without reference to the Usury Laws of England, which neither party intended to evade or violate by the execution of a mortgage upon the lands here." Story, Conf. L. pp. 400, 401. In the opinion itself it is further said: "No doubt appears to have been entertained as to the validity of a loan upon a bond and mortgage actually executed in Ireland or the colonies, though the loan itself was made in England, and was made payable there to a mortgagee who resided there." "Here the verbal contract for a loan upon the security of a mortgage upon lands in this State was wholly inoperative until the mortgage and other written security were executed in this State. It was a contract made partly in this State and partly in England; and being actually made with reference to our laws, and to the rate of interest allowed here, it must be governed by them in the construction and effect of the contract as to its validity." 6 Paige, 631-634, 3 L. ed. 1181, 1132. If it be admitted that, in the absence of an express stipulation as to the place of the payment of the debt, it was payable at the residence of the obligor in New York, instead of the residence of the payee in England, the principle of the decision will not be affected, as it was expressly placed upon the ground that the debt was payable in England. The case decided was that a debt contracted in England by a resident of New York, payable in England, and the money received

there by the borrower, secured by a note and deed of trust upon land in the State of New York, which were signed in that State, but delivered to the lender in England, and stipulating for a rate of interest lawful in New York, but usurious in England, was valid and enforceable in a court of New York. The case decided was in every material respect similar to the one now before us. See *Kilgore v. Dempsey*, 25 Ohio St. 416; *Townsend v. Riley*, 46 N. H. 806; *Fitch v. Remer*, 1 Biss. 337.

In the case of *Arnold v. Potter*, 23 Iowa, 195, the plaintiff, who was a resident of the State of Massachusetts, sued the defendant, who resided in Iowa, upon a debt contracted in the State of Massachusetts, and payable in the State of New York, for a rate of interest usurious in both of said States, but lawful in Iowa. The notes and trust deed were delivered in the State of Massachusetts, and the money was received there by the borrower. The defendant pleaded usury, and contended that the contract was to be governed either by the laws of New York or Massachusetts. The plaintiff contended that it was an Iowa contract, and made in good faith, with reference to her laws. The supreme court approved the following charge given by the judge of the district court: "If defendant went to Boston and urged the loan, and promised 10 per cent under the laws of Iowa, and all the arrangements and contracts were made as to the laws of Iowa in good faith, and no more than 10 per cent was contracted for, then the defense fails, and plaintiff can recover. If the parties in good faith loaned and borrowed the money sued for, with a full understanding that the law of Iowa was to govern as to the interest, then the laws of New York and Massachusetts can have no influence here, but the understanding of the parties must prevail." In the opinion of the supreme court it is said: "Parties may in good faith contract with reference to the place where the payor resides, and where the property upon which the security is taken is located."

In *Randolph on Commercial Paper* it is said: "If the money is employed on the land mortgaged, and borrowed for that purpose, it has been held that the *lex loci rei sita* should apply." Vol. 1, p. 23. And see *Wharton*, Conf. L. § 510; *Fitch v. Remer*, *supra*.

We readily concur in the rule announced by the Supreme Court of the United States, and the doctrine of the cases cited, which are in entire harmony with it. The doctrine established that a citizen of one State, contracting a debt with a citizen of another, may make the interest according to the law of either, the solution of such a case as the one now before us cannot long be doubtful; for, the contracting parties having the right to enforce their own wishes on the subject, the mere form of manifesting their purpose cannot be treated as of importance. There is no reason why their making their contract in one State instead of in the other, nor why their making it payable

in one State instead of in the other, should have a controlling influence over the question. Doing either will, in the absence of other evidence, serve to show their purpose and control the result. But not so when they otherwise distinctly provide, or when from other facts their intention can be more satisfactorily ascertained. It must be kept in view that Usury Laws cannot be evaded under cover of naming a State whose laws shall control the contract. It is difficult, however, to conceive how that result can ever proceed from the State of the actual residence of the debtor being named. The difficulty is emphasized when the right of the parties to contract with reference to the laws of that State is conceded, without there being any difficulty on the subject except the method of developing the intention. It is not entirely clear to us that the language contained in the deed of trust, that "the contracts embodied in this conveyance, and the notes secured hereby, shall in all other respects be construed by the laws of the State of Texas, where the same is made," has reference to the rate of interest, except in a general way. The question as it is involved in this case can hardly be said to be a question of the construction of the contracts. We think, however, that the expression should be taken as a circumstance to be considered in ascertaining and giving effect to the intention of the parties to the contracts.

It is contended that as the deed of trust provides that on failure of the borrower to pay said note, or either of said coupons, or failure to comply with any of the stipulations contained in said deed of trust, the whole sum of money secured thereby may without notice to the borrower, at the option of the lender or his assigns, and at his option only, be declared due and payable at once, and the trustee was authorized to take possession and sell the land; and as default was made in the payment of the coupon due December 1, 1887, and the whole amount was declared due, the whole five years' interest became collectible, according to the terms of the contract, long before the termination of the five years, thus making the interest reserved greater on the happening of the contingency than 12 per cent per annum, and the contract usurious under the laws of this State. We do not think that a correct construction of the contract will make a greater amount of interest due and collectible upon it than shall have accrued on the principal, calculated up to the date of collection at the rate named in the note, or, in other words, that any unearned interest comes within the proper meaning of the stipulation. In any event, we agree with the conclusion of the judge before whom the cause was tried, that said stipulation "is to be construed as a penalty, which will not be enforced except upon canceling the unearned interest notes, and that it does not make the contract usurious."

We find no error in the proceedings, and the judgment is affirmed.

## NORTH DAKOTA SUPREME COURT.

William ELL, *Resp't.*,

v.

NORTHERN PACIFIC R. CO., *Appt.*

(....N. Dak....)

\*1. The negligence of the foreman of a gang in failing to block a pile which was shoved against plaintiff, injuring him, because it was not blocked, is the negligence of a fellow servant although the foreman had authority to employ and discharge plaintiff, and the plaintiff was under his superintendence and control in doing the work in the performance of which he was injured.

2. Whether a negligent servant is the fellow servant of an employé who is injured by the carelessness of the former depends, not upon the relative ranks of the two servants, but upon the character of the work, the negligence with respect to which resulted in the injury.

3. The negligent performance or omission to perform a duty which the master owes to his employé is at common law the negligence of the master, whatever the grade of the servant who is in that respect careless. The negligence of a servant engaged in the same general business with the injured servant is the negligence of a fellow servant, whatever position the former occupies with respect to the latter, as to all acts which pertain to

\*Head notes by CORLISS, Ch. J.

the duties of a mere servant, as contradistinguished from the duties of the master to his employé.

4. In actions for damages for negligence, interest may be awarded or withheld in the discretion of the jury.

(January 15, 1891.)

APPEAL by defendant from a judgment of the District Court for Stutsman County in favor of plaintiff in an action brought to recover damages for personal injuries resulting from negligence for which defendant was alleged to be responsible. *Reversed.*

The facts are stated in the opinion.

Mr. John S. Watson, for appellant:

From *Farwell v. Boston & W. R. Corp.*, 4 Met. 49, has sprung the doctrine of the master's exemption from liability for injury to one servant by the negligence of another in the same service.

In *Herbert v. Northern Pac. R. Co.*, 3 Dak. 88, affirmed, 116 U. S. 642, 29 L. ed. 755, the true rule was declared by which it may always be ascertained whether the culpable employé is a fellow servant within the rule, viz.: by considering the character of the act or omission with respect to which negligence is alleged. If such act or omission pertain to the performance of a duty which the master owed absolutely to his servant, than he cannot escape liability by delegating its performance to another.

NOTE.—Master, when liable for negligence of co-servant acting under authority.

Where the negligent act of one servant causes injury to another, as the result of the exercise of the authority conferred upon him by the master over the servant injured, the master is liable. Consolidated Coal Co. v. Wombacher, 134 Ill. 57, citing Chicago & A. R. Co. v. May, 108 Ill. 238; Wabash, St. L. & P. R. Co. v. Hawk, 10 West. Rep. 127, 131 Ill. 259; North Chicago R. Mill Co. v. Johnson, 114 Ill. 57; Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 28 L. ed. 787; Northern Pac. R. Co. v. Herbert, 116 U. S. 647, 29 L. ed. 755; Thompson v. Chicago, M. & St. P. R. Co. 14 Fed. Rep. 554.

As regards the liability of the master, there is no difference between an act of a fellow servant that causes an injury and a command that produces the same result. Gulf, C. & S. F. R. Co. v. Blohm, 4 L. R. A. 764, 78 Tex. 637. See Robinson v. Houston & T. C. R. Co. 46 Tex. 541.

A vice-principal or foreman represents the principal so far only as his act is the act of the principal, and so long as he is in discharge of the duties which the principal owes to his employé, and not as to anything which it is not the duty of the principal to do. Ross v. Walker (Pa.) 27 W. N. C. 165, 169. See Patterson v. Pittsburg & C. R. Co. 78 Pa. 389; Mullan v. Philadelphia & S. Mail S. Co. 78 Pa. 25; Pennsylvania & N. Y. C. R. Co. v. Mason, 109 Pa. 296; Lewis v. Seifert, 9 Cent. Rep. 751, 116 Pa. 622; Bier v. Standard Mfg. Co. 130 Pa. 446.

A foreman of a gang is a vice-principal, if he is vested with the entire management, control and supervision of the particular work; but where he is working side by side with the other men, merely leading the work and giving immediate direction to it and to the men, sometimes in the presence of another person as superintendent, he is merely a fellow servant. Lindvall v. Woods, 44 Fed. Rep. 555.

A roadmaster having control of the movements 13 L. R. A.

of a work train and all the trainmen, with power to employ and discharge them, is, in respect to the movements of the train, a fellow servant of a section hand on the train who is injured by a collision. Galveston, H. & S. A. R. Co. v. Smith, 78 Tex. 611.

The master is not liable for injuries caused to a servant by a defective structure, appliance or instrumentality, where the furnishing and preparation of it is itself part of the work which the servant is employed to perform, though such injuries may arise from the negligence of another servant employed upon a branch of such work differing from that of the injured servant. Fraser v. Red River Lumber Co. 43 Minn. 520. See Foster v. Minnesota Cent. R. Co. 14 Minn. 380; Collins v. St. Paul & S. C. R. Co. 30 Minn. 31; Brown v. Minneapolis & St. L. R. Co. 31 Minn. 553; Roberts v. Chicago, St. P. M. & O. R. Co. 33 Minn. 313; Lindvall v. Woods, 4 L. R. A. 793, 41 Minn. 212.

Although the foreman of a mill may not be the fellow servant of a person working in the mill so far as the matter of providing safe and sound machinery is concerned, he is a fellow servant while actually engaged with him in sawing. Sayward v. Carlson (Wash.) Jan. 29, 1890. See Quincy Min. Co. v. Kitts, 43 Mich. 34; Sell v. Riets & Bro. Lumber Co. 70 Mich. 479.

Where a workman on a railroad grade was injured by the falling of a trestle upon which he was working, it was held that all the workmen on the grade, including the foreman, were fellow servants. Lindvall v. Woods, 4 L. R. A. 793, 41 Minn. 212. See Kelley v. Norcross, 121 Mass. 508; Colton v. Richards, 123 Mass. 484; Killea v. Faxon, 125 Mass. 485; Peschel v. Chicago, M. & St. P. R. Co. 62 Wis. 338; Gallagher v. Piper, 16 C. B. N. S. 609.

Fellow servants, who are. See notes to Brennan v. Gordon (N. Y.) 8 L. R. A. 518; Hunn v. Michigan Cent. R. Co. (Mich.) 7 L. R. A. 500; Lindvall v. Woods (Minn.) 4 L. R. A. 793.

The superior servant may, as in fact he usually does, fulfill a dual function,—that of representing the master in the performance of certain personal duties incumbent upon the latter, and also the performance of other work in common with other employes.

*Ford v. Fitchburg R. Co.* 110 Mass. 241; *Hough v. Texas & P. R. Co.* 100 U. S. 219, 25 L. ed. 615.

While it is just and proper to impose liability upon the master for the negligent performance of the first-named duties, no good reason can be assigned for its imposition in the latter instance.

See McKinney, Fellow Servants, §§ 111-167, p. 118, and authorities cited; Dillon, Am. Law Concerning Employer's Liability, 24 Am. Law Rev. p. 175. See also *Crispin v. Babbitt*, 81 N. Y. 516; *Hofnagle v. New York Cent. & H. R. Co.* 55 N. Y. 608; *Murphy v. Boston & A. R. Co.* 59 How. Pr. 197; *Hanrathy v. Northern Cent. R. Co.* 46 Md. 280; *Zeigler v. Day*, 128 Mass. 152; *Cumberland U. & I. Co. v. Scally*, 27 Md. 589; *Hogan v. Central P. R. Co.* 49 Cal. 128; authorities cited in 17 Am. & Eng. R. R. Cas. 516, notes.

The master cannot be held liable for the negligent use by competent servants of tools and proper appliances, sufficient in themselves and in proper repair, in cases where their use does not involve the performance of some personal duty of the master.

*Howard v. Denver & R. G. R. Co.* 26 Fed. Rep. 887; *Lindvall v. Woods*, 4 L. R. A. 798, 41 Minn. 212; *Brown v. Winona & St. P. R. Co.* 27 Minn. 162; *Johnson v. Ashland Water Co.* (Wis.) May 20, 1890; *International & G. N. R. Co. v. Hester*, 64 Tex. 401, 21 Am. & Eng. R. R. Cas. 535; *Copper v. Louisville, E. & St. L. R. Co.* 1 West. Rep. 287, 103 Ind. 305; *McCooker v. Long Island R. Co.* 84 N. Y. 77; *Brick v. Rochester, N. Y. & P. R. Co.* 98 N. Y. 211; *Loughlin v. State*, 7 Cent. Rep. 70, 105 N. Y. 159; *Hussey's Case*, 8 L. R. A. 559, 112 N. Y. 614; *McKinnon v. Norcross*, 8 L. R. A. 820, 148 Mass. 553; *Quinn v. New Jersey L. Co.* 23 Fed. Rep. 363; *Mealman v. Union Pac. R. Co.* 37 Fed. Rep. 189.

The true test in all cases as to whether the negligent servant is a vice-principal is, Was the act with respect to which he was negligent one which he was employed to do for and in the place of the master?

*Gunter v. Graniteville Mfg. Co.* 18 S. C. 262; *Shearm. & Redf. Neg.* § 1041.

**Mr. S. L. Glaspell**, for respondent:

Even if the affirmance of the judgment in this case can only be had by a full and unqualified adoption by this court of the fellow-servant rule, the court will then follow the Supreme Court of the United States and every State Supreme Court which has passed upon the question as an original proposition since 1884, when *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, was decided and the superior-servant limitation given a full and unqualified adoption by the highest court in this country.

*Elliot v. Chicago, M. & St. P. R. Co.* 3 L. R. A. 368, 5 Dak. 223; *Union Pac. R. Co. v. Fort*, 84 U. S. 17 Wall. 558, 21 L. ed. 789.

By the clear weight of authority it is now 19 L. R. A.

held that the general rule, that the master is exempt from liability to one servant for an injury caused by the negligence of a fellow servant, does not apply where the injured servant is inferior in rank to the one by whose negligence he is injured, and is under the direction and control of such other and is bound to obey his orders.

*Beach, Contrib. Neg.* § 110; *Deering, Neg.* § 204; *Thomp. Neg.* p. 1028; *Shearm. & Redf. Neg.* 4th ed. § 226; *Wharton, Neg.* § 229; *Gravelle v. Minneapolis & St. L. R. Co.* 10 Fed. Rep. 711; *Miller v. Union Pac. R. Co.* 12 Fed. Rep. 600; *Thompson v. Chicago, M. & St. P. R. Co.* 14 Fed. Rep. 564; *Mason v. Edison Mach. Works*, 28 Fed. Rep. 228; *Borgman v. Omaha & St. L. R. Co.* 41 Fed. Rep. 667; *Slater v. Chapman*, 12 West. Rep. 60, 67 Mich. 523; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; *Brown v. Sennett*, 68 Cal. 226; *Denver S. P. & P. R. Co. v. Driscoll*, 12 Colo. 520; *Kelley v. Cable Co.* 7 Mont. 70; *Northern P. R. Co. v. O'Brien* (Wash.) Jan. 1889; *Wabash, St. L. & P. R. Co. v. Hawk*, 10 West. Rep. 137, 121 Ill. 259; *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586; *Harrison v. Detroit, L. & N. R. Co.* 7 L. R. A. 628, 79 Mich. 409; *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775; *Criswell v. Pittsburgh, St. L. & O. R. Co.* 80 W. Va. 798, 38 Am. & Eng. R. R. Cas. 232; *Stephens v. Hannibal & St. J. R. Co.* 86 Mo. 221, 28 Am. & Eng. R. R. Cas. 588; *Louisville & N. R. Co. v. Collins*, 2 Duvall, 114, 87 Am. Dec. 486; *Nashville & D. R. Co. v. Jones*, 9 Heisk. 27; *Patton v. Western N. O. R. Co.* 96 N. C. 455, 31 Am. & Eng. R. R. Cas. 294; *Mann v. Oriental Print Works*, 11 R. I. 152; *Couch v. Charlotte, C. & A. E. R. Co.* 23 S. C. 557, 28 Am. & Eng. R. R. Cas. 331; *Ayers v. Richmond & D. R. Co.* 84 Va. 679, 38 Am. & Eng. R. R. Cas. 269; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285; *VanAmburg v. Vicksburg, S. & P. R. Co.* 87 La. Ann. 650; *Richmond & D. R. Co. v. Williams* (Va.) 39 Am. & Eng. R. R. Cas. 326; *Baldwin v. St. Louis, K. & N. W. R. Co.* 63 Iowa, 210; *Atlanta Cotton Factory Co. v. Speer*, 69 Ga. 187, 47 Am. Rep. 750; *Reddon v. Union Pac. R. Co.* 5 Utah, 344; *Hobson v. New Mexico & A. R. Co.* (Ariz.) 28 Am. & Eng. R. R. Cas. 360.

In some States where the superior-servant limitation is denied it is conceded that where a foreman has the power of employing, directing and discharging the men under him, he is a vice-principal.

McKinney, Fellow Servants, § 64; *Missouri Pac. R. Co. v. Williams*, 75 Tex. 4; *Patton v. Western N. O. R. Co.* 96 N. C. 455, 31 Am. & Eng. R. R. Cas. 308; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 17 Am. & Eng. R. R. Cas. 514, note, and cases cited; notes in 17 Am. & Eng. R. R. Cas. 560, 563.

It was clearly the duty of Withnell, having charge of a crew of men performing a dangerous work in a dangerous place, to provide for their safety. This was an obligation of the Company which it had delegated to him.

*Moore v. Wabash, St. L. & P. R. Co.* 81 Mo. 499, 31 Am. & Eng. R. R. Cas. 512; *Lake Shore & M. S. R. Co. v. Lavalley*, 36 Ohio St. 221, 5 Am. & Eng. R. R. Cas. 549; *Abel v. Delaware & H. Canal Co.* 5 Cent. Rep. 615, 118 N. Y.

581, 28 Am. & Eng. R. R. Cas. 497; *Borgman v. Omaha & St. L. R. Co.* 41 Fed. Rep. 671; *Kelley v. Cable Co.* 7 Mont. 70; *Baldwin v. St. Louis, K. & N. R. Co.* 68 Iowa, 87; *Burlington & M. R. Co. v. Crockett*, 19 Neb. 88.

Ell was working in a dangerous place by reason of the orders and directions of his foreman. It was not a mere careless act done by the foreman in performing his work as a co-laborer or fellow servant, but it was a negligent and unskillful exercise of authority over the men in his charge, which caused the injury complained of.

*Chicago & A. R. Co. v. May*, 106 Ill. 288, 15 Am. & Eng. R. R. Cas. 820; *Heckman v. Mackey*, 85 Fed. Rep. 353; *Brown v. Sennett*, 68 Cal. 225.

*Corliss, Ch. J.*, delivered the opinion of the court:

This litigation has its origin in an injury sustained by plaintiff while in the employ of the defendant. He, with several others, was engaged in removing long piles from a platform car to bents on the north side of the defendant's track. These bents were heavy timbers resting on piles driven in the ground, and running at right angles with the track, and the ends nearest to the track were about five feet therefrom. They were the same height as the platform of the car. At the time the accident occurred they were covered over with piles to within two feet from the ends nearest to the track. The piles were rolled from the car to the bents over two round skids about eight inches in diameter, one end of each of which rested upon a pile on the car, and the other upon the pile on the bents which was nearest to the track. Both ends of the skids were on the same level. Reaching from the platform of the car to the ends of the bents were boards a foot wide, over which the men passed from the car to the bents in rolling the piles along over the skids to the bents. In transferring the piles from the car, some of the men rolled them with their hands, and others used cant-hooks in the work. One of the piles which was being removed from the car rolled from the ends of the skids into the space between the pile on the bents nearest to the track and the next pile, and pushed the latter pile towards the plaintiff, and upon his leg, breaking the same near the ankle. One of the grounds upon which plaintiff based and seeks to sustain his recovery was the alleged negligence of the foreman of the gang at work in failing to block this pile so as to prevent its being shoved towards the plaintiff. That the pile was not blocked at the end where plaintiff was working appears to be undisputed. There was evidence to show that the foreman was notified of this fact before the accident. While he denies this, yet there was sufficient evidence to warrant a jury in finding the fact against his testimony. We are clear that the jury were authorized, under the evidence, to find that plaintiff was injured by reason of the negligence of the foreman, Withnell, in failing to block the pile. Will the law hold the defendant responsible for this negligence? Against such liability, defendant invokes the fellow-servant rule, and our Statute embodying it. To escape the force of this rule, plaintiff contends that the case is brought within

the scope of the superior-servant limitation to the fellow-servant rule, and that such limitation has the voice of weightier authority, of better reason and of more numerous precedents in its behalf. This issue of law we are to determine, and our investigation must run along the line of general principles; for the adjudications upon this subject,—so multitudinous as almost to warrant the simile, “thick as autumnal leaves that strew the brooks in Vallambrosa,”—these adjudications are so discordant, enumerating so many rules, stating so many limitations, applying the law to facts so diverse, that one is reminded of Gibbon's remark upon the infinite variety of laws and opinions when Justinian entered upon the reform of condification,—that they were beyond the power of any capacity to digest. We are compelled to decide whether this superior-servant limitation shall be adopted in this State. The trial court declared it to be the law in his charge to the jury, and refused to charge against the adoption of the doctrine, although requested to so charge by defendant's counsel. Whatever other ground of liability there may have been, the verdict cannot stand if the trial judge erred in this respect, for the verdict may rest entirely upon the ground-work of such instruction.

The foreman, Withnell, through whose negligence it is insisted that plaintiff was injured, had control of the gang employed on the work, and was vested with authority to employ and discharge the men, who were subject to his direction and supervision. Hence it is urged that he was in his position, and therefore, in the prosecution of the work of unloading these piles, a vice-principal, and not a fellow servant. In this connection the authorities are cited which sustain the doctrine that the station of the employé, and not the character of the act, determines the question whether the master is responsible. In many of the cases where the superior-servant limitation was applied, such servant was in fact the fellow servant of the employé injured. But, because of some superior position occupied by him with respect to the servant injured, the master was, by a legal fiction, regarded as personally present in the person of the superior servant, and made responsible to one servant for the manner in which another servant performed the duties and labors pertaining to a servant's employment. Here lies the difference between the two rules. Those cases which preserve the fellow-servant rule in its full integrity bring the facts of each case to the test, not of the rank of the negligent servant, but of the character of the negligence from which damage results. Did the master owe to his servant a duty as master? Answer the inquiry in the affirmative, and he cannot escape a careless discharge of that duty by shifting the burden to the shoulders of a servant, however inferior his position may be. The negligence of a fellow servant has not wrought injury in such a case. It is the negligence of the master himself, because that was carelessly done which he was bound to have carefully performed. The master must use due care in supplying his servants with safe appliances, and in providing them a safe place in which to work. These are duties of the master. They are none the less his du-

ties because from the necessities of business, or for other reasons, he confides their discharge to an employé. His personal negligence in this respect would create liability. He cannot gain exemption from negligence of another in this regard by delegating these personal duties to another. This doctrine is sound, and it in no manner is a limitation of the fellow-servant rule. On the other hand, the other doctrine is a limitation—a very important limitation—of that rule. It finds no warrant in the cases which first enunciated that rule. It rests on no subsequent legislation; and we are firm in the conviction that the mere superiority in the rank of the negligent servant—his right to control the servant injured, and to employ and to discharge him—calls for no modification of the fellow-servant rule. The bed-rock of that doctrine is that every employé assumes the risk of his co-employé's negligence as one of the ordinary risks of his work. Is a superintendent or foreman so much more careless in the performance of work pertaining to a servant's duties than a subordinate employé that the risk of the former's negligence is an extraordinary one? If work belonging to the duties of a servant be done carelessly, what conceivable difference is there whether the negligence proceed from a commander or a subaltern, so long as the master himself is not personally at fault? The superior servant is in fact a fellow servant. The two are engaged in the same general work for the master, one using his muscle chiefly, and the other perhaps working mainly with his brain. The only ground on which the superior's relation as fellow servant is ignored is the constructive presence in his person of the master, because the master in the distribution of labor has appointed him to work in the line of superintendence and control. But this control, this superior rank, cannot lift him above the grade of a fellow servant into the position of a vice-principal so long as he is engaged in the work of a servant only. If a servant of inferior rank should perform the same work, he would not be regarded as the master; and we are at a loss to understand how the higher rank of the servant can change the nature of the act, or increase the risk of the inferior servant, so as to render inapplicable the fellow-servant rule. The superior servant is no more the representative of the master than the inferior servant, except in the enlarged field of his action, and the wider scope of the trusts confided to him. They are both laboring for a common master in the same general business; both ultimately accountable to him and employed, controlled and discharged by him, either personally, or by someone selected by him for that purpose. The ultimate power to employ, control and discharge is in his hands. The reason for the fellow-servant rule applies with full force to the work of a servant, whatever the rank of the servant who performs it. It would be an anomalous condition of the law if the negligence of one servant was within the ordinary risks of the employment, while the negligence of another, no more prone to carelessness, should be without the domain of such risks merely because he had been set in a higher place of service by reason of superior skill or ability.

Judge Cooley says: "In some quarters a 12 L. R. A.

strong disposition has been manifested to hold the rule not applicable to the case of a servant who at the time of the injury was under the general direction and control of another, who was intrusted with the duties of a higher grade, and from whose negligence the injury resulted. But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts and omissions on the part of one class of servants, and not those of another class. Nor, on grounds of public policy, could this distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who, in their dealings with the employer, may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care, not only that he be not negligent himself, but also that any negligence of others in the same employment be properly guarded against by him so far as he may find it reasonably practicable, and be reported to his employer, if needful. And in this regard it can make little difference what is the grade of the servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant who, being aware of the negligence, should fail to report it." Cooley, Torts, 548. Judge Dillon is equally emphatic against the limitation. He says: "The master owes certain defined, personal, unalienable, nonassignable duties towards servants. These duties may be devolved upon others by the master, but not without recourse on him.

... In the general American law, as I understand it, the doctrine of vice-principal exists to this extent, and no further, viz.: That it is precisely commensurate with the master's personal duties towards his servants. As to these, the servant who represents the master is what we may call for convenience a 'vice-principal,' for whose acts and neglects the master is liable. Beyond this the master is liable only for his own personal negligence. This a plain, sound, safe and practicable line of distinction. We know where to find it, and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine, based upon the notion of 'grades' in the service, or what is much the same thing, distinct 'departments' in the service (which 'departments' frequently exist only in the imagination of the judges, and not in fact), will breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges that made it seem to be able to 'find no end; in wandering mazes lost.'

... The real inquiry is, Was the injury caused by another servant one of the ordinary risks of the particular employment? If so, the grade, whether higher, lower, co-ordinate, or the department of the faulty servant, is of no consequence. It is a condition of the contract of service that the servant takes upon himself the risk of accidents in the common course of the business, all open and palpable risks, including the negligence of all fellow servants of



whatever grade in the same employment." 24 Am. Law Rev. 175. The superior-servant doctrine unfairly discriminates against masters whose business is of such nature that grades of service are indispensable. This case will furnish an illustration of the truth of this statement. The work with respect to which Withnell, the foreman, was careless—the blocking of the pile—was the work of a servant. Had the same accident occurred in the employ of a master whose servants were all of the same rank, no claim of liability would be thought of. The proprietor of a factory, of a machine-shop, of a mill, of any business in which gradations of service are not absolutely essential, is present in the persons of his servants only so far as his personal duties to his employes are concerned. But the railroad master, though Argus-eyed to discern, and Briarean to prevent, the negligence of its horde of vice-principals,—conductors, as in the *Ross Case*, 112 U. S. 377, 28 L. ed. 787, superintendents, section bosses, foremen of various gangs and many others,—would find itself impotent to save itself from enormous responsibility not incurred by many other masters, notwithstanding its utmost caution in the selection of its employes. According to this doctrine, the master that has fully discharged all its or his personal duties may be guilty at the same time in as many different places of a score of negligent acts by construction of law, although they are acts pertaining to the duties of a mere servant, performed by one who is in fact a servant, and whose carelessness in this regard can as fairly be said to be within the risks incurred by the injured servant as the carelessness of an employé of lower rank. If there is anything in the reason for the fellow-servant rule, it applies with even stronger force to a class of servants whose higher position is a guaranty of better skill and intelligence, and consequently of the exercise of greater care. Their enlarged responsibility to the master will tend to make them more cautious. Their compensation is frequently so large as to make the retention of their positions very desirable to them. This will augment their caution; for negligent performance of duty would be almost certain to result in their dismissal. There is nothing in the controlling power of the superior servant that warrants any difference in the law; for it cannot be said, as is frequently asserted in cases, that any employé is justified in submitting to the carelessness of a superior from fear of being discharged; and the fact is that it is seldom in the power of the injured servant to anticipate or guard against the careless act of the fellow servant causing injury to him. If he could and did, the accident would not happen. If he could and did not, he would be himself negligent, and his recovery would be defeated. In either case there would be no occasion for the fellow-servant rule. The basis of the fellow-servant doctrine is not that the servant can, as a rule, be on his guard against his co-servants' carelessness, but that he takes the risk of such negligence when he makes his contract of employment. It is said that a servant can exert an influence for care upon a fellow servant of the same grade that he could not exert upon a superior servant by whom he had been employed, and could be discharged,

12 L. R. A.

and therefore in the latter case the master is responsible. If this affects the question, then the master should have been held liable, in many cases, where the injured servant could not possibly have exerted any such influence upon the negligent servant. The books are full of such cases, in none of which was the master adjudged responsible. The courts have held that the rule is "not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty." *Holden v. Fitchburg R. Co.* 129 Mass. 263.

Many of the cases holding the master exempt from liability under the fellow-servant rule were, as we have said, cases in which the injured servant could not possibly have exerted influence over the negligent servant. Their separate departments of service, or their usual stations of employment, kept them, as a rule, entirely aloof from each other. In the following cases the relation of fellow servant was held to exist between persons who could exert little, if any, influence over each other: *Quebec S. S. Co. v. Merchant*, 138 U. S. 875, 33 L. ed. 656,—the carpenter, the porter and stewardess of a steam-ship; *St. Louis, A. & T. H. R. Co. v. Welch*, 72 Tex. 208, 2 L. R. A. 889,—foreman of a bridge gang, and servants operating train; *Elliot v. Chicago, M. & St. P. R. Co.* 5 Dak. 528, 3 L. R. A. 868,—a section foreman and a conductor; *Fagundes v. Central Pac. R. Co.* 79 Cal. 97, 3 L. R. A. 824,—a laborer employed to remove snow from track and a conductor; *Baughman v. Calaveras County Super. Ct.* 72 Cal. 573,—a conductor and brakeman; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003,—a brakeman and conductor of different trains; *Van Wickle v. Manhattan R. Co.* 32 Fed. Rep. 278,—a track repairer and an engineer; *McMaster v. Illinois Cent. R. Co.* 65 Miss. 264,—brakeman of one train and employé on another; *Naylor v. New York Cent. & H. R. R. Co.* 38 Fed. Rep. 801,—engineer and switchman; *Van Aery v. Union Pac. R. Co.* 35 Fed. Rep. 40,—engineers of different trains; *Connelly v. Minneapolis & N. R. Co.* 38 Minn. 80,—a sectionman and an engineer or brakeman; *Howard v. Denver & R. G. R. Co.* 26 Fed. Rep. 887,—an engineer and fireman of different trains; *Houston & T. O. R. Co. v. Rider*, 62 Tex. 287; *Gormley v. Ohio & M. R. Co.* 72 Ind. 81; *Collins v. St. Paul & S. O. R. Co.* 80 Minn. 81; *Clifford v. Old Colony R. Co.* 141 Mass. 564, 2 New Eng. Rep. 175; *Keys v. Pennsylvania Co. (Pa.)* 1 Cent. Rep. 898; *Whelan v. Mad River & L. E. R. Co.* 8 Ohio St. 249,—in each case an engineer and a sectionman.

Without stating the relation of the injured to the negligent servant in each of the following cases, they are referred to as being in the same line: *Holden v. Fitchburg R. Co.* 129 Mass. 268; *Valter v. Ohio & M. R. Co.* 85 Ill. 600; *Beal v. New York Cent. & H. R. R. Co.* 70 N. Y. 171; *Brown v. Central Pac. R. Co.* (Cal.) 7 Pac. Rep. 447; *Roberts v. Chicago, St. P. M. & O. R. Co.* 33 Minn. 218; *Brown v. Minneapolis & St. L. R. Co.* 31 Minn. 553; *Cooper v.*

*Milwaukee & Pr. du Ch. R. Co.* 23 Wis. 668; *Haine v. Chicago & N. W. R. Co.* 58 Wis. 526; *Copper v. Louisville, E. & St. L. R. Co.* 108 Ind. 805, 1 West. Rep. 287; *Henry v. Staten Island R. Co.* 81 N. Y. 378; *Blake v. Maine Cent. R. Co.* 70 Me. 60; *Harvey v. New York Cent. & H. R. R. Co.* 88 N. Y. 481.

The list might be greatly enlarged.

Going back to the fountain, we find this idea of exertion of influence by the injured servant as the basis of the servant rule distinctly repudiated. In the *Farwell Case*, 4 Met. 60, Chief Justice Shaw says: "It was strongly pressed in the argument that although this might be so where two or more servants are employed in the same department of duty, where each can exert some influence on the conduct of the other, and thus to some extent provide for his security, yet that it could not apply where two or more are employed in different departments of duty at a distance from each other, and where one can in no degree influence or control the conduct of the other. But we think this is founded upon a supposed distinction on which it would be extremely difficult to establish a practical rule. . . . When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department, and what a distinct department, of duty. It would vary with the circumstances of every case. If it were made to depend on the nearness or distance of the persons from each other, the question would immediately arise, How near or how distant must they be to be the same or different departments? Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master in the case supposed is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself; . . . and he is not liable in tort as for the negligence of his servant because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability where it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant." It is thus apparent that there is nothing in the fact that an inferior servant may not be able to exert any influence for safety over his superior to justify the refusal to apply the fellow-servant rule. On principle, we are opposed to the doctrine of the *Ross Case*, 112 U. S. 877, 28 L. ed. 787. We believe that the true rule was stated and applied in *Crispin v. Babbitt*, 81 N. Y. 516: "The liability of the master does not

depend upon the grade or rank of the employé whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is in the management of the machinery a fellow servant of the other operatives. . . . The liability is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employé performing it. If it is one pertaining to the duty that the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows: If the act is one which pertains to the duty of an operative, the employé performing it is a mere servant; and the master, although liable to strangers, is not liable to a fellow servant for its improper performance." To the same effect are *Lindall v. Woods*, 41 Minn. 212, 4 L. R. A. 798; *Davis v. Central Vermont R. Co.* 55 Vt. 84; *State v. Maister*, 57 Md. 287; *Indiana Car Co. v. Parker*, 100 Ind. 191; *Hussey v. Coger*, 112 N. Y. 614, 3 L. R. A. 559; *Copper v. Louisville, E. & St. L. R. Co.* 108 Ind. 805, 1 West. Rep. 287; *Yates v. McCullough Iron Co.* 60 Md. 870; *Baltimore Elevator Co. v. Neal*, 65 Md. 488; *McGovern v. Columbus Mfg. Co.* 80 Ga. 227; *Lewis v. Seifert*, 116 Pa. 628, 9 Cent. Rep. 751; *Olsen v. St. Paul, M. & M. R. Co.* 38 Minn. 117; *Anderson v. Winston*, 81 Fed. Rep. 528; *Webb v. Richmond & D. R. Co.* 97 N. C. 887.

This list might be added to, but we are concerned, not so much about the number of cases to be cited in support of our views, as about the soundness of our position upon principle. We believe that the fellow-servant rule should hedge about all masters without discrimination: that its wise and just barrier against liability should not be broken down by a fiction; that those whose business, from its very nature, necessitates gradations of service should not be deprived of its protection on account of a distinction which in no manner affects the considerations which gave it birth, and have led to its almost universal adoption. We see nothing to justify the limitation doctrine, except the increased safety of employés in a dangerous business; and this applies, if at all, equally to cases where the two servants are of the same grade. But, so far from augmenting their safety, the liability of the master will have the contrary effect, if it produces any effect at all. That servant will grow more careless who, instead of being exclusively liable for his own negligence, finds that beyond him is another liability, so much more desirable to the injured servant that the careless servant is invariably lost sight of,—the liability of the corporation, against which the verdict is more easily secured, and, when obtained, is certain of payment.

We have assumed that our Statutes on this question (§ 8753, Comp. Laws) are only declaratory of the common law. But we do not decide whether they limit the liability of a master. They certainly impose upon him no greater responsibility than the common law, and, as the question of their restrictive force has not been discussed, we do not decide it. See *Herbert v. Northern P. R. Co.* 38 Dak. 38, on appeal, 116 U. S. 642, 29 L. ed. 755, and dissenting opinion.

We are clear that the trial court erred in refusing to charge the jury that the negligence of Withnell in failing to block the pile was the negligence of a fellow servant, and in instructing them that it was not; and for this error the judgment of the district court is reversed. There are other questions in the case, on which we refrain from expressing any opinion, as the evidence on a new trial may be materially different. This does not apply to the question of

interest, and we therefore hold that the trial court erred in charging the jury to give the plaintiff interest on his recovery, without submitting it to their discretion. "In an action for the breach of an obligation not arising from contract, . . . interest may be given in the discretion of the jury." Comp. Laws, § 4578.

*Judgment reversed, and new trial ordered.*

All concur.

### ALABAMA SUPREME COURT.

TENNESSEE COAL, IRON & R. CO., *Appt.*,  
v.

WILLS KYLE.

(.....Ala.....)

**Running a freight train without a cow-catcher attached to the engine is negligence which will entitle an employé to recover for injuries occasioned by derailment of the train in running over a cow.**

(January 23, 1891.)

**A**PPEAL by defendant from a judgment of the Birmingham City Court in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion.

*Messrs. Hewitt, Walker & Porter*, for appellant.

*Messrs. E. T. Taliaferro and William Vaughan*, for appellee:

It was the duty of the Company to employ the best machinery and appliances which are in use by well-regulated railroad companies, and to take the best precautions against danger, and its omission of this duty—the failure to have a cow-catcher on the engine—was negligence for which defendant is liable.

*Memphis & O. R. Co. v. Lyon*, 62 Ala. 71; *Alabama & G. S. R. Co. v. Jones*, 71 Ala. 487; *Frankford & B. T. Co. v. Philadelphia & T. R. Co.* 54 Pa. 345.

The jury having found necessarily that the injury came from the defects in the engine, and that the defective condition was imputable as negligence to defendant, the general charge should have been given for defendant.

*Note to Bajus v. Syracuse, B. & N. Y. R. Co.* 57 Am. Rep. 728.

*Stone, Ch. J.*, delivered the opinion of the court:

The plaintiff appellee in this case was the servant (brakeman) in the employment of the appellant corporation. He was at his post of duty, and on one of the trains of the Railroad Company, when the train on which he was serving was derailed, and one of his legs

was thereby so much injured and mangled as that he was forced to submit to amputation of the limb. The engine drawing the train—a freight train, with loaded cars—was without a pilot or cow-catcher, and the immediate cause of the derailment was that the train ran over a cow, and was thus thrown from the track. No other defect in the machinery, and none in the track, was shown. The contention of plaintiff was and is that the running of the train without a cow-catcher attached to the engine was negligence in the Railroad Company, which caused the injury, and entitles him to recover under the Statute. Code 1896, § 2590. So much of that Statute as pertains to this case reads as follows: "When a personal injury is received by a servant or employé in the service or business of the master or employer, the master or employer is liable to answer in damages, to such servant or employé, as if he were a stranger, and not engaged in such service or employment, in the cases following: (1) When the injury is caused by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the master or employer. . . . But the master or employer is not liable, under this section, if the servant or employé knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself, engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior, already knew of such defect or negligence; nor is the master or employer liable under subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition."

It was testified on the trial that those in control of the train knew the engine was being run without a cow-catcher, and it would over-tax credulity to suppose that either the conductor or engineer operating the train was ignorant of that fact. It was shown that

**NOTE.**—Master, not to expose servant to extraordinary risk. See note to *Myhan v. Louisiana E. L. & P. Co. (La.)* 7 L. R. A. 172.

Duty of master to warn servant of danger. *Brasil Block Coal Co. v. Gaffney (Ind.)* 4 L. R. A. 650.

12 L. R. A.

Duty of railroad company to provide safe machinery, implements, etc. *Louisville, N. A. & C. R. Co. v. Buck (Ind.)* 2 L. R. A. 520.

Duty of railroad company as to safety of its employes. *Griffin v. Boston & A. R. Co. (Mass.)* 1 L. R. A. 693.

switch-engines, on all well-regulated railroads, are operated without pilots or cow-catchers, and satisfactory reasons are given why they are so run. The operations of switch-engines are confined to stock-yards, and to the switching area of the track. As a rule, they are much more easily brought under control of the engineer than road engines are: *first*, because they move at a much lower rate of speed; and, *secondly*, because they usually draw fewer and less-burdened cars, and hence their momentum is much more easily overcome. This, however, can furnish no excuse or palliation in this case. At the time the plaintiff was injured the engine was not engaged in switching, nor was it within the area allotted to such operations. It was drawing a freight train of loaded cars, and could not be easily or speedily brought to a

stand-still. All the testimony agrees that the cow-catcher is useful in throwing obstructions from the track; that they are in general use alike on passenger and freight trains; and that, when used, derailments by obstructions on the track are less likely to occur. And there is no testimony that they are a new invention, or one the utility of which is in dispute or doubt in the minds of railroad men. It is common knowledge that they have long been in general, if not universal, use on railroads. The city court did not err in refusing to let the witness Elmore testify about another case. Nor was there error in refusing to give the general charge. *Louisville & N. R. Co. v. Hall* (Ala.) present term.

*Affirmed.*

### CALIFORNIA SUPREME COURT.

T. D. KELLOGG, *Appl.*,

*v.*

W. G. COCHRAN *et al.*, *Repts.*

(91 Cal. 192.)

1. The power of a court to restore to capacity, under Code Civ. Proc., § 1768, persons adjudged insane or incompetent, is applicable only to incompetent persons for whom guardians have been appointed under § 1764.
2. A person committed to an insane asylum is restored to his legal capacity to sue by his discharge from the asylum by the resident physician, in accordance with the Statutes (Pol. Code, § 2197; Act March 9, 1885; Deer. Pol. Code, p. 360).
3. The order of commitment of a person to an insane asylum is not conclusive evidence against him, in an action for the malicious prosecution of him as an insane person.
4. A rehearing will not be granted in order to consider points not made in the argument upon which the case was originally submitted.

(December 19, 1890.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in favor of defendants in an action brought to recover damages for a malicious prosecution of plaintiff as an insane person. *Reversed.*

The facts are stated in the commissioner's opinion.

*Messrs. J. M. Damron and Chapman Brothers* for appellant.

*Messrs. Wells, Guthrie & Lee*, for respondents Cochran *et al.*:

All contracts of a lunatic, or person of unsound mind, made after an inquisition and confirmation thereof, are absolutely void, until by permission of the court he is allowed to assume control of his property.

*L'Amoureux v. Crosby*, 2 Paige, 423, 2 L. ed. 972; *Wadsworth v. Sharpesten*, 8 N. Y. 388; *Hughes v. Jones*, 5 L. R. A. 685, 116 N. Y. 67.

In such cases the lunacy record, as long as it remains in force, is conclusive evidence of incapacity, and from the time of the adjudication

of insanity until the restoration to reason has been judicially determined the person declared to be of unsound mind is the ward of the court and is legally an incompetent person.

*Redden v. Baker*, 86 Ind. 195; *L'Amoureux v. Crosby*, *Wadsworth v. Sharpesten*, *supra*; *Wadsworth v. Sherman*, 14 Barb. 169; *Leonard v. Leonard*, 14 Pick. 280; *Imhoff v. Witmer*, 81 Pa. 245; *Re Patterson*, 4 How. Pr. 34; *McCormick v. Littler*, 85 Ill. 65.

#### *On petition for rehearing.*

Such an action as the present cannot be maintained where the complaint does not aver a reversal of the judgment or commitment complained of, and as well also an allegation that the same was obtained by perjury or subornation of perjury, fraud or collusion.

An action for malicious prosecution cannot be maintained, unless the prosecution upon which the action is based has been ended in the plaintiff's acquittal.

*Hibbing v. Hyde*, 50 Cal. 206; *Steel v. Williams*, 18 Ind. 161; *Oreocent City L. S. L. & S. H. Co. v. Butchers Union S. H. & L. S. L. Co.* 120 U. S. 141, 80 L. ed. 614; 1 Hilliard, Torts, 8d ed. p. 450; Cooley, Torts, p. 161; *Walker v. Martin*, 43 Ill. 508; *Miller v. Deere*, 2 Abb. Pr. 1; *Cloon v. Gerry*, 18 Gray, 201; *Soverance v. Judkins*, 78 Me. 876; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Sayles v. Briggs*, 4 Met. 421.

And this applies equally to a civil proceeding.

*O'Brien v. Barry*, 106 Mass. 800; *Stewart v. Sonneborn*, *supra*; *Dunlap v. Glidden*, 81 Me. 485.

Where the complaint shows a conviction, it is fatal to the suit for malicious prosecution.

*Miller v. Deere*, *supra*.

The complaint in the action for malicious prosecution must show on its face the termination of such prosecution in favor of the plaintiff, the party prosecuted.

*Stewart v. Sonneborn*, *supra*; *Wood v. Laycock*, 8 Met. (Ky.) 194; *Spring v. Beare*, 12 B. Mon. 558; 1 Hilliard, Torts, 8d ed. p. 451.

Verdict of guilty, though obtained by false testimony, and afterwards set aside for newly

discovered evidence and a verdict of not guilty returned, is conclusive evidence of probable cause in a subsequent action for malicious prosecution, unless the complaint avers and the evidence shows that it was obtained through perjury or fraud, etc.

*Parker v. Huntington*, 7 Gray, 86; *Parker v. Farley*, 10 Cush. 279; *Griffe v. Sellers*, 2 Dev. & B. L. 492; *Clements v. Odorless Extracting Apparatus Co.* 67 Md. 461; *Oreoscent City L. S. L. & S. H. Co. v. Butchers Union S. H. & L. S. L. Co.* 120 U. S. 141, 80 L. ed. 614; *Adams v. Bicknell* (Ind.) Nov. 26, 1890, and the cases collated therein; *Phillips v. Kalamazoo*, 53 Mich. 88; *Saville v. Roberts*, 1 Ld. Raym. 874; *Pollard v. Evans*, 2 Show. 50; *Fisher v. Bristol*, Dougl. 215.

The plaintiff cannot recover in an action for malicious prosecution without producing the record of his acquittal.

*Williams v. Woodhouse*, 8 Dev. L. 257.

*Messrs. Gottschalk & Luckel* for respondent Wernick.

*Vanelle, C.*, filed the following opinion:

The purpose of this action is to recover from the defendants damages for a malicious prosecution of the plaintiff as an insane person, and causing him to be unlawfully arrested and committed to the insane asylum at Stockton. A demurrer to the complaint was sustained by the court. The plaintiff declined to amend his complaint, and final judgment was thereupon rendered against him, dismissing his complaint, and for costs, from which he appeals on the judgment roll. The grounds of demurrer are that the complaint does not state facts sufficient to constitute a cause of action, and "that it appears upon the face of the complaint that the plaintiff has not the legal capacity to sue herein." The substance of those parts of the complaint relevant to these grounds of demurrer is as follows: That on January 28, 1889, the defendants willfully, maliciously, unlawfully and without probable cause, "caused and procured the plaintiff to be arrested and committed to the state insane asylum at Stockton, State of California, on the charge of insanity; that under and by virtue of said commitment plaintiff was unlawfully and against his will detained and imprisoned in said state insane asylum, at Stockton, on said charge of insanity, for and during the period from said 28th day of January, 1889, up to and including the 20th day of February, 1889, whereupon said plaintiff was then and there given leave of absence, and afterwards, to wit, April 18, 1889, was discharged; that plaintiff was not on said 28th of January, 1889, or ever at any other time, before or since said day, dangerously insane, or insane at all, nor was he at any of said times so far disordered in his mind as to injure health, person or property, all of which was known by said defendants before and at the time of said arrest and commitment."

The learned counsel for respondents contend that the demurrer was properly sustained, on the ground that the plaintiff had not legal capacity to sue, for the reasons: (1) that it appears on the face of the complaint that the plaintiff had been adjudged to be insane on January 28, 1889, by the judge of a court of record, pursuant to section 2317 of the Political

Code, relating to commitments to the state insane asylums; and (2) that such adjudication is conclusive upon the plaintiff, not only that he was insane at the time he was so adjudged, but that he continued to be insane at the time this action was commenced, unless before that time he had been found to be of sound mind, and capable of taking care of himself and property, as authorized by section 1766 of the Code of Civil Procedure. It is true that where guardians have been appointed for persons who, by reason of their insanity, imbecility or habitual drunkenness, are mentally incompetent to manage their property, under statutes in other States similar to article 2, title 11, pt. 8, of our Code of Civil Procedure (§§ 1763-1766), it has been held that an adjudication of such incompetency is conclusive against all persons dealing with the ward until he is restored to capacity to manage his own affairs, by an order of a court similar to that authorized by section 1766 of the Code of Civil Procedure.

The cases of *Wadsworth v. Sharpsteen*, 8 N. Y. 388, and *Imhoff v. Witmer*, 81 Pa. 243, are fair samples of the strongest cases to this effect. In the latter case the court said: "The object of the Statute was protection and guardianship over persons and estates of parties wanting capacity to take proper care of either, and to preserve the property of such from being squandered or improvidently used to their own injury and that of their families, if they have any. It is not necessary to adduce reasons to prove the self-evident proposition that, to admit the capacity of control to exist in the lunatic or habitual drunkard over his estate, after inquisition settling his condition in this respect, or submit it to be controverted by evidence of lucid intervals or sobriety at the moment of contracting, would leave the estates of these unfortunate classes about as much exposed as before proceedings had in regard to them. The inquisition and decree, standing of record, was intended for notice to all the world of the incapacity of the particular party to contract. It is the judgment of the law to this effect, and, as a consequence, his acts in regard to his property are absolutely void while the condition exists."

In the case cited from 8 N. Y. the court said: "The right of the committee to the custody and control of the property is not superseded during the drunkard's sober intervals, and therefore, during such intervals, the drunkard has no more authority to deal with, or dispose of, the property, than while he is in a state of intoxication. If it were otherwise, the proceedings would furnish a very ineffectual security against waste and improvidence. Every transaction would be open to litigation upon the question whether it took place while the drunkard was in a state of sobriety or intoxication, and the committee could not execute his trust with safety to himself, or benefit to the drunkard or his family."

These quotations are made merely to show that the reasons assigned in those cases for holding an adjudication of incompetency conclusive until set aside cannot be applied to the order of a judge in this State committing a person to the state insane asylum, under the provisions of the Political Code, although they may be applicable to adjudications of our

courts in proceedings had under section 1766 of the Code of Civil Procedure. But, whether the reasons assigned in those cases are to be considered sufficient for holding an adjudication of incompetency, under section 1766 of the Code of Civil Procedure, conclusive against the person adjudged incompetent until set aside, as therein provided, need not be decided in this case, since it seems clear that the proceeding against insane and other mentally incompetent persons, authorized by the Code of Civil Procedure, is entirely distinct from the proceedings authorized by the Political Code for the commitment of insane persons to the state insane asylum. The provision in section 1766 of the Code of Civil Procedure authorizing the court to restore the person adjudged insane or incompetent to capacity is only applicable to persons adjudged insane or incompetent, and for whom guardians have been appointed under section 1764 of the same Code. The application of it to persons committed to the asylums would be utterly inconsistent with the government of those institutions according to the requirements and regulations of the Political Code. After a person has been committed to either of the insane asylums on a charge of insanity, and received into the asylum, no court in this State is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon writ of habeas corpus. The power to discharge him otherwise than upon habeas corpus is vested exclusively in the officers of the asylum. Section 2197 of the Political Code provides: "Insane persons received in the asylums must, upon recovery, be discharged therefrom." This implies the power to determine whether or not the patient has recovered. By an Act of March 9, 1885, the resident physician is authorized, and it is made his duty, to discharge persons who have been improperly committed. Deer. Pol. Code, p. 850. By another Act of March 9, 1885 (Deer. Pol. Code, p. 842), it is provided that the kindred or friends of an inmate of the asylum may apply to the judge who committed him for an order to be directed to the trustees of the asylum for his removal to their custody, and, upon their proving that they are capable and suited to take care of him, and to give protection against his insane acts, the judge may issue the order. But the Act further provides that "the trustees shall reject all other orders or applications for the release or removal of any insane person, except the order of a court or judge on proceedings in habeas corpus." See also a like provision in section 19 of "An Act to Provide for the Future Management of the Napa State Asylum," approved March 6, 1876 (Stat. 1875-76, p. 133).

It would seem, therefore, not only that the power to discharge an inmate of the asylum is vested solely in the officers of the asylum, but that such power is to be exercised upon one of two grounds only: (1) that the insane inmate has recovered; and (2) that he had been improperly committed. I think the effect of a discharge on either ground, if no guardian had been appointed under the Act of March 9, 1885 (Deer. Pol. Code, p. 842), would be to restore the person discharged to legal capacity to sue. A discharge on the first ground is an

12 L. R. A.

adjudication, by competent authority, that the person had recovered from insanity; and a discharge on the second ground, by like authority, overrules or nullifies the order of commitment, and leaves the person committed in the same status, as to capacity to sue, that he was in before he was committed. Civil Code, § 40. Besides, I think the order of commitment is not conclusive evidence against the plaintiff in this action of his insanity at any time, or of probable cause for the prosecution of which he complains; for, if it is so, it is difficult to conceive how he is to prove a cause of action which depends upon the truth of his averments that he was not insane to the degree required by section 2317 of the Political Code, or at all, at the time the order was made, and that the prosecution was without probable cause. If he is estopped, by the order of commitment, from proving these averments, it would seem to follow that no action for a malicious prosecution on a charge of insanity, resulting in an order of commitment, can be maintained; yet the authorities sanction such actions. Cooley, Torts, § 176 *et seq.*

That the order of commitment would not thus estop or conclude the plaintiff in a proceeding by writ of habeas corpus is obvious, and we have seen that it is not final, or conclusive as to the resident physician of the asylum, whose duty it is to disregard it, if, in his opinion, it was not properly made. Indeed, the final determination, as to whether the person committed is insane or not, is to be made and announced by the resident physician of the asylum. The proceeding before the judge is only preliminary, and is analogous to the preliminary examination of a criminal charge by a magistrate. As the only ground of demurrer argued here is that the plaintiff has not the legal capacity to sue, and no particular in which the complaint fails to state a cause of action has been suggested by counsel, or discovered, I think the judgment should be reversed, and the court below directed to overrule the demurrer.

#### Per Curiam:

For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to overrule the demurrer.

A petition for rehearing was subsequently filed and on January 17, 1891, the following opinion was handed down in response thereto:

#### Per Curiam:

In submitting this case for decision, respondents argued but a single point raised by their demurrer to the appellant's complaint. We considered that objection, and decided it correctly. In their petition for a rehearing, other objections to the complaint are called to our attention; but we have decided—and with manifest propriety—that we will not grant a rehearing in order to consider points not made in the argument upon which the case was originally submitted. A respondent whose demurrer has been sustained by the superior court ought to fairly present in this court every objection upon which he relies. We cannot be expected to scrutinize the record for the purpose of discovering points which counsel have not taken the trouble to specify.

Rehearing denied.

## UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

## NATIONAL PROGRESS BUNCHING MACHINE CO.

v.

JOHN R. WILLIAMS CO.

(44 Fed. Rep. 190.)

1. A combination to be patentable must not only be new, but it must produce a new result, or an old result in a better way.
2. A new result produced by a combination of old elements must be due to their co-operative action; they must so act that each qualifies every other. If they act independently, or if one acts independently of the others, it is an aggregation and not a patentable combination.
3. A patent for a cigar bunching machine which consists of a combination of old elements, one of which is a "bunch receiver" or receptacle which performs no function except to hold the bunch after it is finished instead of letting it fall to the floor or into a box, or into the hand of the operator, is invalid because there is only an aggregation of the parts and not a combination, the function of the other parts being entirely independent of the bunch receiver.
4. An unusually specific description of the parts in a claim for a combination of elements, all of which are old, where the patent is only for an improvement upon prior machines, cannot be broadened by construction so as to cover the use of a combination which leaves out some of the elements described.

(December 8, 1890.)

NOTE.—*Patent for combinations.*

A patent for a combination, where the inventor is not a pioneer in the art, must be strictly construed. *Lapham Dodge Co. v. Severin*, 40 Fed. Rep. 762, citing *Union Water-Meter Co. v. Desper*, 101 U. S. 237, 25 L. ed. 1026; *Goodyear Dental V. Co. v. Davis*, 102 U. S. 227, 26 L. ed. 150.

A patent which is for improvements merely in a combination must receive a narrow construction, and be limited to the form of combination therein described. *Eagle Mfg. Co. v. Miller*, 41 Fed. Rep. 351.

In a suit on a patent, a claim must be limited, where it is a combination of parts, to a combination of all the elements included in the claim as necessarily constituting that combination. *Phoenix Caster Co. v. Spiegel*, 123 U. S. 320, 33 L. ed. 623; *Rosmer v. Peddie*, 123 U. S. 315, 33 L. ed. 623, citing *Leggett v. Avery*, 101 U. S. 256, 25 L. ed. 866; *Goodyear Dental V. Co. v. Davis*, *supra*; *Fay v. Cordesman*, 109 U. S. 408, 27 L. ed. 979; *Mahn v. Harwood*, 112 U. S. 354, 359, 28 L. ed. 655, 667; *Union Metallic Cartridge Co. v. United States C. Co.* 112 U. S. 624, 28 L. ed. 822; *Sargent v. Hall Safe & Lock Co.* 114 U. S. 63, 29 L. ed. 67; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. ed. 722; *White v. Dunbar*, 119 U. S. 47, 30 L. ed. 308; *Sutter v. Robinson*, 119 U. S. 590, 30 L. ed. 422; *Bragg v. Fitch*, 121 U. S. 473, 30 L. ed. 1008; *Snow v. Lake Shore & M. S. R. Co.* 121 U. S. 517, 30 L. ed. 1004; *Crawford v. Heysinger*, 123 U. S. 559, 31 L. ed. 299.

It cannot be permitted to read into it any delicate adjusting apparatus not originally included in the claim. *Howe Mach. Co. v. National Needle Co.* 124 U. S. 583, 31 L. ed. 933.

A party who uses a patented combination cannot escape the consequences of infringement by showing that he uses something in addition to the combination. *Williams v. Barnard*, 41 Fed. Rep. 353.

In construing patents the doctrine of mechanical equivalents is applicable to claims for combina-

**B**ILL in equity to restrain the alleged infringement of letters-patent No. 381,678, granted December 1, 1885, to Nicholas H. Borgfeldt and Adolph C. Schutz for an improved cigar-bunching machine. *Dismissed*.

The machine is designed to produce automatically the inner part or bunch of a cigar.

This controversy relates to the following claim of the patent:

(9). In a bunch-machine, the combination of the cylinder B, having notched disk D, and chute C, with the reciprocating hopper I, reciprocating plunger L, apron M, sliding frame N, having roller v, and a bunch receiver R, substantially as specified.

The further facts appear in the opinion.

*Messrs. Briesen & Knauth*, for complainant:

The ninth claim of complainant's patent covers a patentable combination.

*Sugar Apparatus Mfg. Co. v. Yaryan Mfg. Co.* 43 Fed. Rep. 140; *Holmes Burglar Alarm Teleg. Co. v. Domestic Teleg. & Teleg. Co.* 43 Fed. Rep. 220.

The complainants cannot be regarded as claiming a new combination of new elements, but they seek to hold by their patent a new combination of old elements, for the purpose of producing a new result. Such a combination is favorably receivable; and the complainant is entitled to invoke in its behalf the doctrine of equivalents. Anyone will not be at liberty, because these elements are old, to substitute for one well-known and old element

tions of old elements and improvements on primary inventions, as well as to claims for primary inventions themselves. *Tatum v. Gregory*, 41 Fed. Rep. 142, citing *Gould v. Rees*, 82 U. S. 15 Wall. 192, 21 L. ed. 40; *Seymour v. Osborne*, 78 U. S. 11 Wall. 555, 20 L. ed. 42; *Gill v. Wells*, 89 U. S. 23 Wall. 23, 22 L. ed. 711.

The mere combination of an oval roll of toilet paper with a toilet-paper fixture, both of which are old, is not patentable where no new mode of operation results. *Morgan Envelope Co. v. Albany Perforated W. P. Co.* 40 Fed. Rep. 577.

A patent for a combination cannot be defeated by proof of the prior use of one part of the combination in one mechanism, and another part in another. *Consolidated R. M. Co. v. Coombs*, 39 Fed. Rep. 25; *Bates v. Coe*, 98 U. S. 48, 25 L. ed. 74; *Parks v. Booth*, 102 U. S. 104, 26 L. ed. 57.

If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality. *Fay v. Cordesman*, 109 U. S. 408, 27 L. ed. 979; *Union Water-Meter Co. v. Desper*, 101 U. S. 322, 25 L. ed. 1024; *Gage v. Herring*, 107 U. S. 640, 27 L. ed. 602.

A substitution for one element, in a combination, of something having a different or additional function, amounts to the same thing as adding to the combination a new and distinct instrument, and may make the improvement patentable. *Holmes Burglar Alarm Teleg. Co. v. Domestic Teleg. & Teleg. Co.* 43 Fed. Rep. 220, distinguishing *Wooster v. Blake*, 8 Fed. Rep. 428; *Dudgeon v. Watson*, 29 Fed. Rep. 248; *Assmus v. Alden*, 27 Fed. Rep. 684. See *Johnson v. Brooklyn & C. R. Co.* 2 L. R. A. 439, 37 Fed. Rep. 147; *Underwood v. Gerber* 2 L. R. A. 357, 37 Fed. Rep. 793.



some other well-known old element having the same function. The substitution, in lieu of the specific measuring device of the patent, of some other equally old and well-known measuring device, will not avoid the charge of infringement.

*Morley Sewing Mach. Co. v. Lancaster*, 139 U. S. 263, 32 L. ed. 715; *Lake Shore & M. S. R. Co. v. National Car Brakes Shoe Co.* 110 U. S. 229, 28 L. ed. 129.

*Mr. Charles C. Gill*, for defendant:

The terms of the claim are clear and definite. The claim of the patent is confined to the mechanism therein specifically referred to.

2 Pat. Off. Gaz. p. 197; *Seymour v. Osborne*, 78 U. S. 11 Wall. 548, 20 L. ed. 39; *Corn-planter Patent Case*, 90 U. S. 28 Wall. 218, 23 L. ed. 168.

Attempts at overreaching and unlawful expansion of claims have never been countenanced.

*Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 42 Fed. Rep. 900; *Goodyear Dental V. Co. v. Davis*, 102 U. S. 222, 26 L. ed. 149; *White v. Dunbar*, 119 U. S. 52, 30 L. ed. 805; *Keystone Bridge Co. v. Phoenix Iron Co.* 95 U. S. 274, 24 L. ed. 844.

The defendant having patents for the machine alleged to infringe, prima facie its title is as good as that of the complainant.

Where the question of infringement is in doubt, the fact that the defendant is acting under authority of a patent is sufficient to resolve the doubt against the complainant.

*Corning v. Burden*, 56 U. S. 15 How. 253, 14 L. ed. 688; *Trader v. Messmore*, 1 Bann. & Ard. 639, 7 Pat. Off. Gaz. 386.

The burden of proving the infringement is on the complainant.

*Puller v. Yentzer*, 94 U. S. 288, 24 L. ed. 108. See *Rogers v. Beecher*, 8 Fed. Rep. 639.

If the ingredient substituted by the defendant for the one left out in the defendant's machine was a newly discovered one, or even an old one performing some new function, and was not known at the date of plaintiff's patent as a proper substitute for the ingredient left out, the charge of infringement cannot be maintained.

*Gill v. Wells*, 9 Brodix, 589; *Rowell v. Lindsay*, 113 U. S. 97, 28 L. ed. 906; *Gould v. Rees*, 83 U. S. 15 Wall. 194, 21 L. ed. 41.

The application of the old feeding and measuring devices, the chute, the funnel and the presser to an old rolling table did not involve invention; and certainly by reason of such application the complainant cannot prevent others from making use of the same old instrumentalities in any way an intelligent mechanic may see fit to arrange them.

*Blake v. San Francisco*, 118 U. S. 682, 28 L. ed. 1071; *Aron v. Manhattan R. Co.* 132 U. S. 84, 33 L. ed. 272; *Dunbar v. Meyers*, 94 U. S. 187, 24 L. ed. 85; *Atlantic Works v. Brady*, 107 U. S. 192, 27 L. ed. 438; *Phillips v. Detroit*, 111 U. S. 608, 28 L. ed. 538; *Pennsylvania R. v. Locomotive Engine S. Truck Co.* 110 U. S. 490, 28 L. ed. 222; *Hollister v. Benedict*, 118 U. S. 59, 28 L. ed. 901; *Sackett v. Smith*, 42 Fed. Rep. 846; *Bragg v. Fitch*, 121 U. S. 478, 30 L. ed. 1008.

Where the patent relates only to a progressive step in a series of improvements the ten-12 L. R. A.

dency of modern decisions is more than ever toward a strict construction of claims and a finding of non-infringement in doubtful cases.

*Snow v. Lake Shore & M. S. R. Co.* 121 U. S. 617, 30 L. ed. 1004; *Newton v. Furst & Bradley Mfg. Co.* 119 U. S. 373, 30 L. ed. 443; *California A. Stone Paving Co. v. Scholicks*, 119 U. S. 401, 30 L. ed. 471; *Hartshorn v. Saginaw Barrel Co.* 119 U. S. 664, 30 L. ed. 539; *Grier v. Willt*, 120 U. S. 412, 30 L. ed. 712; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 153, 33 L. ed. 391; *McCormick v. Graham*, 139 U. S. 1, 33 L. ed. 598; *Sargent v. Burgess*, 129 U. S. 19, 33 L. ed. 604; *Peters v. Active Mfg. Co.* 129 U. S. 580, 32 L. ed. 788; *Union Water-Meter Co. v. Deeper*, 101 U. S. 332, 25 L. ed. 1024.

The differences between the complainant's machine and the defendant's machine are substantial and material, and amply sufficient to warrant a finding of non-infringement.

*Blake v. San Francisco*, 118 U. S. 679, 28 L. ed. 1070; *Fay v. Cordeman*, 109 U. S. 408, 27 L. ed. 979.

The complainant is forced to contend that the claim is broad and comprehensive, otherwise the prosecution could not have even the shadow of foundation. When given a liberal interpretation, however, the claim falls within the rule announced in *Pickering v. McCollough*, 104 U. S. 310, 26 L. ed. 749, and is invalid.

*Coze, J.*, delivered the following opinion: The machine covered by the ninth claim of the patent is designed to make a cigar bunch—which is all of a cigar minus the outer wrapper—from scrap-tobacco. The tobacco is placed in a large receptacle or cylinder which throws out accurately measured quantities, through a chute, into a vertically movable funnel, each does being sufficient for one bunch. The funnel is provided with a plunger which descends upon the tobacco and compacts it into a form approximating a cigar. It is then delivered upon an apron on which a leaf of tobacco, called a "binder," has been placed and is rolled, by means of a traveling roller, into a completed bunch. This bunch is deposited in a clamp, or receiver, where it is held intact until removed by hand. The claim covers a bunch machine having the following features: *first*, the cylinder B, having notched disk D and chute C; *second*, the reciprocating hopper I; *third*, the reciprocating plunger L; *fourth*, the apron M; *fifth*, the sliding frame N, having roller v; *sixth*, the bunch receiver R. Experts and counsel agree that these elements, considered separately, were old and well known. The complainant has vied with the defendant in demonstrating that each was "thoroughly old" long prior to the date of the patent. The complainant's brief states the proposition as follows: "Now, therefore, it is clear from the foregoing that the complainant cannot be regarded as claiming a new combination of new elements, but that it seeks to hold by its patent a new combination of old elements—old, well-known elements—for the purpose of producing a new result."

Not only was each element old, but sometimes two and sometimes three had been united to do similar work to that of the complainant's machine. Machines for making cigars were known over forty years ago, and since

then there has been a steady evolution in the art. Previous to the patent, machines were in use which discharged the tobacco in accurate doses, compacted it by pressure into the shape of a cigar and rolled the binder and filler into the finished bunch. The machines in controversy show the progress which time would naturally develop in a busy and lucrative industry.

But two defenses will be examined: *first*, Does the claim cover a combination or an aggregation?—and, *second*, Does the defendant infringe?

In order to be patentable a combination must not only be new but it must produce a new result, or an old result in a better way. If the combination be old and the result new, or if the result be unchanged and the combination new, in either case there is no patentable novelty. In a combination of old elements all the parts must so act that each qualifies every other. If they act independently, or if one acts independently of the others, it is an aggregation. It is not enough that these independent parts are conveniently associated in one machine, if each performs the same function it did before they were united. They must be so connected that the new result is due to their co-operative action. *Thatcher Heating Co. v. Burris*, 121 U. S. 266, 30 L. ed. 942; *Pickering v. McCullough*, 104 U. S. 810, 26 L. ed. 749; *Packing Company Cases*, 105 U. S. 566, 26 L. ed. 1172; *Hasles v. Van Wormer*, 87 U. S. 20 Wall. 858, 22 L. ed. 241; *Bussell Trimmer Co. v. Stevens*, 187 U. S. 423, 34 L. ed. 719, 53 Pat. Off. Gaz. 2044; *Stephenson v. Brooklyn C. T. R. Co.* 114 U. S. 149, 39 L. ed. 58; *Becher Mfg. Co. v. Atwater Mfg. Co.* 114 U. S. 523, 29 L. ed. 232; *Laundry Machinery Co. v. Bunnell*, 27 Fed. Rep. 810; Merwin, Patentability, 401.

The ninth claim must be considered as covering, irrespective of connecting mechanism, the combination of elements therein enumerated, and tested by the foregoing rules, it is somewhat difficult to perceive what new result is produced by their united action. That the machine is better than any which preceded it is sufficiently established; but it is argued by the defendant that, although a number of old devices and instrumentalities are placed in convenient juxtaposition, each acts just as it did before. The cylinder will, it is said, discharge the dose in the old way irrespective of the fact that the hopper and plunger are under the chute. The hopper and plunger will compact the tobacco in the similitude of a cigar whether the tobacco is dropped from the chute or is placed in the hopper by hand. The roller will roll and the receiver will hold the bunch in the same manner separately as in their present position. And yet it is thought that the claim might be sustained for a combination were it not for the introduction of the last element—the bunch receiver. The result to be accomplished is the finished bunch. This object is attained by the successive action of the cylinder, the hopper and plunger and the rolling apparatus. It is true that if one of these were removed the others would act, but the bunch would not be made in a manner so convenient and advantageous. For these elements a combination claim might be sustained within the doctrine of the following authorities: *Furbush* 12 L. R. A.

*v. Cook*, 2 Fish. Pat. Cas. 668; *Haffman v. Young*, 2 Fed. Rep. 74; *Birdsall v. McDonald*, 1 Bann. & Ard. 165.

But the introduction of the bunch receiver renders the application of these cases to the claim in question, at least, exceedingly doubtful. What reciprocity can there be between the clamp at the end of the rolling table and the cylinder at the top of the machine? In what way does the cylinder act upon the clamp or the clamp upon the cylinder? Remove either and the other would perform its function unimpaired. The clamp is simply a convenient device for holding the completed bunch. Its very name, "bunch-receiver," would seem to preclude its being a part of the combination. A combination produces something which, when finished, is placed in a receptacle. The receptacle adds nothing to the manufactured thing—it simply holds it. To use the language of the complainant's expert: "Such bunch-receiver is entirely independent and outside of the rolling apron." All action of the other parts of the machine ceases before the clamp begins to perform its office. The bunch (the result) is finished, and rather than have it fall to the floor, or into a box, or into the hand of the operator, the patentees thought it convenient to provide, what complainant's counsel aptly terms, "a mechanical hand" to receive it. This hand has no more to do with the operation of the cylinder, the reciprocating plunger, or the roller, than would a hand of flesh and blood, if placed at the end of the table to catch the bunch. Test it by carrying the operation a step or two further. It is said that the cigar is taken from the clamp by the operator, who places it in a cigar mold and applies the final external wrapper. Assume that the mold is located directly under the clamp, with proper machinery arranged to deposit the bunch in the mold and to convey it to an automatic wrapper-applying device, and again to a cigar box, where it is packed and prepared for the market. Can it be that these structures—the mold, the wrapper-applying machine and the box—could be added to the elements of the claim and included in a valid combination? And yet these also are the progressive but independent steps in accomplishing the desired result—a cigar ready for the smoker. There is no more combination between the cylinder which acts at the beginning of the bunch-making operation and the receptacle for holding the bunch at the end, than there is between a canal-boat which receives the grain from the elevator chute, and the bin from which the grain is taken; no more than there is between the knife of the guillotine, and the basket which catches the head of the victim. In a recent case the supreme court decided that where the mechanical operation and effect of the patented devices are the same, whether one of the elements of the claim is present or absent, there can be no patentable combination between those devices and that element. It is a mere aggregation. *Fond du Lac v. May*, 127 U. S. 395, 34 L. ed. 714, 53 Pat. Off. Gaz. 1884.

But irrespective of these views, it is thought that there is no infringement. It will be observed that the claim is more than ordinarily specific. Every element is designated by a letter restricting it to the mechanism shown in the

description and drawings. The complainant contends that the claim may be construed substantially as follows: In a bunch machine, the combination of a measuring and dose-distributing device, having a chute or outlet, with a dose-receiving, shaping and compacting device, a bunch-rolling and binder-applying device and a bunch-receiver or clamp, substantially as specified.

It is not necessary to consider what might have been the result had such a claim been allowed. It is enough that there is no such claim in the patent and none that can be so broadened by construction. Even if the state of the art permitted it, and it does not, the use of language unusually concise and technical makes the parts, thus referred to, essential features of the claim, and precludes a loose construction. The courts are not to consider what the patentees might have patented, but what they did patent. Here they have accepted a claim limited to the mechanism shown in the description and drawings. The court cannot now construct for them a different claim. *Keystone Bridge Co. v. Phoenix Iron Co.* 95 U. S. 274, 24 L. ed. 844; *Snow v. Lake Shore & M. S. R. Co.* 121 U. S. 617, 80 L. ed. 1004; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. ed. 733; *Seymour v. Osborne*, 78 U. S. 11 Wall. 548, 20 L. ed. 39; *Sutter v. Robinson*, 119 U. S. 580, 80 L. ed. 492; *White v. Dunbar*, 119 U. S. 47, 30 L. ed. 803; *Fay v. Cordesman*, 109 U. S. 408, 27 L. ed. 979; *Corn-Planter Patent Case*, 90 U. S. 23 Wall. 181, 218, 23 L. ed. 161, 168; *McCormick v. Talcott*, 61 U. S. 20 How. 402, 15 L. ed. 980; *Norton v. Haight*, 22 Fed. Rep. 787.

The case of *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 263, 32 L. ed. 715, relied on by the complainant, is not in point, as appears from the following quotation from the opinion: "Morley, having been the first person who succeeded in producing an automatic machine for sewing buttons of the kind in question upon fabrics, is entitled to a liberal construction of the claims of his patent. He was not a mere improver upon a prior machine which was capable of accomplishing the same general re-

sult; in that case his claims would properly receive a narrower interpretation."

Morley was a pioneer, he claimed his invention broadly and the court said he was right. These patentees are not pioneers. They are improvers upon prior machines. They have claimed the features of their machine narrowly, and the court is of the opinion that they were right in so doing. Adopting these well-known rules of construction it is clear that the defendant does not infringe.

The proposition that the defendant's machine contains the six enumerated features of the claim cannot be maintained. The complainant's theory seems to be that the succinct language of the specification may be ignored, and that the defendant's machine contains the "essential elements" of the claim, if construed as above. In other words, if the claim is for a combination containing four main sub-elements operating substantially like the apparatus described, the defendant infringes. Perhaps this is so, but, as before stated, the patent does not contain such a claim. The defendant does not use a cylinder or a notched disk, and there are essential points of difference in the defendant's compacting and rolling apparatus. The same rules of interpretation must apply to all parts of the claim. It will not do to place a broad construction upon one part and a narrow construction upon another part. If any measuring and distributing device may be substituted for "the cylinder B, having notched disk D, and chute C," it would seem to be equally clear that any compacting device may be substituted for "the reciprocating hopper I, and reciprocating plunger L," and so on. In view of the prior art and the explicit language of the claim it is thought that such a loose interpretation is not permissible, and that the court would not be justified in omitting features expressly designated as essential to the combination. But if the claim were so construed it would then be broad enough to include some of the prior Williams structures, and so would be anticipated.

It follows that *the bill must be dismissed.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

George E. BULLARD *et al.*, Trustees under the Will of Mary D. Whitney, Deceased,

TOWN OF SHIRLEY *et al.*

(.....Mass.....)

1. The legal incapacity of a town to support a clergyman entirely defeats a bequest to it, made "strictly on this condition," that it shall support him.
  2. Legal incapacity of a legatee to perform a condition on which the gift is made will prevent it from taking effect, although the time for performance was subsequent thereto.
  3. A gift over is not affected by the rule against perpetuities where the primary gift falls at once and as matter of law on the face of the will.
- 12 L. R. A.

(May 19, 1891.)

REPORT by the Supreme Judicial Court for Suffolk County (Holmes, J.) for the opinion of the full court of a bill filed by the trustees under the will of Mary D. Whitney, deceased, for instructions as to the proper construction of the second clause of such will.

The facts sufficiently appear in the opinion.

For a prior construction of the same clause of the will now in controversy, see *Bullard v. Chandler*, 5 L. R. A. 104, 149 Mass. 540.

Mr. H. E. Ware for plaintiffs.

Mr. Warren H. Atwood, for the Town of Shirley, respondent:

The purpose and objects of the gift come within the Statute of 48 Eliz., chap. 4, and also within the definitions of a public charity, in *Jackson v. Phillips*, 14 Allen, 539, 556, and in *Saltonstall v. Sanders*, 11 Allen, 446, 456.

*Bullard v. Chandler*, 5 L. R. A. 104, 149 Mass. 540; *Going v. Emery*, 16 Pick. 107; *Earle v. Wood*, 8 Cush. 430, 445; *Fairbanks v. Lomson*, 99 Mass. 583; *Dexter v. Gardner*, 7 Allen, 243; *Old South Soc. v. Crocker*, 119 Mass. 1; *North Adams Soc. v. Fitch*, 8 Gray, 421; *Sohier v. St. Paul's Church*, 12 Met. 250; *Bartlett v. Nye*, 4 Met. 378, 380; *Atty-Gen. v. Trinity Church*, 9 Allen, 423, 439; *Drury v. Natick*, 10 Allen, 169; *Schouler, Petitioner*, 134 Mass. 426; *Winslow v. Cummings*, 8 Cush. 358; *Brown v. Kasey*, 2 Cush. 243; *Shrewsbury v. Hornby*, 5 Hare, 406; *Atty-Gen. v. Gladstone*, 13 Sim. 7; *Powerscourt v. Powerscourt*, 1 Moll. 616; *Thorner v. Wilson*, 8 Drew. 245, 4 Drew. 350; *Lloyd v. Spillet*, 3 P. Wms. 844; *Atty-Gen. v. Cock*, 2 Ves. Sr. 278; *Mills v. Farmer*, 1 Meriv. 55; *Buck, Parishes*, 162.

The "condition" annexed to the gift to the Town of Shirley is illegal, and the Town cannot comply with it.

Mass. Const. Amend. art. 11; Pub. Stat. chap. 27, §§ 9, 10; chap. 88, § 19; *Minot v. West Roadbury*, 113 Mass. 1; *Hood v. Lynn*, 1 Allen, 108, 105; *Parsons v. Goshen*, 11 Pick. 396; *Stetson v. Kempton*, 18 Mass. 272.

It is a condition subsequent.

*Pinlay v. King*, 28 U. S. 8 Pet. 346, 7 L. ed. 701; *Lindsey v. Lindsey*, 45 Ind. 553, 563.

If performance of a condition subsequent is impossible, because contrary to law or public policy, such condition is void, and the estate to which it is annexed is absolute, notwithstanding the intention or express direction of the testator that, upon breach of condition, it shall revert to his heirs.

2 Jarman, Wills, 5th Am. ed. p. 18; *Nourse v. Merriam*, 8 Cush. 11, 20, 31; *Brattle Square Church v. Grant*, 8 Gray, 143; *Foster v. Durant*, 2 Cush. 544; *Parker v. Parker*, 123 Mass. 584; *Otis v. Prince*, 10 Gray, 581; *Blackstone Bank v. Davis*, 21 Pick. 42; *Gleason v. Flayerweather*, 4 Gray, 348, 351; *Whitney v. Spencer*, 4 Cow. 39; *Williams v. Williams*, 8 N. Y. 525; *Martin v. Margham*, 14 Sim. 280; *Atty-Gen. v. Greenhill*, 33 Beav. 193.

The Town of Shirley is capable of taking and holding the fund as trustee, and of administering the trust.

See *Webb v. Neal*, 5 Allen, 575; *Worcester v. Eaton*, 18 Mass. 371, 378; *Com. v. Wilder*, 127 Mass. 1, 4; *White v. South Parish in Braintree*, 13 Met. 506, 513; *Drury v. Natick*, 10 Allen, 169, 182; *Vidal v. Girard*, 43 U. S. 2 How. 127, 189, 11 L. ed. 205, 230; *Perin v. Carey*, 65 U. S. 24 How. 465, 505, 16 L. ed. 701, 711; *Philadelphia v. Fox*, 64 Pa. 169; *Sargent v. Cornish*, 54 N. H. 18.

Towns may take and hold gifts for religious purposes.

*Com. v. Wilder, supra*.

When there is a gift to charity, coupled with an illegal, or merely burdensome, condition or direction, the charity will be supported and the condition will fail.

*Weeks v. Hobson*, 6 L. R. A. 147, 150 Mass. 377; *Drury v. Natick* and *Nourse v. Merriam, supra*; *Tainter v. Clark*, 5 Allen, 66; *Jackson v. Phillips*, 14 Allen, 589; *Atty-Gen. v. Boutbee*, 2 Ves. Jr. 380; *Williams v. Williams, supra*; *Bullard v. Chandler*, 5 L. R. A. 104, 149 Mass. 540; *Minot v. Baker*, 6 New Eng. Rep. 688, 147 Mass. 348.

12 L. R. A.

The attempted limitation over to the heirs-at-law is void, because it is to take effect upon the breach of an illegal and void condition; also, because it is a conditional limitation which is to take effect, if at all, by way of an executory devise or bequest, and upon an event which may not happen within the time allowed by the rule against perpetuities.

*Brattle Square Church v. Grant, supra*; *Odell v. Odell*, 10 Allen, 1, 7; *Wells v. Heath*, 10 Gray, 17.

*Mr. S. K. Hamilton*, for the First Congregational Society in Shirley, respondent:

The Town of Shirley is not capable of taking said gift and administering the trust because it is a gift to a charity which is not within the scope of the duties of a town, and is not even germane to the purposes for which such corporations exist.

Pub. Stat. chap. 27; *Dillon, Mun. Corp. arts. 566-578*; *First Parish in Sutton v. Cole*, 8 Pick. 232; *Webb v. Neal*, 5 Allen, 575; *Com. v. Wilder*, 127 Mass. 1, 4; *Worcester v. Eaton*, 18 Mass. 371, 378; *Anthony v. Adams*, 1 Met. 284; *Stetson v. Kempton*, 18 Mass. 272; *Vidal v. Girard*, 43 U. S. 2 How. 127, 11 L. ed. 205; *Philadelphia v. Elliott*, 8 Rawle, 170; *Philadelphia v. Girard*, 45 Pa. 1; *Philadelphia v. Fox*, 64 Pa. 169.

In case of a gift to a charity, if the trustee named is incapable of taking it, the court will appoint a suitable trustee in his place.

*Minot v. Baker*, 6 New Eng. Rep. 688, 147 Mass. 348; *Bliss v. American Bible Soc.* 2 Allen, 384; *Winslow v. Cummings*, 8 Cush. 358; *McCartee v. Orphan Asylum Soc.* 9 Cow. 484; *North Adams Soc. v. Fitch*, 8 Gray, 421.

The principal intention of the testatrix will be carried out if possible, even if subordinate intentions and directions must be disregarded.

*Sanderson v. White*, 18 Pick. 328; *Thellusson v. Woodford*, 4 Ves. Jr. 320.

The law favors gifts to public charities. In case of a gift to a charity coupled with an illegal or merely burdensome condition, the condition will be held void and the charity will be supported.

*Weeks v. Hobson*, 6 L. R. A. 147, 150 Mass. 377; *Nourse v. Merriam*, 8 Cush. 11, 20, 31; *Jackson v. Phillips*, 14 Allen, 589.

The court is bound to carry the will into effect, if it can see a general intention to give to charity, "consistent with the rules of law, even if the particular mode or manner pointed out by the testator is illegal" or impracticable.

*Jackson v. Phillips, supra*; *Bartlett v. Nye*, 4 Met. 378; *Sanderson v. White* and *Thellusson v. Woodford, supra*.

In a gift to a public charity, the charity is deemed to be of the substance of the gift, and the mode in which it is to take effect is subordinate thereto.

*Minot v. Baker, Winslow v. Cummings* and *Bliss v. American Bible Soc. supra*.

Public charities will be administered *ex parte* if the exact directions of the testator cannot be followed.

*Jackson v. Phillips, supra*. See also *Mogridge v. Thackwell*, 7 Ves. Jr. 35; *Mills v. Farmer*, 1 Meriv. 55, 94, 96, 99, 100; *Atty-Gen. v. Gladstone*, 13 Sim. 7; *Atty-Gen. v. Guise*, 2 Vern. 286; *Atty-Gen. v. Whitechurch*, 3 Ves. Jr. 141, 145; *Bartlett v. King*, 12 Mass. 537, 543; *Bur-*

*bank v. Whitney*, 24 Pick. 146; *Drury v. Natick*, 10 Allen, 169, 188; *Sohier v. St. Paul's Church*, 12 Met. 250, 258; *Martin v. Margham*, 14 Sim. 230; *Atty-Gen. v. Greenhill*, 88 Beav. 198.

The fund will go to the residuary legatees, because there is no failure of the objects of the charity, and therefore no resulting trust, and because such a disposition would be contrary to the expressed intention of the testatrix.

*Brattle Square Church v. Grant*, 8 Gray, 142; *Thayer v. Wellington*, 9 Allen, 283.

If a corporation or person, having the ability and suitable in other respects, offers to assume and comply with the condition of the gift and to accept and execute the trust in the place of the Town of Shirley, it is consistent with the intention of the testatrix, and within the powers and practice of this court, to frame a scheme whereby said offer may be accepted, and said funds may be applied to the charity named.

*Bliss v. American Bible Soc. supra*; *American Academy v. Harvard College*, 13 Gray, 582; *Winslow v. Cummings, supra*.

*Messrs. J. Willard, G. P. Sanger and G. L. Clarke*, for the heirs-at-law, respondents:

The *cy-près* doctrine cannot be applied, either to enable the Town to use the income for any other purpose than the support of a Unitarian clergyman, or to change the conditional or limited gift particularly described by the testatrix into a general gift to promote Unitarian preaching in the Town of Shirley, and thus enable the parish to take.

*Cherry v. Mott*, 1 Myl. & C. 128; *Re Blundell's Trusts*, 80 Beav. 860; *De Thaminnes v. De Bonneval*, 5 Russ. 288; *Randell v. Dixon*, L. R. 88 Ch. Div. 218; *Chamberlayne v. Brookett*, L. R. 8 Ch. App. 206, 211.

Where the special object of charity fails, the doctrine of *cy-près* does not apply.

*Re Ovey*, L. R. 29 Ch. Div. 560; *Atty-Gen. v. Oxford*, 1 Bro. Ch. 444, note; *Corbyn v. French*, 4 Ves. Jr. 418; *Marsh v. Means*, 3 Jur. N. S. 790; *Cherry v. Mott, supra*; *Easterbrooks v. Tillinghant*, 5 Gray, 17; *Stratton v. Physio-Medical College*, 5 L. R. A. 83, 149 Mass. 505.

It is a common thing to offer to give a certain sum to a particular charity in case other persons of financial responsibility will promise to give a larger sum, which is held not to bind unless such promise is exactly complied with.

See *Bates College v. Bates*, 185 Mass. 487.

**Holmes, J.**, delivered the opinion of the court:

This is a bill for instructions, brought by the trustees under the will of Mary D. Whitney, touching the disposition of the fund given by the second clause of the will. That clause is as follows: "Secondly, I give and bequeath to my friend, Rev'd Seth Chandler, of Shirley, the sum of five thousand dollars (\$5,000), which after his death shall revert to the Town aforementioned strictly on this condition, namely: that said Town shall support, fairly and permanently, a Unitarian clergyman; in which case

all interest accruing on above sum shall be used to aid in payment of his salary, failing which it shall revert to my heirs-at-law."

Seth Chandler died after the testatrix. It is admitted by all parties that the Town cannot lawfully support the clergyman as required, and the question is whether the gift fails on that account.

We are of opinion that support by the Town, and not merely in the Town, is of the essence of the condition. The words require it. They are explicit "that said Town shall support." Any latitude of interpretation based on conjectures as to what the testatrix would have done had she known of the difficulty raised by her language is excluded by the introductory and governing phrase "strictly on this condition." We must take her condition strictly as she wrote it, and taking it so it cannot be performed. Again we are of opinion that, although the act of supporting a minister need not begin until after the receipt of the legacy, a capacity to do the act is a condition attached to the gift itself. The case is not like one where it is attempted to impose an illegal restriction on the use of the thing granted. Here, that which by our construction is contemplated by the testatrix as the consideration and inducement of her gift fails altogether. It is true that the testatrix may be assumed to have acted from religious or charitable motives; but she says very plainly that the motive is not sufficient unless the terms of her bargain are complied with. The question is one of construction, not of technical rules. We cannot doubt that what she required from the Town went to the root of her gift. See *Achorley v. Vernon*, Willes, 153.

In *Parker v. Parker*, 128 Mass. 584, where land was devised on condition that the devisee should support his brother, although the support was no doubt a part of the consideration of the gift, yet it was limited by the life of the brother, there was the further intention manifest to benefit the devisee subject to the charge, and therefore the devise did not fail because of the previous death of the brother.

It follows from our construction of the second clause that the legacy to the Town must fail. Assuming that the object is a charity, still there is no universal principle that the testator's particular intentions must be sacrificed by reason of that general object. *Stratton v. Physio-Medical College*, 149 Mass. 505, 508, 5 L. R. A. 83; *Re Ovey*, L. R. 29 Ch. Div. 560; *Re Randell*, L. R. 88 Ch. Div. 218.

The limitation to the testatrix's "heirs-at-law" is not dependent upon the gift to the Town taking effect. It is a limitation upon the failure of the primary purpose at any time and for any cause. As the primary purpose fails at once, and as matter of law on the face of the will, the gift over is immediate, and is not open to any objection on the ground of the rule against perpetuity. Therefore the fund does not fall into the residue. As the gift is of money it will go to the next of kin. *Codman v. Krell*, 152 Mass. 214.

*Decree accordingly.*

## NORTH CAROLINA SUPREME COURT.

Albert PURCELL, *Appt.*,

v.

RICHMOND &amp; DANVILLE R. CO.

(....N. C....)

1. An action of tort will lie for a railroad company's breach of its statutory duty to stop at a station for a passenger.
2. Punitive damages are recoverable of a railroad company for disregard of its statutory duty to stop at a station for a passenger when it has advertised for passengers for that train and has room for them, or could by reasonable diligence have had cars enough to accommodate them.

(March 17, 1891.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Alamance County disallowing his claim to punitive damages because of defendant's failure to stop its train according to its schedule at a station at which plaintiff was waiting to take passage. *Reversed.*

At the close of the evidence plaintiff asked the court to charge the jury that if they believed that the defendant stopped its train at Mebane, and received and discharged passengers, and also at Graham, and there received twelve or fifteen passengers, and discharged two or three, and that there was then room, standing or sitting, for fifty or sixty persons at the time the train passed Haw River, and that a part of the tickets were sold to persons at Haw River the evening before, and in due time to communicate with the officers of the Company, then to run by, as shown in this action, is such willful disregard of the rights of the plaintiff as would entitle him to recover punitive damages. This prayer was refused and the court instructed the jury that, upon the testimony, they would not be warranted in finding the defendant guilty of such a degree of negligence as indi-

cated a reckless indifference to consequences, oppression, needless caprice, willfulness or other cause of aggravation, as would entitle plaintiff to punitive damages. The measure of damages upon the admitted facts, or those proven, if the jury believed the testimony, would be the price paid for the ticket,—15 cents, and the amount paid for another conveyance to Burlington,—25 cents.

*Mr. J. A. Long* for appellant.

*Messrs. D. Schenck and F. H. Busbee* for appellee.

*Clark, J.*, delivered the opinion of the court: Code, § 1963, provides: "Every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads, and at usual stopping places established for receiving and discharging way passengers and freight for that train, and shall take, transport and discharge such passengers and property at, from and to such places on due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises." For a violation of such statutory duty the plaintiff might have sued in contract (*Hodges v. Wilmington & W. R. Co.* 105 N. C. 170), but he could elect to sue in tort for the injury, and the breach of public duty (existing independent of the Statute), by the willfulness or negligence of defendant. *Bishop, Non-Cont. Law, §§ 73, 74.*

If the tort was committed by mere negligence of the defendant, as simple carelessness or inadvertence, the plaintiff would be restricted to

**NOTE.—Railway company liable for torts.**

It is well established that railway companies are liable civilly, the same as individuals, for all classes of torts committed in the prosecution of their business. *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Carter v. Howe Mach. Co.* 51 Md. 290; *Williams v. Planters Ins. Co.* 57 Miss. 759; *Boogher v. Life Assn. of America*, 75 Mo. 819; *Evening Journal Assn. v. McDermott*, 44 N. J. L. 430; *Vance v. Erie R. Co.* 28 N. J. L. 334; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. 365; *Wheless v. Second Nat. Bank*, 1 Bart. 400; *National C. B. Shoe Co. v. Lake Shore & M. S. R. Co.* 4 Fed. Rep. 219; *Emigh v. Chicago, B. & Q. R. Co.* 1 Biss. 400; *Turrill v. Illinois Cent. R. Co.* 3 Biss. 66; *Sayles v. Chicago & N. W. R. Co.* 1 Biss. 468; *Winans v. Schenectady & T. R. Co.* 2 Blatohf. 379; *Philadelphia, W. & B. R. Co. v. Quigley*, 68 U. S. 21 How. 312, 16 L. ed. 73; *York & M. L. R. Co. v. Winans*, 58 U. S. 17 How. 30, 15 L. ed. 37; *Winans v. New York & E. R. Co.* 62 U. S. 21 How. 33, 16 L. ed. 63; *Eastern Counties R. Co. v. Broom*, 6 Exch. 814; *Poulton v. London & S. W. R. Co.* L. R. 2 Q. B. 584; *Gott v. Great Northern R. Co.* 3 Ell. & Ell. 672; *Whitfield v. South Eastern R. Co.* Ell. Bl. & Ell. 115.

Trains must be stopped at a station that passengers may alight upon the platform, and if stopped elsewhere the company is liable. *Columbus & I. Cent. R. Co. v. Farrell*, 31 Ind. 406, cited in 2 Wood, 13 L. R. A.

*Railway Law*, § 306, p. 1123; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 406.

Where the law imposes duties on a carrier a breach of performance of such duties is a tort for which the carrier is liable in damages. *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 619; *Clark v. St. Louis, K. C. & N. R. Co.* 64 Mo. 440; *Hammond v. North Eastern R. Co.* 6 S. C. 130; *Southern Exp. Co. v. McVeigh*, 20 Gratt. 234; *Rich v. Kneeland, Hob. 17, Cro. Jac.* 330; *Nicholls v. More*, 1 Sid. 38.

If a contract imposes a legal duty on a person, the neglect of that duty is a tort founded on contract, for which an action *ex contractu* for the breach, or an action *ex delicto* for the breach of duties, may be brought at the option of the party aggrieved. 1 *Addison, Torts*, 27; *Marzetti v. Williams*, 1 Barn. & Ad. 423.

The class of tortious actions growing out of contracts does not arise from the breach of express provisions thereof, but from the breach of an implied duty arising out of and incident to the contract. 1 *Addison, Torts*, 27, *note*.

All duties imposed upon a corporation by statute raise an implied promise of performance. *New York & N. H. R. Co. v. Schuyler*, 84 N. Y. 85; *Bath v. Freeport*, 5 Mass. 326; *Bullard v. Bell*, 1 Mason, 243; *Kortright v. Buffalo Commercial Bank*, 20 Wend. 94; *Carrol v. Green*, 23 U. S. 513, 23 L. ed. 739.

compensatory damages, and, as no special damages were alleged and shown, other than obtaining another conveyance, the measure of damages, as laid down by the court, to wit, the price of the ticket and of procuring such other conveyance, 40 cents in all, would have been correct. But if the conduct of the defendant was willful, or showed such gross negligence as to indicate a wanton disregard of the rights of the plaintiff, he was entitled to recover punitive damages in addition. Railroads are granted valuable franchises and privileges by virtue of the State's right of eminent domain. On their part they assume correlative obligations and duties to the public, and become quasi public servants. They are not granted such great and unusual privileges to the sole end that they may be operated for the mere pecuniary benefit of the corporation, and at the arbitrary pleasure and will of their managers and employé. It is well recognized that they are subject to proper regulation, supervision and control by public authority, and that they owe duties to the individuals who may wish to ship goods or to travel over their lines. When the defendant advertised its schedule, and the plaintiff bought a ticket and presented himself at the advertised time at a regular passenger station of the road, he had the right to be taken aboard the cars on their arrival at that point. In running its cars by the station without stopping, the defendant committed a breach of public duty,—a tort. If such breach was mere inadvertence or negligence, or was caused by an unforeseen number of passengers presenting themselves, which rendered it unsafe to take a greater number aboard, and the Company could not by reasonable diligence have increased the number of cars, then the plaintiff would be held to recover only the bare compensatory damages laid down. If, however, the defendant, having advertised for passengers for that train, by reasonable diligence could have ascertained that the number of cars was insufficient, and made no effort to supply the deficiency, but regardless of its duties, and of the rights of those whom it had invited to leave their ordinary avocations, and present themselves at its regular station for passage, ran its train by the station without stopping, or if there was room in the cars for fifty or sixty persons additional, and the train passed by the station without taking on at least as many as it had accommodations for, then the defendant did display a gross and willful disregard of the rights of the plaintiff which entitled him to recover punitive damages. There was evidence to justify, if believed, the state of facts recited in plaintiff's prayer for instruction, and it was error to refuse to grant it. Should an excessive verdict have been found by the jury, the discretion rested with the trial judge to correct it; but it would be a denial of justice to permit a common carrier to exhibit such arbitrary and willful neglect of the duties it has assumed, and such disregard of the rights of others. Yet such is the effect if, without adequate excuse, it should be allowed so to act, with no other penalty than refunding the price of the ticket and the price paid for another conveyance, since the latter would be

demanded in very few cases, and only when the destination is at a short distance. The effect of such ruling would be to license the common carrier to furnish cars or not, and to stop at its regular stations or not, at its arbitrary pleasure, and not as a duty required by law. The refunding the price of the ticket would amount, in most cases, to nothing, as the passenger would usually buy a ticket by the next train. Yet the inconvenience, annoyance and injustice to the traveling public by such detentions would be great and difficult to estimate.

A case exactly in point is *Harin v. McCaughan*, 82 Miss. 17, where it is held that exemplary damages were recoverable against a common carrier (there a steam-boat company) in an action of tort for violation of duty in willfully refusing to land its vessel, and receive the plaintiff as a passenger, according to its advertisement.

In *New Orleans, J. & G. N. R. Co. v. Hurst*, 86 Miss. 660, which was a case somewhat similar, where the train ran by the regular station without stopping to put off (instead of to receive) a passenger, the court affirms the case last cited, and says it is "the right of the jury in such cases to protect the public, by punitive damages, against the negligence, folly or wickedness which might otherwise convert these great public blessings into the most dangerous nuisances."

It is the duty of a common carrier, especially where it has a monopoly, to provide sufficient cars for the transportation of all passengers, as well as for the carriage of all freight which its invitation naturally brings to it, as was held in *Branch v. Wilmington & W. R. Co.*, 77 N. C. 847. Indeed, the identical facts of the present case are cited by Judge Rodman as an hypothetical illustration in that opinion. Page 851. No regard for their own profits or convenience will justify the corporation in having only sufficient cars for the ordinary amount of freight and travel, leaving the public to bear the inconvenience and loss, when, on unusual occasions, the volume of business may swell beyond the average. Common carriers could not be held liable for an unforeseen and extraordinary rush of business not within reasonable calculation, but when the additional volume of travel or freight is such as, with reasonable foresight, could be expected, it is the duty of the company to have the extra cars furnished. With the modern facilities of telegraph and telephone, the occasion of an unusual number of passengers or quantity of freight can be promptly notified and provided for. If this is not done, it is gross and willful negligence, and the Company should not be allowed to find its profit in a willful and reckless disregard of the rights of the public, and of its own duties. It may be that on the whole testimony the defendant could show sufficient matter of excuse, but the plaintiff was entitled to have the phase of the evidence set out in his prayer for instruction presented to the jury. Taking that evidence to be true, and nothing else appearing, he was entitled to recover punitive damages.

*Error.*



## IOWA SUPREME COURT.

Incorporated TOWN OF SPENCER, *Appl.*,George ANDREW *et al.*

(....Iowa....)

1. The certificate of the judge that a transcript contains all the evidence will be accepted as true against an objection that the evidence is not all included, in the absence of any specific reference to show that fact.
2. Permission may be granted by an incorporated town, under Code, § 464, to a private person to place weighing scales in a street in front of his lots, where they will serve the public convenience and do not constitute an obstruction to travel.
3. A town is estopped from revoking permission to a person to place scales in a street in front of his lot until the interests of the public require a revocation, where on the faith of the permission he has purchased scales, and incurred other expenses, such as enlarging a building with which they were to be connected, for the purpose of preparing them for use.
4. The use by a firm of a privilege granted to one member to place scales in a street, where it was granted with the knowledge and expectation that it was to be used by the firm, is no ground for revoking the privilege.

(January 26, 1891.)

**A**PPPEAL by plaintiff from a judgment of the District Court for Clay County in favor of defendants in a proceeding instituted to determine the right of defendants to set, maintain and use a weighing scale in plaintiff's Main Street, and to restrain them from so doing. *Affirmed.*

The case was submitted under a stipulation by which defendants waived the right to insist that plaintiff had a remedy at law. The facts are stated in the opinion.

**NOTE.**—Obstructions to highway may be authorized.

An obstruction in a highway, which would otherwise constitute a nuisance, may be legalized by legislative enactment. *Dubach v. Hannibal & St. J. R. Co.* 4 West. Rep. 683, 69 Mo. 428; *Northern Transp. Co. v. Chicago*, 99 U. S. 636, 25 L. ed. 336; 2 Dillon, Mun. Corp. § 512; *Elliott, Roads and Streets*, 484, citing *Cooley, Torts*, 615; *First Baptist Church v. Utica & S. R. Co.* 6 Barb. 312; *Com. v. Coopp*, 48 Pa. 53; *North Vernon v. Voegler*, 1 West. Rep. 563, 108 Ind. 314; *Perry v. New Orleans, M. & C. R. Co.* 55 Ala. 412; *Detroit v. Detroit City R. Co.* 37 Mich. 558; *Cushing v. Boston*, 123 Mass. 320; *Sawyer v. Davis*, 133 Mass. 230.

Statutes authorizing such obstruction are, however, strictly construed. 2 Dillon, Mun. Corp. § 512; *Elliott, Roads and Streets*, 484, citing *Jersey City v. New Jersey Cent. R. Co.* 4 Cent. Rep. 327, 40 N. J. Eq. 417; *Newark v. Delaware, L. & W. R. Co.* 5 Cent. Rep. 680, 48 N. J. Eq. 186; *Pennsylvania R. Co. v. Mich.* 4 Cent. Rep. 379, 115 Pa. 514; *Cogswell v. New York, N. H. & H. R. Co.* 4 Cent. Rep. 255, 108 N. Y. 10; *Stormfels v. Manor Turnp. Co.* 13 Pa. 555; *Hughes v. Providence & W. R. Co.* 2 R. I. 493.

Power to authorize obstructions may be delegated to municipal corporations. *State v. Newark*, 6 Cent. Rep. 540, 49 N. J. L. 344; *Mercer v. Pitts-*

*Mamra, Parker & Richardson*, for appellant:

The title to the streets of a city or incorporated town is in the city in trust for the public. Code, § 561; *Bansom v. Boal*, 29 Iowa, 68; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Clinton v. Cedar Rapids & M. R. Co.* 24 Iowa, 455; *Warren v. Lyon City*, 23 Iowa, 351; *Stanley v. Davenport*, 54 Iowa, 468.

The city council have no power or control over streets of the city not delegated by statute or included in the trust relation and purpose.

Code, § 464; 2 Dillon, Mun. Corp. 3d ed. § 556.

The Statute does not confer upon the city council authority to devote the streets and alleys to a particular use for the private benefit of an individual.

*Heath v. Des Moines & St. L. R. Co.* 61 Iowa, 11; *State v. Newark*, 6 Cent. Rep. 540, 49 N. J. L. 344; *Mikeell v. Durkee*, 84 Kan. 509; *Smith v. Leavenworth City*, 15 Kan. 81; *Emerson v. Babcock*, 66 Iowa, 257.

It is made the duty of the city council to keep the streets free and clear of all obstructions and incumbrances.

Code, § 527; *Emerson v. Babcock*, 66 Iowa, 257; *Heath v. Des Moines & St. L. R. Co.* *supra*.

They are required to keep them in proper and safe condition for the entire width.

*Stafford v. Oskaloosa*, 57 Iowa, 748; *Rusch v. Davenport*, 6 Iowa, 435.

Defendants are not in a position to urge the defense of estoppel; they were dealing with a municipal corporation in respect to the use and occupancy of a street, which is the property of the public. The municipal corporation is known to have no rights or powers except such as are created by law. The defendants are conclusively presumed to know the law, and if they deal with the corporation they

*burgh, Ft. W. & C. R. Co.* 36 Pa. 39; *Clarke v. Blackmar*, 47 N. Y. 150; *Atchison & N. R. Co. v. Manley*, 42 Kan. 577; *Michigan City v. Boeckling*, 123 Ind. 39; *Iron Mountain R. Co. v. Bingham*, 4 L. R. A. 622, and note, 87 Tenn. 523; *Terre Haute & L. R. Co. v. Bissell*, 6 West. Rep. 254, 108 Ind. 113; *Merchants Union R. W. Co. v. Chicago, B. & Q. R. Co.* 70 Iowa, 105; *Chicago D. & C. Co. v. Garrity*, 1 West. Rep. 670, 115 Ill. 155; *Pacific R. Co. v. Leavenworth*, 1 Dill. 303.

Under this delegated power municipalities have authorized the placing in streets of culverts, drains, sewers, reservoirs, gas and water pipes, telegraph poles, horse and steam railroad tracks, as well as the excavation of cellars under the sidewalks and streets. 2 Dillon, Mun. Corp. 544 *et seq.*

But the power to authorize such obstruction must be conferred expressly or by the clearest implication. *Glaesner v. Anheuser-Busch Brew. Asso.* 100 Mo. 506; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *Grand Rapids R. L. & P. Co. v. Grand Rapids R. E. L. & F. G. Co.* 39 Fed. Rep. 689; *Atty-Gen. v. Heishon*, 18 N. J. Eq. 410; *Stetson v. Faxon*, 19 Pick. 154; *Columbus v. Jacques*, 30 Ga. 505; *Savannah, A. & G. R. Co. v. Shiele*, 33 Ga. 601; *Mikeell v. Durkee*, 84 Kan. 509.

If the Legislature has not delegated power to the municipality it has none. *Com. v. Bush*, 14 Pa. 193.

cannot plead that they were misled by the unauthorized act of the corporation.

*St. Louis, A. & T. H. R. Co. v. Belleville*, 10 West. Rep. 605, 123 Ill. 876; *Davison v. Young*, 88 Ill. 145; *Schnell v. Chicago*, Id. 382; *Bigelow, Estoppel*, 480.

The act of the council was in effect a mere license, and as such was revocable at any time before an entry upon the premises and possession taken thereunder and expense incurred.

3 Kent, Com. 8th ed. 586; 2 Bouvier, L. Dict. 44; *Upton v. Braster*, 17 Iowa, 158; *Melhop v. Meinhardt*, 70 Iowa, 685; *Kipp v. Coonan*, 55 Iowa, 68; 7 Wait, Act. and Def. 195, 206; 6 Wait, Act. and Def. 86; 2 Wait, Act. and Def. 656.

The application for a permit to erect the scales was made by George Andrew alone, in his own behalf. It is now sought to make the expenditure incurred by the firm of McQueen & Andrew the basis of an estoppel against the plaintiff from revoking a personal privilege granted to George Andrew alone.

Only parties and their privies are bound by the representation, and only those to whom the representation is made, or whom it is intended to influence, and their privies may take advantage of the estoppel.

A copartnership is a person distinct from the individual members thereof.

Code, § 2558; *Fitzgerald v. Grimmell*, 64 Iowa, 261.

A license does not extend to any but the licensee.

7 Wait, Act. and Def. 167, citing *Mendenhall v. Klink*, 51 N. Y. 248; *Dark v. Johnston*, 55 Pa. 164.

*Messrs. Hughes & Hastings and F. H. Helsell* for appellee.

Given, J., delivered the opinion of the court:

1. Appellees insist in argument that appellant has not made all the evidence taken on the trial of record, namely, Exhibit A and Exhibit No. 1, and that therefore the case cannot be tried *de novo*. We are not referred to any part of the six abstracts or of the transcript in support of this claim, but are left to search these several hundred pages to see what they show, if anything, as to these exhibits. In the absence of any specific reference, we conclude that we may rely upon the certificate of the judge that the transcript contains all the evidence, and therefore consider the case *de novo*.

2. The following statement of facts, with those hereafter mentioned, will be sufficient to a correct understanding of the questions presented: Defendant Andrew was the owner of two lots fronting on Main Street, upon which he and McQueen decided to erect a building in which to carry on the fuel and implement business. April 17, 1888, the petition of defendant Andrew for permission to put in a scale in Main Street in front of said lots was granted by the town council. Thereupon defendants ordered a street scale with levers and attachments, so that the scale-beam would be inside the building, and changed the construction of their building accordingly. On May 15, 1888, after the scale had been ordered and shipped and freight paid, the town council passed a resolution rescinding said permission, and caused notice thereof to be served on the

defendant Andrew. Some attempt was made to arrive at an arrangement satisfactory to both parties, but, failing, the defendants proceeded to set their scale in the street, under the permission granted to Andrew. The principal conflict in the testimony is whether the scale is an obstruction to public travel. We may here say that the decided preponderance of the evidence is that the scale is not an obstruction or hindrance to public travel. The scale-beam is inside of the building, and connected by levers under the sidewalk, and no part of the scale shows upon the street except the platform, which is so substantial, and near the level of the street, that it can be safely and conveniently traveled over.

3. Our next inquiry is whether the Incorporated Town of Spencer had power to grant the permission given to the defendant Andrew. That the title to public streets and alleys is in the city or town in trust for the use of the public is not questioned. That other uses than travel may be made of the public streets and alleys is shown by numerous provisions of the Statute granting power to authorize other uses. The paramount purpose of maintaining streets and alleys is for public travel, and all other uses must be subordinate thereto. The city or town must keep them free from obstructions, except where the use or obstruction is such as the city or town is specifically empowered to and has authorized. Code, § 524; *Heath v. Des Moines & St. L. R. Co.* 61 Iowa, 11.

Among the powers conferred upon incorporated cities and towns is the right "to establish and regulate markets, to provide for the measuring or weighing of hay, coal or any other articles of sale." Code, § 456.

In *Davis v. Anita*, 73 Iowa, 835, the town authority of this provision passed an ordinance appointing a weighmaster, and providing a penalty for selling certain commodities within the town, when the quantity exceeded 1,000 barrels, without being weighed upon the city scales, and declaring a certain scale in the town to be "city scales." The court says, with reference to the power conferred, that "the power given, in substance, is to regulate; and this implies that the corporation is empowered to do all things essential to the proper exercise of the power expressly conferred. The privilege conferred should not be confined within narrow bounds, but the discretion reposed in the corporation must be fairly exercised, so as not to unduly infringe upon the rights of the citizen, on the one hand, and yet, on the other, so that the express and necessarily implied object of the Statute shall not be unduly limited. It is under the authority conferred by section 456 that many of the cities and towns have erected and maintained scales in the public streets. It is certainly the duty, as well as the privilege, of cities and towns to provide conveniences for the correct weighing or measuring of commodities brought to their markets. If the cities and towns may maintain scales of their own in the public streets to facilitate the weighing of hay, coal or other articles of sale, we see no good reason why they may not, under reasonable restrictions, authorize others to maintain scales whereby the public convenience will be served. If it may be said that this power is not delegated by statute, it is certainly

included in the trust relation and purpose under which cities and towns hold title to and exercise control over the public streets and alleys.

In *Emerson v. Babcock*, 66 Iowa, 258, the plaintiff sought to restrain the defendant, the city marshal, from removing a set of scales. The petition alleged that the scales were not an obstruction, were a benefit to the public, and that they were put in the street at the first laying out of the town, and that the council had passed an ordinance requiring their removal. It was held, on demurrer, that the plaintiff had no legal right to carry on his private business in the streets; that his being permitted to maintain his scales for a time was a mere license which might be terminated at any time, and in such case it was immaterial whether the scales amounted to a nuisance or not; and hence that the demurrer was properly sustained. The distinction between the cases is obvious: In this, the scales were put in by permission, and evidently to serve the public need; in that, there was no permission, and the plaintiff was a trespasser. Our conclusion is that the Town of Spencer did have power to grant the permission it did.

4. Appellant contends that, although the council had power to grant the permission, "it was in effect a mere license, and as such was revocable at any time before an entry upon the premises, and possession taken thereunder, and expense incurred." Appellees contend that under the facts the plaintiff was estopped from revoking the permission at the time it was attempted to do so. We have seen that, before the attempted revocation, the defendants, relying upon the permission, had ordered a scale suited to the place, paid the freight thereon and had it shipped to them at Spencer. It also appears that the location requires grading, some of which was done, and that defendants enlarged the plan of their building so as to make room for the scale-beam on the inside.

These facts were known to the council at the time of the attempted revocation, and, under the familiar rules of the law, they were estopped from then revoking the permission. Appellees cite cases wherein licenses were held irrevocable, but we do not understand them to claim, nor would we hold, that this license must continue perpetually; for surely such was not contemplated by either party. The license having been granted by authority, and the defendants having acted thereon, as stated, the plaintiff is estopped from revoking it until the interests of the public shall require that it be revoked. If from any cause, such as change in the travel or business, the construction of a scale by the Town, or the condition or management of this scale, public interests require its removal, then the council may revoke the permission.

In *Emerson v. Babcock*, *supra*, where the scales were placed without permission, it was held that permission implied from allowing them to remain might be terminated at any time. The doctrine of estoppel had no application in that case. As no reason is shown for revoking the permission at the time the resolution of revocation was passed, we think the council were not authorized to revoke it.

5. The permission being to Andrew alone, appellant contends that it confers no privilege upon the firm of Andrew & McQueen. It is evident that the privilege was granted with the knowledge and expectation that it was to be used by the firm. Authorities are cited as to the difference between the rights of a partnership and of those composing it. It is a sufficient answer to appellant's claim that the mere fact that the firm of which Andrew is a member is exercising the privilege is not a sufficient reason for granting the relief asked.

This discussion fully disposes of the case, and leads to the conclusion that *the judgment of the District Court should be affirmed.*

## CALIFORNIA SUPREME COURT.

PEOPLE of the State of California, *ex rel.*,  
ATTORNEY-GENERAL, *Appt.*,

v.

DASHAWAY ASSOCIATION.

(84 Cal. 114.)

**The promotion of the cause of temperance** is too vague and uncertain as a description of the objects for which a corporation was formed to enable a court to say that funds contributed for the use of the corporation constitute a public charity which can be administered by a court of equity. Hence a division of the fund by the corporation among its own members is not such a perversion thereof as amounts to an injury to the public so as to demand a forfeiture of the corporate charter.

(May 10, 1890.)

**NOTE.**—Public charities. See notes to *Cary Library v. Bliss* (Mass.) 7 L. R. A. 755; *Stratton v. The Physio-Medical Institute* (Mass.) 5 L. R. A. 33; *Bulard v. Chandler* (Mass.) 5 L. R. A. 104; *Penny v.* 12 L. R. A.

**A PPEAL** by relator from a judgment of the A Superior Court for the City and County of San Francisco, sustaining a demurrer to an information filed to procure the forfeiture of the charter of defendant corporation. *Affirmed.*

The facts are stated in the opinion.

*Messrs. George A. Johnson, Atty-Gen., S. Heydenfeldt, Jr., Walter H. Levy and J. P. Kelly* for appellant.

*Messrs. Tilden & Tilden and McClure & Dwinelle* for respondent.

**Per Curiam:**

This is an information in the nature of a quo warranto to forfeit the charter of the Dashaway Association, a corporation organized and existing under the Laws of the State

*Croul* (Mich.) 5 L. R. A. 353; *Heiskell v. Chickasaw Lodge No. 8* (Tenn.) 4 L. R. A. 609; *Cottman v. Grace* (N. Y.) 8 L. R. A. 145; *Fire Ins. Patrol v. Boyd* (Pa.) 1 L. R. A. 417.

of California, and for a judgment declaring that its property escheat to the State; that a receiver be appointed to take possession of all the property; that an injunction issue, etc.

The complaint avers that the object and purpose for which the said corporation was formed was to promote the cause of temperance; that it has no capital stock; that it has members who are elected under provisions of its by-laws; that it has since its incorporation received at various times from its members and others contributions and donations of money for the purpose for which it was incorporated, to wit., the promotion of the cause of temperance; with which moneys it acquired by purchase real estate in the City and County of San Francisco.

That in 1888, by leave of the court, it sold certain real estate in said city and county for \$156,000; that it paid off a mortgage of \$45,000, leaving a balance in cash on hand of \$111,000, realized from property purchased with donations as aforesaid and for the purposes aforesaid.

That the corporation has abused and misused its powers, disregarded its corporate trust, and violated its charter, and has fraudulently and unlawfully perverted its funds and misapplied \$72,000, from the object for which the corporation was formed, and from the use for which it was given and received, by dividing, distributing and paying out the same among its members.

That the officers and members have conspired and colluded with defendant to fraudulently and unlawfully accomplish this result, and that the corporation has still the sum of \$89,000 on hand received in like manner and for like purpose, which, as relator is informed, it will dispose of in like unlawful manner unless restrained.

Defendant demurred to the information upon the grounds:

1. "That the said complaint does not state facts sufficient to constitute a cause of action.

2. "That the said court has no jurisdiction of the person of the defendant or the subject of the action."

The demurrer was sustained by the court below "on the ground that the court has no jurisdiction."

Judgment was entered in favor of defendant, from which judgment relator appeals to this court.

Corporations are creatures of the law, and when they fail to perform duties which they were incorporated to perform, and in which the public have an interest, or do acts which are not authorized, or are forbidden them to do, the State may forfeit their franchises and dissolve them by an information in the nature of a quo warranto. *People v. Utica Ins. Co.* 15 Johns. 358; *People v. Pittsburgh R. Co.* 53 Cal. 694; *Golden Rule v. People*, 118 Ill. 492, 7 West. Rep. 219.

The grant of corporate franchises is always subject to the implied condition that they will not be abused. *Chicago Life Ins. Co. v. Needles*, 118 U. S. 574, 28 L. ed. 1084.

"In its relations to the government, and when the acts or neglects of a corporation, in violation of its charter or of the general law, become the subject of public inquiry, with a view to the forfeiture of its charter, the willful

acts and neglects of its officers are regarded as the acts and neglects of the corporation, and render the corporation liable to a judgment or decree of dissolution." *Ang. & A. Corp. § 310; Life & Fire Ins. Co. v. Mechanics Ins. Co.* 7 Wend. 85; *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497, 8 L. ed. 1076; *Ward v. Sea Ins. Co.* 7 Paige, 294, 4 L. ed. 162.

This reasoning proceeds upon the theory that the corporation is cognizant of and approves of the acts of its agents, and where it is made to appear that the agent has departed from his duties as prescribed by the corporation, or violated his instructions in the performance of the acts complained of and relied upon as a basis for forfeiture, no such forfeiture will be declared. *State v. Manchester Commercial Bank*, 6 Smedes & M. 267.

In *People v. Utica Ins. Co.*, *supra*, an application had been previously made by the attorney-general to a court of chancery for an injunction to restrain the company from usurping the franchise of banking, which application was refused because there was a complete and adequate remedy at law, by an information in the nature of a quo warranto.

*People v. Bank of Niagara*, 6 Cow. 196; *People v. Washington and Warren Bank*, 6 Cow. 211, and *People v. Bank of Hudson*, 6 Cow. 217,—are authority to the point that the action is properly brought in the name of the People, and against the corporations in their corporate names, in cases where they had, as corporations, usurped franchises not granted by their charters. See also *People v. Trustees of Geneva College*, 5 Wend. 211.

The writ of *certio facias* was formerly used by government as a mode to ascertain and enforce the forfeiture of a corporate charter, in cases where there was a legal existing body, capable of acting, but who had abused their power. It would not lie in cases of mere *de facto* corporations. It was necessary that the government be a party to the suit, for the judgment was that the parties be ousted and the franchises seized into the hands of the government. 2 Kent, Com. 318.

The writ of quo warranto was a writ which issued to bring the defendant before the court to show by what authority he claimed an office or franchise, and was applicable alike to cases where the defendant never had a right, or where, having a right or franchise, he had forfeited it by neglect or abuse. 8 Bl. Com. 262, 263.

An information in the nature of quo warranto, which has succeeded the writ of that name, was originally in form a criminal proceeding, to punish the usurpation of the franchise by a fine, as well as to seize the franchise. This information has in process of time become in substance a civil proceeding to try the mere right to the franchise or office.

It was a peculiarity of both the quo warranto and information in the nature of quo warranto that the ordinary rule of pleading was reversed, and the State was bound to show nothing, and the defendant was required to show his right to the franchise or office in question; and if he failed to show authority judgment went against him. *Ang. & A. Corp. § 756*.

The practice has, however, become quite general in this country for the information to

set forth the facts relied upon to show the intrusion, misuser or non-user complained of.

In information of quo warranto there were two forms of judgment: When against an officer or individual, the judgment was ouster; when against a corporation by its corporate name, the judgment was ouster and seizure.

In the first case, there being no franchise forfeited, there is none to seize; in the second case there is; consequently the franchise is seized. 2 Kent, Com. 312, and *note*.

But there may be a judgment of ouster of a particular franchise, and not of the whole charter. *People v. Rensselaer & S. R. Co.* 15 Wend. 118.

By such ouster and seizure the franchises are not destroyed, but pass to and exist in the State. The corporation was destroyed and ceased to be the owner or possessor of lands, or goods, or rights, or credits. The lands reverted to the grantor and his heirs, and the goods escheated to the State.

The principle of a forfeiture is, that the franchise is a trust; and the terms of the charter are conditions of the trust, and if any one of the conditions of the trust be violated it will work a forfeiture of the charter.

Cases of forfeiture are said to be divided into two great classes:

1. Cases of perversion; as where a corporation does an act inconsistent with the nature and destructive of the ends and purposes of the grant. In such cases unless the perversion is such as to amount to an injury to the public who are interested in the franchise, it will not work a forfeiture.

2. Cases of usurpation, as where a corporation exercises a power which it has no right to exercise. In this last case the question of forfeiture is not dependent, as in the former, upon any interest or injury to the public.

We have referred in a general way to the modes of procedure under these several writs and the nature of the relief granted under them, for a purpose which will become apparent when we look into the following provisions of our Code:

Section 802 of the Code of Civil Procedure of 1872 provides as follows:

"The writ of *scire facias* of quo warranto and proceedings by information in the nature of quo warranto, are abolished. The remedies obtainable in these forms may hereafter be obtained by civil actions, under the provisions of this chapter."

Then follow the provisions of the chapter from sections 808 to 809, both inclusive, providing for an action by the attorney-general in the name of the people of the State, against any person who usurps, intrudes into or unlawfully holds or exercises any public office, civil or military, or any franchise within this State.

This was the condition of our law until 1879, when the present Constitution of the State went into effect, the fifth section of article 6 of which authorizes the superior courts and their judges to issue writs of quo warranto; and in 1890 the Code of Civil Procedure was amended to conform in this respect to the Constitution. Code Civ. Proc. § 76.

If, then, it be contended that the effect of the Constitution, and amendment to section 76, of 12 L. R. A.

the Code of Civil Procedure, reviving the writ of quo warranto, is to repeal by implication the chapter providing for an action against persons who usurp offices or franchises, the answer must be that it makes little difference, as the power under a writ of quo warranto is quite as broad as under the Statute.

The mode of proceeding under the several writs we have mentioned has not in modern times been very uniform, and we regard the information or complaint in this case sufficient in its general scope to uphold a proceeding like the present, whether brought under the Statute, or in support of a writ of quo warranto.

We say sufficient in its general scope, in the view that it will uphold the one equally with the other.

We are clearly of opinion that the proper parties are before the court, the nature of the relief sought considered.

The vital question, however, remaining in either case is this:

Has there been a perversion by the defendant of its funds under such circumstances as to amount to an injury to the public?

We have already said that in cases of perversion the acts must result in injury to the public who are interested in the franchise, or no forfeiture will be declared. Has the public such an interest here, and has it been injured?

The information avers "that the object and purpose for which the said corporation was formed was to promote the cause of temperance."

That it has received moneys contributed and donated by its members and other persons for "the promotion of the cause of temperance."

These are the only allegations touching the objects of the Association, the scope of its action and the manner of its achievement.

Whether temperance in eating, in drinking, or temperance generally and in all things, is meant, is not stated and must be left to conjecture.

Whether its operations and efforts are confined to members of the Association, or extended to those outside of the pale of the society, does not appear.

In *Saltontail v. Sanders*, 11 Allen, 446, the Supreme Court of Massachusetts upheld as a public charity a residuary bequest for the following purposes: (1) "to the furtherance and promotion of the cause of piety and good morals;" or (2) "in aid of objects and purposes of benevolence or charity, public or private;" or (3) "temperance;" or (4) "for the education of deserving youths." In reference to the third clause, relating to the bequest, viz., that for the furtherance and promotion of temperance, another portion of the will indicated so unmistakably the meaning of the testator that the court says that the term "temperance" "is shown by the previous clause above quoted to have been used by the testator in its modern and limited sense of restraining the abuse of intoxicating liquors." That a bequest for the purpose of being used by a trustee for the cause of temperance, in restraining the abuse of intoxicating liquors, is a public charity, and may be upheld as such, we do not doubt.

So, too, we are fully alive to the fact that upon the construction of general charitable be-

quests, "if there are two meanings of a word, one of which will effectuate and the other will defeat the testator's object, the court is bound to select that meaning of the word which will carry out the intention and objects of the testator."

The enforcement of charitable uses cannot be limited to any narrow and stated formula. As has been well said, it must expand with the advancement of civilization and the daily increasing needs of men. New discoveries in science, new fields and opportunities for human action, the differing condition, character and wants of communities and nations, change and enlarge the scope of charity, and where new necessities are created new charitable uses must be established. The underlying principle is the same; its application is as varying as the wants of humanity.

Public charities have often been enforced in cases lacking in that definiteness essential to uphold a bequest to individuals.

It does not follow, however, that we can by adjudication give a definite meaning to language which, standing by itself, or in connection with its context, has only a general significance, incapable of limitation.

The word "temperance" has no fixed legal meaning as contradistinguished from its usual import.

Webster defines it as "habitual moderation in regard to the indulgence of the natural appetites and passions; restrained or moderate

indulgence; moderation, as, temperance in eating and drinking; temperance in the indulgence of joy or mirth."

Where a testator bequeathed the residue of her estate to the Bishop of D. to dispose of the same "to such objects of benevolence and liberality as the Bishop in his own discretion shall most approve of," the bequest was held void upon the ground that objects of benevolence and liberality were not necessarily charitable within the Statute of Elizabeth, and were, therefore, too indefinite to be executed. *Morice v. Durham*, 9 Ves. Jr. 399.

Upon the like ground a bequest "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," has been held void for vagueness and uncertainty, and as not being within the scope of the Statute of Elizabeth. *Kendall v. Granger*, 5 Beav. 800.

We are of opinion that the term used in the information here is too vague and uncertain to enable us to say therefrom that the fund in question is a public charity, which can be administered by a court of equity.

It follows that the perversion of the fund is not an injury to the public, and hence that the forfeiture cannot be maintained.

*The judgment is affirmed.*

Fox, J., deeming himself disqualified, did not participate in this decision.

Petition for rehearing overruled.

## INDIANA SUPREME COURT.

Nellie AUSTIN, *Appt.*,

v.

Ruth DAVIS *et al.*

(....Ind....)

1. A parol agreement to adopt a child as heir and to leave her all one's property at death is within the Statute of Frauds where the estate

at death consists of property for the transfer of which a parol contract is not valid under the Statute.

2. Performance on the part of a girl of a parol contract to live with a man and his wife during their lives in consideration of their agreement to leave her all their property will not take the agreement out of the Statute of Frauds.

3. A man is not prevented from trans-

**NOTE.—Certain contracts not binding on makers.**

In the Roman law it was declared that a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding. 3 Just. Inst. title 12, § 24.

In modern jurisprudence a contract may be illegal and void because contrary to law, or inconsistent with sound policy and good morals; and "many contracts which are not against morality are still void as being against the maxims of sound policy." Lord Mansfield, in *Jones v. Randall*, 1 Cowp. 39.

Such contracts, for instance, come within the latter category as tend to operate, with a corrupting influence in the election and appointment to public office (*Swayze v. Hull*, 8 N. J. L. 66; *Eddy v. Capron*, 4 R. I. 385; *Parsons v. Thompson*, 1 H. Bl. 323; *Gray v. Hook*, 4 N. Y. 449; *Meguire v. Corwine*, 101 U. S. 108, 25 L. ed. 899); or a contract for lobby services (*Barry v. Capen*, 6 L. R. A. 806, 151 Mass. 99; *Bartle v. Nutt*, 29 U. S. 4 Pet. 184, 17 L. ed. 825); or to procure public influence (*Slocum v. Wooley*, 9 Cent. Rep. 659, 48 N. J. Eq. 451); or for procuring a bid on a public work (*Nash v. Kerr Murray Mfg. Co.* 1 West. Rep. 393, 19 Mo. App. 1; *Jones v. Caswell*, 3 Johns. Cas. 29; *Doolin v. Ward*, 6 Johns. 194); or on a mail contract (*Gulick v. Ward*, 10 N. J. L. 12 L. R. A.

102); or a contract procured by bribery (*State v. Cross*, 38 Kan. 698); or to pay for procuring a government contract (*Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 868); or to pay for signatures to a petition for pardon (*Hatzfield v. Gulden*, 7 Watts, 152); to sell land without surrogate's order (*Overseers of Bridgewater v. Overseers of Brookfield*, 3 Cow. 299); to pay for suppressing evidence (*Collins v. Blantern*, 2 Wils. 347); to pay for promoting marriage (*Scribblehill v. Brett*, 4 Bro. P. C. 144; *Arundel v. Trevillian*, 1 Ch. Rep. 87); to influence disposition of property by will. *Debonhan v. Ox*, 1 Ves. Sr. 278. See Addison, Cont. 91; 1 Story, Eq. chap. 7; *Collins v. Blantern*, 1 Smith, Lead. Cas. 9th Am. ed. 678.

So a certificate of deposit given for a gambling debt is void as against public policy. *Savings Bank of Kansas v. National Bank of Commerce*, 38 Fed. Rep. 800.

So a negotiable note given in payment of a gambling debt is void in the hands of an innocent purchaser for value. *Harper v. Young*, 2 Cent. Rep. 622, 112 Pa. 419.

So contracts in general restraint of trade are void as against public policy. *Tardy v. Creamy*, 31 Va. 553. Contracts imposing no obligations are void as

ferring his property by an agreement to leave all his property at death to an adopted child, if the transfer is not made for the purpose of defrauding the latter.

4. A contract by a married woman to leave to an adopted child all her property at death, which is void because of her coverture, cannot be ratified after she becomes sole.

(March 12, 1891.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendants in an action brought to enforce specific performance of a contract alleged to have been made by defendants' ancestor. *Affirmed.*

The facts are stated in the opinion.

*Messrs. U. J. Hammond and Edwin St. George Rogers, for appellant:*

An agreement to settle, or charge, or dispose of, or leave one's property at one's death, is a good and available agreement, and will operate and can be enforced in equity on the property when such time arrives and finds the party who so agrees of ability to carry out such agreement with respect to such property, or finds the property in any claimant of it who has not acquired it bona fide for a valuable consideration without notice of the agreement.

*Metcalfe v. York*, 1 Myl. & C. 547, 556; *Lyde v. Mynn*, 1 Myl. & K. 688; *Wellesley v. Wellesley*,

4 Myl. & C. 561; *Lewis v. Madocks*, 17 Ves. Jr. 48.

Although such an agreement may fail to be couched in such terms as that it interferes with one's power to dispose of and expend such property during one's lifetime, yet it does not for this reason fail to prevent him from making such a disposition of the property as is, in form or effect, testamentary, or as does not end in his lifetime his own enjoyment or use of the property.

See *Lewis v. Madocks*, 8 Ves. Jr. 158, *note*; *Cochran v. Graham*, 19 Ves. Jr. 66, *note*; *Eyre v. Monro*, 26 L. J. Ch. N. S. 757; *Needham v. Kirkman*, 8 Barn. & Ald. 581; *Gregor v. Kemp*, 8 Swanst. 404; *Johnson v. Hubbell*, 10 N. J. Eq. 332; *Van Duyn v. Vreeland*, 12 N. J. Eq. 147; *Porteus v. Hannah*, 19 Ves. Jr. 67; *Maddox v. Rowe*, 23 Ga. 481; *Brinker v. Brinker*, 7 Pa. 53.

When the evidence concerning such an agreement is not so uncertain as to fail to show any definite arrangement in regard to the matter, and where the agreement has been performed on the part of the promisee, and where there is no objection to the agreement on account of the adequacy of the consideration, and no circumstance rendering the claim under it inequitable, it is the province of equity not only to compel a specific performance of the agreement, but, if necessary, charge anyone coming to hold the property with knowledge of the agreement, or otherwise than as a bona fide

against public policy. *Maloney v. Herbert* (N. J.) Nov. 8, 1888; *Bowman v. Phillips*, 8 L. R. A. 681, and *note*, 41 Kan. 384; *Tappan v. Albany Brewing Co.* 5 L. R. A. 414, 80 Cal. 570; *Parsons v. Randolph*, 4 West. Rep. 863, 21 Mo. App. 368; *Nash v. Lathrop*, 1 New Eng. Rep. 913, 143 Mass. 29; *Re Gould*, 1 New Eng. Rep. 913, 53 Conn. 415. See *notes* to *Chippewa Valley & S. R. Co. v. Chicago*, 84 P. M. & O. R. Co. (Wis.) 6 L. R. A. 601; *Adams County v. Hunter* (Iowa) 6 L. R. A. 615. And see *Materne v. Horwitz*, 2 Cent. Rep. 472, 101 N. Y. 499.

*Contracts in violation or in fraud of statute, void.*

Contracts in violation of statutes are void whether the statutory prohibition is expressed or implied. *Harris v. Runnels*, 53 U. S. 12 How. 79, 13 L. ed. 901; *Kennett v. Chambers*, 55 U. S. 14 How. 38, 14 L. ed. 316; *Hannay v. Eve*, 7 U. S. 8 Cranch, 243, 3 L. ed. 427; *Maybin v. Coulon*, 4 U. S. 4 Dall. 298, 1 L. ed. 841; *Davidson v. Lanier*, 71 U. S. 4 Wall. 447, 15 L. ed. 577; *Gardner v. Tatum*, 77 Cal. 458; *Well v. Golden*, 2 New Eng. Rep. 235, 141 Mass. 364.

No recovery can be had for milk sold in cans not sealed according to the requirements of the Statute. *Miller v. Post*, 1 Allen, 434.

So no recovery can be had on a contract made on Sunday in contravention of the Statute. *Brimhall v. Van Campen*, 8 Minn. 12; *Finney v. Callender*, Id. 41; *Pattee v. Greely*, 13 Met. 284.

Contracts in consideration of compounding are void. *Pearce v. Wilson*, 2 Cent. Rep. 57, 111 Pa. 14; *Hicketts v. Harvey*, 3 West. Rep. 699, 108 Ind. 564; *Foley v. Greene*, 1 New Eng. Rep. 17, 14 R. I. 613.

*Gambling contracts.*

If a contract for sale and delivery of goods at a future date contemplates no actual delivery of the subject matter of the contract, the real intention being merely to speculate on the rise and fall of the market, such contract is void. *Irwin v. Williar*, 110 U. S. 499, 23 L. ed. 225; *Embrey v. Jemison*, 121 U. S. 836, 32 L. ed. 172; *Lyon v. Culbertson*, 83 Ill. 28; *Pickering v. Cease*, 79 Ill. 323; *Waterman v. Buck-* 12 L. R. A.

land, 1 Mo. App. 45; *Bourke v. Short*, 34 Eng. L. & Eq. 219; *Bigelow v. Benedict*, 70 N. Y. 202; *Story v. Salomon*, 71 N. Y. 420; *Davis v. Davis*, 119 Ind. 511; *Sondheim v. Gilbert*, 117 Ind. 71; *Osgood v. Bauder*, 1 L. R. A. 655, 75 Iowa, 550; *Kahan v. Walton*, 46 Ohio St. 195; *Floyd v. Patterson*, 73 Tex. 208; *Dunn v. Bell*, 85 Tenn. 581; *Griseword v. Blane*, 11 C. B. 583; *Re Chandler*, 13 Am. L. Reg. N. S. 310; *Cassard v. Hinman*, 1 Bosw. 207; *Gregory v. Wendell*, 39 Mich. 387; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Murry v. Ochel-tree*, 59 Iowa, 428; *Williams v. Carr*, 80 N. C. 294. And see *note* to *Harvey v. Merrill* (Mass.) 5 L. R. A. 200.

Generally, in this country all wagering contracts are held to be illegal and void. *Irwin v. Williar*, *supra*. See *Tantum v. Arnold*, 4 Cent. Rep. 421, 42 N. J. Eq. 60; *Commiskey v. Williams*, 3 West. Rep. 604, 20 Mo. App. 603.

Such contracts are void because they are against public policy. *Crawford v. Spencer*, 10 West. Rep. 83, 23 Mo. 498; *Cochran v. Ellis*, 14 West. Rep. 574, 123 Ill. 493; *McNamara v. Gargett*, 12 West. Rep. 650, 68 Mich. 454; *Dempsy v. Harn* (Pa.) 9 Cent. Rep. 615; *Thayer's App.* (Pa.) 8 Cent. Rep. 473.

*Contract if illegal cannot be ratified.*

A contract void because it stipulates for the doing what is forbidden by law at the time when it is to be done cannot be ratified, even at a time when, owing to a change in the law, it would be lawful to do the thing. *Handy v. St. Paul Globe Pub. Co.* 4 L. R. A. 466, and *note*, 41 Minn. 188.

No agreement void at its inception can be given operative force by ratification of the parties, even after the accomplishment of its object. *Greenhood*, Pub. Pol. Rule 9, p. 8, citing *Shenk v. Phelps*, 6 Ill. App. 612; *Coppell v. Hall*, 74 U. S. 7 Wall. 548, 19 L. ed. 244; *Thompson v. Warren*, 5 B. Mon. 491.

The following are instances of agreements against public policy, and void, and not susceptible of ratification by the parties thereto: A combination between purchasers at a sale not to bid against each other, but to divide the property between



purchaser for a valuable consideration without notice of the agreement, with a trust for the benefit of the party to whom it was agreed to be given.

*Shakespeare v. Markham*, 10 Hun, 322; *Parson v. Stryker*, 41 N. Y. 480; *Rhodes v. Rhodes*, 8 Sandf. Ch. 279, 7 L. ed. 852; *Wright v. Tinsley*, 80 Mo. 389; *Frisby v. Parkhurst*, 29 Md. 58; *Rivers v. Rivers*, 8 Desaus. Eq. 190; *Haleyburton v. Kershaw*, Id. 105; *Isard v. Middleton*, 1 Desaus. Eq. 116, note; *Watson v. Mahan*, 20 Ind. 228; *Brinker v. Brinker*, *supra*; *Gupton v. Gupton*, 47 Mo. 37; *Logan v. McGinnis*, 12 Pa. 37; *Mundorf v. Kilburn*, 4 Md. 459; *Logan v. Wienholt*, 1 Clark & F. 611; *Needham v. Smith*, 4 Russ. 318; *Stockley v. Stockley*, 1 Ves. & B. 30; *Fortescue v. Hennah*, *supra*; *Carlisle v. Fleming*, 1 Harr. (Del.) 490; *Jeremy*, Eq. 1st Am. ed. 401; 1 Hovenend, Fr. 1st Am. ed. p. 374; 1 Story, Eq. Jur. § 882; 8 Parsons, Cont. 7th ed. p. 407. See especially *Van Tyne v. Van Tyne* (N. J.) 1 L. R. A. 155; *Sharkey v. McDermott*, 16 Mo. App. 80, 91 Mo. 647.

Mr. T. S. Rollins for appellees.

Coffey, J., delivered the opinion of the court:

The complaint in this cause consists of three paragraphs. The material allegations in the first paragraph are, substantially, that in the year 1868, when the appellant was four years of age, John S. Johnson and Elizabeth D.

Johnson, husband and wife, without children and residing in the City of Indianapolis, proposed, in writing, to the mother of the appellant, then living alone with the appellant at the Town of Neoga, in the State of Illinois, that if the said mother would surrender to them the appellant they would take her as their own child, provide for her and bring her up as their own, and at their death leave her all their property; that said proposition was contained in a letter written to the mother of the appellant by the said Elizabeth D. Johnson and signed by her for her said husband, John S. Johnson and herself; that the letter is lost and a copy cannot be filed with the complaint; that said proposition was accepted and the custody of appellant surrendered to the said Johnson and Johnson; that in the year 1869, said John S. Johnson, by proceedings in the proper court, adopted the appellant as his daughter and she thereupon took upon herself the name of Johnson; that the said Elizabeth Johnson was present in court at the time said proceedings were had and gave her assent thereto and thereafter promised the mother of the appellant that she would treat appellant as her daughter; that thereafter the appellant remained with said Johnson and Johnson, rendering them all the duties, affection and obedience due from a natural child, until she was eighteen years of age, when, with their consent and approval, she intermarried with Charles Austin, which

them, is against public policy and void. *Wheeler v. Wheeler*, 5 Lans. 355.

After appointment to office by agreement between two parties to share the profits of the office in consideration of the withdrawal of the candidacy of one of the parties a renewal of the promise by the incumbent is void. *Hunter v. Nolf*, 71 Pa. 232.

An agreement to pay for lobbying a private bill through Congress cannot be validated by ratification and new promise to pay for the service. *McKee v. Cheney*, 52 How. Fr. 144. See *Pearson v. Chapin*, 44 Pa. 9.

Where one withdrew his candidacy in favor of another, who agreed to pay all expenses already incurred, a new promise to pay, made after the election, was void. *Robinson v. Kalbfleisch*, 5 Thomp. & C. 212. Compare, however, *Stout v. Ennis*, 28 Kan. 705.

No number of subsequent promises to pay can infuse vitality into a contract originally void by the policy of the law. *Fireman's Charitable Assn. v. Berghaus*, 13 La. Ann. 209; *Negley v. Lindsay*, 67 Pa. 217; *Shelton v. Marshall*, 16 Tex. 344; *Chamberlain v. McClurg*, 8 Watts & S. 31.

A transaction between enemies, originally unlawful, cannot be made better by ratification. *United States v. Grossmayer*, 76 U. S. 9 Wall. 72, 19 L. ed. 627.

The reason of the rule is, that the public have an interest in the contract, on the ground of public policy, which the immediate parties to the contract are not at liberty to control by an attempted ratification. See *Wight v. Rindskopf*, 43 Wis. 348; *Reeves v. Butcher*, 81 N. J. L. 227.

Courts will not take jurisdiction in cases of illegal contracts.

No principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law. *Armstrong v. Toier*, 24 U. S. 11 Wheat. 271, 6 L. ed. 472; *Kimbrow v. Bullitt*, 63 U. S. 22 How. 209, 12 L. R. A.

16 L. ed. 317; *Hall v. Coppel*, 74 U. S. 7 Wall. 559, 19 L. ed. 247; *Re Green*, 7 Biss. 340; *Platt v. Oliver*, 2 McLean, 277; *Tufta v. Tufta*, 3 Woodb. & M. 505; *Steers v. Lashley*, 6 T. R. 61; *Craft v. McConoughy*, 79 Ill. 846; *Western Union Teleg. Co. v. Burlington & S. W. R. Co.* 11 Fed. Rep. 1. See note to *Bowman v. Phillips* (Kan.) 3 L. R. A. 681.

That which the law prohibits, either in terms or by fixing a penalty to it, is unlawful; and it will not permit in one form that which it declares wrong in another,—as a contract for the loan of money to be used in gambling or other transactions in contravention of the Statute (*White v. Bus*, 3 Cush. 448; *McKenna v. Robinson*, 3 Mees. & W. 434. See *Webb v. Brooke*, 3 Taunt. 6; *Cannan v. Bryce*, 3 Barn. & Ald. 179; or where spirituous liquors were sold by one having no license, and the Statute requires a license (*Griffith v. Wells*, 3 Denio, 226; *Solomon v. Dreschler*, 1 Minn. 373); or a partnership agreement one object of which was to deal in the illegal sale of lottery tickets (*Williams v. Woodman*, 8 Pick. 78); or where a part consideration of attorneys' fees for professional services was the division of the fees contrary to the provision of the statute. *Allen v. Hawke*, 18 Pick. 79.

#### Parties in pari delicto.

Parties in pari delicto are without remedy, whether the transactions are mala prohibita or malum in se. *Brown v. Tarkington*, 70 U. S. 8 Wall. 377, 18 L. ed. 255; *James v. Steers*, 2 L. R. A. 164, 16 R. I. 367; *Hess v. Culver*, 6 L. R. A. 493, 7 Mich. 538. See note to *Kirkpatrick v. Clark* (Ill.) 8 L. R. A. 511.

Where an unlawful object, known to both parties, was intended as part of a contract to commit a fraud, as to sell domestic sardines in boxes with French labels, the courts will not aid either party. *Materne v. Horwitz*, 2 Cent. Rep. 473, 101 N. Y. 493.

Contracts in violation of the Statute of Frauds not enforceable.

If the requirements of the Statute of Frauds are not complied with, a contract falling within its

marriage occurred in the year 1882, and that during the time she so lived with them she was treated as their daughter; that the said John S. Johnson departed this life on the 6th day of April, 1887, having disposed of his property to the said Elizabeth D. Johnson while yet in life and leaving no children except the appellant; that the said Elizabeth D. Johnson at all times up to the time of her death treated the appellant as her daughter, and declared that she desired the appellant to have all her property after her death; that the said Elizabeth D. Johnson died intestate on the 8th day of March, 1888, leaving no issue of her body nor the descendants of any issue; but leaving the appellant, whom she had up to the time of her death reared, trained and loved and held out to the world as her child, and whom she had declared up to the time of her death she desired to take and have all her property both real and personal; that the appellees claim to be the heirs of the said Elizabeth D. Johnson, and deny the right of the appellant to any portion of the property owned by the said Elizabeth at the time of her death. This paragraph contains a description of the real estate owned by Elizabeth D. Johnson at the time of her death, and alleges that the personal estate amounts to the sum of \$900, and prays that the right of the appellee to said property be ascertained and fixed by a proper decree.

The second paragraph of the complaint, in

legal effect, does not differ materially from the first paragraph, except in that it alleges that Elizabeth D. Johnson was in court at the time the record was made adopting the appellant by John S. Johnson and believed herself to be a party thereto and to be bound thereby, and that she died in that belief; that the property conveyed by John S. Johnson to his wife, the said Elizabeth D. Johnson, was a voluntary conveyance and without any consideration whatever; and at the time she took the same she had full knowledge of the obligations of the said John S. Johnson to the appellant under the terms of said contract.

No question is made in this court in relation to the third paragraph of the complaint, and we need not, for that reason, state its contents.

The circuit court sustained a demurrer to each paragraph of the complaint, and the propriety of that ruling is called in question by a proper assignment of error.

This is not an action by the appellant to recover damages for a breach of the contract set up in the complaint; nor is it an action to recover the value of services rendered by the appellant to John S. Johnson and Elizabeth D. Johnson; but the complaint is constructed upon the theory that the appellant is entitled to specific performance. It has been decided by this court that where a childless husband and wife, in consideration that a young girl should live with them until the death of both, in all re-

spect, as long as it remains *in fieri*, cannot be enforced, either at law or in equity. *Andrews Bros. Co. v. Youngstown Coke Co.* 89 Fed. Rep. 353.

An interest in an irrigating ditch is an interest in realty which cannot pass by mere verbal sale. *Barnham v. Freeman*, 11 Colo. 601.

A parol promise made by a woman to her adult daughter to reconvey property on the arrival of minors at maturity, on certain conditions, if the daughter would convey title to her, is void under the Statute. *Cleaman v. Cotton*, 66 Miss. 467.

Statements of a person, since deceased, that another had done a good many things for him, and that he was going to leave him a certain sum in his will, do not establish a contract liability, but are only a declaration of decedent that he intended to give a legacy of that sum. *Re Miller's Estate*, 136 Pa. 230.

Mere statements to third persons by a person since deceased, that he intended to devise a certain sum to another for services, do not establish a binding contract enforceable against decedent's estate, especially where there is no proof that the services were actually rendered. *Ibid.*

A promise to make provision by will for payment for services rendered before the promise is not enforceable against the promisor's estate, after his death, as a contract on the faith of which actual services were performed. *Ibid.*

A letter to a sister in England asking to have some relative come to the writer, so that in case of his death his property will not be eaten up by outsiders, and a subsequent telegram to a nephew, but not received till after his uncle's death, saying, "Come at once if you wish to see me alive; property is yours; answer immediately,"—do not constitute a contract in writing which will give the nephew a right to the uncle's real estate. *Turner v. Prevost*, 17 Can. S. C. 253.

The services of a child to its parent, or of a grandchild to whom the grandparent stands *in loco parentis*, to such grandparent, are not gratuitous, but are presumed, in the absence of evidence of an express promise, to be rendered as a recompense 12 L. R. A.

for the care and protection extended to the child. *Dodson v. McAdams*, 96 N. C. 149.

#### *Secret agreement, when void.*

When one acts with others in a matter of common interest and apparently upon an equality, his signature being used to induce others to sign, a secret promise for his individual advantage with the promoter of the enterprise is void and a new agreement may be so connected with it as to be tainted with the illegality. *Nickerson v. English*, 2 New Eng. Rep. 632, 142 Mass. 267, citing *Harvey v. Hunt*, 119 Mass. 279; *White Mountain R. Co. v. Eastman*, 34 N. H. 494; *Melvin v. Lamar Ins. Co.* 80 Ill. 446; *Robinson v. Pittsburgh & O. R. Co.* 23 Pa. 384; *Miller v. Hanover Junction & S. R. Co.* 87 Pa. 96; *Henry v. Vermillion & A. R. Co.* 17 Ohio, 187; *Stanhope's Case*, L. R. 1 Ch. App. 161.

#### *Part performance, to take contract out of the Statute.*

To take a case out of the Statute of Frauds upon the ground of part performance of a parol contract, it is not only indispensable that the acts done should be clear and definite, and referable exclusively to the contract, but the contract should be established by clear, definite, competent and unequivocal proofs. *Berry v. Hartzell*, 8 West. Rep. 309, 91 Mo. 132.

Part performance of a parol contract which the Statute of Frauds requires to be in writing has no effect at law to take a case out of the provisions of the Statute. *Henry v. Wells*, 48 Ark. 485.

Part performance must have been made in reliance upon the oral agreement, and to the prejudice of the party seeking to enforce the contract. *Brown v. Hoag*, 36 Minn. 373.

The acts of part performance should clearly appear to be done solely with a view to the agreement being performed. *Wheeler v. Reynolds*, 66 N. Y. 238; *Johnson v. Skillman*, 29 Minn. 99; *Wolfe v. Frost*, 4 Sandf. Ch. 72, 7 L. ed. 1027; *Wheeler v. Reynolds*, 66 N. Y. 232; *Byrne v. Ro-maine*, 2 Edw. Ch. 444, 6 L. ed. 451.

spects as their own child, and render such services as she was capable of doing, orally agreed to make her their heir, and at their death, or the death of the survivor, to will her the entire estate of which they were possessed, consisting, at the death of the survivor, of real estate, and also of personal property exceeding in value \$50, the agreement was within the Statute of Frauds, and that a performance on the part of the girl did not take it out of the Statute. *Wallace v. Long*, 105 Ind. 523, 8 West. Rep. 370, and authorities there cited.

It is sought by the complaint before us to take the case at bar out of the rule announced in this case by alleging that the contract was embodied in a letter written to the mother of the appellant. If a contract which comes within the Statute of Frauds can be extracted from correspondence between the parties upon the subject of the contract, the Statute is satisfied. *Wills v. Ross*, 77 Ind. 1; *Thames Loan & Trust Co. v. Beville*, 100 Ind. 309.

The allegations in relation to the letter resulting in the contract set up in the complaint are somewhat vague and uncertain. We are left in doubt as to whether the name of John S. Johnson was signed to the letter which it is alleged was written by appellant's mother. It is not alleged that John S. Johnson wrote the letter, but the allegation is that it was written by his wife and signed by her for her husband and herself. Assuming, however, that the letter was of such a character as to bind John S. Johnson, we are confronted with the question as to what were his duties and obligations under the terms of the contract contained therein. It bound him to leave to the appellant whatever property he might possess at the time of his death. This he could do in two ways, namely: first, by adopting the appellant so that she would take the property by inheritance from him; second, by the execution of a will in proper legal form so as to bequeath to her his property. He chose to adopt the first mode, but before his death he conveyed and transferred, or caused to be conveyed and transferred, all his property to his wife, Elizabeth D. Johnson, and at the time of his death had no property which the appellant could inherit from him.

All the authorities agree that such contract as the one now under consideration left John S. Johnson perfectly free and unrestrained in the enjoyment of his property, and that he could dispose of it as he pleased at any time during his life by gift or otherwise. *Van Dyne v. Freeland*, 12 N. J. Eq. 146; *Jeremy, Eq.* 1st Am. ed. 401; 1 Story, Eq. Jur. § 382.

It is not claimed that the transfer made by John S. Johnson to his wife was made for the purpose of defrauding the appellant; and we must presume, therefore, that it was made in good faith and for some lawful purpose. Under these facts it cannot be successfully maintained that John S. Johnson was guilty of any breach of the contract set out in the complaint. Nor are we able to perceive how it can be successfully maintained, by any process of legitimate reasoning, that the property of John S. Johnson became charged with any trust, since he was at liberty to dispose of it at his pleasure. Ordinarily, one who holds property in trust for another must keep it for the benefit of the *cestui*

*que trust*. It would be idle to say that one has the legal right to dispose of his property in such manner as to him seemed best, even in making a donation of it, and at the same time say that the person taking it took it subject to a trust which might, in certain contingencies, be enforced. We are not inclined to adopt the contention of the appellant that the property of John S. Johnson became charged with a trust in favor of the appellant, and that Elizabeth D. Johnson took it subject to such trust.

As John S. Johnson possessed the undoubted right to dispose of his property, we think his wife took the absolute title to the same free from any charge against it on account of any contract made by him with the appellant. And this brings us to a consideration of the obligations and duties of Elizabeth D. Johnson under the contract in suit. At the time the contract was entered into she was a married woman, and the contract as to her was void for want of power in her to bind herself by such a contract. *Long v. Brown*, 66 Ind. 160; *Hudson v. Davis*, 48 Ind. 253; *O'Daily v. Morris*, 31 Ind. 111; *Johnson v. Tusweiler*, 35 Ind. 355; *Maher v. Martin*, 43 Ind. 814.

It is contended by the appellant that under the facts stated in the complaint it must be held that Mrs. Johnson, after she ceased to be a married woman, ratified the contract made by her while under coverture, or that she made a new contract. It appears by the complaint that the appellant became a married woman prior to the death of John S. Johnson; and while it does appear that she, subsequent to his death, resided with Mrs. Johnson, under the same roof, she could not occupy that relation which she occupied prior to her marriage. Furthermore, it is a general principle of law that a void contract cannot be ratified, and this principle has been held to apply to the contracts of married women. *Long v. Brown, supra*.

In this case it was said by this court, speaking of the contracts of a married woman then in suit: "Such contract is not susceptible of ratification. Nothing short of a new, valid and binding contract, made after the death of her husband, upon a new consideration, can operate as a contract to deprive her of her interest in the land."

It is not claimed that Elizabeth D. Johnson made any new written contract after the death of her husband. If she made any contract at all, it was a verbal one. As we have seen, such a contract is within the Statute of Frauds, and cannot be enforced. *Wallace v. Long, supra*.

The appellant relies upon the case of *Van Tine v. Van Tine* (N. J.), 1 L. R. A. 155, and the case of *Sharkey v. McDermott*, 16 Mo. App. 80, 91 Mo. 647. In each of these cases it was held that performance on the part of the child was sufficient part performance to take the case out of the Statute of Frauds. This is in direct conflict with *Wallace v. Long, supra*, and *Johns v. Johns*, 67 Ind. 440. We cannot follow the case of *Van Tine v. Van Tine*, and the case of *Sharkey v. McDermott*, without overruling the case of *Wallace v. Long*, and the cases upon which it rests. To hold that specific performance could be had in this case, as to the real estate of which Mrs. Johnson died seized

there being no valid written contract between the appellant and Mrs. Johnson, and no possession of such real estate having been surrendered under the contract, would also be in conflict with the cases of *Atkinson v. Jackson*, 8 Ind. 31; *Watson v. Mahan*, 20 Ind. 223; *Le-Follett v. Kyle*, 51 Ind. 446; *Law v. Henry*, 39 Ind. 414; *Stater v. Hill*, 10 Ind. 176; *Moreland*

*v. Lemasters*, 4 Blackf. 383, and *Arnold v. Stephenson*, 79 Ind. 196.

In our opinion, the court did not err in sustaining the demurrer to the complaint before us. *Judgment affirmed.*

Petition for rehearing overruled June 12, 1891.

## ILLINOIS SUPREME COURT.

William MISCH, *Appt.*,

v.

Horace RUSSELL.

(...Ill....)

1. Officers of school districts are included in the words "all other officers," in the Act of April 3, 1873 (Rev. Stat. chap. 46), giving the county court jurisdiction of contests of election of county, township and precinct officers and all other officers for the contest of whose election no provision is made.
2. By application of the maxim *ejusdem generis*, which is only an illustration or specific application of the broader maxim *notetur a sociis*, general and specific words which are capable of an analogous meaning being associated together take color from each other so that the general words are restricted to a sense analogous to the less general, but the rule does not require the entire rejection of the general terms.
3. An elector may lawfully vote for the same man as a candidate for two incompatible offices at the same election.

(January 22, 1891.)

**A**PPEAL by plaintiff from a judgment of the County Court for Iroquois County dismissing his petition in a proceeding instituted to contest the election of defendant to the office of president of the board of education of a certain school district. *Reversed.*

The facts are stated in the opinion.

*Messrs. Kay, Evans & Kay* for appellant.  
*Mr. Free P. Morris* for appellee.

**Bailey, J.**, delivered the opinion of the court:

This was a proceeding brought by William Misch in the County Court of Iroquois County, to contest the election of Horace Russell to the office of president of the board of education of school district No. 2, township 25 north, of range 12 west, in said county. The petition alleges that said Misch is a resident of said school district, over the age of twenty-one years, and able to read and write the English language; that on the 19th day of April, 1890, an election was held in said school district for the purpose of electing a board of education,

to consist of a president and six members, as provided in section 2, art. 6, of the "Act to Establish and Maintain a System of Free Schools," approved and in force May 21, 1889; that at said election there were cast at least 212 votes; that the result of said election, as declared by the judges thereof, gave to said Russell 96 votes and to said Misch 95 votes, for the office of president of said board of education, and that said Russell was thereupon declared by said judges elected to said office; that said Russell did not in fact receive a majority of the votes cast at said election for said office, but that said Misch did receive a majority of said votes, and was actually elected; that there were cast at said election not less than 10 ballots which were not counted by said judges; that said ballots were headed "For President, William Misch," and thereunder, among the names of the candidates voted for as members of said board, there also appeared the name of said Misch; that said judges did not count any of said last-mentioned ballots; and that, if said ballots had been counted for said Misch as president of said board, he would have received a majority of all the votes cast for that office, and would have been declared elected thereto. Said Russell appeared and answered, alleging that said county court had no jurisdiction of the subject matter of said petition or power to hear and determine the matters therein set forth, but admitting that said Misch was properly qualified to be elected to and hold the office of president of said board of education; that an election was held in said school district, as alleged in said petition, and that at said election about 212 votes were actually cast; that the judges of said election counted 96 votes in favor of said Russell and 95 votes in favor of said Misch for the office of president of said board, and declared said Russell elected to said office; that at said election there were cast about ten ballots in which it appeared that the voters had voted for said Misch for president of said board and also for a member of said board; that said judges held that, inasmuch as said Misch could not hold both of said offices, they being incompatible with each other, and contrary to the spirit and intention of said Act, they, the said judges, did not have the power to discriminate as to which of said offices they

**NORM.—Voting for same person for incompatible offices.**

This appears to be the first case upon the question as to an elector's right to vote for the same person as a candidate for incompatible offices. It is decided, however, in harmony with the doctrine as to appointments to incompatible offices or the election of an incumbent of one office to another 13 L. R. A.

and incompatible office, in which cases the appointment or election is not void but simply puts the candidate to an election as to which office he will hold (see *People v. Carrigue*, 2 Hill, 98; *State v. Butts*, 28 C. 156), unless some law positively forbids a person holding one office from accepting another. See *Re Corlies*, 11 R. L. 633; *State v. De Gress*, 53 Tex. 387.

should count said votes for, did therefore reject them altogether, and thereupon declared that said Misch had received 95 votes for said office, and that said Russell had received 96 votes therefor, and that said Russell was elected to said office. The answer alleges that said president and the members of said board declared elected afterwards met and organized as required by law. The cause being heard on petition and answer, the county court held that it had no jurisdiction of the subject matter of said contest, and for that reason dismissed the petition. From that judgment the petitioner has appealed to this court.

The first question, then, to be considered is whether the county court decided correctly in holding that it had no jurisdiction. The Act of April 8, 1872, in regard to elections (Rev. Stat. chap. 46), after providing proper tribunals before which contests may be had of the election of governor and other state officers, members of the Senate and House of Representatives, judges of the several courts, and some other officers, provides, in section 96, as follows: "The county court shall hear and determine contests of election of all other county, township and precinct officers, and all other officers for the contesting of whose election no provision is made." It is claimed that by the canon of construction usually indicated by the phrase *ejusdem generis*, the words "all other officers," as used in said section, must be limited to other officers of the same grade or class as those specifically mentioned, and that such construction necessarily excludes the officers of school districts. It certainly cannot be held that all officers who are not county, township or precinct officers are excluded, because that construction would render the words "and all other officers for the contesting of whose election no provision is made" wholly meaningless, and of no effect. The contesting of the election of all county, township and precinct officers is already provided for; and the last-mentioned clause, therefore, unless it is held to embrace officers who are not county, township or precinct officers, is wholly without force or meaning. By application of the maxim *ejusdem generis*, which is only an illustration or specific application of the broader maxim, *nos citur a sociis*, general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general. Endlich, Interpretation of Statutes, § 400.

But it has never been supposed that the rule required the rejection of the general terms entirely, but only that they should be restricted to cases of the same kind as those expressly enumerated. *State v. Williams*, 2 Sibbh. L. 474.

On the contrary, it must yield to another salutary rule of construction, viz., that every part of a statute should, if possible, be upheld and given its appropriate force. The cases to be found in the reports in which the rule under consideration has been applied are numerous, but the following will be sufficient for purposes of illustration:

In *Renick v. Boyd*, 99 Pa. 555, a statute giving a remedy by replevin to recover timber, lumber, coal or other property severed from 12 L. R. A.

the realty, was held to include articles of the same generic character as those already mentioned, such as slate, marble, iron ore, zinc ore and all other forms of minerals and ores, building stone, fixtures and machinery of every description which had been permanently affixed to the realty; but that it did not apply to growing crops. The generic or family characteristic by reason of which these several species of property were held to be included within the same *genus* as those specifically enumerated was that of being permanently affixed to the freehold, while growing crops were only ephemeral, and never intended to become permanently affixed, but to be removed from the freehold at maturity.

In *Reg. v. Dickenson*, 7 El. & Bl. 831, a municipal by-law, which imposed a penalty for causing obstructions in the streets in various specified ways, all temporary in their character, and for causing or committing "any other obstruction, nuisance or annoyance" in any of the streets, was held not to include, under the general words, a permanent obstruction, the general characteristic by which the class of nuisances embraced within the general words was distinguished being that which was common to those specially mentioned, viz., their being merely temporary.

In *Wanstead Local Board v. Hill*, 18 C. B. N. S. 479, a statute prohibiting the establishment without license of the business of a bone-boiler, blood-boiler, fell-monger, slaughterer of cattle, horses or animals of any description, soap-boiler, tallow-melter, tripe-boiler or other noxious or offensive business, trade or manufacture, was held not to include, under the final general terms, any employment not connected, as all the specified trades were, with animal matter, and so did not include the business of brick-making.

In *Re Suigert*, 119 Ill. 83, 6 West. Rep. 725, the question was whether a certain grain elevator belonging to the Illinois Central Railroad Company was exempt from taxation under the provisions of the charter of said company. The case, therefore, was one calling for a strict rule of construction. In determining whether the grain elevator came within the classes of property exempted from taxation, construction was given to the first section of the company's charter, which gave the company power "to purchase, hold and use all such real estate and other property as may be necessary for the construction of its railway and stations and other accommodations as may be necessary to accomplish the objects of its incorporation;" and it was held to be the well-settled doctrine that, in construing statutes, particularly those requiring a strict construction, a general description, following a specific enumeration of objects or things, will be held to include only such things or objects as are of the same kind as those specifically enumerated. In applying that principle to the section above quoted, it was held that said section did not include a grain elevator, as that had no direct connection with the railway or its operation; yet, without attempting to state the various "other accommodations" which may be held to be *ejusdem generis* with the company's "railway and stations," it was said that such general description would clearly include the road, with all necessary

switches and turn-outs, together with all structures thereon; also rolling stock, with all its machinery and appendages, warehouses and other structures at the terminus or along the line of the road, belonging to the company, and used by it exclusively for the reception of passengers, the storage of freight, and also for the purpose of keeping the road and rolling stock in repair, or of improving their general condition, including all necessary depot grounds and buildings, machine and work shops of all kinds, machinery, tools and implements of every description used in keeping the road and rolling stock in repair and in good and safe condition, together with whatever would be necessary to increase the capacity of the road, such as laying down an additional track, or increasing the amount of rolling stock. All these were said to be included, upon the principle that they had an immediate connection with the improvement and operation of the road. Without adopting what is said in the case last cited as being in all respects a proper exposition of the clause of said charter here under consideration, that one, as well as the other above referred to, may be a test as fairly illustrative of the rule for the construction of the Statute here under discussion.

In construing the Statute before us in the present case we have to determine whether the officers of counties, townships and precincts belong to a *genus* or class which also includes the officers of school districts. Counties, townships and precincts have one quality or characteristic in common, and one only, viz., they are all quasi municipal corporations; and this quality or characteristic they also hold in common with school districts. There is no legal classification which will include the first three which will not also include the last. As the corporations themselves all belong to the same class, there is no reason for holding that the officers of the three species of quasi municipal corporations particularly mentioned are not *eiusdem generis* with the officers of school districts, which are only another species of the same class of corporations. It would seem clear, then, that, under any reasonable application of the canon of construction we are now considering the officers of the latter class of corporations should be held to be included in the general description, "all other officers," that is, "all other like officers," for the contesting of whose election no provision is made. What we here say is intended in no way to conflict with the rule laid down in *Brush v. Lemma*, 77 Ill. 496. In that case the same section of the Statute in relation to elections was under consideration, and it was held that no jurisdiction was thereby conferred upon the county court of a proceeding to contest the election of the mayor of a city incorporated under a special charter. A city is a municipal corporation, properly so called, and is therefore a corporation of an entirely different class, organized for different purposes, and possessing powers and subject to liabilities essentially different from those which obtain in case of counties, townships, school districts and other quasi municipal corporations. It would therefore be much more difficult to hold that cities are corporations *eiusdem generis* with counties, townships and precincts than to give school districts that

classification. We would be understood as expressing no opinion as to the soundness of the conclusion reached in the case last cited, but only desire to say that it does not apply to the facts now before us. But there is another ground upon which the jurisdiction of the county court in this case may be sustained. Section 12 of article 8 of the "Act to Establish and Maintain a System of Free Schools," approved and in force May 21, 1889 (Rev. Stat. 1889, chap. 122), provides for the qualifications of voters "at any school election held under this Act;" and section 13 provides that "the time and manner of opening, conducting and closing said election, and the several liabilities appertaining to the judges and clerks and to the voters, separately and collectively, and the manner of contesting said election, shall be the same as prescribed by the general Election Laws of this State defining the manner of electing magistrates and constables, so far as applicable, subject to the provisions of this Act." While these provisions occur in the article more especially relating to school townships, and the election, qualifications and duties of township trustees, they are plainly intended to apply to all elections held under said Act, except so far as modified by subsequent provisions establishing different rules. Such is the obvious import of the language used, and this view is corroborated by the further fact that, while in subsequent articles provision is made for the election of school directors and boards of education, nothing appears in those articles in relation to the qualifications of voters, the liabilities of judges, clerks or voters, or the mode of contesting elections; nor any special rules in relation to the mode of conducting elections, except as to the mere matter of calling and giving notice, the selection of judges and clerks, adjournments under specified circumstances, and one or two others of minor importance. The general rules governing all elections under said Act having been once laid down in said section 13, it was doubtless deemed unnecessary to repeat them in making provision for the election of directors and boards of education. Magistrates and constables are officers of townships, at least in counties under township organization; and the School Law, having provided that school elections may be contested in the same manner as is provided by the general Election Law in case of the election of those officers, viz., before the county court, clearly vested that court with jurisdiction of proceedings to contest school elections. It follows from what we have said that the county court erred in entering a judgment dismissing the proceeding for want of jurisdiction.

The material facts alleged in the petition are admitted by the answer; and, said court having in its final order found that such was the case, its order is tantamount to a finding that the facts are as alleged in the petition, and admitted by the answer. The facts being found, and no dispute arising in respect to them, the legal conclusion or judgment which should follow becomes a question of law. The errors committed by the county court, and which are open here for review, consist: *first*, in entering the judgment which was entered; and, *second*, in refusing to enter the judgment which is the proper legal conclusion from the admitted

facts. We may therefore determine upon this appeal what the judgment of the county court should have been. The admissions of the answer lead to the inevitable conclusion that, if the votes for Misch for the office of president of said board of education, evidenced by the ballots which also contained a vote for him for the office of member of said board, were counted in his favor, he would have received a majority of the votes cast, and would have been elected to the office of president of said board. The only question is whether the judges of election properly refused to count those votes in his favor. The theory upon which their rejection was based, as the answer alleges, was that the two offices, viz., president and member of the board of education, were incompatible, and could not therefore be both held by the same person at the same time, and that, as said judges had no power to determine for which of the two offices the voters casting said ballots intended to vote for him, said votes could not properly be counted for either office, and were accordingly rejected altogether. We know of no rule of law which prohibits a man's becoming a candidate or being voted for at the same election for two incompatible offices; but, undoubtedly, if he should be elected to both, he would be incapable of discharging the duties of both offices, and would be compelled to elect which to accept. If, for example, a man should be voted for at the same election for county judge and sheriff, no one, we presume, would insist that the votes cast for him by one portion of the voters for one office would be invalid because another portion of the voters saw fit to vote for him for the other. If, then, different voters may vote for him at the same election for different and incompatible offices, we see no reason why a particular voter, if he chooses so to do, may not vote for him for both offices at the same time. Such manner of voting creates no uncertainty or ambiguity in his ballot, the intention to vote in that way being capable of just as clear and certain an expression as would be an intention to vote for different candidates for the two offices. The judges of election in this case were mistaken in supposing that there was any uncertainty or ambiguity in the ballots in question which needed explanation. The intention of the voters clearly appeared to vote for Misch, both for president and member of the board of education; and the fact that they saw fit to vote for him for the latter office furnished said judges no excuse for refusing to record in his favor their vote for him for the former. Their intention to vote for him for president of said board appeared clearly and unmistakably upon the face of the ballots, and said votes should have been counted for him for that office. Section 58 of the Statute in relation to elections provides that, if more persons are designated upon a ballot for any office than there are candidates to be elected, such part of the ballot shall not be counted for either candidate. This statutory provision

12 L. R. A.

is founded upon the obvious reason that the insertion in a ballot of more names than there are candidates to be elected creates an uncertainty or ambiguity, which renders it impossible for the judges of election to select the candidates according to the intention of the voters.

In *State v. Tierney*, 38 Wis. 480, three persons were voted for for the office of justice of the peace where but two were to be elected; and the court, in holding such ballots void, says: "Three persons are voted for by each voter, when only two can be elected. What is the choice of the elector in such a case? It is manifestly impossible to tell. The insertion upon the ballot of a single name more than ought to be upon it renders it as absolutely uncertain as though a half a dozen or a dozen were inserted. The result is that such a ballot is void for uncertainty. It fails to express the choice of the elector, and consequently cannot be counted as a vote." See also *People v. Loomis*, 8 Wend. 396; *Re School Directors of Wilkesbarre Twp.* 6 Phila. 437; *State v. Griffey*, 5 Neb. 161.

But it has been held that where a ballot contains the name of the person voted for and the office for which he is designated several times repeated, it is not for that reason void, but is to be counted as one ballot. *People v. Holden*, 28 Cal. 124; *Ashfield's Case*, Cush. Elect. Cas. 583.

The ballots under consideration in this case, however, do not come within the letter or intention of the section of the Election Law last above quoted. They contain only the proper number of names of candidates for the respective offices, and there is no uncertainty as to the choice of the voters casting said ballots.

*The judgment of the County Court will be reversed, and the cause will be remanded to that court, with directions to enter a judgment finding and declaring that at the school election in question said William Misch received a majority of the votes cast for the office of president of said board of education, and was duly elected to that office, and awarding him a certificate of said election.*

**Magruder, J.**, concurring specially:

I concur in the conclusion reached by this opinion, but not in all that is said in it. The opinion designates counties as quasi municipal corporations, whereas they have been held to be municipal corporations in at least two cases: *Wulff v. Aldrich*, 124 Ill. 591, 14 West. Rep. 545; *Jimison v. Adams County*, 130 Ill. 558. What is said about *Brush v. Lemma*, 77 Ill. 496, does not harmonize with the views of that case as expressed in *Rock Island v. Cuisinly*, 126 Ill. 408, and *Greenwood v. Murphy*, 181 Ill. 604. The mere purposes of illustration would not seem to require that, in a case involving the question of the power of the county court to entertain jurisdiction of or control over the election of a school director, there should be inserted a long statement of what kind of property the Illinois Central Railroad Company may hold for the operation of its road.



## MICHIGAN SUPREME COURT.

Charles E. UPHAM, Appt.,  
v.  
DETROIT CITY R. CO

(....Mich....)

**Riding on the platform of a street-car** when there is room inside is not negligence *per se* in the absence of any prohibition on the part of the car company to do so or any notification that persons doing so assume the risk.

(February 27, 1891.)

**ERROR** to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed*. The facts are stated in the opinion.

**Mr. John G. Hawley**, for plaintiff in error:

Standing on a street-car platform is not negligence *per se*.

*Gienna v. Second Ave. R. Co.* 67 N. Y. 596; *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63; *Maguire v. Middlesex R. Co.* 115 Mass. 289; *Germantown Pass. R. Co. v. Walling*, 97 Pa. 55, 61; *Meesel v. Lynn & B. R. Co.* 8 Allen, 234; *Burns v. Bellefontaine R. Co.* 50 Mo. 139; *City R. Co. v. Lee*, 50 N. J. L. 435; *Topeka City R. Co. v. Higgs*, 38 Kan. 375; *Fleck v. Union R. Co.* 134 Mass. 481; *Seigel v. Eisen*, 41 Cal. 109; *Augusta & S. R. Co. v. Rens*, 55 Ga. 126; *Geitz v. Milwaukee City R. Co.* 73 Wis. 307.

**NOTE**—Street railways, carrying passengers on platform of car.

A street-railway company has the right to carry passengers on the platform. *Topeka City R. Co. v. Higgs*, 38 Kan. 375; *Germantown Pass. R. Co. v. Walling*, 97 Pa. 55; *Meesel v. Lynn & B. R. Co.* 8 Allen, 234; *Maguire v. Middlesex R. Co.* 115 Mass. 289; *Burns v. Bellefontaine R. Co.* 50 Mo. 139; *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63.

Seats inside the car are not the only place where the managers expect passengers to remain; but it is notorious that passengers stand inside the car until the car is full, then upon the platforms until they are full, and even after there is no place to stand except on the steps of the platforms. *Meesel v. Lynn & B. R. Co.* 8 Allen, 234.

So that the mere fact of riding on a platform of a street car is not conclusive proof of negligence. *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63; *Meesel v. Lynn & B. R. Co.* *supra*; *Fleck v. Union R. Co.* 134 Mass. 481. See *Wills v. Long Island R. Co.* 34 N. Y. 670; *Hadenoamp v. Second Ave. R. Co.* 1 Sweeney, 490; *Gienna v. Second Ave. R. Co.* 67 N. Y. 596; *Morrison v. Erie R. Co.* 56 N. Y. 307; *Maguire v. Middlesex R. Co.* 115 Mass. 289; *Westchester & P. R. Co. v. McElwee*, 39 Pa. 311.

When a woman gets on the front platform when the rear platform is crowded and the driver whips up his team throwing her under the wheels and crushing her arm, she may recover from the company for such injury. *Coast Line R. Co. v. Boston*, 33 Ga. 367.

12 L. R. A.

**Messrs. Sidney T. Miller and Brennan & Donnelly** for appellee.

**Grant, J.**, delivered the opinion of the court:

Plaintiff was injured while riding upon one of the defendant's cars, under the following circumstances: On September 17, 1890, in the evening, plaintiff, with his wife and children and some friends, had returned by boat from the exposition grounds, landing at the foot of Woodward Avenue. A street-car was standing there, and many passengers from the boat rushed for the car. Plaintiff and his party went to the front of the car. He entered with the ladies and children of his party, while his friend, Mr. Metcalf, remained upon the front platform. Some of them secured seats, and the others stood up. After providing for them as well as he could, he returned to the front platform. The car was drawn by horses. Shortly after the car started it struck a switch, and plaintiff, who was standing with his back against the door, was thrown to the pavement and severely injured. Plaintiff brought this suit to recover damages, alleging that the defendant was guilty of negligence in that it drove and propelled the car, without any notice or warning to plaintiff, against and around said switch. Upon the conclusion of the testimony defendant's counsel requested the court to instruct the jury that there could be no recovery by plaintiff. This the court declined to do, but said the cause "would be submitted to the jury with the instruction that, if plaintiff could have remained in the car, he could not recover; but if it was so full that he could not get a place to go to in the car, then he could re-

When a street-railway company undertakes to carry large numbers of people, vastly in excess of the seating capacity of its cars, and permits passengers to ride on the platforms and footboards without objection, and runs its cars so near the intersection of a switch with the main track that they cannot pass without injury to passengers, the company is guilty of gross negligence. *Topeka City R. Co. v. Higgs*, 38 Kan. 375.

#### Contributory negligence defeats recovery.

One who voluntarily stands on the front platform of a street-car, contrary to the regulations of the carrier, is guilty of contributory negligence, which is not excused by a bare license or express permission of the conductor, if there was ample room for him inside the car. *Baltimore & Y. Turnp. Road v. Cason*, 72 Md. 377.

Where plaintiff occupied a sitting position upon the front platform of a car while in motion, against the rules of the company and the warning of the driver, and without any reasonable excuse therefor, he cannot recover. *Lapointe v. Middlesex R. Co.* 3 New Eng. Rep. 666, 144 Mass. 18; *Wills v. Lynn & B. R. Co.* 129 Mass. 351.

It is not enough for the conductor of a street-railway car to warn a child not to ride on the platform; and the company must employ more efficient means to remove him from danger. *Indianapolis, P. & C. R. Co. v. Pitzer*, 7 West. Rep. 403, 109 Ind. 179; *East Saginaw C. R. Co. v. Bohn*, 27 Mich. 503.

cover; and if there were room enough for him to remain in the car, when he went in, it was his duty to remain." After the judge had announced his conclusion upon the law, neither of the counsel desired to make any argument to the jury. The court thereupon instructed the jury, and in closing said to them: "The question for you to decide is simply this: When he went into the car, could he have remained in there? that is to say, Was there room enough for him to remain there without going outside? If there were room enough to remain there, and he went outside voluntarily, then he cannot recover. If you should find that there was not room enough to remain there; that the car was full; that he could not stay there; that he was obliged to stand outside to get carriage,—then, gentlemen, you are to consider the damages he has suffered, and award him damages for loss of services, physician's bill and for the injury that has befallen him." Under these instructions, the jury found a verdict of no cause of action.

The question of fact submitted to the jury has been by them decided against the plaintiff. The jury could not well have found otherwise, for the plaintiff's own witnesses testified that there was plenty of standing room inside. Mrs. Metcalf testified that "there was no difficulty about persons standing up inside the car, if they desired to; that there was room enough, if they preferred to stand inside to outside." Miss Mary Metcalf testified that there was plenty of standing room inside when plaintiff went out. The car was supplied with straps for passengers to take hold of when compelled to stand up. We must therefore determine the defendant's liability upon the fact found by the jury that plaintiff voluntarily left the car when there was room for him to ride within it, and voluntarily stood upon the platform.

Is the Company liable under such circumstances for negligently driving its car? Defendant's counsel assert that plaintiff left a place of safety inside the car, and voluntarily chose one of danger upon the platform, and that, as his injury was due in part to the fact that he voluntarily took that position, he cannot recover; and that he took an unnecessary risk is evidenced by the fact that no one who was standing within the car was injured. They also assert that the law recognizes but two excuses for leaving a place of safety for one of danger: (1) where a party, whether erroneously or not, acted under the reasonable impulse of fear produced by another; and (2) where one has tried to save human life, when such effort did not amount to rashness,—neither of which the plaintiff can of course make. The answer to the question depends entirely, we think, upon whether or not it is negligence *per se* to ride upon the platform of a street-car when one may ride within. Whether one leaves the car, after entering, to ride upon the platform, or whether he steps upon the platform without entering, is of no consequence. His act is as voluntary in the one case as in the other, and the same rule must govern both. The record is entirely silent as to any regulations on the part of the defendant in this respect. But we cannot denude ourselves of the knowledge, which is alike common to all, that

passengers are constantly riding upon these platforms with the tacit assent of the defendant, and without any protest, notice or regulation. We must therefore determine the question with the fact before us that this use of the platforms is permitted by the defendant without objection. It is recognized as dangerous *per se* to ride upon the platform of the ordinary steam railway. This is apparent to anyone, and the difference in danger between riding there and upon the platform of the street-car is too obvious to require comment. Authorities discussing the question afford no light in the determination of this. In the presence of the fact that passengers are permitted to ride upon these platforms constantly, can courts hold them to be dangerous *per se*? If the railway companies considered them dangerous places, would they not take some means to notify passengers not to ride there, or to inform them that they did so at their own risk? It is certainly reasonable to presume that they would. That they do not consider them dangerous is further apparent from the fact that, when their cars are full, they stop them to take on more passengers, and thus invite them to ride upon the platforms. This appears to be their constant custom. It is evident that the public do not consider these platforms places of danger from the fact of their constant use. It is therefore difficult to see upon what reasons courts can hold that they are dangerous, and that persons who ride there assume all the risk, and thereby relieve such companies from all liability except for gross, willful and wanton misconduct. Under the facts shown by this record, the question of the negligence of the plaintiff, as well as of the defendant, belonged to the jury to determine, and should have been submitted to them under the proper instructions. Such, in my judgment, is the rule established by the clear weight of authority. *Nolan v. Brooklyn City & N. E. Co.* 87 N. Y. 63; *Maguire v. Middlesex R. Co.* 115 Mass. 289; *German-town Pass. R. Co. v. Walling*, 97 Pa. 55; *Moose v. Lynn & B. R. Co.* 8 Allen, 284; *Burns v. Bellefontaine R. Co.* 50 Mo. 189; *Augusta & S. R. Co. v. Rens*, 55 Ga. 126; *Seigel v. Eisen*, 41 Cal. 109.

This is not in conflict with the case of *Downey v. Hendrie*, 46 Mich. 496, where the plaintiff went through the car to the front platform and sat on the driving-bar, a thin iron rail not exceeding an inch in thickness, from which he fell under the car. We have no doubt of the correctness of that decision. It is within the power of street-railway companies to prohibit passengers from riding upon the platforms, or to give notice that those who ride there must do so at their own risk, or to limit the number of passengers which each car shall carry, and to require them to ride inside the cars. Until they adopt some such regulations, and notify the public, it is but reasonable to hold them liable for injuries, resulting from their own negligent acts, to their patrons, who are themselves in the exercise of reasonable care, whether riding upon the platforms or within the cars.

*Judgment must be reversed, with costs, and a new trial ordered.*

The other Justices concurred.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

## FALL RIVER NATIONAL BANK

v.

Jonathan SLADE.

(....Mass....)

1. Collateral security given by the maker of a note "for the payment of this note or any of my liabilities . . . due or to become due," gives an indorser of such note no right to a preference in the application of the proceeds of such security to such note as against other notes not indorsed by him.

2. The rights of an indorser as to the application of collateral security given by the maker to the holder of the note are to be determined by the terms of the pledge as they exist at the time of the sale of the security, and are not affected by pledges formerly made to secure different notes in a series of renewals of which the present note is the last.

(March 7, 1891.)

REPORT by the Superior Court for Bristol County (Mason, J.) for the opinion of the Supreme Judicial Court of an action brought to determine for which of two sums defendant was liable under his indorsements of notes made by William L. Slade. *Judgment for the larger sum.*

The facts are stated in the opinion.

*Messrs. Jennings & Brayton*, for plaintiff:

In case of a general pledge without directions as to application the holder has the right to apply the proceeds in such a manner as will be most advantageous to himself; and the maker or surety has no right to direct as to the order or amount of application to any particular debt or debts.

*Field v. Holland*, 10 U. S. 6 Cranch, 8, 8 L. ed. 186; *National Bank of Newburgh v. Bigler*, 88 N. Y. 51; *Wilcox v. Fairhaven Bank*, 7 Allen, 270; *Moors v. Washburn*, 6 New Eng. Rep. 680, 147 Mass. 845.

*A fortiori*, neither maker nor surety has the right to direct the application of collateral, when they have expressly agreed that it is pledged for the payment of any of William L. Slade's liabilities to the Bank, and expressly directed and agreed at the time of making the pledge that the security may be applied in payment of any of such liabilities. The collateral is not held to secure payment for the note in which it is named any more specifically than it is to secure payment of any other liability.

*Richardson v. Washington Bank*, 8 Met. 586.

*Mr. James F. Jackson*, for defendant:

The evidence showed a special pledge of the Stafford Mills stock upon the note for \$19,500 when that note was given, and a second special pledge of the same stock at the time of the first renewal of the note for \$7,000. The stocks

NOTE.—Right of surety to control application of collaterals.

As between debtor and creditor, the rule as to application of payments is that if several debts are due at the time of a partial payment the debtor is at liberty to apply the payment to whichever debt he pleases, if his intention is manifested at the time of the payment, subject to the restriction that the creditor is not obliged to receive a partial payment of any particular debt of which the whole is due at the time the offer of payment is made. Where the debtor neglects to manifest his intention as to the application of the payment at the time it is made the creditor may, at the time he receives the money, apply it to which debt he pleases, unless the debtor objects at the time. *Stone v. Seymour*, 15 Wend. 23; *Field v. Holland*, 10 U. S. 6 Cranch, 27, 8 L. ed. 142; *King v. Sutton*, 42 Kan. 600; *L'Hommedieu v. The H. L. Dayton*, 38 Fed. Rep. 926; *Green v. Ford*, 79 Ga. 130; *Sanborn v. Stark*, 31 Fed. Rep. 13; *Heard v. Pulaski*, 80 Ala. 603. See also *Pennsylvania Ins. Co. v. Clarsen Brewing Co. (Pa.)* 5 Cent. Rep. 227; *Byrnes v. Claffey*, 69 Cal. 120; *Leeds v. Gifford*, 4 Cent. Rep. 150, 41 N. J. Eq. 404; *Kline v. Ragland*, 47 Ark. 111; *Pardee v. Markie*, 2 Cent. Rep. 327, 111 Pa. 548; *Flannery v. Flannery*, 2 New Eng. Rep. 791, 58 Vt. 576.

The creditor may apply payments to debts which are not secured by liens in preference to those which are thus secured. *Lester v. Houston*, 101 N. C. 605; *North v. La Flech*, 73 Wis. 520.

The mere fact that there is a surety for one of the debts does not preclude the creditor from applying a payment to the debts for which he has no security. *Harding v. Tift*, 75 N. Y. 464.

Sureties are bound by any application which is legally made by a party having the right to make it. *Allen v. Culver*, 8 Denio, 201.

The surety has no right to give any direction as to the application of payments by the creditor. *Richardson v. Washington Bank*, 8 Met. 541.

12 L. R. A.

*Mr. Colebrooke*, in his work on Collateral Securities, § 219, states the rights of the creditor as against the surety in regard to the application of collaterals as they would be if deduced from the above authorities; and although the authorities cited by him are not cases of attempts to control the application of collateral securities by sureties but in the main cases of application of payments, yet no reason is apparent for a distinction in the rules applicable in the two cases. The rule seems to be similar in the two cases so far as the rights of the debtor and creditor are concerned; for if property is assigned as collateral security for several debts without direction at that time by the assignor as to the application of its proceeds, the creditor may apply the money realized to any of the debts that are due at the time the money is received. *National Bank of Newburgh v. Bigler*, 88 N. Y. 64. See also *Nichols v. Knowles*, 8 McCrary, 477.

It has been held that a surety on one or more of a series of promissory notes given for the purchase price of a machine cannot, on a sale of the machine under a mortgage given to secure all the notes, have the proceeds applied on the notes on which he is surety, but the holder may apply them on the notes not otherwise secured. *Hanson v. Manley*, 72 Iowa, 48.

The creditor may apply the proceeds of collaterals upon his unsecured debt in the absence of direction by either the principal or surety. *Wood v. Callaghan*, 61 Mich. 412. See also *Wilson v. Allen*, 11 Or. 154.

The Pennsylvania rule is rather more favorable to the surety, since it holds that although he cannot require a general payment to be applied to a later debt on which alone he is liable to the exclusion of earlier ones, yet he can require that the payment shall not be applied on the last item, leaving him liable on earlier ones. *Pardee v. Markie*, 2 Cent. Rep. 327, 111 Pa. 548.

were special pledges upon the notes in which they were named, and the defendant would have been entitled to have had the Stafford Mills stock applied first upon the note for \$19,500, and next upon the note for \$7,000.

*Hathaway v. Fall River Nat. Bank*, 181 Mass. 14; *Baldwin v. Bradley*, 69 Ill. 82; *Masonic Sav. Bank v. Bangs*, 84 Ky. 185; *Neponset Bank v. Leland*, 5 Met. 259; *Duncan v. Brennan*, 88 N. Y. 490; *Wyckoff v. Anthony*, 90 N. Y. 442.

Devens, J., delivered the opinion of the court:

In December, 1888, when William L. Slade failed, the plaintiff held four notes signed by Slade as maker for the sums of \$19,500, \$10,000, \$7,000 and \$1,000, respectively, which were renewals of notes given originally for money loaned to him by the plaintiff. All these notes, except the one for \$10,000, were indorsed by the defendant, waiving presentment, demand and notice, and had long been overdue. The plaintiff held certain stocks as collateral security for the liabilities of William L. Slade, and having sold certain shares of a stock known as the Stafford Mills stock for the sum of \$23,600, applied the money received therefor to the full payment of the note of \$19,500, on which there was then due \$18,900 as principal and \$204.75 as interest, and applied to the payment of the \$10,000 note in addition to the value of certain other stocks which it deemed applicable to that note the sum of \$3,576.87, and further applied on the note for \$1,000 the balance which was left after payment of the \$10,000, note in the manner stated. To the application made on the note of \$1,000 of the part of the amount of the \$23,600 left after payment of the \$10,000 note, the defendant makes no objection, but he contends that the plaintiff had no right to apply on the \$10,000 note the balance of the sum derived from the sale of the Stafford Mills stock, and that he had a right to have this sum applied on the \$7,000 note, upon which he was indorser. As the defendant is in any event indebted still to the plaintiff, it is agreed that if the plaintiff had the right to apply the proceeds of the Stafford Mills stock after satisfying the \$19,500 note to the \$10,000 note, judgment shall be rendered for the plaintiff in the sum of \$8,384.80 with interest from the date of the writ, but if the defendant is entitled to have the proceeds of the Stafford Mills stock after satisfying the \$19,500 note and the note for \$1,000 applied next on the \$7,000 note rather than that on the \$10,000 note, then judgment is to be rendered for the plaintiff in the sum of \$3,866.87 with interest from the date of the writ.

The defendant introduced, under exception, evidence of certain facts showing the previous transactions of the parties, which he claimed should be considered in construing the notes as they existed at the time of the failure and assignment of W. L. Slade. It will be more convenient, first, to consider the case without reference to this evidence.

The \$19,500 note was dated January 1, 1885, and to the promise to pay is added: "I, having deposited with the Fall River Natl. Bank as collateral security for the payment of this or

of any of my liabilities to said Bank due or to become due, now or hereafter, contracted or incurred, two hundred shares of the capital stock of the Stafford Mills of Fall River, hereby authorize said Bank to sell the same either at public or private sale at the option of said Bank on the nonpayment of this note or any other liabilities above mentioned." It is then added that the Bank is to give the promisor credit for any balance deducting expenses, etc., and there is a memorandum on the note that it is a renewal of note for \$19,500, dated July 10, 1878.

The note for \$7,000 is dated January 10, 1885, and after the promise to pay is added: "I having deposited with the Fall River National Bank, as collateral security, for the payment of this note, or any of my liabilities to said Bank, due, or to become due, now or hereafter contracted or incurred, one hundred twenty-five shares of the capital stock of the Slade Mills, pledge dated November 23, 1880, and two hundred shares of the capital stock of the Stafford Mills, pledge dated July 10, 1878, hereby authorize said Bank to sell the same without notice, either at public or private sale, at the option of said Bank, on the nonpayment of this note or any other of the liabilities above mentioned, the said Bank giving me credit for any balance of the net proceeds of such sale or sales, after deducting the expenses thereof and interest, and all sums for which I may be liable to said Bank, together with all costs, charges and damages to said Bank to enforce this pledge."

The note for \$10,000 is dated February 28, 1885, and after the promise to pay is added: "I having deposited with the Fall River National Bank as collateral security for the payment of this note or any of my liabilities to said Bank, due, or to become due, now or hereafter contracted or incurred, one hundred twenty-five shares of the capital stock of the Slade Mills, hereby authorize said Bank to sell the same without notice, either at public or private sale, at the option of said Bank, on the nonpayment of this note or any other of the liabilities above mentioned, the said Bank giving me credit for any balance of the net proceeds of such sale or sales, after deducting the expenses thereof and interest, and all sums for which I may be liable to said Bank, together with all costs, charges and damages to said Bank, to enforce this pledge."

It is claimed by the defendant that this presents the case of a special pledge of the Stafford Mills stock upon the \$19,500 note, with a general pledge of the same security for any subsequent indebtedness, that then follows next in the order of time, a special pledge of the same stock upon the note for \$7,000, and that therefore the plaintiff could only apply the proceeds of the sale of the Stafford Mills stock to the payment of the \$10,000 note, which was subsequent in date after satisfying these two notes. Where stock is specially pledged for the payment of a particular debt, the application of the proceeds would certainly be taken out of the rule which permits a holder of collateral security for several debts due to him to apply the proceeds as he may deem most for his own interest. *Wilcox v. Fairhaven Bank*, 7 Allen, 270.

Nor do we doubt that a special pledge may be made subject to a previous special pledge which would entitle the pledgor or his surety to have an application of the proceeds made upon the debt for which it was thus specially pledged a second time, in preference to other debts then existing or subsequently incurred. *Neponset Bank v. Leland*, 5 Met. 259; *Hathaway v. Fall River Nat. Bank*, 181 Mass. 14.

The question is therefore presented whether there was any special pledge of the Stafford Mills stock for the payment of either the \$19,500 note or subject thereto to the payment of the \$7,000 note. This stock was deposited with the \$19,500 note as collateral security, not for the payment of that note only or of that note in preference to any other. The pledge was for the payment of that note or of any liabilities then due or thereafter becoming due from the principal debtor. It was to be sold, not on nonpayment of the note alone, but on nonpayment of any other of his liabilities either then or thereafter becoming due, and the proceeds could be applied to the payment of them or either of them. The debtor was to have credit for the balance of the proceeds only, after payment of all expenses of the sale and of all sums due the Bank. While the individual note of \$19,500 is mentioned, there is no suggestion that it is to receive any preference in the payment. Indeed, by the failure of the debtor to meet other liabilities the collateral security might be sold and applied long before the \$19,500 note became due. The same reasoning applies to the second pledge of the same stock upon the \$7,000 note. Neither of them constitutes special pledges, so that when the plaintiff lawfully sells the collateral security he is compelled to apply the proceeds on these notes, rather than on the other liabilities of William L. Slade. The form of the pledge of the Stafford Mills stock set forth in these notes strongly resembles that considered in the case of *Richardson v. Washington Bank*, 8 Met. 586; indeed we do not see that it can be distinguished therefrom. The language in that case after the description of the notes pledged as collateral was: "That for the punctual payment of this or any other sum which I have obtained or may hereafter obtain on loan or discount from said bank, these notes are hereby pledged and made liable, and the directors of said bank are hereby authorized, after said loan or loans have become due and payable, and shall thereafter remain unpaid, to sell the said notes," etc. It was there held that the defendants were under no obligation upon the party holding the security, first to apply it to the payment of the loan obtained when the security was given; that the language of the contract could not be construed as giving a preference or priority to any particular debt, and that the creditor had a right to apply the proceeds of the security as he saw fit. Where collateral security is equally given for various debts, if there is one or more of the debts thus secured for which the debtor alone is responsible, and the amount of which cannot be obtained from him on account of his pecuniary inability, the proceeds may be applied, so far as is necessary for that purpose, to the payment and discharge of such debts, and to that extent the sureties or indorsers on notes

constituting other debts have no interest or rights in them. *Wilcox v. Fairhaven Bank*, 7 Allen, 270.

The defendant was allowed to introduce evidence of the various forms which the notes in question had assumed in the course of the transactions between the parties. It appeared that the \$19,500 was the last renewal of a note of July 10, 1878, which earlier note after the promise to pay was in the following form: "I have deposited herewith as collateral security hereto two hundred shares of the capital stock of the Stafford Mills, with full authority to sell the same without notice, either at public or private sale, or otherwise, at the option of the holder or holders hereof, on the nonperformance of this promise, he or they giving me credit for any balance of the net proceeds of such sale or sales, after deducting the expenses thereof, and paying all sums then due from me to said holder or holders, or his or their order, which collateral is to be returned to me on the payment of this note."

The original note of \$10,000 was dated November 10, 1880, the Slade Mills stock being named therein as collateral security, while the note of \$7,000 was of the date of January 6, 1881, no collateral security being named therein or given for the payment thereof. The original notes of \$19,500 and \$10,000 were renewed from time to time in the form in which they were originally made, but in December, 1881, the forms of these renewals were changed to the form appearing in the last renewals of 1885 as cited above. At the first renewal of the \$7,000 note in May, 1881, and in all subsequent renewals the Slade and Stafford Mills stock were named as collateral. In what language they were thus named does not appear, as the form of the first renewal is not given in the report, but the form appearing in the last renewal was adopted in January, 1882. When the notes under discussion, together with the terms of the pledge, assumed the form which they now have in December, 1881, and January, 1882, substantially contemporaneously and so continued through repeated renewals during a series of years, and when their present form is one entirely intelligible, no profitable inference as to their construction can be drawn from the form which they had either originally or in previous years.

Even if in May, 1881, when the \$7,000 note was first renewed, a change was made in the contracts of pledge by which the defendant had more rights in regard to the application of the collateral security to the payment of the notes upon which he was surety, there is no reason why the parties interested might not in December, 1881, and January, 1882, so subsequently change their contracts as to give the plaintiff more rights in the application of the collateral security than he had in May, 1881. The form by which the note of \$7,000 was first renewed is not before us, but the defendant's right as the notes were originally made and in the shape they finally assumed in the construction we have given to the contract by which the collateral security was pledged gave him no right that the \$7,000 should be preferred in payment to the \$10,000 note. If there was a time in the history of the transactions when this preference existed, which is not

shown by the evidence reported, the defendant could not single that out and demand that his rights should be tested as of that time rather than as they existed when the collateral security was sold and the proceeds applied by the plaintiff.

While it has been held that the renewal or extension by note or otherwise of an original debt secured by collateral security does not without express agreement extinguish the original debt or security, as it cannot be inferred that the holder intended to surrender to his own detriment rights which are established, yet this principle has no application to those cases where in the renewal the collateral security is mentioned and new or different terms are provided upon which it is to be held.

The defendant was allowed to put in a state-

ment marked "H," but we do not understand from this that it appears that the plaintiff made any different application of the surplus after sale of the Stafford Mills from that which it claimed the right to make.

In the view we have taken of the case the evidence as to the previous transactions of the parties and the previous forms of their notes and the provisions for the collateral security thereof was not important, even if admissible.

The rights of the defendant to the application of the collateral security are to be determined by the terms of the pledge as they existed at the time of the sale thereof. According to these the defendant had no right that the proceeds should be applied to the payment of the \$7,000 note rather than that of \$10,000.

*Judgment for a larger sum.*

## ALABAMA SUPREME COURT.

### *Ex parte* ALABAMA STATE BAR ASSOCIATION.

(...Ala....)

1. **Mandamus is the proper remedy to compel a judge to act** in proceedings where he has improperly refused on the ground of supposed disqualification.
2. **Membership in a state bar association does not disqualify a judge** to hear a proceeding brought by it for the disbarment of an attorney, although the association may be liable for the costs if defeated.
3. **Proceedings before a special judge**, even by consent of parties, are *coram non judge* and void if the regular judge is not in fact disqualified, although he supposed he was and refused to sit.

(January 23, 1891.)

**A**PPPLICATION by the Alabama State Bar Association for a writ of mandamus to compel a judge to proceed with, hear and determine proceedings instituted for the disbarment of an attorney. *Granted.*

The facts are stated in the opinion.

*Messrs. H. C. Tompkins and John P. Tillman* for petitioner.

*Messrs. A. A. Coleman and Brooks & Brooks, contra.*

All tribunals must "take care that not only in their decrees they are not influenced by their personal interest, but avoid the appearance of laboring under such an influence."

Cooley, Const. Lim. §§ 410, 411.

The decision of *Judge Head*, that he was incompetent to proceed further in the cause, after argument and consideration, and which was entered of record, was a judicial act, a judicial determination, the exercise of judicial functions, and cannot be reviewed, set aside and a new and different decision ordered and enforced by mandamus.

The special judge proceeded and the cause was tried,—proceeded regularly, and continuously from beginning to end, without "neglect of any duty" or "refusal to act" by either *Judge Head*, or *Special Judge Thornton*. If 12 L. R. A.

during the progress of the trial either judge made an erroneous decision, an appeal was open to remedy the wrong. Mandamus will not lie if there be any other adequate remedy or mode of redress.

3 Brickell, p. 240, §§ 4, 23; *Ex parte Garland*, 42 Ala. 559; *Ex parte Small*, 25 Ala. 74; *Ex parte Schmidt*, 63 Ala. 254; *Ex parte Elston*, 25 Ala. 73; 8 Brickell, p. 637, § 40; *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 823; 7 Walt, Act. and Def. 182; *Wright v. Douglass*, 10 Barb. 97; *Huntington v. Charlotte*, 15 Vt. 48; *State v. Shreve*, 15 N. J. L. 57; *Cooley, Const. Lim.* § 410; *State v. Castleberry*, 23 Ala. 85; *Heydenfeldt v. Towns*, 27 Ala. 429.

A peremptory mandamus will not be issued if it appears from the record in the cause that there was any other adequate remedy.

*Ex parte Shaudies*, 66 Ala. 134; *Comer v. Bankhead*, 70 Ala. 136; *Hall v. Steele*, 82 Ala. 562; *Shields v. State*, 86 Ala. 586.

*Messrs. Semple & Little, Martin & McEachin* and *G. W. Hewitt*, also, *contra.*

**McClellan, J.**, delivered the opinion of the court:

The disbarment of attorneys is a subject matter of which the circuit courts of this State have jurisdiction. The filing of the accusation shown by the record before us, by and in the name of the Alabama State Bar Association against Peyton G. Bowman, the order thereon made requiring the accused to appear and answer the same, and the service of a copy of said order, together with a copy of the accusation, on said Bowman, gave the Circuit Court of Jefferson County, in which these proceedings were had, jurisdiction of his person, at least in the sense of establishing in some sort a *lis pendens* between him and the Association. Whether the accusation was sufficient to put into exercise the jurisdiction of the court to the end of finally determining and adjudging between these parties the truth or falsity of its specifications; whether it was bad, in that it was not verified and did not proceed in the name of the State of Alabama, so that a final judgment of guilt and consequent disbarment would be *coram non judge* and void,—are

questions which do not arise on this application for mandamus, and which we do not at all consider. Whatever may be the correct solution of those questions is wholly immaterial to the matter now in hand. In any event, as to them a proceeding was pending in the circuit court at the time the judge of that court refused to act in respect to it. There was then on the files and in the records of that court an action by the Alabama State Bar Association against Bowman, and to the disposition of that action the discharge of judicial functions by the judge was essential. The right of the relator to file the accusation at all was denied, and a question for the determination of the judge was thereby presented. The right of the relator to file an unsworn accusation was denied, and thereupon it devolved on the judge to decide whether verification was necessary. And however infirm the accusation may have been, however lacking in necessary parties or averment, however essential its verification and however incurable by amendment may have been its defects, both the relator and the respondent had a right to demand that it be passed upon by the judge of the court in which it was pending, if he was competent to sit in the case; and without such adjudication by him, assuming his competency, the case could not be gotten rid of. Moreover, the circuit judge, before the objection to his competency was made and sustained, passed upon these questions, and ruled that the accusation was in all respects sufficient to invoke the jurisdiction of the court to a final determination of the issues of fact presented by it; and this adjudication, to the effect that the case was not only actually but properly pending in the court, cannot be expunged, even if it be erroneous, except by or consequent upon further judicial action of Judge Head, if he be competent. So that it is manifest, we think, that in any aspect the issuance of a peremptory mandamus would not be a vain and useless thing to do,—conceding the case to be otherwise a proper one for this remedy,—but would be to require necessary judicial action.

Is mandamus the proper remedy in cases like this? The point appears to be too well settled by the authorities to justify, or even admit, of much discussion. While recourse is never had to this writ to control judicial action, it is the usual, and generally the only adequate, process to compel the discharge of judicial functions. Its mandate is that the judge before whom a cause is pending shall proceed to hear and determine the same, but its use is not warranted to direct what particular judgment shall be rendered therein. High, Extr. Legal Rem. §§ 147, 151; *Foreman v. Marianna*, 48 Ark. 324; *Ex parte Mahone*, 80 Ala. 49; *Ex parte Schmidt*, 63 Ala. 252; *State v. Williams*, 69 Ala. 311.

The writ is not to be resorted to, of course, when the party invoking it has another adequate remedy. With respect to what is an adequate remedy, within the sense of this rule, the doctrine obtaining in this court is supposed by text-writers to be more favorable to the remedy by mandamus than that which generally prevails. However that may be, it seems assured by the former adjudications of the court that this remedy may be invoked whenever there is wrongful refusal of a judge to act, other rem-

edies for such a wrong, if they exist at all, being considered inadequate to the end in view. In the case at bar, manifestly no appeal would lie from the refusal of the presiding judge to hear and determine the cause; and, conceding that the petitioner had a remedy by appeal from the final judgment rendered in the cause by the special judge, it can scarcely be contended, if the position of petitioner with respect to the competency of the judge of the circuit court be sound, that a remedy which involved a trial with a stranger on the bench, and could only arise upon the rendition of an absolutely void judgment, is one which is adequate to the end of ousting that stranger, and reinstating the *de jure* judge of the court. So that, premitting the consideration whether a final judgment with the alleged special judge on the bench would support an appeal at all,—conceding, for argument, that it would, though void,—we are of opinion that the remedy by appeal from it is so inadequate as to authorize a resort to this summary proceeding. High, Extr. Legal Rem. § 186, and citations.

The objection urged in argument that the writ should not be awarded in this instance because the circuit judge had judicially determined his own incompetency, and hence that to command him to proceed would be to control his judicial action, is wholly untenable. One of the original offices of the writ was to compel judicial officers who, from whatever cause or upon whatever considerations, wrongfully refused to act, to proceed with, hear and determine the case in hand. Their discretion will not be controlled; and in the decision of every question arising on the trial of a cause, whether of law or fact, with respect to the rights of the parties litigant in the subject matter involved, they, in the sense of this doctrine, have a discretion, the exercise of which will in general be reviewed only on error or appeal, when those remedies are adequate. But it can never rest in the discretion of a judge whether he will sit in a given cause. If he is not disqualified under the Constitution, it is his duty to sit, a duty which he cannot delegate or repudiate, and which no consent can devolve upon another. The inquiry is not what he has determined, but What are the facts in regard to his alleged incompetency? Is he, in point of fact, as shown by his return to the alternative writ, "for any legal cause" incompetent to hear and determine the case presented? It is to be assumed that no refusal to sit proceeds on other than a determination of the judge that he is incompetent to do so; and to hold that mandamus will not lie where there has been such determination would be to destroy the efficacy of this summary remedy as a means of compelling recusant judges to discharge their judicial functions. The doctrine would be especially pernicious in cases like the present one, where recusation is at the objection of a party, and on the ground of interest; since it would be natural for a conscientious and sensitive judge to resolve all doubts on the question against his competency to try the cause.

The sole ground of incompetency disclosed by the return in this case is the membership of Judge Head in the plaintiff corporation, the Alabama State Bar Association, and his consequent interest in the suit, resulting from the



liability of that corporation for the costs of the proceedings should its determination be adverse to the Association. This corporation is not a commercial or financial concern. It is not capitalized; its members are not stockholders. Its purposes are social, ethical and public, and not pecuniary or private. Its scheme involves no element of gain or loss pecuniarily to its membership. It is supported by fixed annual dues, exacted from its members, and these would neither be increased nor diminished by any possible result of this litigation. It has authority to acquire and hold property within certain limits of value. Whether it has acquired any property does not appear from the return, and if the respondent seeks any advantage by reason of its ownership of property, his interest in which as a member would be affected by any judgment that might be rendered in this cause, it was upon him to return the fact. But conceding that we must assume that the Association did own property to the limits of its power in that respect, and conceding, further, that the interest of members in that property was such that, upon the dissolution of the corporation, each member would be entitled to a distributive share of it—a proposition unsupported by authority—still this interest would be entirely too remote and speculative to disqualify the member from sitting as judge or juror in a case to which the corporation is a party. The interest which will disqualify must be a pecuniary one, or one affecting the individual rights of the judge. The fact that dues which he pays to the Association may have to be appropriated to the satisfaction of a judgment for costs cannot constitute such interest, since the dues are paid for that purpose, among others, whether in contemplation of such judgment or not, and the amount of his liability in that respect is not affected by the rendition of a judgment for costs against the Association. Moreover, "the liability of pecuniary gain or relief to the judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of law upon the status fixed by the decision." 12 Am. & Eng. Encyclop. Law, p. 45 *et seq.*

The diminution of a member's distributive share in the corporation property depending upon a dissolution which may never occur, or never during his life or membership, or relief from such result, is certainly entirely too remote to be considered in any sense as occurring "upon the event of the suit." It is, on the contrary, if possible at all, a result of the remote future, "from the general operation of law on the status fixed by the decision." That the interest relied on to disqualify must be a pecuniary one, and be affected by the event of the suit, and not remotely, is fully illustrated in the adjudged cases. Thus it has been frequently held that the interest of a taxpayer and citizen of a town was not such as to disqualify him to sit as a judge or juror in the trial of a cause to which the town was a party. *Foreman v. Marianna*, 48 Ark. 824; *Minneapolis v. Wilkin*, 80 Minn. 140; *State v. Craig*, 80 Me. 85, 6 New Eng. Rep. 160; *Re Guerrero*, 69 Cal. 88. And the same doctrine applies to the interest a citizen of a county has in the result of a suit to which it is a party (*Com. v. Reed*, 1 Gray, 472; *Clermont County Comrs. v. Lytle*, 8 12 L. R. A.

Ohio, 289); and likewise, of course, in respect to state citizenship, and consequent interest in its property. *Connecticut v. Bradish*, 14 Mass. 296.

And where the salary of a judge is payable out of a fund arising from the imposition of fines, as is the case with the judges of some of the city courts in this State, his interest is too remote to disqualify him to sit in a cause which may involve the imposition of a fine to be thus appropriated. *Re Guerrero*, 69 Cal. 88. And so, where the question involved is the removal of the county seat of the county of the judge's residence; and this, though he, with other registered voters, had signed a petition addressed to the commissioners' court to that end. *Sauls v. Freeman*, 28 Fla. 325.

Where the interest relied on to justify a judge in refusing to sit lay in the fact of his honorary membership of a bar association which was prosecuting a proceeding to disbar an attorney, it was held insufficient "since he had not a particle of pecuniary interest involved." *Bowman's Case*, 87 Mo. 146. Nor does membership of a church which is a party to a suit involve such interest as will disqualify the member to hear and determine the cause as judge or juror. *Methodist Episc. Church v. Wood*, 5 Ohio, 288. And the same rule prevails with respect to a member of a masonic lodge which is a party to a suit. *Burdine v. Grand Lodge of Alabama*, 87 Ala. 478.

In all these cases there was either no pecuniary interest at all, because of the character and purpose of the corporation, or the interest was too remote to disqualify. In most of them the interest was more direct than in the case at bar, conceding any pecuniary interest to exist here, and in others there was more ground to predicate the existence of such interest upon than is disclosed in this record. Our conclusion is that the return of Judge Head does not justify his refusal to sit in and hear and determine this cause. The proceedings had therein before the attorney selected by the clerk were *coram non iudice* and void. The fact of Judge Head's incompetency being non-existent, there was no authority to appoint a special judge, and no acquiescence, submission or consent of parties could confer upon him any power to try the cause or render any judgment in it. *Cooley*, Const. Lim. p. 504; *Hoagland v. Creed*, 81 Ill. 596; *Andrews v. Beck*, 28 Tex. 455; *Haverly Invincible Mining Co. v. Horcutt*, 6 Colo. 574.

*The judges of the Tenth Judicial Circuit will proceed in the cause upon advice of this opinion.*

Thomas R. McCARTY, *Appt.*,

v.

WOODSTOCK IRON CO.

(....Ala....)

1. A letter by the grantee in a deed, soon after coming of age, demanding,

NOTE.—What acts necessary to disaffirm an infant's contract.

Contracts relating to persons or personal property may be disaffirmed by any act which shows an intention not to be bound by them. *Skinner v. Maxwell*, 66 N. C. 47.

Thus a chattel mortgage may be disaffirmed by

without qualification or condition, the repayment of money which he had paid, on the sole ground that he was a minor at the time of the purchase, although claiming that he was morally justified, under the circumstances, in repudiating the trade, is a binding disaffirmance of the purchase.

**2. Disaffirmance of a deed by the grantee on coming of age,** because of his infancy at the time of the purchase, does not, *proprio vigore*, divest him of the legal title and reinvest it in the grantor.

**3. Disaffirmance of a deed by the grantee on coming of age because of his infancy** when it was made is conclusive, and he cannot thereafter affirm it without the other party's consent, although no further action has been taken by either party to restore the other to his original condition by transfer of the title or consideration.

**4. A suit to cancel a deed to an infant,** after his disaffirmance on coming of age, can be maintained on his subsequently claiming to affirm it, as the disaffirmance did not reinvest the grantor with title.

(November 26, 1890.)

**A**PPEAL by defendant from a judgment of the City Court of Anniston in favor of plaintiff in an action brought to procure the cancellation of a deed. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Brothers, Willett & Willett,* for appellant:

Where an infant after becoming of age repudiates a purchase or sale of lands made during minority, the legal title passes with repudiation, and ejectment for the premises can be successfully maintained or defended upon this repudiation.

*Manning v. Johnson*, 26 Ala. 446; *Sedgw. &*

*W. Trial of Title*, § 198; *Voorhies v. Voorhies*, 24 Barb. 150; *Freeman v. Bradford*, 5 Port. (Ala.) 270; *Boal v. Mix*, 17 Wend. 119, 81 Am. Dec. 285; *Sharp v. Robertson*, 76 Ala. 343; 8 Wait, Act. and Def. p. 89.

The letter of March 16, 1886, was not in itself sufficient to amount to a repudiation. While it may have expressed an intention to repudiate, still no steps were ever taken to consummate the repudiation. It would take a more solemn act of McCarty to repudiate the deed or sale to him than it would to confirm it.

*Irvine v. Irvine*, 76 U. S. 9 Wall. 626, 19 L. ed. 808. See also *Willis v. Twambley*, 13 Mass. 240; *Tucker v. Moreland*, 85 U. S. 10 Pet. 71, 9 L. ed. 351; *Seranton v. Stewart*, 52 Ind. 69.

*Messrs. Knox & Bowie and Caldwell & Johnston* for appellee.

*Clopton, J.*, delivered the opinion of the court:

Our decisions, which are in harmony with the later adjudications, have established that a contract of purchase of land entered into by an infant, whether executed or executory, is voidable, subject to confirmation or disaffirmance at his election, on arriving at age. The right of election is personal, and paramount to any equity of the other party; it may be exercised without reference to his assent or dissent. When the infant has exercised the privilege to rescind his contract, he cannot afterwards abandon or repudiate the rescission, and take the other alternative. The disaffirmance renders the contract void *ab initio*, and restores the rights of the parties to the same condition in which they would have been had no contract been made, though the adult party may, in some cases, and under some circumstances, be remediless. Appellee, the Woodstock Iron

an unconditional sale of the mortgaged chattel to a third person (*State v. Plaisted*, 43 N. H. 414), at least if the chattel has remained in the possession of the mortgagor. *Chapin v. Shafer*, 49 N. Y. 407.

With reference to contracts relating to real estate the precise acts which will be sufficient to effect a disaffirmance are not fully determined. The earlier cases, especially in the Eastern States, held that to effect a disaffirmance the disaffirming act must be of equal solemnity with the original one. Thus it was held that though an entry may be necessary to avoid a feoffment and livery by an infant, yet it is not necessary to avoid a deed of bargain and sale, but the latter may be avoided by another deed of the same description and of equal notoriety with the original conveyance. *Jackson v. Carpenter*, 11 Johns. 541; *Jackson v. Burchin*, 14 Johns. 124.

Those were cases in which the land remained vacant after the conveyance; and in *Boal v. Mix*, 17 Wend. 123, it was intimated that if the land was held adversely to the infant a second deed would be ineffectual to revoke the first conveyance, and that in such case there should be an entry or some act of equal notoriety, and that such avoidance must precede the bringing of an action to recover possession.

In *Voorhies v. Voorhies*, 24 Barb. 153, the same doctrine was maintained, though the "act of equal notoriety" was described as "demanding possession or giving notice of intention not to be bound by the first deed."

This doctrine distinguishing between cases in which the land has gone into the possession of the grantees and those where it remains vacant or in the possession of the grantor is found in other 12 L. R. A.

cases. *Roberts v. Wiggins*, 1 N. H. 73; *Harris v. Cannon*, 6 Ga. 382.

That the disaffirming act must be one of equal solemnity with the original one found partial support in the United States Supreme Court, Mr. Justice Story stating that there are different ways in which an infant may avoid his acts, yet if the act is by matter of record it must be avoided by act of record, and if the act is matter *in pais* it may be avoided by act *in pais* of equal solemnity or notoriety. (*Tucker v. Moreland*, 85 U. S. 10 Pet. 72, 9 L. ed. 351), although the court stated in that case: "We do not mean to say that the act of disaffirmance should be of the same or of as high and solemn a nature as the original act, but simply that if the act of disaffirmance be of as high and solemn a nature there is no ground to impeach its sufficiency."

*Roberts v. Wiggin*, 1 N. H. 73, held that if the infant had retained possession of the land his conveyance might be defeated by any act explicitly evincing such intent, such as express and formal notice, etc.

This doctrine has been applied to all cases by later decisions, which hold that the doctrine of equal solemnity was applicable to feoffments only; that entry was not necessary in any case, and that avoidance may be accomplished by entry, suit or action, subsequent conveyance, effort to restore the parties to their original condition, or any act unequivocally manifesting the intention (*Cresinger v. Welch*, 15 Ohio, 186, citing *Drake v. Ramsey*, 5 Ohio, 232); by notice of disaffirmance, by suit, plea, or entry upon real estate, or other unmistakable act of dissent (*McCarthy v. Nicrosi*, 72 Ala. 335); by

Company, seeks by the bill the cancellation of a deed, made May 1, 1884, conveying to appellant a lot in the City of Anniston. The cancellation is sought on the ground that the grantee was a minor at the time of its execution, and after arriving at his majority disaffirmed the contract of purchase without reconveying, or offering to reconvey, the property, and retains the deed, denying complainant's right to a conveyance. The answer denies disaffirmance, and sets up confirmation of the contract, of which complainant had notice long before the bill was filed.

The main point of contention involves the construction and effect of a letter, admitted to have been written by defendant to complainant March 16, 1886. The following is a copy: "In the spring of 1884, I purchased from you a lot in the City of Anniston, and paid you three hundred and thirty-four dollars; also gave you two notes, each calling for three hundred and thirty-three dollars, bearing interest from date, one due one year, and the other two years. I do not think that the Woodstock Iron Co. has performed its part in its attitude towards the town, and for this reason I claim from the W. I. Co. three hundred and thirty-four dollars, with interest from date of deed. The Company cannot ignore this claim, because the trade was made before I was of age. I consider myself, under the circumstances, justified in repudiating the trade, and claiming the law on the subject." Defendant contends that the letter is the mere expression of mere intention to repudiate the contract if the demand therein made was not complied with, or a conditional repudiation, and in order to make it complete and effectual should have been followed by suit to recover the money, or by some unequivocal

act of equal notoriety and solemnity with the original act. In support of their contention, counsel refer to the case of *Irvine v. Irvine*, 76 U. S. 9 Wall. 617, 19 L. ed. 800. The question under consideration being whether, in order to be sufficient to affirm an infant's deed, the act of affirmance must be of the same solemnity of the deed itself, it was said: "There is a well-recognized distinction between the nature of those acts which are necessary to avoid an infant's deed and the character of those which are sufficient to affirm it; and the act of confirmation, being of a character less solemn than the act of avoidance, may be effected in a less formal manner. The reasons assigned for the distinction are that the deed of an infant, not being void, passes the title to the land to his grantee; and if avoided, the ownership is retransferred, and the seisin changed; while a confirmation passes no title, effects no change of property and disturbs no seisin." The question in that case was whether the infant had affirmed his deed. The nature of the act sufficient to avoid a contract of purchase was not involved. Also, there is a well-recognized distinction between the acts which will avoid an infant's deed in the case of a sale and those which will avoid a contract of purchase, though a deed was made to the infant. Acts which are usually regarded as necessary to avoid an infant's deed—such as entry, selling and conveying to another, and bringing suit to recover possession—would amount to a confirmation in the case of a purchase. Even in respect to the avoidance of deeds made by infants, the current of modern decisions is to a liberal extension of the rule; and the tendency is to establish one simpler, more conservative and of easier and more

notice of disaffirmance followed by acts of ownership or such as indicate a claim of ownership as against the deed, such as possession, suit to regain possession, payment of taxes, selling or leasing or improvement of premises. *Tunison v. Chamblin*, 88 Ill. 378.

So that the modern doctrine, in most of the States at least, seems to be that the act of disaffirmance need not be as solemn as the original act (*Allen v. Poole*, 54 Miss. 331; and that notice or a subsequent conveyance is sufficient without an entry (*Scranton v. Stewart*, 52 Ind. 93; *Peterson v. Lalk*, 24 Mo. 541; *Pitcher v. Laycock*, 7 Ind. 403; *Vallandigham v. Johnson*, 85 Ky. 233; *Hoyle v. Stowe*, 2 Dev. & B. L. 320; *M'Gill v. Woodward*, 3 Brev. 401; *Haynes v. Bennett*, 58 Mich. 17; *Dixon v. Merritt*, 21 Minn. 193; *Hastings v. Dollarhide*, 24 Cal. 211), though an entry is always safest in those States where land held adversely cannot be conveyed; but even in such cases, *Riggs v. Fisk*, 64 Ind. 100, held that the second deed is simply ineffectual to put the grantee in possession, and that it constitutes full authority for the grantee to prosecute a suit in the name of the grantor to obtain possession of the premises for the grantee's benefit.

The Missouri court says that the ancient doctrine which required the disaffirming act to be as high and solemn in character as the act disaffirmed has no place in modern law. The disaffirming act need take no particular form or expression, but it must show an unequivocal intent to repudiate. If consistent with the continued existence of the original act there is no disaffirmance. *Singer Mfg. Co. v. Lamb*, 81 Mo. 225.

Expressions are found to the effect that any

12 L. R. A.

act showing an intention to disaffirm is sufficient. *Heath v. West*, 26 N. H. 190; *White v. Flora*, 2 Over. (Tenn.) 423.

An action of ejectment preceded by notice of intention to disaffirm is sufficient. *Doe v. Abernathy*, 7 Blackf. 443.

And in some States the bringing of a suit for possession within proper time is a sufficient disavowal of the deed though there is no disaffirmance or notice of intention to disaffirm; at least such suits seem to pass unchallenged. *Birch v. Linton*, 73 Va. 584 (citing *Bedinger v. Wharton*, 37 Gratt. 370; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; *Harris v. Ross*, 85 Mo. 83; *Webb v. Hall*, 85 Mo. 336; *Clark v. Tate*, 7 Mont. 171. See also *Cole v. Pennoyer*, 14 Ill. 158.

But some of the cases hold that disaffirmance is necessary before an action can be brought. *Law v. Long*, 41 Ind. 599; *Haynes v. Bennett*, 53 Mich. 71.

There appears to be no need for disaffirmance or notice before bringing suit to set aside a conveyance or have a contract declared void. *Gillespie v. Bailey*, 13 W. Va. 70; *Shaffer v. Lavretta*, 57 Ala. 14.

The acts must, of course, be inconsistent or there can be no disaffirmance. *Bagley v. Fletcher*, 44 Ark. 155; *Buchanan v. Griggs*, 18 Neb. 121.

So a subsequent deed will avoid a prior one, but a second mortgage will not avoid a prior one. *Morgan v. Marshall*, 7 Humph. 120.

#### When ratified cannot be disaffirmed.

If the act has once been ratified it cannot afterwards be disaffirmed. *Hastings v. Dollarhide*, 24 Cal. 211.

general application, thereby avoiding many of the perplexing and refined distinctions under the strict rule, which required the act of disaffirmance to be of equal notoriety and solemnity with the original act or conveyance, but which was never of universal application, for the deed could always be avoided by a proper plea.

In *McCarthy v. Nicotri*, 73 Ala. 883, speaking in reference to the avoidance of an infant's deed, or other executed contract, it is said: "The usual rule is that any such contract may be affirmed by unequivocally recognizing its continued existence and binding force. So it may be disavowed by some distinct and positive act, leaving no room for doubt as to the intention of the party. This may be effected by notice of disaffirmance, by suit, plea or entry upon real estate, or other unmistakable act of dissent, or of confirmation, as the case may be." *A fortiori* a contract of purchase of land may be disaffirmed by the infant after attaining majority by act manifesting distinctly and unequivocally an election and intention to disaffirm, by any act of distinct and positive dissent, whatever may be its form or expression. *White v. Flora*, 3 Overt. (Tenn.) 426; *Drake v. Ramsey*, 5 Ohio, 251; *Tunison v. Chamblin*, 88 Ill. 378; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221.

This rule is consistent with and conserves the absolute and paramount right of disaffirmance. Recurring to the letter, there seems no room for doubt as to the intention of defendant. It was written a few days after he had arrived at twenty-one years of age; states the precise terms of the contract, so that there could be no mistake; and claims the exact amount of the purchase money paid, with interest from date of deed. The reason assigned, that the Company had not performed its part in its attitude towards the town, is not stated as the legal basis of the claim,—he shows no injury he had sustained by the conduct of the Company or what that conduct was,—but as morally justifying him "in repudiating the trade, and claiming the law on the subject." What law? The law which gave him the right to disaffirm a contract entered into while a minor, which is the only legal ground stated why the Company could not ignore the claim. Claim of repayment of the precise sum paid at the time of the purchase, with interest from the date of the deed, is inconsistent with the recognition of the continued existence of the contract; for without rendering it void by disaffirmance he had no right to claim the return of the money.

But it is said the money was not returned, and no suit was brought for its recovery. As we have stated, the exercise of defendant's right did not depend upon the conduct of the Company. Neither the manner in which the letter was treated nor the failure or refusal to return the money could affect in any way the exercise of defendant's right of election, or avoid the effect of the disaffirmance. A suit to recover the money would itself have been an act of avoidance, but it is not necessary the letter should be followed by such suit to render it effectual as an act of disaffirmance. And, though rescission of the contract restores the rights of the parties to the situation in which they were when the contract was entered into, 13 L. R. A.

an offer to reconvey the lot was not essential to a complete disaffirmance. An infant need not tender anything he may have acquired or received under the contract. He subjects himself to liability to account for what he has received and has in possession when he reached his majority, and may sue for what he has paid. A tender is only material and essential as a condition to the right of either party to sue and recover in equity. *Eureka Co. v. Edwards*, 71 Ala. 248; *Chandler v. Simmons*, 97 Mass. 508. The letter, being a demand or claim for the repayment of the money, without qualification or condition, on the sole ground that defendant was a minor at the time of the purchase, must be regarded as a distinct and positive act of dissent, unequivocally manifesting his intention and election to disaffirm the contract.

Another point of contention arises on the ground of demurrer to the bill,—that, conceding an avoidance, complainant's remedy at law is complete and adequate. The position is that on disaffirmance the title to the lot was, *ipso facto*, retransferred to complainant, and the Company can maintain ejectment to recover possession. Many authorities so hold in respect to the avoidance of an infant's deed; and, as an infant's deed passes the title to his grantee, subject to the right of the grantor to confirm or avoid,—in legal effect a conditional transfer, continuing in force until avoided and defeated by disaffirmance,—it may be that avoidance in such case operates, *proprio vigore*, to divest the grantee of the title, and reinvest it in the grantor. But the case is different when the deed is made by an adult grantor to an infant under a contract to purchase; such deed is not subject to avoidance by the grantor at his option or election. It has been uniformly held in this State that an estoppel resting in parol, though it may bind the land in equity, does not and cannot affect the legal title in a court of law. *McPherson v. Wallers*, 16 Ala. 714; *Morgan v. Casey*, 73 Ala. 222.

It has also been held that the rescission of a contract of purchase, and cancellation or destruction of the deed, by agreement of the parties, will not divest the title out of the grantee and reinvest it in the grantor. *Brady v. Huff*, 75 Ala. 80. It is true that, when an infant disaffirms his contract of purchase after becoming of age, it ceases to exist for the benefit of either party, and is rendered void *ab initio*, and the other party is reinvested with a right to whatever he has parted with under the contract, and may sue to reclaim it. But it results from the foregoing well-established principles that when the grantor is capable of passing the title, and the grantee capable of taking, the deed not being subject to avoidance by the grantor, no act *in pais* will operate to retransfer to him the legal title. The disaffirmance destroyed all defendant's equitable claim or title to the land, but did not affect the legal. Defendant, having once disaffirmed, could not repudiate it, and then confirm; the contract, having been made void, cannot be revived, except by mutual consent. Still, he retains the deed and denies complainant's right to a reconveyance, claiming that he abandoned the idea of disaffirming, and has confirmed the purchase. The real object of the bill is to procure a judicial

ascertainment of the rescission of the contract, and the enforcement of the rescission by cancellation of the deed. The bill offers to pay the amount paid by defendant, and to return the purchase-money notes. Its equity rests on the jurisdiction of the court of the rescission of contracts. The bill and proof make a case for relief.

*Affirmed.*

J. A. MONTGOMERY, *Appt.*,

*v.*

J. D. CROSTWAIT.

(....Ala....)

1. A stipulation, in a promissory note, to pay all costs of collecting if not paid at maturity, does not destroy its negotiability.
2. A material alteration of a promissory note by any of the parties thereto discharges from liability all other parties not consenting to, or authorizing, the alteration, whether

it is apparently or presumably to their benefit or detriment.

3. Adding "& Co." to his name by the maker of a note is a material alteration of it, which will release the indorser, if done without his consent or authority.
4. The fact that the addition of "& Co." to the maker's name on a note is ineffectual to bind his partners will not prevent it from being a material alteration as to an indorser.
5. An act which may be authorized or consented to in *vitae* may be effectually ratified after it has been performed.
6. No new consideration is necessary in order to make valid a ratification of a note by one who was entitled to his release therefrom because of an alteration.
7. The burden of proving that a note was altered after indorsement is upon the indorser, where he relies on that fact as a defense.
8. One who indorsed a note before it was signed, and gave it to the maker to be signed in such a way as to raise money for both of them, is not released as indorser by the fact that the maker changed his signature to that of his firm by adding "& Co.," since, so far as the

**NOTE.**—As to effect of stipulation for attorney's fees upon negotiability of note, see notes to *Bowie v. Hall* (Md.) 1 L. R. A. 546; *Wright v. Traver* (Mich.) 3 L. R. A. 50; *Exchange Bank v. Tuttle* (N. M.) 7 L. R. A. 445.

*Necessity of consideration to validity of ratification of altered note.*

As shown in the principal case, an alteration of a negotiable instrument may generally be ratified, and as further shown the conflict seems to arise over the necessity for a consideration to support such ratification. Contributing towards the uncertainty are cases which are at variance as to the—

*Ratification of forged instruments.*

That a forgery may be ratified has been held in *Dow v. Spenny*, 29 Mo. 387; *Forsyth v. Day*, 46 Me. 176; *Howard v. Duncan*, 3 Lans. 175, citing *Union Bank v. Middlebrook*, 33 Conn. 90; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Wellington v. Jackson*, 121 Mass. 159.

That a forgery cannot be ratified is decided in *Brook v. Hook*, L. R. 6 Exch. 88; *McHugh v. Schuykill Co.* 67 Pa. 391; *Henry v. Heeb*, 14 West. Rep. 84, 114 Ind. 275.

It is also held that the doctrine of ratification is not applicable to a case of forgery, since such doctrine has reference to the acts of an agent while a forger cannot be considered in any sense the agent of the one whose name he forges. *Ferry v. Taylor*, 38 Mo. 338; *Workman v. Wright*, 33 Ohio St. 405.

*Shisler v. Vandike*, 62 Pa. 447, holds that permitting ratification of a forgery would be contrary to public policy.

One whose name has been forged may estop himself from denying the genuineness of the signature. *Hefner v. Vandolah*, 62 Ill. 468; *Woodruff v. Munroe*, 33 Md. 155; *Crout v. DeWolf*, 1 R. I. 398.

The States which do not recognize a possibility to ratify a forgery hold a new contract upon a new consideration necessary, in the absence of estoppel, to raise any liability. *McHugh v. Schuykill Co.* and *Workman v. Wright*, *supra*.

Cases of that class are cited as authority for the necessity of consideration in—

*Cases of alteration.*

But even those cases hold that where the transaction is contrary only to good faith and fair dealing, where it affects individual interests and nothing

else, ratification is allowable. *Shisler v. Vandike*, *supra*.

In Connecticut the court early held that the promise of an accommodation indorser, made after his discharge, to pay a note was of no efficacy if without consideration. *Huntington v. Harvey*, 4 Conn. 123. Most, if not all, of the authorities cited in that case were application of doctrines of the common law, and not of the law merchant.

The case of *Wilson v. Hayes* (Minn.), 4 L. R. A. 196, cited in the principal case, appears to be the strongest case which holds a consideration necessary. It was a suit between the original parties to the instrument, and the court held that where there was a fraudulent alteration which both destroys the instrument (see note in 4 L. R. A. 196), and extinguishes the debt, subsequent ratification of the alteration given to the party who made it, without any new consideration, is a mere naked promise.

The Kentucky doctrine referred to in the principal case appears to have gone no further than to affirm that if the surety's name is forged to a note, or if he is discharged by a material alteration, since he receives no benefit from the instrument, his promise to pay the debt will be of no avail unless made upon sufficient consideration. *Warner v. Fant*, 79 Ky. 1; *Owsley v. Phillips*, 78 Ky. 517.

That court recognizes a distinction in the effect of an alteration upon the liability of the principal debtor and upon that of a surety. *Emmons v. Overton*, 18 B. Mon. 650.

Most of the cases which have held that an altered or forged instrument could be ratified have contained no intimation that any new consideration was necessary. *Goodspeed v. Cutler*, 75 Ill. 534; *Stewart v. First Nat. Bank of Port Huron*, 40 Mich. 343; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Sweetser v. French*, 3 Cush. 315; *Wellington v. Jackson*, 121 Mass. 159.

*Prouty v. Wilson*, 123 Mass. 297, holds an agreement to forbear, followed by actual forbearance of enforcement of the note when due, is a sufficient consideration. The principal case seems to cite all the cases which are fully in accord with its doctrine on this question. In addition, *Cameron v. Grigsby*, 3 West. Rep. 87, 116 Ill. 151, held that where the maker of a note given for property knew of alterations in it, and retained the property without rescinding the contract, he would be liable on the note. See also *Humphreys v. Guillow*, 12 N. H. 385, 38 Am. Dec. 499.

indorser was concerned, he could have signed the firm name in the first place.

9. A stipulation to pay all costs of collecting, not less than ten per cent, refers to attorneys' fees, as the parties are liable for court costs without any stipulation.

10. The indorsement of a waiver of protest, and notice of protest, implies knowledge of all the paper contains at the time, and precludes any defense based on matter then apparent on the face of the instrument.

11. Statement of a witness that a party "examined the note thoroughly" is admissible, where the issue is as to the party's knowledge of the way the note was signed.

12. What a witness has heard as to the character of a person cannot be given in evidence on the part of the person for whom he has testified that he knows the character under inquiry, although such matters may be brought out on cross-examination.

(December 8, 1890.)

**A**PPEAL by defendant from a judgment of the Birmingham City Court in favor of plaintiff in an action brought to enforce the alleged liability of the indorser of a promissory note. *Affirmed.*

The note which was the foundation of this suit was as follows:

Birmingham, Ala., Oct. 12, 1887.

Sixty days after date we promise to pay to the order of J. A. Montgomery three thousand dollars, value received, at First National Bank of Birmingham, Ala. The right of exemption to personal property is hereby waived, as provided in the Constitution of the State of Alabama, or any other State in the United States; and it is further agreed that the undersigned shall pay costs for collecting above, not less than 10 per cent on failure to pay at maturity.

[Signed] Percy R. Smith & Co.

This note was indorsed:

Pay to the order of J. D. Crosthwait.  
10/12/87. J. A. Montgomery.

The third plea alleges that, after appellant had indorsed the note, the same had been materially changed, with the knowledge of the plaintiff, but without the knowledge or consent of the defendant, by adding to the signature of Percy R. Smith, the words "& Co."

Plaintiff filed a replication setting out that on the 14th day of December, 1887, defendant, with full knowledge of all the facts now averred, in and by his third plea, indorsed on said written instrument the words following, to wit: "'I hereby waive protest and notice of protest on the within note. J. A. Montgomery,'—and at divers times, both before and after the maturity of said instrument, ratified the signature signed thereto, and the supposed alteration of said instrument by said Smith, and promised to pay it; and the plaintiff avers that defendant has waived any right that he may have had to aver and plead the supposed alteration of said instrument, and that by reason of his said waiver and ratification he is now estopped to deny that he is bound by his said indorsement."

12 L. R. A.

Defendant demurred to the replication upon the following grounds: "(1) Because the averment therein that defendant, before and after the maturity of said instrument in writing, ratified the signature by Percy R. Smith of the name of Percy R. Smith & Co. to said instrument in writing, is the averment of a mere conclusion, and not the averment of facts constituting such ratification. (2) Because the promises of payment of said instrument in writing, alleged to have been made by the defendant, appear to have been made without any consideration therefor. (3) Because the waiver of protest and notice made by the defendant and indorsed on said instrument in writing does not, of itself, nor does the promise of payment, alleged to have been made by said defendant, of itself, nor do such waiver and promise of themselves conjointly, operate to estop defendant from denying that he is bound by said indorsement of said instrument in writing, it not appearing from said replication that the plaintiff had been misled thereby to his prejudice." The court overruled each of these grounds of demurrer.

*Messrs. Hewitt, Walker & Porter* for appellant.

*Messrs. J. A. Mitchell and Talliaferro & Smithson*, for appellee:

The instrument sued on is a negotiable promissory note.

*Sperry v. Horr*, 82 Iowa, 184; *Stoneman v. Pyle*, 85 Ind. 108, 9 Am. Rep. 687; *Hubbard v. Harrison*, 88 Ind. 828; *Proctor v. Baldwin*, 82 Ind. 870; *Maxwell v. Morehart*, 66 Ind. 801; *Smith v. Muncie Nat. Bank*, 29 Ind. 58; *Gaar v. Louisville Bkg. Co.* 11 Bush, 180, 21 Am. Rep. 209; *Heard v. Dubuque County Bank*, 8 Neb. 10; *Newton Wagon Co. v. Diers*, 10 Neb. 284; *Seaton v. Scott*, 18 Kan. 435, 26 Am. Rep. 779; *Overton v. Matthews*, 85 Ark. 146; *Trader v. Chidester*, 41 Ark. 242, 48 Am. Rep. 88; *Dietrich v. Baylis*, 28 La. Ann. 767; *Nickerson v. Sheldon*, 83 Ill. 872, 85 Am. Rep. 88; *Farmers Nat. Bank v. Rasmussen*, 1 Dak. 60; *Wilson Sewing Mach. Co. v. Moreno*, 7 Fed. Rep. 806; *Bank of British North America v. Ellis*, 2 Fed. Rep. 44; *Adams v. Addington*, 16 Fed. Rep. 89; *Schlesinger v. Arline*, 31 Fed. Rep. 648; *Howenstein v. Barnes*, 5 Dill. 482; 1 Randolph, Com. Paper, § 205; 1 Dan. Neg. Inst. § 62, and note to § 62a; *Merchants Nat. Bank v. Sevier*, 14 Fed. Rep. 674, note; *Witherspoon v. Musselman*, 14 Bush, 214, 29 Am. Rep. 406, note; 2 Parsons, Notes and Bills, 147, 418.

The stipulation for the payment of attorneys' fees and costs of collection is binding on the indorser as well as the maker.

1 Randolph, Com. Paper, § 205; 1 Dan. Neg. Inst. § 62, note, § 62a; 7 Wait, Act. and Def. 618; *Hubbard v. Harrison*, 88 Ind. 828; *Martinsville First Nat. Bank v. Canatsey*, 34 Ind. 149; *Bank of British North America v. Ellis*, 2 Fed. Rep. 44.

The alleged addition of the words "& Co." to the signature of Percy R. Smith would be an immaterial alteration.

*Toomer v. Rutland*, 57 Ala. 879; *Montgomery R. Co. v. Hurst*, 9 Ala. 518; *Huntington v. Finch*, 8 Ohio St. 445; *Granite R. Co. v. Bacon*, 15 Pick. 289; *Brown v. Jones*, 8 Port. (Ala.) 429;

*Glover v. Robbins*, 49 Ala. 219; *Brownell v. Winnie*, 29 N. Y. 400.

Percy R. Smith had no authority to bind his firm by signing the firm name to the note; if it is not the firm's note it is the note of Percy R. Smith, and only the note of Percy R. Smith.

*Myatts v. Bell*, 41 Ala. 281; 1 Bates, Partn. § 849.

Any alteration which in no degree varies the legal effect of the writing is classed with the harmless, immaterial.

Bishop, Cont. §§ 751, 755. See also § 761.

That appellant with full knowledge of such alteration wrote a waiver of protest on the back of the instrument and promised to pay the note renders him liable thereon.

8 Randolph, Com. Paper, §§ 1776, 1774, 1775; *Weed v. Carpenter*, 10 Wend. 404; *Stewart v. First Nat. Bank of Port Huron*, 40 Mich. 848; *Union Bank v. Middlebrook*, 88 Conn. 95; 2 Parsons, Notes and Bills, 565; *Grimstead v. Briggs*, 4 Iowa, 559; *Humphreys v. Guilloe*, 18 N. H. 865, 89 Am. Dec. 499.

If Montgomery indorsed the note sued on before it had been signed, and delivered it to Percy R. Smith in that condition, he has no defense to this action.

*Snyder v. Van Doren*, 46 Wis. 602, 82 Am. Rep. 789; 1 Am. & Eng. Encyclop. Law, 516; 2 Am. & Eng. Encyclop. Law, 889; *Johnson v. Blasdale*, 1 Smedes & M. 17, 40 Am. Dec. 85; *Goss v. Whitehead*, 83 Miss. 218; *Bank of Commonwealth v. McChord*, 4 Dana, 191; *Ledwich v. McKim*, 58 N. Y. 307; *Page v. Morrell*, 8 Keyes, 117; *Huntington v. Branch Bank of Mobile*, 8 Alf. 186; *Hall v. Bank of Commonwealth*, 5 Dana, 258, 80 Am. Dec. 685; *Davidson v. Lanier*, 71 U. S. 4 Wall. 456, 18 L. ed. 379; *Androscoggin Bank v. Kimball*, 10 Cush. 878.

Plaintiff having proved that the defendant wrote his name across the back of the paper sued on, and no alteration being apparent on the face of the instrument, the burden of proof is on the defendant to show that the note was altered.

*Hardt v. Treece*, 77 Ala. 532; 2 Dan. Neg. Inst. § 1421; 8 Randolph, Com. Paper, § 1785.

McClellan, J., delivered the opinion of the court:

One of the prominent questions presented by this record is whether the stipulation in a promissory note to pay all costs of collecting if not paid at maturity destroys its negotiability. Upon no other question in the law, perhaps, are the authorities so irreconcilably, and at the same time so equally, divided, both in respect to the number of adjudged cases and the respectability of the courts upon either hand. The following cases maintain the commercial character of notes which embody the stipulation referred to: *Stoneman v. Pyle*, 85 Ind. 108; *Pate v. Aurora First Nat. Bank*, 68 Ind. 254; *Maxwell v. Morehart*, 66 Ind. 801; *Proctor v. Baldwin*, 82 Ind. 370; *Hubbard v. Harrison*, 88 Ind. 827; *Heard v. Dubuque County Bank*, 8 Neb. 10; *Sperry v. Horr*, 82 Iowa, 184; *Nickerson v. Sheldon*, 83 Ill. 378; *Dieblich v. Bayhs*, 28 La. Ann. 767; *Gaar v. Louisville Bkg. Co.* 11 Bush, 180; *Wilson Sewing-Mach. Co. v. Moreno*, 7 Fed. Rep. 806; *Seaton v. Seowu*, 18 Kan. 485; *Merchants Nat. Bank v. Se-*

*eler*, 14 Fed. Rep. 671; *Trader v. Chidester*, 41 Ark. 342; *Farmers Nat. Bank v. Rasmussen*, 1 Dak. 60; *Schlesinger v. Arline*, 81 Fed. Rep. 648; *Hovenstein v. Barnes*, 5 Dill. 489; *Adams v. Addington*, 16 Fed. Rep. 89; and the following sustain the doctrine that the stipulation involves such contingency and uncertainty as to the sum payable as to destroy negotiability: *First Nat. Bank v. Bynum*, 84 N. C. 24; *First Nat. Bank of Trenton v. Gay*, 68 Mo. 33; *Goodloe v. Taylor*, 8 Hawks, 458; *First Nat. Bank of Carthage v. Marlow*, 71 Mo. 618; *Samstag v. Conley*, 64 Mo. 476; *First Nat. Bank of Carthage v. Jacobs*, 78 Mo. 35; *Wood v. North*, 84 Pa. 407; *Johnston v. Speer*, 92 Pa. 327; *Stillwater First Nat. Bank v. Larsen*, 60 Wis. 206; *Fertilizing & Mfg. Co. v. Newman*, 60 Md. 584; *Mahoney v. Fitzpatrick*, 183 Mass. 151; *Jones v. Radatz*, 27 Minn. 240; *Oayuga County Nat. Bank v. Purdy*, 56 Mich. 6; *Altman v. Bittershafer*, 68 Mich. 287, 13 West. Rep. 581; *South Bend Iron-Works v. Paddock*, 87 Kan. 510; *Farguhar v. Fidelity Ins. Co.* 13 Phila. 478.

The question has never been determined in this State. It was mooted somewhat in the case of *Hanover Nat. Bank v. Johnson*, 90 Ala. 549 (at the last term), and dismissed with an indication on the part of the present writer unfavorable to the negotiability of such instruments. Such was the inclination of my mind at that time. A more careful investigation into the adjudged cases, and especially a more critical consideration of the reasons upon which the divergent conclusions of other courts are made to rest, have produced the contrary conviction, and lead me to adopt the view first advanced by the Indiana and Kentucky courts, and which has since received the sanction of all recognized texts which discuss the point. Tiedeman, Com. Paper, § 285; 1 Randolph, Com. Paper, §§ 205, 206; 1 Dan. Neg. Inst. §§ 62, 62a; Parsons, Notes and Bills, pp. 146, 147; 2 Am. & Eng. Encyclop. Law, p. 324.

The cardinal principle that the sum to be paid must be certain in amount, and not dependent upon contingencies, is fully recognized and accommodated in this doctrine. It is true, the stipulation involves a contingency, in that there may or may not be any costs of collection to be paid, depending primarily upon failure to pay the note at maturity, and secondarily upon whether the note should be paid, even after dishonor, without resort to attorneys or legal proceedings. It is true, also, that the amount of such costs, if any, is uncertain. But it is fully assured that no costs will be incurred before maturity, and no costs will have to be paid at all, unless there is default in the payment of the sum promised at maturity, and the paper ceases by reason of that fact alone to be a circulating medium, performing in a sense the functions of money; so that, as long as the paper, considered apart from the stipulation, would be negotiable, it will have that character, notwithstanding the stipulation. Looked at in this way, stipulated attorney's fees and costs of collection after maturity stand upon the same footing, as to contingency of liability thereof, and uncertainty as to the amount thereof, as do protest fees, attorneys' tax fees, court costs, and statutory damages in the event a resort is had to legal remedies to enforce payment; and it is not conceivable why



the former class of charges should destroy negotiability, while the latter confessedly do not. *Stoneman v. Pyle*, 85 Ind. 108; *Gaar v. Louisville Bkg. Co.* 11 Bush, 180.

The Pennsylvania court has said that a "promissory note is a courier without luggage, traveling on the wings of the wind, and should not be lumbered up" with provisions of the class under consideration. Another high authority has declared that a stipulation for attorney's fee is not luggage, but ballast, and does not clog the circulation of the paper, but facilitates its progress. To further pursue the metaphor, it were, we think, more apt to say that the stipulation is neither luggage nor ballast, and neither impedes nor facilitates the flight of the paper through the transactions of commerce, since all persons are presumed to deal with it upon the assumption that it will be paid at maturity; but is for the well-being of the "courier" when its monetary functions have been fully discharged, and its journey as a circulating medium has been brought to an end by default in payment at maturity. Our conclusion is, therefore, that the note sued on here was for a sum certain, the payment of which depended upon no contingency, and, being payable at a bank, is commercial paper, within sections 2094, 2112, 2118, Code 1876, and sections 1756, 1778, Code 1886. The demurrer to the complaint which proceeded on the contrary assumption was properly overruled.

We understand the law to be well settled that a material alteration of a promissory note by any of the parties thereto discharges from liability thereon all other parties not consenting to or authorizing such alteration; and this without regard to whether the alteration is apparently or presumably to the benefit or detriment of the parties objecting. Courts cannot undertake to say that a party would have made the contract as altered, and thus make it for him, merely because its terms are more favorable to him than those embodied in the original instrument, any more than a like conclusion could be justified where the alteration imports additional liability. In the one case no less than in the other the altered paper is not the contract which the party has made; and in neither case can the courts declare it to be his contract, or enforce it as such. The law proceeds on the idea that the identity of the contract has been destroyed, that the contract made is not the contract before the court, that the party did not make the contract which is before the court; and, so adjudging, it cannot go further, and hold him bound by it, on speculations, however probable and plausible, that he would or ought to have entered it in the altered agreement because it involved less liability than the original and only paper executed by him. There are some expressions in the books to the contrary. They will, for the most part, and certainly so far as the adjudications of this court are concerned, be found in cases where the change was prejudicial to the party complaining; and this fact is made one of the reasons for the decision against liability, though it might as well have been rested entirely on the abstract fact of alteration. Thus, in the case of *Toomer v. Rutland*, 57 Ala. 379, reference is made to the prejudicial character of the alteration, but the conclusion there reached might

better have been based solely on the change in the legal identity of the contract,—a doctrine there fully recognized *arguendo*,—entirely regardless of the effect upon the promisor. It was not decided in that case that an alteration favorable to the party seeking to avoid the instrument would not release him. The sounder doctrine, and certainly the one supported by the overwhelming weight of authority, is that stated in *Anderson v. Bellenger*, 87 Ala. 384, 4 L. R. A. 680, and there applied to a surety, that any material alteration by one not a stranger to the paper, whether injurious or not, avoids the contract as to all parties not consenting. It is enough that, if the instrument were genuine, it would operate differently from the original; or, as otherwise expressed, avoidance will result "if the alteration is one which causes the paper to speak a language different in legal effect from that which it originally spoke." *Mahawie Bank v. Douglass*, 81 Conn. 170, 181; *Gardner v. Walsh*, 5 El. & Bl. 83; *Morrill v. Otis*, 12 N. H. 466; *Reeves v. Pierson*, 28 Hun, 185; *Humphreys v. Guilloe*, 18 N. H. 387; *Dickerman v. Mider*, 43 Iowa, 506; *Lunt v. Silver*, 5 Mo. App. 186; 2 Parsons, Notes and Bills, 551-564; *Tiedeman*, Com. Paper, § 894; 3 *Randolph*, Com. Paper, § 1743, and many other authorities.

Even were the rules of law otherwise, we are unable to see how appellee could be benefited by it. The appellant might for very good reasons have preferred to indorse for Percy R. Smith in preference to Percy R. Smith & Co., for aught this or the trial court could know. It may be, for instance, that Smith has abundant property to pay his individual debts, while the firm of Smith & Co. may be wholly insolvent, so that the indorser for Smith individually would be saved harmless on a marshaling of assets, while the indorser for Smith & Co., forced to look to firm assets, with only the excess of individual assets after paying individual liabilities, would lose his claim in whole or in part; so that it could not be safely assumed that the change from "Percy R. Smith" to "Percy R. Smith & Co." was beneficial to the indorser. That the alteration was a material one we have no doubt. The considerations just adverted to demonstrate that it was; and the authorities are full to the point that the addition of other names as makers discharges parties already bound by the paper. Cases *supra*; *Wallace v. Jewell*, 21 Ohio St. 170; *Davis v. Coleman*, 7 Ired. L. 424; *Hall v. McHenry*, 19 Iowa, 521; *Henry v. Coates*, 17 Ind. 161; *Broughton v. Fuller*, 9 Vt. 873; *Anderson v. Bellenger*, 87 Ala. 384, 4 L. R. A. 680.

The effect of adding "& Co." was to make that partnership and the members of it, on the face of the paper, parties to it, whereas only one member of that firm, and he in his individual capacity alone, was a party to the original contract. The precise alteration here involved was adjudged to be a material one in the case of *Haskell v. Champion*, 80 Mo. 186. Nor is it of moment in this connection that in point of extraneous fact the firm of Smith & Co. was not bound by the signature, because of a want of authority in Smith to sign the firm name to the paper. The court is to determine the materiality of the alteration by an inspection of the instrument. Evidence *abundant* will

be received to show the fact of alteration, and, in a proper case, also that the alteration was in accordance with the intention of the parties; but, with these exceptions, the court cannot, on the question of materiality, look beyond the paper. Considering the original by comparison with the altered paper, it is to determine whether the latter, assuming its genuineness, evidences a contract materially variant from the former. It can make no difference that the parties, the addition of whose names constitutes the alteration, are not in fact bound by the instrument. On the face of it they are bound. On its face, therefore, the contract is not identical with the original. The legal identity of the first is destroyed, and parties not consenting thereto are discharged. Thus, in *Haskell v. Champion*, *supra*, it was ruled that the addition of "& Co." to the maker's name discharged the indorser, although there was no such firm, but the maker was a member of another firm. Here the firm clearly was not bound; nobody was in fact bound but the original maker; but on the face of the paper not only he, but a firm of which he was a member, was liable. The question of materiality was determined, not by the outside fact, but by the paper, and the other parties were held to be discharged.

To the pleas which set up the alteration we have been discussing it was replied that the defendant (indorser), with full knowledge of the alteration, indorsed and signed a waiver of protest and notice of protest on the note, "and at divers times, both before and since the maturity of said instrument, ratified the signature signed thereto, and the supposed alteration of said instrument by said Smith, and promised to pay it;" and also, generally, that the defendant had waived the right, and is now estopped to plead said alteration. Eliminating the legal conclusions alleged in these replications, there yet remain two averments of fact that, with full knowledge of the alteration, the defendant waived protest and notice by indorsement of the note over his own signature, and promised to pay the same. This, in our opinion, was a good replication to the matter pleaded, and the several demurrers to it were properly overruled. These facts, standing alone, constitute a waiver of the discharge otherwise operated by the alteration, or the adoption of the act of Smith in making the alteration. The authorities are uniform to the point that such an alteration may be made by the consent of the parties. *Ravines v. Alston*, 5 Ala. 297; *Hill v. Nelms*, 86 Ala. 442; Tiedeman, Com. Paper, § 896; 3 Randolph, Com. Paper, § 1766; 2 Dan. Neg. Inst. p. 412; 2 Parsons, Notes and Bills, 565. And it is a very general proposition that an act which may be authorized or consented to *in limine* may be effectually ratified after it has been performed, and *ex concessu*. *Knox v. Armistead*, 87 Ala. 511, 5 L. R. A. 297; *First Nat. Bank of Trenton v. Gay*, 68 Mo. 83, 89; *Commercial Bank of Buffalo v. Warren*, 15 N. Y. 577. At least it is certain that an alteration such as is shown here may be ratified by the innocent party affected by it, so as to bind him, to all intents and purposes, as if he had fully authorized it in the first instance. *National State Bank v. Rising*, 4 Hun, 12 L. R. A.

798; *Huntington v. Ballou*, 2 Lans. 120; *Korshaw v. Cox*, 3 Esp. 246; *Hazard v. Spears*, 2 Abb. App. Dec. 853; *Kilkelly v. Martin*, 34 Wis. 525; *Stewart v. First Nat. Bank of Port Huron*, 40 Mich. 348; *Goodspeed v. Oulter*, 75 Ill. 584. And efficient ratification will be implied from facts such as are set forth in these replications. *Boans v. Foreman*, 60 Mo. 449; *Bell v. Mahin*, 69 Iowa, 408; *Stewart v. First Nat. Bank of Port Huron*, *supra*; *Grimstead v. Briggs*, 4 Iowa, 559; *Union Bank v. Middlebrook*, 83 Conn. 95; *Carles v. Tattersall*, 2 Man. & G. 890; *Weed v. Carpenter*, 10 Wend. 403; *Bowers v. Jewell*, 2 N. H. 543.

Whether a new consideration is essential to support the contract thus made by ratification there is some conflict of authority. The courts of Kentucky and Minnesota hold that a new consideration is necessary. *Wilson v. Hayes*, 40 Minn. 531, 4 L. R. A. 196; *Warren v. Pant*, 79 Ky. 1. But a great majority of courts of last resort, if, indeed, not all of them, except in the States named, sustain the contrary doctrine. *Commercial Bank v. Warren*, *supra*; *Patton v. Prescott*, 18 Iowa, 567; *King v. Hunt*, 18 Mo. 97; *Prouty v. Wilson*, 123 Mass. 297; *Goodspeed v. Oulter*, 75 Ill. 584; *Stewart v. First Nat. Bank of Port Huron*, *supra*.

With respect to this question we adopt the language and conclusion of the Missouri court in a strictly analogous case: "There have been many refinements adopted about this doctrine of ratification; refinements which savor more of subtlety than of sound judgment. With some exceptions, not necessary to be adverted to here, the proposition is, however, undoubtedly correct that he who may authorize in the beginning may ratify in the end. . . . And there is therefore no force in the point urged on our attention, that there would have to be a new consideration in order to attach validity to a confirmatory act. No independent consideration is required in the case of an accommodation indorser, surety, etc., in the first instance; and it is difficult to see why anything more should be required on subsequent sanction than on original assent." *First Nat. Bank of Trenton v. Gay*, 68 Mo. 89.

Coming now to the bill of exceptions, it is first to be noted that what we have said in relation to ratification of the alleged alteration, and to the effect that ratification may be inferred or implied from circumstances, and need not be supported by a new or distinct consideration, when applied to charges 4, 7, 8, 12, 15 and 19, given at the request of the plaintiff, and charges 8, 16 and 19, asked by the defendant and refused, serves to determine the exceptions reserved to the action of the court in respect thereto against the appellant. The instrument sued on did not bear on its face any evidence of having been altered at any time. The burden of proving that it had been altered after indorsement was, therefore, upon the party who relied on that fact to defeat recovery against him. It follows that appellant's exceptions to charges 1, 2 and 5, given at the instance of plaintiff, and to the refusal of the court to give charges 1, 2, 3, 4, 9 and 18, as requested by defendant, which proceed on the theory that it was upon the plaintiff to disprove the alleged alteration, are untenable. 2

Dan. Neg. Inst. § 1421; 8 Randolph, Com. Paper, § 1785; Tiedeman, Com. Paper, § 898; *Bardist v. Trece*, 77 Ala. 598.

Charge numbered 5, given for plaintiff, is faulty in one of its clauses, when considered alone, in that it might be construed to authorize the jury to find according to the preponderance of evidence, regardless of whether such preponderance was sufficiently great to reasonably satisfy their minds. This fault is obviated in other portions of the instruction, where it is said the defendant must satisfy the jury by a preponderance of the evidence that the fact in issue is as he alleges it to be; and, even were this otherwise, the appellant could not complain, for the error, if any, in the charge is favorable to him. *Mays v. Williams*, 27 Ala. 267; *Jarrell v. Lellie*, 40 Ala. 271; *Vandevanter v. Ford*, 60 Ala. 610.

There was evidence which tended to show that the note was indorsed by the defendant before it was signed, and was delivered to Smith to be signed in such a way as would enable him to get the money on it for himself and Montgomery. We hold that this agreement, if it existed, authorized Smith, so far as Montgomery was concerned, to sign the firm name of Percy R. Smith & Co. to the paper, since, without any agreement, Smith had the right to fill up the blank by inserting his own name as maker; and to accord any operation to the agreement it must be construed into a consent by the defendant to the subscribing of the name of Smith's firm. Whether Smith had, as between himself and his copartner, the right to so sign, is immaterial. Montgomery's consent to the thing that was done estops him now to object to its having been done, whether Smith, in point of legal fact, had the power to do it or not. Charges 8 and 15, given for the plaintiff, find justification in these considerations. We construe plaintiff's charge numbered 6 to assert that if the note was made on the joint account of Smith and Montgomery, and was indorsed by the latter before it had been signed, but was afterwards, in pursuance of their agreement, executed by attaching thereto the name of Percy R. Smith & Co., Montgomery, having received his share of the proceeds, is bound by his indorsement. So construed, if this instruction has an infirmity, it lies in its being too favorable to the defendant. The fact postulated, that the signature of Smith & Co. was attached in consonance with the previous understanding between Smith and Montgomery, would, of itself, and wholly irrespective of Montgomery's interest in the money borrowed, be quite sufficient to bind him. The appellant can take nothing on his assignment of error directed against this charge. Charges 9, 10, 11, 13 and 16, for plaintiff, as modified by the explanatory charge given in connection therewith, are correct expositions of the familiar rule of law applicable to the filling of blanks left in promissory notes at the time of indorsement. The stipulation to "pay all costs of collecting not less than ten per cent," must be construed to refer to other than court costs, since the parties bound on the paper are liable for those without any agreement to pay them. Other costs of collection ordinarily consist of attorney's fees; and the stipulation may be interpreted as if it provided for the payment of 10 per cent 12 L. R. A.

attorney's fees, or a greater amount than that if expended reasonably and properly in realizing on the note. Stipulations to pay a given per cent for the services of attorneys are held to import liability for reasonable compensation for legal services rendered in that behalf, not in excess of the amount limited. We do not think the stipulation here is for more than this, and hence, that it can be enforced to this extent in the present action. Charge 5, asked by defendant, was well refused.

It would unduly extend this opinion, and serve no good purpose, to discuss the remaining charges requested by the appellant in detail. Enough has already been said, we think, to show that they severally are either affirmatively bad, as stating propositions which are unsound, or are abstract or misleading, or invasive of the province of the jury. Not a few of them, for instance, are addressed to the question of defendant's estoppel to rely upon the alleged alteration, and set forth that this, that and the other fact does not estop him to avail himself of it. This matter of estoppel was not nearly so prominent in the case as the question of ratification and promise to pay after knowledge of the alteration; and the tendency of all these charges was to mislead the jury into discharging the defendant because he was not technically estopped to set up this defense, although they may have been fully satisfied that the defendant, being let in to make this defense, had utterly failed to sustain it with evidence. Moreover, we are by no means prepared to say that the proposition of these charges is absolutely correct. On the contrary, we apprehend that the indorsement of a waiver of protest and notice of protest on a paper, as shown here, implies knowledge of all the paper contained at that time, and was such a recognition of its binding force as a contract as precludes the party from making any defense based on matters then apparent upon the face of the instrument; and certainly such would be the effect when the indorsement of the waiver is accompanied by a promise to pay the note.

We have examined the trial court's rulings on evidence to which exceptions were reserved, and find no error in them. The statement of the witness Smith that the loan of stock by Montgomery to him to enable him to borrow money upon its security "was not considered a debt between us," considered with the context of his answer to the interrogatory, was no more or less than to say that there was no agreement that he should pay Montgomery for the stock, the clear implication being that when it had performed the purposes of the loan—that is, had been used as collateral by Smith—it should be returned *in specie* to Montgomery.

The statement of plaintiff, made as a witness, that the defendant at a certain time "examined the note thoroughly," the issue being whether he knew that it was signed as by Percy R. Smith & Co., was but a "short-hand" rendering of the facts involved in reading the paper and ascertaining all of its contents. It was properly admitted. *Woodstock v. Roberts*, 87 Ala. 486; *Perry v. State*, 87 Ala. 80.

It has come to be a familiar rule of law in this State that a witness as to character may, on cross-examination, be interrogated as to

what he has heard in the community touching the character of the party inquired about. This is to afford a test of the value of his evidence in chief; to show that his conclusion as to the reputation in issue, and which rests upon the estimation of the community, is not supported by the expressions of that estimation, and thus to weaken its force. Such expressions cannot be given in evidence by the party whose witness is being examined, and who testified that he knows the character under inquiry. He must state what that character is as upon his own knowledge, and is not allowed to substitute for his knowledge the means or sources of it. On these principles, the action of the city court in refusing to allow the wit-

ness Mudd to testify to the character of the adverse criticism he had testified to on cross-examination as having heard on the character of Smith, and in excluding the evidence of Read, given in chief, that "he had heard a good many people say they would not believe Smith on oath," was unobjectionable. The ruling as to Mudd's testimony, moreover, may be sustained on the further ground that it involved no injury to appellant, in that he had already deposed to the character of the criticisms which he had heard with respect to Smith's character, to the effect that they were "severe" expressions condemnatory of Smith.

We find no error in this record, and the judgment of the City Court is affirmed.

### NEW YORK COURT OF APPEALS (2d Div.).

Edward A. DURANT, Jr., *Resp't.*,  
v.

Henry R. PIERSON *et al.*, *Appts.*

(.....N. Y. ....)

**Money loaned to a surviving partner for the express purpose of paying the debts of the firm, and so used, creates a valid claim in equity against the assets of the firm, and may be treated as such in a subsequent assignment for creditors of the firm, although the firm was in fact insolvent at the time of the loan, where this fact was not known either by the lender or the survivor.**

(Vann, J., *dissents.*)

(March 17, 1891.)

**A** PPEAL by defendants from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment entered in the office of the Clerk of Albany County upon the report of a referee in favor of plaintiff in an action brought to set aside an assignment for benefit of creditors upon the ground that it was fraudulent and void, because made with intent to hinder, delay and defraud creditors. *Reversed.*

The facts are stated in the opinion.

**Mr. Marcus T. Hun**, for appellants:

A surviving partner may make a general assignment of the firm property with preferences.

*Haynes v. Brooks*, 116 N. Y. 487; *Williams v. Whedon*, 12 Cent. Rep. 227, 109 N. Y. 533.

The rights of the firm creditors of the firm assets must be worked out through the equities existing between the partners, and only thus.

*Saunders v. Reilly*, 7 Cent. Rep. 59, 105 N. Y. 19.

The equity ceases when one partner acquires the entire firm property. He is then vested with the title to the property free from any lien or equity in favor of the partnership creditors, and may make an assignment by which he prefers his individual creditors to those of the firm, in the payment of their debts out of the firm assets.

*Dimon v. Hazard*, 32 N. Y. 65; *Stanton v. Westover*, 2 Cent. Rep. 189, 101 N. Y. 265; *Smith v. Howard*, 20 How. Pr. 121; *Fitzpatrick* 12 L. R. A.

*v. Flannagan*, 106 U. S. 648, 27 L. ed. 211; *Story*, Partn. § 358.

A surviving partner may borrow money to pay firm obligations and repay the same from the firm assets.

*Haynes v. Brooks*, 8 N. Y. Civ. Proc. 106. See *Fitzpatrick v. Flannagan*, *supra*; *Emerson v. Senter*, 118 U. S. 8, 30 L. ed. 51; *Butchart v. Dresser*, 4 De G. M. & G. 542; *Braaford Com. Bkg. Co. v. Cure*, L. R. 81 Ch. Div. 326; *Williams v. Whedon*, *supra*; *Nehrboss v. Bliss*, 88 N. Y. 600.

Under the circumstances of this case, in view of the fact of the agreement made by the surviving partner with the Bank that this money would be paid back out of the firm assets, that the note was given in the firm name, the amount credited to the firm account, that it was used to pay firm debts, and the mistake of fact as to the solvency of the firm, equity will give a lien upon the firm assets.

*Perry v. Board of Missions*, 3 Cent. Rep. 62, 102 N. Y. 99; *Fowler v. Mutual L. Ins. Co.* 28 Hun, 195; *Smith v. Smith*, 51 Hun, 164.

**Mr. G. L. Stedman**, for respondent:

The debt of \$15,000 contracted by the survivor was his individual debt, and not a debt for which the firm assets were liable.

*Stedman v. Feidler*, 20 N. Y. 437; *Parsons*, Partn. 8d ed. p. 440; *Farr v. Morrill*, 53 Hun, 85; *Hooley v. Gieve*, 9 Daly, 104, affirmed, 83 N. Y. 625; *Lusk v. Smith*, 3 Barb. 570; *Bloodgood v. Bruen*, 8 N. Y. 362; *Van Keuren v. Parmelee*, 2 N. Y. 528; *Sanford v. Mickles*, 4 Johns. 224; *First Nat. Bank of Alexandria v. Payne*, 3 L. R. A. 284, 18 Va. L. J. 264; *National Bank v. Norton*, 1 Hill, 575; *Stewart v. Robinson*, 5 L. R. A. 410, 115 N. Y. 328, 21 Abb. N. C. 63; *Story*, Partn. 843; 2 Kent, Com. 68; *Hall v. Lanning*, 91 U. S. 170, 23 L. ed. 273; *Haynes v. Brooks*, 116 N. Y. 487; *Payne v. Slate*, 39 Barb. 634; *Payne v. Gardiner*, 29 N. Y. 146; *Jonness v. Carleton*, 40 Mich. 348; *Edw. Bills and Notes*, 113; *Lanning v. Gaine*, 2 Johns. 300; *Abel v. Sutton*, 3 Esp. 108.

The purpose for which the debt was created and the application do not change the personality of the debtor or the character of the indebtedness and render the firm assets liable.

*Turner v. Jaycox*, 40 N. Y. 470; *Coster v.*

*Clarke*, 3 Edw. Ch. 411, 6 L. ed. 708; *National Bank of Salem v. Thomas*, 47 N. Y. 15.

An assignment of partnership property preferring or directing the payment of individual debts before partnership debts are fully paid is fraudulent and void.

*Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 53 N. Y. 146; *Bulger v. Rosa*, 119 N. Y. 459; *Fourth Nat. Bank v. Burger*, 15 N. Y. S. R. 101; *Importers & T. Nat. Bank v. Burger*, 25 N. Y. S. R. 186; *Hurlbert v. Dean*, 2 Keyes, 97.

There is no principle of equity that can be successfully invoked in this case to change this legal status.

1. There is no right of subrogation on the part of the Bank. This right exists only where a surety, being liable to pay the debt of his principal, pays it. He can then be subrogated to all the creditor's rights.

*Hayes v. Ward*, 4 Johns. Ch. 133, 1 L. ed. 786; *Hubbell v. Carpenter*, 5 N. Y. 171; *Wilkes v. Harper*, 1 N. Y. 586; *Mercantile Mut. Ins. Co. v. Caldeh*, 20 N. Y. 177; *Gans v. Thieme*, 93 N. Y. 225; *Acer v. Hotchkiss*, 97 N. Y. 895; *Perkins v. Hall*, 7 Cent. Rep. 751, 105 N. Y. 539.

2. Equity will not give a remedy in direct contravention of a positive rule of law.

*Story*, Eq. Jur. § 12; 3 Bl. Com. 430; *Bispham*, Eq. Jur. p. 54; *Burke v. Murphy*, 27 Miss. 167; *Patterson v. Brown*, 33 N. Y. 81.

*Mr. Abraham Lansing*, for the National Commercial Bank:

The note was purely a promise binding the firm property, so far as it could be made such by the only person authorized to sign the firm name, and whose signature of the firm name would, at that time, have been binding upon the firm property for purposes not easily distinguishable.

*Williams v. Whedon*, 12 Cent. Rep. 227, 109 N. Y. 338; *Robbins v. Fuller*, 24 N. Y. 570; *Bradford Com. Bkg. Co. v. Cure*, L. R. 81 Ch. Div. 824; *Butchart v. Dresser*, 4 DeG. M. & G. 545, 81 Eng. L. & Eq. 121; *King v. Smith*, 4 Car. & P. 108.

A surviving partner may sell the firm assets, in whole or in part, and apply the avails to payment of any of the firm debts, at his option.

*Williams v. Whedon*, *supra*; *Loeschigk v. Hatfield*, 5 Robt. 26, 51 N. Y. 660.

Or he may mortgage or otherwise pledge or appropriate them, in whole or in part, for such purpose.

*Williams v. Whedon*, *Loeschigk v. Hatfield* and *Bradford Com. Bkg. Co. v. Cure*, *supra*.

A pledge of firm securities for a loan to pay a firm debt may be made by a surviving partner.

*Butchart v. Dresser*, 4 DeG. M. & G. 545, 81 Eng. L. & Eq. 121.

There is no lack of authority over the assets of a dissolved firm, in the sole surviving member of the firm, after its dissolution by the death of his copartner.

*Williams v. Whedon*, *supra*; *Haynes v. Brooks*, 116 N. Y. 490; *Stewart v. Robinson*, 5 L. R. A. 410, 115 N. Y. 843; *Butchart v. Dresser*, 4 DeG. M. & G. 543; *Bradford Com. Bkg. Co. v. Cure*, L. R. 81 Ch. Div. 824.

12 L. R. A.

*Haight, J.*, delivered the opinion of the court:

This action was brought to set aside an assignment made by the defendant Henry R. Pierson, as survivor of the late firm of Henry R. Pierson & Son, to the defendant Robert C. Pruyn, for the benefit of creditors, upon the ground that it was fraudulent and void as against the creditors of the firm for the reason that it directed the payment to the National Commercial Bank of the sum of \$15,000. The referee has found as facts that Henry R. Pierson, the elder, died on the 1st day of January, 1890, leaving the defendant Henry R. Pierson, his son, as the sole surviving member of the firm; that the firm kept an account with the National Commercial Bank of Albany, in the name of Henry R. Pierson & Son, which was open and unsettled upon the books of the Bank on the 9th day of January, 1890, at which time the defendant Pierson made application to the Bank for the loan of \$15,000; that upon making such loan there was credited upon the books of the Bank to the firm the sum so loaned, and a note was given therefor, payable on demand, signed in the name of the firm by Henry R. Pierson, survivor; that \$10,150 thereof was subsequently drawn out of the Bank by the checks of the defendant Henry R. Pierson, signed by him as survivor, and the same was applied and used in the payment of the debts of the firm. The referee further found as facts that the purpose of said defendant Henry R. Pierson in applying for and obtaining such loan was to procure money with which to pay the obligations of the firm which had matured, or were about to mature and that the Bank understood such to be the purpose of the loan at the time of making the same; that the firm was in fact insolvent on the 1st day of January, 1890, at the time of the decease of the elder Pierson, but that such fact was not known to either the defendant Pierson or the National Commercial Bank at the time the loan was made. He further found as a fact that in inserting in the assignment the direction to pay the National Commercial Bank of Albany from the firm property the amount of the note, the defendant Pierson acted with intent to hinder, delay and defraud the creditors of the firm, but that at the time of making such assignment the defendant Pierson believed that such note was a firm obligation, or an obligation which was legally enforceable against the property and assets of the firm, and that he therefore was not morally chargeable with wrong in directing its payment out of the property of the firm; that the appropriation by him of the money borrowed of the Bank to the payment of the firm debts created a claim in his favor against the estate, which, before the assignment, could have been properly paid out of the firm's assets. As a conclusion of law he found that the debt created by the loan by the National Commercial Bank was the individual debt of the defendant Pierson, and not that of the firm; that the assignment was consequently fraudulent as to the plaintiff, and directed judgment accordingly. If the debt created by the loan be the individual liability of the survivor, and one that the firm ought not to pay, and the firm be insolvent, the survivor had no right in his assignment to direct its payment out

of the firm's assets, and by so doing the assignment was rendered fraudulent as to the creditors of the firm. *Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 N. Y. 146; *Second Nat. Bank v. Burt*, 98 N. Y. 233-245; *Bulger v. Rosa*, 119 N. Y. 459-465.

It thus becomes important to determine whether the loan contracted by the survivor became a firm obligation for the payment of which its assets may justly be applied. As we have seen, the note given upon procuring such loan bore the name of the firm and that of Henry R. Pierson, as survivor, but at the time that this note was given it was known to all the parties concerned that the senior member of the firm had died. The death of a partner puts an end to the copartnership, and there is no longer any power or authority of the surviving partners to carry on for the future a partnership trade or business, or to engage in new transactions, contracts or liabilities on account thereof. *Story*, Partn. §§ 842, 848; *Hall v. Lanning*, 91 U. S. 160-170, 23 L. ed. 271-274; *Farr v. Morrill*, 53 Hun, 81.

It is thus apparent that while the note in form would appear to create an obligation of the firm, it is at law unavailable as such, for the reason that there was no power in the survivor to make it; but it does not follow but that it is a claim which ought in justice and equity to be paid out of the firm's assets. If it is, the preference in the assignment would not be void, for the law will not declare fraudulent that which equity adjudges right and proper. *Denton v. Merrill*, 48 Hun, 224-229.

We must therefore consider whether there are equities which will support the claim of the Bank to be paid out of such assets. It is apparent that the money borrowed from the Bank by the survivor was for the purpose of paying the creditors of the firm the claims then matured and pressing. The amount of the loan was credited upon the open account of the firm with the Bank, and subsequently \$10,000 thereof or thereabouts was drawn out by the survivor upon his check, and used in payment of the liabilities of the firm. At the time this loan was made it was not supposed by the officers of the Bank or the surviving partner that the firm was insolvent, and no question is made but that both parties acted in good faith. The question is therefore presented whether a surviving partner may in good faith borrow money for the express purpose of paying the debts of his firm, and, by so applying the money borrowed, create an equity for the satisfaction of which the assets of the firm may properly be devoted. As we have seen, the survivor became entitled to the assets, which he had the right to sell, mortgage and dispose of in order to pay the debts and close up the affairs of the copartnership. If he had the power to sell or mortgage, it would seem to follow that he had the power to borrow and pledge the assets for the repayment of the loan; and, the amount borrowed having been faithfully applied in liquidation of the debts of the copartnership, equity will recognize the justness of the claim of the party making the loan. Cases may arise where the exercise of such authority may be highly expedient if not necessary, for the preservation of the rights of

creditors and persons interested in the distribution of the assets of the firm; as, for instance, creditors, may by levy expose the assets to a forced public sale under circumstances which would work great sacrifice to the estate. In case a survivor should be insolvent, he might be able to raise money by a pledge to repay out of the partnership assets when he could not obtain it upon his own credit. We do not see that harm could result to the other creditors by permitting this to be done, for it would not increase the obligations of the firm, or lessen their share in the distribution of the assets in case the firm be insolvent. It is not questioned but that the survivor had the right to turn out as a security or pledge the assets of the firm in payment for the money received by him. He could have sold the assets and repaid the money loaned at any time before executing the assignment, and without the taint of fraud. It is not apparent how the rights of the parties are changed and the act of the survivor made fraudulent by doing that in the assignment which he had the right to do immediately before executing it.

The precise question involved in this case does not appear to have been passed upon in any reported case, so far as we have been able to discover, except in *Haynes v. Brooks*, 8 N. Y. Civ. Proc. 106-113, where an assignment was made for the benefit of creditors by a surviving partner. In that case, as in this, the creditors had loaned money to the surviving partner to pay a note of the firm. *Van Vorst, J.*, in commenting upon the transaction, said: "If a firm obligation was retired by the use of the money loaned or advanced by Brown & Co. the surviving partner would have been entitled to be repaid out of the firm property. As the moneys of Brown & Co. in fact paid a firm obligation, I see no objection in the subrogation of them in equity to the rights of the surviving partner or to the regarding of them as entitled to be repaid out of the firm assets. That works injustice to no one." The learned judge concluded by ordering the complaint dismissed, thereby sustaining the validity of the assignment. This case was affirmed in the general term (42 Hun, 528), and in this court in 116 N. Y. 487. This question, however, was not considered in either of the appellate courts.

In *Ex parte Davis*, 5 Whart. 580, it was held that after the dissolution of a copartnership the partner authorized to settle the estate may borrow money on the credit of the firm for the purpose of paying its debts, and, if the credit be given in good faith, though with a knowledge of the dissolution, and the money borrowed be faithfully applied in liquidation of the debts of the partnership, the creditor has a claim against the firm assets, and is not to be considered as a creditor merely of the partner borrowing.

In the case of *Prudhomme v. Henry*, 5 La. Ann. 700, it was held that, where a liquidating partner after dissolution has borrowed money to pay the debts of the firm, the partnership is liable so far as the evidence shows that the money was used for the benefit of the firm. In the last two cases the partnerships were not insolvent, and the question arose as between the partners. The courts, however, recognized the claim of the lender as one which

ought to be paid by the partnership. In the case under consideration it is true that the partnership is insolvent, and the question arises as between the Bank and creditors of the partnership, but the creditors have not been harmed or prejudiced by the action of the Bank in loaning the money to the survivor, for the assets were increased in value to the amount of the loan, and the money drawn out of the Bank was applied in extinguishment of the claims of the creditors, thus reducing to that extent the liabilities of the firm. When a partnership is dissolved by the death of a partner the survivor is entitled to the possession and control of the joint property for the purpose of closing its business, and to that end and for that purpose he may, according to the settled principles of the Law of Partnership, administer the affairs of the firm, and by sale, mortgage or other reasonable disposition of the property make provision for meeting its obligations. He may, for that purpose, borrow money, and give a valid pledge of the copartnership property for its repayment. *Williams v. Whedon*, 109 N. Y. 883, 12 Cent. Rep. 227; *Emerson v. Senter*, 118 U. S. 3-8, 30 L. ed. 49-51; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 27 L. ed. 211; *Butchart v. Dresser*, 4 De G. M. & G. 542, 10 Hare, 458; *Bradford Com. Bkq. Co. v. Cure*, L. R. 31 Ch. Div. 326.

In *Case v. Beauregard*, 99 U. S. 119-124, 25 L. ed. 370, 371, Mr. Justice Strong, in commenting upon the rights of partners in a suit involving the marshaling of the assets, says: "The right of each partner extends only to the share of what may remain after payment of the debts of the firm and a settlement of its accounts. Growing out of this right, or, rather, included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity that partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have the privilege or preference, sometimes loosely denominated a 'lien,' to have the debts due to them paid out of the assets of a firm in course of liquidation to the exclusion of the creditors of its several members. This equity is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. *Rice v. Barnard*, 20 Vt. 479; *York County Bank's App.* 82 Pa. 446. But so long as the equity of the partner remains in him,—so long as he retains an interest in the firm assets as a partner,—a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce through it the application of those assets primarily to the payment of the debts due them whenever the property comes under its administration."

In the case of *Saunders v. Reilly*, 105 N. Y. 12, 7 Cent. Rep. 59, it was held that a mere general creditor of a firm, having no execution or attachment, has no lien whatever upon its personal assets. That, while firm creditors are

entitled to a preference over creditors of the individual members of the firm in the payment of their debts out of the assets in the course of liquidation, their equity is not held or enforceable in their own right, but is a derivative one, practically a subrogation of the equity of each individual partner to have the firm assets applied primarily to the payment of its debts; and where no such equity exists in favor of any member of the firm the firm creditors have none; and, therefore, where a judgment is recovered against all the members of a firm upon a joint obligation, but not an indebtedness of the firm, the firm property may be levied upon and sold on execution issued on the judgment. See also *Dimon v. Hazard*, 32 N. Y. 84; *Stanton v. Westover*, 101 N. Y. 265, 3 Cent. Rep. 189; *Kirby v. Schoonmaker*, 8 Barb. Ch. 46, 5 L. ed. 809; *Brown v. Higginbotham*, 5 Leigh, 588, 37 Am. Dec. 618; *Peyton v. Stratton*, 7 Gratt. 380; *Stebbins v. Willard*, 53 Vt. 665. It appears to us that the conclusion is warranted from the authorities referred to that where a person in good faith loans money to a surviving partner, and where the money is faithfully applied by such partner in satisfaction of the liabilities of the firm, the claim becomes one which in equity should be paid out of the assets of the firm; and in an accounting between the survivor with the personal representatives of the deceased partner equity will recognize the right of the surviving partner to have the money so borrowed and applied by him repaid out of the assets of the firm, and an assignment so directing is not fraudulent. Attention is called to the fact that the deceased partner left a will making the survivor his sole devisee and legatee, and it is claimed that he left no individual debts. If this were so, it is not apparent that it would affect the equities of the bank; but the evidence is silent upon the question as to whether or not the deceased left individual debts. The referee refused to so find, and we cannot assume that there were none. It may also be claimed that, the firm being insolvent, the survivor has no equities to which the Bank can be subrogated for the reason that he is liable individually for the payment of the firm debts. But the Bank is not asking for any relief by way of subrogation; it is only defending the provision already made for it in the assignment from the claim of fraud. Even though both the firm and the survivor were insolvent, the survivor still had the right to have his contract recognized, and to say which of the creditors should be paid first, and to so provide in his assignment. *Williams v. Whedon*, *supra*.

It follows that the judgment should be reversed, and a new trial granted, with costs to abide the final award of costs. All concur, except Vann, J., dissenting, and Potter, J., not voting.

Vann, J., dissents upon the ground that the note preferred in the assignment as a firm debt was simply the individual debt of the surviving partner, who, as he did not bind the firm in creating the debt, could bind neither it nor its property by directing payment out of the firm assets.



## WASHINGTON SUPREME COURT.

CITY OF OLYMPIA, *Appt.*,

v.

C. B. MANN.

(....Wash.....)

(November 21, 1890.)

**A**PPEAL by defendant from a judgment of the Superior Court for Thurston County overruling a demurrer to the complaint in an action brought to enjoin defendant from interfering with the erection by plaintiff of a wooden building within the fire limits established by a city ordinance. *Reversed.*

The facts are stated in the opinion.

*Messrs. Charles H. Ayer and B. F. Denison*, for appellant:

The charter gives the City power to make regulations for the prevention of accidents by fire.

This includes the power to establish "fire limits" and to prohibit the erection of wooden buildings therein.

*Green v. Cape May*, 41 N. J. L. 45; *Macdon v. Patty*, 57 Miss. 378.

The propriety and mode of exercising the power is a question solely for the legislative body exercising it.

*Knoxville v. Bird*, 12 Lea, 121, 47 Am. Rep. 336; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105.

Courts will not investigate the reasonableness of an ordinance unless the same is plainly and clearly unreasonable on its face.

*Horr & Bemis*, Mun. Pol. Ord. §§ 127, 129.

Courts refuse to interfere with the exercise of discretion by the municipality except in cases of gross abuse.

*Van Baalen v. People*, 40 Mich. 258; *Ex parte Delaney*, 43 Cal. 476; *Ex parte Smith*, 38 Cal. 709; *Dillon*, Mun. Corp. 94, 95.

**1. An ordinance establishing fire limits** within which wooden buildings cannot be erected is authorized by a city charter giving the city power to make regulations for the prevention of fire, provided such means are proper or necessary to the accomplishment of the end in view.

**2. Where a city is given power to make regulations for the prevention of fire** and the propriety or necessity of the methods to be pursued to accomplish that object is left to the discretion of the council the courts will not be warranted in setting aside as improper an ordinance adopting means which the council has by its acts declared proper.

**3. A court should not set aside a municipal ordinance for unreasonableness**, unless it is manifestly so on its face, or is based on fraud, or was passed in wanton disregard of private rights, or exceeded the power of the council.

**4. The reservation by a city council to itself**, in an ordinance establishing fire limits within which the erection of wooden buildings is prohibited, of the right to grant special permits for the erection of such buildings within such limits does not make the ordinance so unreasonable as to render it void.

(*Stiles, J., dissents from proposition 4.*)

**NOTE.**—Power of municipality to prescribe fire limits and prohibit the erection of wooden buildings therein.

In *Klinger v. Bickel*, 10 Cent. Rep. 381, 117 Pa. 326, Paxson, J., says: "No one at this day doubts the power of the Legislature to prohibit the erection of wooden buildings within the limits of a city or borough, nor that the Legislature may confer the same power upon municipal corporations such as cities and boroughs." See also *Com. v. Tewksbury*, 11 Met. 53.

The leading case upon the topic appears to be *Republica v. Duquet*, 2 Yeates, 493, which upheld a law directing the corporation of Philadelphia to pass ordinances to prevent the erection of wooden buildings in certain parts of the city as they might think proper.

As to what is necessary to invest a municipality with the power, there is some diversity of opinion. The two cases in which the question was first decided—*Wadleigh v. Gilman*, 12 Me. 403, and *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148—seem to directly conflict. The former holds that a city charter authorizing the common council to ordain and establish such acts, laws and regulations, not inconsistent with the laws of the State, as shall be needful to the good order of said body politic, would permit the passage of an ordinance prohibiting the erection of wooden buildings within certain limits. The following cases have held that the power to prevent the erection of wooden buildings was conferred by a general welfare clause, with the addition, perhaps, of special authority "to secure the prevention of fire": *Salem v. Maynes*, 123 Mass. 372; *Alexander v. Greenville*, 54 Miss. 669; *Ford v. Thrallkill*, 84 Ga. 169; *Charleston v. Reed*, 27 W. Va. 687.

*Hudson v. Thorne*, *supra*, on the other hand, held that charter authority "to adopt and establish such

regulations for the prevention or suppression of fires as might be necessary" did not confer authority to restrict the erection of wooden or frame buildings within the city. This decision was stated to be *obiter dictum* in the subsequent case of *Troy v. Winters*, 2 Hun. 64.

*Pye v. Peterson*, 45 Tex. 315, however, followed the doctrine hinted at in *Hudson v. Thorne*, *supra*, by holding that without an express grant of power a city cannot establish fire limits and declare wooden buildings erected therein to be nuisances. See also *Kneedler v. Norristown*, 100 Pa. 371; *Charleston v. Reed*, *supra*.

In the following cases the municipal charter or the general laws have been held sufficient to authorize the establishment of fire limits by the municipality. *Ex parte Fiske*, 73 Cal. 125; *McCloskey v. Kreling*, 76 Cal. 511; *Knoxville v. Bird*, 12 Lea, 121; *Hine v. New Haven*, 40 Conn. 473.

*Brady v. Northwestern Ins. Co.*, 11 Mich. 425, seemed to expand the doctrine a little, holding that the City of Detroit had power to pass ordinances establishing fire limits within which the rebuilding or repair of wooden buildings should be forbidden, although no charter authority is referred to and there is no intimation that such authority is necessary.

*Monroe v. Hoffman*, 29 Ia. Ann. 651, held that municipal corporations had inherent power, independent of legislative grant, to forbid the erection of buildings with combustible materials within the densely built-up parts of the town. This doctrine was cited with approval in *Baumgartner v. Hasty*, 100 Ind. 575.

The general question of the power to establish fire limits was raised in *Keokuk v. Scroggs*, 39 Iowa, 447, and denied under a charter fully as broad as many which other courts have held to confer such power, the court placing its ruling upon the

A municipal corporation has inherent power, independent of any legislative grant, to prohibit the erection of wooden buildings in the densely built-up parts of a city.

*Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 845; *Horr & Bemis*, Mun. Pol. Ord. §§ 221, 222; *Dillon*, Mun. Corp. § 89, and *note*; *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923.

Municipal corporations with power to provide for the safety of their inhabitants may establish "fire limits," and prevent erection therein of wooden buildings.

1 *Dillon*, Mun. Corp. § 405; *Wadleigh v. Gilman*, 12 Me. 408.

The council must necessarily exercise judgment and discretion in granting permits, and when this power is not clearly abused and made a pretext for doing a wrong to an individual, courts will not interfere with municipal discretion.

1 *Dillon*, Mun. Corp. § 94, and *notes*; *Van Baalen v. People*, *Ex parte De Laney* and *Barbier v. Connolly*, *supra*; *Soon Hing v. Crowley*, 118 U. S. 708, 28 L. ed. 1148.

Courts are bound to presume that the corporate authorities will properly exercise the discretion with which they are clothed, and that they had sufficient reasons for doing the act, the result of such discretion.

*Des Moines Gas Co. v. Des Moines*, 44 Iowa, 508, 24 Am. Rep. 756; *Dillon*, Mun. Corp. § 94, *note*; *Vanderbilt v. Adams*, 7 Cow. 349; *King v. Davenport*, 98 Ill. 305; *Monroe v. Hoffman*, 29 La. Ann. 651; *Salem v. Maynes*, 128 Mass. 372; *Brady v. Northwestern Ins. Co.* 11 Mich.

425; *Soon Hing v. Crowley*, 118 U. S. 708, 28 L. ed. 1145.

*Mr. J. W. Robinson and Cavanaugh & Fitch* for appellee.

*Anders, Ch. J.*, delivered the opinion of the court:

Appellee, being the owner of a vacant lot on Fourth Street, in Olympia, described as lot 1 in block 24 of the Town (now City) of Olympia, and being desirous of erecting thereon a two-story frame building to be used as store-rooms and offices, applied to the city council of said City, in accordance with section 8 of Ordinance No. 304 of said City, entitled "An Ordinance Defining the Fire Limits, and to Protect Property from Fire," approved April 24, 1889, for a permit to erect said building. The said lot being within the fire limits, as established by said ordinance, the city council refused permission to erect the proposed building, and notified appellee not to undertake the erection of the same. Appellee thereupon brought this action to perpetually enjoin and restrain the City and its officers from, in any manner, enforcing, or attempting to enforce, said ordinance against him or his employees laboring upon said building. In his complaint he alleges substantially, in addition to the facts above mentioned, that the boundaries of said fire limits, as fixed by said ordinance, are unreasonable, injurious and inequitable, and the same was passed with a desire to force brick and stone buildings on Fourth and Main Streets, and increase the value of neighboring property at the expense of those intending to

fact that the charter had been amended and the powers of the corporation restricted and defined.

The Louisiana court does not seem inclined to extend the doctrine of *Monroe v. Hoffman*, *supra*, for in *State v. Schuchardt*, 43 La. Ann. 48, without mentioning the former case, it held that a charter authority to prevent the reconstruction in wood of old buildings within the fire limits did not authorize the forbidding of necessary repairs to such buildings with the same kind of materials used in the original construction, in this case the use of shingles in repairing a roof.

*Reservation of power to permit building within the limits.*

The question as to the effect of a reservation of power to grant permits to build within the prohibited limits does not appear to have been directly passed upon.

There are some cases in which the question has been passed upon incidentally, as *Hine v. New Haven*, 40 Conn. 478, where an ordinance containing such a reservation was held justified by the charter, and *Welch v. Hotchkiss*, 39 Conn. 140, where the requirement of a license fee for the privilege of building within the prohibited limits was held proper.

*Newton v. Belger*, 3 New Eng. Rep. 725, 143 Mass. 598, held that statutory authority to pass such ordinances regulating the construction, material and use of buildings as are necessary "for the prevention of fire and preservation of life," did not justify the passage of an ordinance that "no person shall erect, alter or rebuild, or essentially change, any building or any part thereof for any purpose other than a dwelling-house, without first obtaining in writing a permit from the board of aldermen." The court said: The ordinance "does not merely forbid the erection of any building which

is hazardous or which exposes other property or persons to danger. It does not require the aldermen to adjudicate and determine that it is necessary to prohibit any proposed building for the purpose of securing the prevention of fire or the preservation of life. On the contrary it gives them the power, by refusing a permit, to prevent the erection of any building . . . for any reason which may be satisfactory to them. . . . They may refuse a permit because in their opinion it is desirable that certain parts of the city shall be used only for handsome dwelling-houses, and that all buildings for the purposes of trade should be excluded, though in no sense dangerous. . . . The ordinance is broader than the Statute in its scope, and cannot be justified as a reasonable exercise of the authority conferred by the statute."

Many of the ordinances contain the reservation clause (see *Keokuk v. Scroggs*, 39 Iowa, 447; *Klingler v. Bickel*, 10 Cent. Rep. 333, 117 Pa. 326; *Troy v. Winters*, 2 Hun, 68), while others do not. See *Ford v. Thrallkill*, 84 Ga. 109; *Douglass v. Com.* 2 Rawle, 232; *Kneidler v. Norristown*, 100 Pa. 368.

To bring certainty out of this uncertainty little help can be had from decisions on analogous questions. Even cases like *Ex parte Fluke*, 72 Cal. 126, and *King v. Davenport*, 98 Ill. 300, which held a reservation clause valid so far as it related to alterations and repairs in buildings already erected, are of little assistance since many reasons exist for permitting repairs which would not justify the erection of new buildings and the question whether alterations and repairs should be allowed could not be fixed by an inflexible rule without working much needless hardship, while it would seem that a rule with reference to fire limits and the erection therein of wooden buildings would be much more just if it was fixed so as to apply equally and uniformly in all cases

improve; and that since the passage of said ordinance, and the rejection of plaintiff's application for a permit, the said City has granted permits for the erection of wooden buildings within said fire limits, but not on Main or Fourth Streets, whereby the danger of conflagration has been much more increased than it would be by the erection of plaintiff's desired building; that said ordinance is null and void; that the said City had and has no authority to create or maintain fire limits; that the ordinance is void also for want of conformity to the city charter, and federal laws, even if the City had such power, that a court of equity should prohibit its enforcement; that the City has no authority to declare anything a nuisance, and only has authority to abate such nuisances as are known and defined by statute.

The complaint further sets forth the penalty prescribed by said ordinance for its violation, and avers that the defendant, the City of Olympia, through its marshal, threatens to arrest plaintiff, and all those who may be found at work on said building; that he has a large number of men employed and ready to commence work on said building, and that unless the City and its officers are restrained and prohibited from enforcing said ordinance plaintiff will suffer great and irreparable damage, for which there is no speedy or adequate remedy at law, and that the threatened arrests will create great and vexatious litigation. To this complaint the defendant filed a general demurrer, which was overruled by the court, and, defendant electing to stand upon the demurrer, judgment was rendered for plaintiff, from which defendant appeals to this court.

We are therefore called upon to decide the question whether the city ordinance complained of is or is not valid, or, in other words, whether the city council were legally empowered to pass it. This ordinance, after setting out the boundaries of the fire limits within the City, among other things, provides as follows: "Sec. 7. No wooden building shall be constructed within the fire limits, provided that the city council may grant permits to construct wooden buildings within the fire limits as hereinafter provided. . . . Sec. 10. Any person who shall erect, or cause to be erected, or assist in the erection of, any building contrary to the provisions of this ordinance, or shall maintain and refuse to remove any building erected contrary to the provisions of this ordinance for ten days after receiving notice to remove the same from the fire wardens, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and be fined in any sum not greater than \$100, or be imprisoned in the city jail not more than thirty days, or be both fined and imprisoned, at the discretion of the court."

This ordinance is assailed by counsel for appellee upon the ground that the city charter did not authorize its passage, and upon the further ground that it is unreasonable, or rather that the boundaries of the fire limits are "unreasonable, injurious and inequitable."

Among the powers granted to the City of Olympia by its charter, and which are relied on by appellant to sustain the ordinance in question, are these: "The City of Olympia shall have power to make regulations for the

prevention of accidents by fire, to organize and establish a fire department, and make and ordain rules for the government of the same; to provide fire engines, and other apparatus, and to levy and collect special taxes for that purpose; . . . to prevent, by all possible and proper means, danger or risk of injury or damages by fire arising from carelessness, negligence or otherwise; . . . to adopt proper ordinances for the government of the City, and to carry into effect the powers given by this Act; . . . and the City of Olympia shall have such other powers and privileges, not herein specially enumerated, as are incident to municipal corporations of like character and degree."

The learned counsel for appellee contends with much earnestness that, notwithstanding these legislative grants, the City had no power to enact the ordinance, for the reason that the powers, if any, conferred by the charter are general in their nature, and that a special grant of power is necessary to authorize the establishment of fire limits, or the prevention of the erection of wooden buildings within the City. To sustain this position counsel cites, among others, the following, as especially in point: *Keokuk v. Scroggs*, 39 Iowa, 447; *Pye v. Peterson*, 45 Tex. 812; *Kneedler v. Norristown*, 100 Pa. 368; *Champaign v. Harmon*, 98 Ill. 491, and *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148.

In the case of *Keokuk v. Scroggs* it appears that the original charter conferred a general power upon the city to make such ordinances as should be necessary to secure the city and its inhabitants from injury by fire. This charter was amended, and the amendment contained a full and specific enumeration of the acts which the city might do for the purposes of guarding against calamities by fire. In the enumeration of powers in the amended charter nothing was said about the control of wood or lumber yards. The defendant was prosecuted for the violation of that portion of the city ordinance relating to the location of lumber yards within the fire limits. And the court said: "The power to pass an ordinance requiring the removal of a lumber yard from a specified portion of the city is not expressly conferred in the charter, nor can it be claimed that it is necessary to make the power conferred available." And further that the general provision contained in the original charter has become absorbed in the particular enumeration in the amendment. "Therefore whatever power is conferred upon the city respecting fires must be found in the amendment to the charter." There being neither a general nor special power in the charter authorizing the city to enact the ordinance as to lumber yards, the court held no such power existed.

The case of *Pye v. Peterson*, 45 Tex. 812, was a case involving the validity of a fire ordinance. The charter provided generally that the city might have power to "ordain and establish such acts, laws, regulations and ordinances not inconsistent with the Constitution or laws of this State as shall be needful for the government, interests, welfare and good order of said body politic," also "to abate and remove nuisances and to punish the authors thereof by penalties, fine and imprisonment, and to define and declare what shall be nuis-

ances." And the court said that "without an express grant a city cannot establish fire limits, declare wooden buildings erected therein to be nuisances, and provide for the removal of such buildings and the punishment of those erecting them." And in this case the court also said: "The form of the ordinance indicates that it was framed under the latter clause." And the point really decided was that the council had no power to declare wooden buildings to be nuisances.

In the case of *Kneidler v. Norristown*, 100 Pa. 368, the court says: "The charter of the Borough of Norristown contains no authority to the council to enact ordinances prohibiting the erection of wooden buildings. Nor is there anything in the grant of general powers conferred upon the borough from which such an authority can be necessarily inferred or to which it is indispensable." But the court was apparently influenced in its decision by the fact that the Legislature had previously assumed jurisdiction of the subject, and had expressly enacted that wooden buildings should not be erected on certain streets of the town, which fact was a very strong reason for the conclusion that it had not delegated the power claimed to the borough itself. And further, the court seems to concede that if the power to enact the ordinance had been conferred by the charter of the borough, or could necessarily be implied from any of the provisions thereof, it would have been valid.

The controversy in the case of *Champaign v. Harmon*, 98 Ill. 491, arose out of a claim made by the city to certain real estate purchased by it at a tax-sale; and the court very properly held that, while the city had the power to purchase and hold real estate necessary for corporate purposes, it could not do so for the purposes of speculation without special power granted to that end.

The case of *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148, seems strongly to support the position of appellee. Other cases are also cited by counsel bearing more or less directly upon the point; but, in view of the provisions of the charter under consideration, and of the decisions of other courts of high standing and ability to the contrary, we do not feel bound by these decisions. In fact we do not think they are sustained by the better reason, or by the weight of authority.

Judge Dillon defines the powers possessed by municipal corporations to be (1) those granted in express terms; (2) those necessarily or fairly implied in or incidental to the power given; and (3) those essential to the declared objects and purposes of the corporation. 1 Dillon, Mun. Corp. 4th ed. § 89.

And taking this to be a correct statement of the law, it follows that if the charter of Olympia, either expressly or by necessary or fair implication, gave the city council authority to enact the fire ordinance, or if such power is essential to the declared objects and purposes of the municipality, then the ordinance ought to be sustained.

The power to do a particular thing may be, and often is, delegated to a municipal corporation in general terms, and these general terms may be quite as broad and comprehensive as if expressed in specific language. In the case 12 L. R. A.

before us, the city charter confers upon the City power to make regulations for the prevention of accidents by fire, and to prevent, by all possible and proper means, danger or risk of injury or damages by fire arising from carelessness, negligence or otherwise. And if these expressions of the Legislature did not expressly authorize the council to establish fire limits within the City, and to prevent the erection of wooden buildings therein, such power is certainly fairly implied in what is expressed, provided the means employed are proper or necessary to prevent accidents or danger or risk of injury or damage by fire. The propriety or necessity of the methods to be pursued to accomplish the object sought was left to the discretion of the council, who are the representatives of the people themselves, and who are the sole legislative body of the corporation. The council having by its acts declared the ordinance to be a proper one, we are of the opinion that this court is not warranted in setting it aside as invalid. In fact, it is held by learned courts and text-writers that municipalities have inherent power to pass ordinances for the protection of its citizens from fire, without express legislative authority. In a recent work upon the subject of municipal police ordinances we find this language: "The power to take all measures necessary to prevent fires and their spread is of prime importance to the citizens of every community. It belongs to that class of powers exercised for self-preservation, which are inherent in every municipality, and which do not need the authorization of an express grant. Every precaution possible should be taken to prevent the destruction to property and the danger to life incident to conflagration; and for this purpose as great a degree of interference with personal rights is permitted as under any other power. Private interests are entirely subservient to the public safety." "The first preventive step taken is usually to prescribe fire limits; that is, territorial limits within which it shall be unlawful to erect certain classes of buildings. This is always permissible." "Owing to the extreme importance of such regulations, and their vital interest to the community, one would hardly think that the power of erecting fire limits in a thickly built-up district would ever be denied; still it is surprising to note that two courts have insisted that express authority must exist for such regulations. It seems that their regard for personal rights had been carried to an unwarranted extent, in view of the importance of preventing the destruction of property by fire; and, great as our regard must be for their reasoning and conclusions, the rule above enunciated seems to be the true one, and the great majority of the well-advised decisions tends to its support." *Horr & Bemis*, Mun. Pol. Ord. §§ 281, 282.

In the case of *Wadleigh v. Gilman*, 13 Me. 408, the court held that an ordinance of the city government of Bangor prohibiting the erection of wooden buildings in the city within certain limits was within the authority conferred, under authority in the charter, "to ordain and establish such acts, laws and regulations, not inconsistent with the Constitution and laws of the State, as shall be needful to the good order of said body politic."

In *Alexander v. Greenville*, 54 Miss. 659, the

court held that a power "to provide for the prevention and extinguishment of fires" implies a right to establish fire limits.

In *Monroe v. Hoffman*, 29 La. Ann. 651, it was decided that a municipal corporation has inherent power, independent of legislative grant, to forbid the erection and compel the removal of buildings formed of combustible materials, within the densely built-up parts of a town. And in *Baumgartner v. Hasty*, 100 Ind. 575, after citing authorities sustaining the proposition that municipal corporations possess inherent power to prohibit the erection of wooden buildings within prescribed limits, and to cause their removal, at page 580, the court says: "These cases rest on solid principle; for the rule has always been that a municipal corporation has inherent power to enact ordinances for the protection of the property of its citizens against fire." And the court says further: "A legislative Act granting authority to take precautions against fire, and ordinances passed under such an Act authorizing the removal of wooden structures erected within forbidden limits, are little more than express declarations of the existence of powers which existed at common law, and are necessarily implied in the grant of a charter to a city." Page 581. See also 1 Dillon, Mun. Corp. § 405. We will not now stop to notice other cases cited by counsel to the same effect, as many of them are commented on and approved in the cases already mentioned by us.

It is further contended by counsel for appellee that the ordinance is unreasonable, and therefore void for that reason if for no other. This is a proper question for the court to determine. The city council, as the legislative body of the municipality; must of necessity be vested with more or less discretion as to the reasonableness of the means necessary to effectuate lawful objects. They are in a better position than the court to judge of the best course to pursue, as well as the methods best calculated to effect desired results, and the courts should not set aside or review their acts, unless, upon their face, they are manifestly unreasonable, or based upon fraud, or passed in wanton disregard of private rights, or are in excess of the power of the council. The motives of the council cannot be inquired into, but must be presumed to have been to accomplish the natural and reasonable result of their act. We see nothing unreasonable in the ordinance, viewed in the light of all the facts before us. Its burdens, if any, are cast alike upon all persons within the limits of the district prescribed by it, and the city council had lawful authority to pass it. We cannot see that it is unduly oppressive, or that it discriminates against any particular individual, or that it was passed in a spirit of wanton disregard of proprietary rights.

For the foregoing reasons, the judgment of the court below will be reversed, and the cause remanded for further proceedings in accordance with this opinion. So ordered.

**Hoyt, J.**, concurs.

**Scott, J.:**

I concur in all that is said in regard to the power of the City of Olympia to establish fire

limits, and concur in the result reached, because it appears to me the question as to the invalidity of the ordinance upon the ground of its unreasonableness is not properly before us in this case. I do not think, however, a municipality has the power, or can have it even by express legislative enactment, to grant or refuse permission at its pleasure to erect wooden buildings within a fire-limit district where the same are prohibited by the ordinance, although an attempt is made therein to except cases where the city council should see fit to grant a special permit, unless certain rules, regulations or conditions are laid down by ordinance which apply to all persons alike, and are conclusive in themselves; that it cannot exercise the arbitrary power to grant such a permission to one person and refuse it to another under like conditions and circumstances. As to whether any of the provisions of this ordinance have this effect, or might be so applied, and if so whether the entire ordinance is thereby invalidated, or rendered void only in so far as it relates to the granting of such special permits, and be otherwise valid, which would prohibit the erection of all wooden buildings within the prescribed district without exception, I desire not to express an opinion in the absence of an argument of the particular questions. Powers granted to a municipality must be reasonably and fairly exercised, and its laws made applicable to all alike. The attempted enforcement of power and the unreasonableness and injustice of ordinances whereby a different result could be brought about, or this principle violated, can be inquired into to this extent at least. There was no attempt to attack the ordinance upon this ground in the complaint, but it is alleged to be void because the boundaries of the fire-limit district as fixed therein are unreasonable, without stating the facts wherein such unreasonableness consists.

**Stiles, J.:**

I dissent. No objection was made upon the argument here to the discussion of the question as to the equality and fairness of sections 7-9 of the Ordinance which it was assumed was raised by paragraph 7 of the complaint, and to my mind those sections set up such a system of arbitrary control of buildings in the City of Olympia by the council as is not entitled to be termed reasonable. The establishment of fire limits means the designation of a territory within which wooden buildings must not be erected. But this ordinance, while it designates limits, and says that no wooden buildings shall be constructed therein, clearly shows by its context that that was not its real purpose. The true purpose of it was to compel every person desiring to erect a wooden building to go before the council, which retained within itself the power to say whether he should erect it or not, not according to any fixed rules of determination, under which all applicants would be treated alike, but without rules or regulations whereby favoritism, or influence, or other motives not proper to the determination of such a question, might enter into and actually determine it. If there were to be exceptions to the ordinance, the exceptions should have been declared, and regulations made under which they could have been availed of. If there was ter-

ritory embraced in the ordinance within which it was not expected to enforce the ordinance, by reason of its unsettled condition, it was unreasonable to so embrace it, and the limits should not have been extended over it until such time as the conditions were proper for such extension. I concur in holding that the

City of Olympia has the power to ordain fire limits implied in its charter; but I cannot agree that such an ordinance was ever contemplated by the Legislature, and therefore hold the court's action in overruling the demurrer to have been eminently right.

### GEORGIA SUPREME COURT.

E. LYONS, Treasurer of Antioch Baptist Church, *et al.*, *Piffs. in Err.*,

v.

PLANTERS' LOAN & SAVINGS BANK.

(.....Ga.....)

- \*1. **Demurring generally** to the plaintiff's petition is pleading to the merits. After appearance at the first term, and demurring generally at a subsequent term, it is too late to raise the question of service by motion or otherwise.
2. **The omission of a prayer for process** is amendable, and is waived by appearance and pleading.
3. **The original petition contained enough** to amend, by, and the amendment allowed was proper.
4. **The petition as amended embraced a cause of action.** A promissory note given by the trustees and officers of a church, and a suit thereon prosecuted to judgment against the makers, will not necessarily extinguish a debt of the church for which it was given. The question of fact whether it was given in payment, or as collateral only, remained open.
5. **A church site and edifice may be sold** to pay the salary of the pastor. In contemplation of law, justice is not only a cardinal, but the pontifical, virtue.
6. **It is doubtful whether the Fourth Equity Rule**, touching exhibits to pleadings, is applicable in its full force, since the Act of 1887, establishing uniformity in pleadings. Whether so or not, the right result of a case on its merits will not be disturbed because the record of a judgment referred to in the petition was not copied and annexed as an exhibit.
7. **Where the material fact in controversy is only the existence of the debt**, the judge may decree the appropriate equitable relief under the allegations of the pleadings and the admissions of the answer, upon a verdict of the jury finding in favor of the plaintiff, so much for principal and so much for interest. The decree rendered in this case that the church property be sold by the sheriff, the proceeds applied to the debt, and the surplus, if any, turned over to the trustee, was proper.

(December 31, 1890.)

**ERROR** to the Superior Court for Richmond County to review a judgment in favor of plaintiff in an action brought to subject church property to the payment of a debt due by it to a former preacher for unpaid salary. *Affirmed.*

The facts are stated in the opinion.

\*Head notes by BLECKLEY, *Ch. J.*

12 L. R. A.

*Messrs. Twigg & Verdery* for plaintiffs in error.

*Messrs. Charles Z. McCord, Leonard Phinney and Foster & Lamar* for defendant in error.

**Bleckley, Ch. J.**, delivered the opinion of the court:

1. The first thing is the question of service. If the defendants below were not before the court in a way to bind them, and if they presented that objection in due time and manner, what was done as the outcome of the proceedings would have no final result. The complaint as to service was that, although there was a subpoena annexed to the original bill, there was no copy of that subpoena served on the defendants, copies of the bill only being served. The case was returnable to the October Term, 1888. At the appearance term, the names of counsel for the defendants, as appearing in their behalf, were entered on the bench docket. On April 12, 1890, the defendants demurred to the petition, "because said petition, and the matters therein contained, in manner and form as therein stated and set forth, are not sufficient to constitute a cause of action," and on several special grounds, one of which was "because there is no copy process annexed to any of the copy petitions served upon defendants." The special demurrer was not sworn to so as to entitle it to stand or be treated as a dilatory plea, in which character it would have to be sworn to. Code, § 8456. Of course, such an averment, as a ground of special demurrer, was no more than blank paper, for no such defect as want of process, annexed to the copy petitions served on defendants, appeared upon the face of the petition or elsewhere in the record. To demur generally to a petition as presenting no cause of action is to plead to the merits of the case. Here, then, was appearance and pleading to the merits, which under the Code was a waiver of service,—a waiver which would have been effective had there been no process even to the original petition nor any service whatever. Code, § 8335. After this it was too late to raise the question of service, whether by motion or by plea, for why should the defendants invoke the judgment of the court on the cause of action by demurrer, unless they were to be bound by that judgment when rendered? The demurrer was overruled on the first day of the April Term, which was the 21st of April, 1890, "upon petitioner's properly verifying the petition and amendments." This condition was complied with on the 29th of April, and not until the previous day was any separate motion made to dismiss, because no copy process was attached to the copy petitions served

upon the defendants. An additional ground of the motion then made was because the sheriff failed to serve the defendants personally with a copy of the petition. This motion was too late, as coming after pleading by general demurrer to the whole action. It follows that there was no error in treating the defendants, in all the subsequent proceedings, as properly in court.

2. We think this was true, although there was no prayer for process either in the original or amended petition, since all such defects are now amendable. Code, § 3479. And inasmuch as amendment may be made at any stage, even after verdict, amendable defects are waived by appearance and pleading.

3. The next question is as to the allowance of an amendment to the plaintiff's petition, the amendment being objected to as introducing a new cause of action, and for the further reason that the original petition contained nothing to amend by. Without going fully into the contents of either, we may state, in general terms, that the original petition, although very meagre, set up a claim to have the church property in question applied to the payment of a debt which the church owed to a former pastor for services as a clergyman. It alleged that this debt was evidenced by a promissory note executed by the trustees and officers of the church, in pursuance of a resolution passed by the church, which note had been indorsed by the payee, and that suit in favor of the plaintiff was then pending upon the note in the City Court of Augusta. An injunction was prayed for, the object of which was to prevent any disposition of the church property before the result of that suit should be reached, and to hold the title of the property *in statu quo* until the further order of the court, the legal title being in the Perkins Manufacturing Company and the equitable ownership in the church. The amendment amplified the statements as to the debt; alleged it to be the debt of the church; averred that the suit on the note had been litigated, had resulted in a judgment in favor of the plaintiff; that the defendants in that suit were personally insolvent, and that the *fi. fa.* founded on the judgment had been returned *nulla bona*. It prayed that the church property be subjected to the debt as the debt of the church, and called for equitable intervention because the legal title was not vested in the church, nor in the defendants in the common-law judgment. It treated that judgment as against the officers and trustees of the church, in their personal and individual character, and not in their character of trustees and officers, the theory of the plaintiff evidently being that the note was not given in satisfaction or extinguishment of the debt which the church owed to its pastor, but only as collateral security for the same. The original petition had subverted its immediate purpose when the amendment was offered. It had kept the title to the church property *in statu quo* until the common-law suit had proved fruitless. But it had a further object, which was to render that property available for payment of the debt in case payment should not be realized out of the collateral note and the suit predicated thereon. The petition was therefore a foundation on which to build by amendment,

in case further equitable proceedings should become necessary, and this contingency was realized when the makers of the note, at the end of legal process against them, proved insolvent. The matter of the amendment was thus proper material for a supplemental bill, and, by our Code, § 4181, could be brought in by way of amendment. We hold, therefore, that the court did not err in allowing the amendment.

4. The amendment which we have discussed was filed on the 18th of April, 1899, nearly one year before the demurrer was interposed. Did the petition, as amended, present a cause of action? The parties before the court were the Bank (the indorsee of the note given by the officers and trustees of the church) as plaintiff, and the church, represented by the trustees, the Perkins Manufacturing Company, together with the indorser, the original payee of the note, as defendants. Thus all the parties interested in the original contract between the church and its pastor, and in the ownership of the note which grew out of that contract, were represented. If that note was given and taken, not in extinguishment of the church debt, but merely as collateral, neither the note itself nor the suit and judgment thereon in the city court would operate as a discharge of the debt. *Wyllie v. Collins*, 9 Ga. 224.

The petition treats the debt as still subsisting, and as one to be paid by the church, now that the collateral security has been prosecuted to a return of *nulla bona*. This security is both legally and equitably the property of the Bank, the Bank having purchased it for value. Such being the case, the Bank has the equitable ownership of the debt owing by the church, the collection of which out of the church property is the ultimate object of this action. The question of fact whether the note was given in discharge of that debt or only as collateral security for it would be for determination by a jury, and that question, we may assume, was properly submitted to the jury on the trial which finally took place.

5. Treating the debt as unpaid, can the church edifice and the premises on which it stands, the same being a city lot in the City of Augusta, be subjected by a court of equity, or rather by a court of law exercising equitable powers, to its payment? The church, as an organization, is the Antioch Baptist Church, and the equitable ownership of the property is in it, or in the trustees, which represent it in this action. The formal legal title is outstanding in the Perkins Manufacturing Company, which once had claims upon the premises as security for a debt now satisfied. Here, then, is a debtor having some property, perhaps sufficient property to discharge the debt. Why should it not be so applied? If any debt ought to be paid, it is one contracted for the health of souls,—for pious ministrations and holy services. If any class of debtors ought to pay, as matter of moral as well as legal duty, the good people of a Christian church are that class. No church can have any higher obligation resting upon it than that of being just. The study of justice for more than forty years has impressed me with the supreme importance of this grand and noble virtue. Some of the virtues are in the nature of moral luxuries, but this is an abso-



lute necessary of social life. It is the hog and hominy, the bacon and beans of morality, public and private. It is the exact virtue, being mathematical in its nature. Mercy, pity, charity, gratitude, generosity, magnanimity, etc., are the liberal virtues. They flourish partly in voluntary concessions made by the exact virtue, but they have no right to extort from it any unwilling concession. They can only supplicate or persuade. A man cannot give in charity or from pity, hospitality or magnanimity, the smallest part of what is necessary to enable him to satisfy the demands of justice. It is ignoble to indulge any of the liberal virtues by leaving undischarged any of these imperative demands against us. On the credit side of justice we can make any sacrifice of it that we will, but on the debit side we can make none whatever. I may burn as an offering my own bull or lamb, but not that which rightfully belongs to another owner. There is nothing more exalted than a strict duty and its performance. What we freely give cannot be better bestowed than what we pay in discharge of a perfect obligation. The law grants exemptions of property to families, but none to private corporations or collective bodies, lay or ecclesiastical. These must pay their debts if they can. All their property, legal and equitable, is subject. *Atlanta v. Grant*, 57 Ga. 846.

We think a court may well constrain this church to do justice. In contemplation of law, justice is not only one of the cardinal virtues, it is the pontifical virtue. Certainly it is an energetic measure to sell the church to pay the preacher; nor would it be allowable to do so if other means of satisfying the debt were within reach. But the plain implication from the facts alleged is that the church has no assets other than this property, and, on looking into the answer, we find that the answer makes no suggestion of any other assets.

6. Touching that ground of the demurrer which points out specially that the plaintiff has failed to annex to the petition a copy of the record upon which the common-law judgment therein referred to is founded, we need say but little. It is doubtful whether, since the Act of 1867 for uniformity of pleading in the superior court, the strict equity rule for attaching exhibits any longer applies. As to how that rule, while in force, was applied, see *Demers v. Soranton*, 8 Ga. 48; *Hollday v. Riondon*, 12 Ga. 417; *Groce v. Field*, 18 Ga. 24; *Brown v. Rodney*, 16 Ga. 67; *Miller v. Saunders*, 18 Ga. 493; *Behn v. Young*, 21 Ga. 207; *Howard Mfg. Co. v. Water-Lot Co.* 39 Ga. 574, 58 Ga. 689; *Patterson v. Turner*, 62 Ga. 874; *Graham v. Dahlonaga G. Min. Co.* 71 Ga. 296; *Millbank v. Penniman*, 78 Ga. 186.

It may be observed that the Fourth Equity Rule, as it stands in the Code (page 1854), seems to omit the word "other" in the second line, as will appear from a copy of the Seventeenth Equity Rule in 2 Ga. 484. It may be that, under the new Act, there ought to be some degree of conformity to the rule in pleading all material records and documents referred to in the petition. But where a case has had a right result in the court below on the merits, we do not feel called upon to reverse the judgment simply because that court may have been too liberal to one of the parties in dispensing

with the formality of annexing exhibits to the pleadings. There is no probability that the defendants were unacquainted with the contents of the record in the common-law case, or that they suffered any substantial injury or disadvantage in the omission to set it out as an exhibit.

7. The verdict of the jury was as follows: "We, the jury, find verdict for plaintiff, principal \$278.75, interest \$97.60." On this verdict the court entered up a decree to the effect that the debt is that of the Antioch Baptist Church; that the property is subject thereto; that the debt be a lien upon it; that the sheriff levy upon it, under and by virtue of the decree, expose it for sale according to law, and execute title to the purchaser; that out of the proceeds of the sale the debt and all costs be discharged, and that the overplus, if any, be paid over to the trustees of the church; also that the defendants be perpetually restrained and enjoined from disturbing or in any way interfering with the title of said property, or the sale thereof, until the debt and costs be paid off and discharged. This decree is excepted to as going beyond the verdict, and as being unwarranted thereby in the light of the pleadings. On looking into the answer, we find that it raised but one material issue, the other material facts being expressly or by fair implication admitted. The answer insisted that the note on which the judgment at law was recovered was given and received in full satisfaction and extinguishment of the debt due from the church to the pastor for his services, and that the note was executed by the makers as individuals, and not as officers of the church; also that they were sued as individuals, and judgment recovered against them accordingly. The jury having found in favor of the plaintiff, they must necessarily have determined that the note was not given in extinguishment of the debt. This was enough to warrant the court in decreeing appropriate relief, adapted to the allegations of the petition and the admissions of the answer. We fail to perceive that the relief awarded was inappropriate or otherwise illegal. The decree devotes the property to the payment of the debt, by judicial sale through the sheriff, and directs the surplus proceeds, if any, to be paid over to the trustees of the church. We think the decree, as a whole, was a proper one.

*Judgment affirmed.*

BAIRD et al., *Piffs. in Err.*,  
v.

BROOKIN

(....Ga....)

\* Where a deed conveyed land to A., as trustee for B. and her children (B. having at the time of its execution no children),—*Held*, that the children of B., born subsequently to the execution of this deed, took no interest thereunder.

(February 23, 1891.)

ERROR to the Superior Court for Bibb County to review a judgment in favor of

\*Head note by LUMPKIN, J.

defendant in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

*Messrs. W. M. Wimberly and Bacon & Rutherford* for plaintiffs in error.

*Messrs. Depau & Bartlett and R. W. Patterson* for defendant in error.

**Lumpkin, J.**, delivered the opinion of the court:

Maria E. Shivers, by a deed dated December 18, 1862, in consideration of \$2,000, conveyed certain land to Charles H. Baird, trustee for Josephine Baird and her children, "to have and to hold . . . to the only proper use, benefit and behoof of him, the said Charles H. Baird, in special trust for the sole and separate use of Josephine Baird and her children, his heirs, executors, etc., in fee simple." At the time this deed was executed no children had ever been born to Mrs. Baird, but since then she has become the mother of several children. This case was submitted to the judge below upon a construction of this instrument, the question being whether or not these children of Mrs. Baird, born after the execution of the deed, took any interest thereunder in the property. The court below held that they did not, and in accordance with this opinion directed a verdict for the defendant. It is conceded that, if the court's construction of the deed was right, the verdict was proper; otherwise it was not. We are of the opinion that the ruling of the court was correct. This court has already decided, in the case of *Lofton v. Murchison*, 80 Ga. 391, that "a will, made and probated in the year 1847, by which the testator devised to his daughter certain land, 'to her and her children, free from the disposition of any future husband' (the daughter then having no children), conveyed to her an absolute fee; and children born to her after the testator's death took no estate under the will by way of remainder or otherwise."

The case of *Wiley v. Smith*, 3 Ga. 551, was one where a testator devised property to his executors, in trust for his son, William Brantley, and his children (William at the time having no children) with devise over to the heirs named in his will upon William dying without having a child or children; and it was held that William took an estate tail, with remainder to the heirs named in the will, and this, of course, under our Statute, made a fee simple in William, the first taker. A devise to "A's children, their heirs and assigns forever," vests the title to those *in esse* at the death of the testator. *Wood v. McGuire*, 15 Ga. 208.

Upon a deed conveying land to Mills, trustee for Mrs. Mills and her children in fee simple, it was held that Mrs. Mills and her children then in life took the land as tenants in common, and that it did not go to her during her life, with remainder to her children. *Loyless v. Blackshear*, 48 Ga. 327.

Where a deed was made by A, conveying property to the heirs of B (the latter then having three children *in esse*), the title passed to those three children, and after-born children of B took no interest. *Tharp v. Yarbrough*, 79 Ga. 382.

The case of *Estill v. Beers*, 82 Ga. 612, was 12 L. R. A.

one in which a deed from Gazaway B. Lamar conveyed property to G. de Rosset Lamar, in trust for himself and his three sisters (naming them), the portions of the sisters to be settled upon them, so as not to be responsible for the debts of any husband they might have, "but for the sole use, benefit and advantage of each of these sisters and their child or children." At the date of this deed one of the sisters had one child, and the others had none. In that case the precise point ruled was that the child in existence when the deed was made took an interest, as tenant in common, with his mother; but *Chief Justice Bleckley* also remarked that "the daughters who had no child or children took an estate severally to themselves in fee simple." While this remark was *obiter*, it shows the bent of the court's mind at the time, and is now adopted as sound law. The head note in that case is manifestly incorrect, as even a casual reading of the case will show. In addition to what it contains, it should also be made to recite that the conveyance was to G. de Rosset Lamar, in trust for himself and his three sisters, and, as to the latter for the sole use, etc., "of them and their child or children." In *Wild's Case*, 6 Coke, 17, the second head note is as follows: "A devise to B, and to his children or issues, B having no issue at the time of the devise, is an estate tail; otherwise when he has issue at the time;" and these comments are made thereon: "And therefore this difference was resolved for good law: that if A devise his lands to B and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the deviser is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore there such words shall be taken as words of limitation, *scilicet*, as much as children or issues of his body, for every child or issue ought to be of the body; and therewith agrees a case, Trin. 4 Eliz., reported by *Sergeant Bendloes*, where the case was that one devised land to husband and wife, 'and to the men children of their bodies begotten,' and it did not appear in the case that they had any issue male at the time of the devise; and therefore it was adjudged that they had an estate tail to them and the heirs males of their bodies; but if a man devises land to A. and to his children or issue, and they then have issue of their bodies, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary." Following *Wild's Case*, and citing it as authority, is the case of *Byng v. Byng*, 10 H. L. Cas. 170, where it was held that "when there is a devise of land to A and his children, and at the time of the devise he has no child, the word 'children' is *prima facie* a word of limitation, and the first taker shall have an estate tail." In this case concurring opinions were delivered by *Lord Chancellor Westbury* and *Lords Cranworth* and *Kingsdown*, all upholding the rule in *Wild's Case*, and reaffirming the doctrine therein stated, as expressed above. See also *Sweetapple v. Emdon*, 2 Vern. 536.

The learned counsel who so ably argued this case for the plaintiff in error undertook to take it out of the rule in *Wild's Case* on three grounds: (1) because the instrument now under consideration is a deed, and not a will, and for this reason a different rule of construction should be applied; (2) because in the deed from Mrs. Shivers a trustee is appointed, and the conveyance made to him, instead of Mrs. Baird and her children directly, whereby the estate might be preserved till children should be born; and (3) because, as he argued, it was a reasonable inference, from the terms of the deed itself, that the maker intended to include in its benefits the after-born children of Mrs. Baird. Taking these propositions in their order, we will first discuss whether or not it makes any difference that the paper in question is a deed instead of a will. Under our system we do not think this fact should vary the rule of construction. In the several chapters of our Code relating to the creation of estates, it seems immaterial whether those estates are made by will or by deed. I refer especially to section 2250, which treats of gifts or grants such as would, under the common law, create estates tail, without making any distinction as to whether such estates are created by deed or will. It is true that the deed before us was made a short time before the Code went into effect, but our understanding is that many of the various sections of the Code in the chapters above referred to simply embody the spirit of our law as it was understood and enforced before the adoption of the Code. In support of this I quote from the opinion of *Chief Justice Lumpkin* in *Skumate v. Williams*, 84 Ga. 249: "The presumption is a fair one that the Code correctly renders the substance of all statutes then [that is, at the time of its adoption] in force, except where modification plainly appears. It would be making a too limited use of this great book to consult it only for the present state of the law, overlooking the fact that, while it introduces numerous changes, it is mainly a declaratory exposition, in a concise and systematic form, of the body of laws, common and statute, which the codifiers found already established. One of its prime objects was to clear up obscurities and resolve doubts. It speaks to us of the past, as well as of the present and future; not, it is true, in the same imperative voice, but with that mitigated authority which belongs to legislative interpretation, led and directed, in this instance, by the professional ability both of the codifiers themselves and of the committee of lawyers who, after scrutinizing their work, approved and recommended its adoption." Another view of this question may be submitted. Children and grandchildren being the natural objects of a testator's affections, it is to be supposed that in the making of his will he usually bears them in mind, and desires them to share in and enjoy his bounty. This is manifest from the large number of wills providing, in one way and another, for the testator's descendants. Deeds are contracts, in the making of which both contracting parties are supposed to take care of themselves; and where a grantee intends to contract for the benefit of his children as well as of himself, having the same natural desire in their behalf as in case of a testator

making a will, and being a party to the instrument, he has the opportunity to secure the end desired by having the deed speak its real purpose plainly and unmistakably. It would seem, then, that no rule more favorable to the interests of children ought to be allowed in the one case than in the other. We have seen what construction has been uniformly put upon wills containing language like that in the deed before us; and, on general principles, we can see no good reason why such deeds should not be similarly treated. Indeed, it will be observed that in several of the cases above cited the instruments construed were deeds, and yet no distinction was made in any of them because the paper under consideration was a deed, and not a will. In the second place, we do not see that the interposition of a trustee should change the rule. In the cases above cited from 8 Ga., 43 Ga., and 82 Ga., the titles were put in trustees. The instruments construed in all these cases were made prior to the passage of the Act of 1866, known as the "Woman's Law," by which the property of married women was vested in them as their separate estates. In the case cited from 43 Ga. it is fair to presume, and in that cited from 82 Ga. it plainly appears, that the conveyance of the property to a trustee was for the purpose of protecting it from the marital rights of the husband. The deed now under consideration was made in 1862, and it is quite as reasonable to conclude that the conveyance was made to a trustee in order to protect the property from the marital rights of Mrs. Baird's husband, as that this was done to preserve the estate for the benefit of children yet to be born; and, this being true, the presence of the trustee in the deed may as well be accounted for upon the one theory as the other. As *Chief Justice Bleckley* remarked, discussing another question, in the case above cited from 80 Ga.: "When a third thing is equally compatible with either of two others it affords no reason for inferring one of the two rather than the other." Hence, we conclude that a deed of this kind should be treated and construed exactly as if no trustee had been interposed, and the decisions of this court to which we have above referred seem to justify this conclusion. In the last place, in reference to the well-settled doctrine that all rules of construction should yield to the manifest intention of the maker, this should only be done when such intention may be plainly and easily gathered from the instrument itself. An examination of the cases in which the courts have sought to follow the intention of the maker of an instrument, without resorting to rules of construction, will show that in almost every instance there were superadded words which plainly indicated what the intention was.

In the case of *Toole v. Perry*, 80 Ga. 681, cited by counsel for the plaintiff in error, it was held that a devise to the testator's daughters and their children would not only include children in life at the death of the testator, but also others born after his death by the daughter's first husband, and others still by a second husband, whom she married after the testator's death. But *Justice Blandford*, in delivering the opinion, said distinctly that this conclusion was reached by the court because from the language used in the will itself it must have

been the intention of the testator to include all the children of his daughters, no matter when they might be born; and this statement is based upon the fact that in this particular will the testator referred to the present or any future husbands of his daughters, and declared that the husbands of those under coverture when the will took effect should be the trustees, respectively, of the portions given to their wives and children.

In the cases of *Brady v. Walters*, 55 Ga. 25, and *Boyd v. England*, 56 Ga. 598, the deeds contained the words, "children born and to be born," and, of course, in these cases the intention was clear, because it was plainly expressed. So in *Chess Carley Co. v. Purtell*, 74 Ga. 487, this court held that the words "her present heirs" manifestly meant the children of Mrs. Purtell then living, and ruled the case on the idea that the intention was plain. In the

deed from Mrs. Shivers there were no super-added words or other expressions to take the case out of the rule in *Wild's Case*. It is simply a plain deed, in the usual form of such deeds, and no more, with nothing in the context outside of the conveying clauses to aid in arriving at the intention of the paper. We think it has been clearly shown that if this paper was a will there would be no question at all as to the propriety of applying the rule stated; and, as we have undertaken to show that the same rule should be applied to both wills and deeds, it follows that the children of Mrs. Baird, born subsequently to the execution of this deed, could take nothing thereunder, but the fee was absolutely vested in the first taker.

*The judgment of the court below is therefore affirmed.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

Edith L. HOWARD  
v.  
CITY OF WORCESTER.

(.....Mass.....)

**Negligence in blasting for the construction of a schoolhouse**, the work being purely for the benefit of the public, cannot create any liability against a city, unless by force of some statute.

(April 1, 1891.)

**EXCEPTIONS** by defendant to rulings of the Superior Court for Worcester County made during the trial of an action brought to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servant, in which a verdict was rendered in plaintiff's favor. *Sustained.*

Plaintiff was traveling upon a highway in defendant City when her horse was frightened by blasting performed under the direction of one Kenney in excavating for the foundations of a public school building. The trial court refused to direct a verdict for defendant, but submitted the case to the jury, who found for plaintiff, and defendant alleged exceptions.

**Mr. Frank P. Goulding**, for defendant:

The case is within the principle of—

*Hill v. Boston*, 122 Mass. 344; *Tindley v. Salem*, 187 Mass. 171; *Fisher v. Boston*, 104 Mass. 87; *Hafford v. New Bedford*, 16 Gray, 297; *Mower v. Leicester*, 9 Mass. 247; *White v. Phillipston*, 10 Met. 108, 110; *Bigelow v. Randolph*, 14 Gray, 541; *Doherty v. Braintree*, 148 Mass. 495; *Benton v. Boston City Hospital*, 140 Mass. 18; *Prince v. Lynn*, 149 Mass. 193; *Clark v. Waltham*, 128 Mass. 567.

A town is not liable for the negligence of its agents or servants in a matter in which it has no interest, and which has no direct or natural

tendency to injure any individual in person or property, and which it has in charge solely in the performance of a public duty imposed upon it by law.

*Neff v. Wellesley*, 2 L. R. A. 500, 148 Mass. 487, 493.

**Messrs. F. A. Gaskill and Blackmer & Vaughan**, for plaintiff:

Chief Justice Gray, in *Hill v. Boston*, 122 Mass. 358, very clearly illustrates the limit of the exemption of cities from liability for injuries to individuals: "In such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it was intended, but it is the doing of a wrongful act, causing a direct injury to the property of another, outside of the limits of the public work."

The use of explosives, dangerous in themselves and liable to escape from the premises, used so near the highway, "had a direct tendency to injure the person or property of another." The City knew that such means were to be used.

At their peril they must keep the dangerous substance or its results from escaping and injuring others.

*Deane v. Randolph*, 132 Mass. 475; *Tindley v. Salem*, 187 Mass. 171; *Waldron v. Haverhill*, 3 New Eng. Rep. 683, 143 Mass. 582.

**C. Allen, J.**, delivered the opinion of the court:

The City contends that, even assuming that Kenney was its servant in such a sense that ordinarily it might be responsible for his acts or negligence, it is nevertheless exempt from responsibility to the plaintiff in the present case by reason of the nature of the work which it was carrying on, namely, the construction of a schoolhouse for public use. It was held in the familiar case of *Hill v. Boston*, 122 Mass. 344, that a city is not responsible in damages to a

NOTE.—As to liability of municipality for negligence, see notes to *Anderson v. East* (Ind.) 2 L. R. A. 712; *Neff v. Wellesley* (Mass.) 2 L. R. A. 500; *Lin-12 L. R. A.*

*coin v. Boston* (Mass.) 3 L. R. A. 257; *Chope v. Eureka* (Cal.) 4 L. R. A. 335; *Culver v. Streator* (Ill.) 6 L. R. A. 270; *Bulger v. Eden* (Me.) 3 L. R. A. 207.

child attending a public school in a schoolhouse provided by the city, under the duty imposed upon it by general laws for an injury sustained by the child by reason of the unsafe condition of a staircase in the building.

In *Bigelow v. Randolph*, 14 Gray, 541, a similar doctrine was applied where a scholar received an injury from a dangerous excavation in the schoolhouse yard. The doctrine was reiterated in *Sullivan v. Boston*, 126 Mass. 540. It has also been applied to other public grounds, like Boston Common. *Steele v. Boston*, 128 Mass. 588; *Veale v. Boston*, 135 Mass. 187; *Clark v. Waltham*, 128 Mass. 567; *Oliver v. Worcester*, 103 Mass. 489.

On the same principle a city was declared to be exempt from responsibility for a personal injury received in consequence of the defective condition of a public hospital. *Benton v. Boston City Hospital*, 140 Mass. 18. In other States a similar rule of exemption has been adopted in reference to schoolhouses and other public buildings maintained solely for public use and service. *Wixon v. Newport*, 18 R. I. 454 (schoolhouse); *Eastman v. Meredith*, 36 N. H. 284 (town-house); *Hamilton County v. Mighels*, 7 Ohio St. 109 (court-house); *Board of Chosen Freeholders of Sussex County v. Strader*, 18 N. J. L. 108, 121 (dictum of Hornblower, Ch. J., as to court-houses and jails).

The principle on which this exemption from responsibility rests is that in the various instances referred to the building was erected, or the grounds were prepared, solely for the public use, and with a sole view to the general benefit, and under the requirement or authority of general laws. In such cases, in the absence of any statute which directly or by implication gives a private remedy, no action lies in favor of a person who has received an injury in consequence of a negligent or defective performance of the public service. The cases

heretofore cited relate to injuries received after the completion of the work. It makes no difference, however, if the injury is caused by a negligent act done in the direct performance of the service. *Tindley v. Salem*, 187 Mass. 171; *Lincoln v. Boston*, 148 Mass. 578, 8 L. R. A. 257; *Fisher v. Boston*, 104 Mass. 87; *Hafford v. New Bedford*, 16 Gray, 297.

The plaintiff seeks to establish a distinction on the ground that her injury was received outside of the limits of the public work, relying on an expression in the judgment in *Hill v. Boston*, above cited, at page 858, and on the various decisions where cities and towns have been held responsible for injuries caused by or in the course of the construction of roads and bridges, by blasting rocks, setting back water, etc.; for example, *Deane v. Randolph*, 183 Mass. 475; *Lawrence v. Fairhaven*, 6 Gray, 110; *Waldron v. Haverhill*, 148 Mass. 589, 3 New Eng. Rep. 688. Those cases, however, rest on grounds which take them out of the general rule, and in the last resort it must probably be considered that, taking all the statutes together which relate to the construction of roads and bridges, it is to be inferred that the Legislature intended to recognize the existence of a liability for the consequences of negligence in the performance of the work. In the present case, the service in which the City was engaged was purely for the benefit of the public, and we think the case falls within the general rule which exonerates it from responsibility for the consequences of its servant's negligence. The servant himself may be responsible. The City is exempt. See also *Neff v. Wellesley*, 148 Mass. 487, 2 L. R. A. 500; *Curran v. Boston*, 151 Mass. 505, 8 L. R. A. 248; *Bates v. Westborough*, 151 Mass. 174, 7 L. R. A. 156.

*Exceptions sustained.*

## OREGON SUPREME COURT.

Libby POTTER, *Resp.*,

v.

JONES *et al.*, *Appts.*

(....Or.....)

### \*1. Delusions are conceptions that originate spontaneously in the mind without

\*Head notes by LORD, J.

evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. They have no foundation in reality, and spring from a diseased or morbid condition of the mind.

2. Where a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they

NOTE.—Testamentary capacity as affected by an insane delusion; delusion defined.

If at the time a testator makes his will he is laboring under an insane delusion, either in regard to his property or the natural and proper objects of his bounty, which affects the disposition which he makes, or of which delusion the papers are the offspring or fruit, he is without testamentary capacity. *Notes to Elkinton v. Brick* (N. J.), 1 L. R. A. 161.

The definition of "insane delusion" given in the principal case is the one almost universally acted upon, although some slight modifications of it appear in some cases and an occasional criticism. See *Smith v. Tebbitt*, L. R. 1 Prob. & Div. 401; *Boughton v. Knight*, L. R. 3 Prob. & Div. 64. 12 L. R. A.

There must be a belief of facts, which no rational person would have believed, which in fact have no basis in reason and the belief in which neither reason nor evidence can expel. Mere mistake of fact is not sufficient, nor is a mistaken belief based on false statements. See *Middleditch v. Williams*, 4 L. R. A. 738, and *note*, 45 N. J. Eq. 728; *Schouler, Wills*, § 146; *Clapp v. Fullerton*, 34 N. Y. 197; *Stackhouse v. Horton*, 15 N. J. Eq. 228 (citing *Greenwood's Case*, as stated in *White v. Wilson*, 13 Ves. Jr. 89); *Merrill v. Rolston*, 5 Redf. 251; *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619.

The delusion must point to actual unsoundness of mind: it must be an insane delusion (*Brown v. Ward*, 58 Md. 322); something more must be shown than simply a mistaken notion on the part of the

are concerned, under a morbid delusion, and delusion in that sense is insanity. But where the belief or aversion to the contestant was formed on an apparent cause, leading on his part to a view unjust and erroneous, this only shows an unfortunate error of judgment or a want of reasoning power, but not an absolute want of intellect on the subject. It shows a bad judgment upon an insufficient state of facts, but not that his conclusion was formed without any foundation in fact, apparent or otherwise.

3. It is not enough that a delusion may exist, but its connection with the testator's will must be made manifest and shown to have influenced its provisions before the will can be set aside and declared void.
4. Where it was claimed that the testator was the subject of an insane delusion, but admitted to be of sound mind on all other subjects not connected with such delusion, but which delusion, the evidence disclosed,—assuming such delusion to have ever existed,—was not present influencing him when he executed the will,—*Held*, that the will was valid.
5. While it seems harsh and cruel that a parent should disinherit one of his children and devise his property to others, or cut them all off and devise it to strangers, from some unworthy motive, yet as long as that motive, whether from pride or aversion, spite or prejudice, is not resolvable into mental perversion, no court can interfere.
6. It is enough that the law recognizes the right of the parent to make such testamentary disposition of his property as he chooses to select as the subject of his bounty, and in the exercise of this right he may have reasons satisfactory to himself why some of his children should enjoy his estate while others are excluded. Some may be more deserving than others,—more needful of help, for various reasons; some may have contributed largely to its acquisition. These and other reasons may exert an influence in favor of some and in exclusion of others.

(January 6, 1891.)

**A**PPEAL by defendants from a decree of the Circuit Court for Clackamas County affirming a judgment of the County Court

which set aside the probate of the will of Cyrus W. Jones, deceased, and adjudged it to be null and void. *Reversed.*

The facts are stated in the opinion.  
Messrs. C. D. Latourette, D. C. Latourette and W. Casey Johnson for appellee.  
Messrs. Stewart & Jones for respondent.

Lord, J., delivered the opinion of the court: This was a proceeding instituted in the County Court of Clackamas County by the contestant to have the order admitting to probate the will of her father, Cyrus W. Jones, deceased, vacated and annulled, and the will set aside and declared void. The will was executed on the 19th day of January, 1887, and the testator died on the 20th day of August, 1887, leaving several children, to whom he devised his property, with the sole exception of the contestant, who was excluded from its bounty. The proceeding resulted in a decree vacating the order, and setting aside the will as void, which was affirmed on appeal by a decree of the circuit court, and from which this appeal is taken. The theory upon which the will is alleged to be void is that the testator, though conceded to be of sound mind upon all other subjects, was laboring under a delusion in relation to the legitimacy of his daughter, the contestant, causing him to entertain a violent hatred or insane aversion towards her, which rendered him wholly incapable of doing any legal act in which her interest was involved, and which so affected and influenced him at the time of the execution of his will as caused him to deprive her of all benefit in his estate. The record discloses that the testator was married to his wife on the 10th day of May, 1835, in the State of Ohio; that a few years thereafter they emigrated to Missouri, where they continued to reside until 1861, when they emigrated to Oregon, having at this time a family of ten children, and settled in Marion County, on what is commonly known as "Mission Bottom." Here they continued to reside until 1865, when they started on a return trip to Missouri, taking with them two of their boys and three of their girls, one of

testator as to the feelings or intentions of his relatives in reference to him or his property. Hall v. Hall, 38 Ala. 134.

Further, the delusion must enter into and influence the testator's action in making the dispositions of his property complained of. Dew v. Clark, 3 Add. Ecol. 72; *Re Cole's Will*, 49 Wis. 123; Cotton v. Ulmer, 45 Ala. 373; Robinson v. Adams, 62 Me. 400; Benoit v. Murrin, 58 Mo. 324; Boyd v. Eby, 3 Watts, 71; Rice v. Rice, 50 Mich. 455.

So a will may be sustained although the testator may be shown to have been subject to insane delusions on certain subjects, for the existence of delusion on one subject is not inconsistent with sufficient soundness of mind on another. Shaver v. McCarthy, 1 Cent. Rep. 142, 110 Pa. 339; note to Kerr v. Lunsford (W. Va.) 3 L. R. A. 608.

Although a testator at the time of executing his will may harbor insane delusions, yet if he has mind enough to know and appreciate his relations to the natural objects of his bounty and the character and effect of the dispositions of his will, he has a mind sufficiently strong to enable him to make a valid will. Dunham's App. 27 Conn. 203. See also James v. Langdon, 7 B. Mon. 196; Boardman v. Woodman, 47 N. H. 120.

12 L. R. A.

This doctrine is not uniform. Some cases have held that an insane delusion on one subject was sufficient evidence of lack of testamentary capacity to avoid a will made by one shown to have been subject to such delusion, whether it appeared to have influenced the particular dispositions of property complained of or not. See Waring v. Waring, 6 Moore, P. C. 349; Smith v. Tebbitt, L. R. 1 Prob. & Div. 393.

These cases, however, have not received the approval of either the English or American courts, and the opposite doctrine has prevailed. Consequently an insane delusion on such subjects as witchcraft, spiritualism or spectral or supernatural influences of any kind will rarely justify the setting aside of the will of one entertaining such delusion. Note to *Middleditch v. Williams* (N. J.) 4 L. R. A. 738; *Re Bonard's Will*, 16 Abb. Pr. 134; *Addington v. Wilson*, 5 Ind. 139.

But where such delusion directly affects the provisions of the will, diverting the estate from its just and natural course and devoting it to purposes which no rational man would countenance or support, it may be sufficient to destroy the will. See Schouler, Wills, § 163.

whom is the contestant, and going by the way of California, where they stopped for a short time and where the two boys concluded to remain. The parents with these three daughters went on to Missouri, and after their arrival there his wife and the contestant of their own choice left him and went to Ohio, where they remained and never lived afterwards with him. The testator returned to Oregon in 1867 with the other two girls. He bought another farm in Marion County, where he resided for a few years, and then purchased the farm in Clackamas County to which he moved, and where he was living when the will was executed and until his death. In 1872 he obtained a decree of divorce from his wife on the ground of desertion and cruel treatment. The evidence shows that the testator was a man of sensitive disposition and of a nervous and jealous temperament; that early after his marriage, and especially while he and his wife resided in Missouri, he became suspicious of her chastity, and entertained the belief that she was intimate with a man who met her near a certain spring for adulterous purposes, and that two of the children—the contestant and Calvin Jones—were the offspring of such adulterous embraces. He also expressed the belief that another person in Oregon, while they lived together here, was on intimate terms with her, and at one time sought to chastise him for his supposed conduct. This belief, however, in the infidelity of his wife and the illegitimacy of two of his children was not proclaimed from the housetop, or to everyone; but with few exceptions, and those intimate friends, it was only communicated to his brothers. His daughters who lived with him are now married, and never seem to have heard of the matter or knew he entertained such a belief until the commencement of this suit. They knew that there was an estrangement between their parents and that they did not live happily together, but they never supposed the cause of it was due to any morbid delusion involving the chastity of their mother or the illegitimacy of any of the children. To avoid prolixity, we shall say our conviction from the evidence is that his wife was a chaste woman and faithful to her marriage vows, and that the two children named were not the spurious product of her adulterous embraces with another man; but the fact remains, according to the testimony of those to whom he confided his domestic troubles, that he always furnished some grounds for his belief. He identified the party and the place, and described the clandestine manner in which their improper meeting was effected. That such things could occur, or have occurred under less probable circumstances, will not be denied; they are only rendered improbable in the present instance by the absolute confidence expressed in her marital fidelity by her acquaintances. While, therefore, we shall regard this suspicion or belief of her infidelity to her marriage bed with its attendant circumstances as unjust and unworthy of belief, we cannot disregard the fact that there was the opportunity for the parties to have met at the spring, and that it might have occurred in reality for perfectly proper and innocent purposes or without evil design or any concert of action; yet to a

man of the testator's sensitive and jealous disposition a trifling circumstance of this kind or a slightly imprudent act would incite his distrust and fill him with jealous suspicions. Whether there were any such visits to the spring near his residence, surreptitious or otherwise, by his wife and the suspected party while they lived in Missouri, there is nothing shown by the evidence, except his declarations, to the persons already referred to, that he had often seen such party go to the spring, when his wife would don her bonnet and go clandestinely to the same place. The evidence of those whose testimony leads to the conviction that his suspicions or accusations were unjust and unfounded rests, not upon any knowledge of the facts one way or the other, but on their knowledge of her character and confidence in her chastity as inconsistent with such conduct. Mr. Sampson Jones and his wife, people of excellent character, and whose testimony is entitled to credit, to whom the testator perhaps talked and gave vent to his insinuations and suspicions with more freedom than any others, regarded his accusations of unchastity as unjust and untrue, and the circumstances which gave rise to them as too inconsistent with her character to be worthy of belief, and express the opinion that she was faithful to her marriage vows and the duties of a wife, and that in view of his conduct the testator was laboring under a delusion upon this matter. Stress and importance have been given to this phase of the case and the evidence, as it is the main starting point of his domestic woes and infelicities, of his suspicions of his wife's infidelity and the illegitimacy of his two children,—the contestant and her brother Calvin Jones. It is true that while they lived in Missouri and in Oregon between 1861 and 1865 their married lives were embittered by estrangements. Much of the time they refused to speak with each other or to conduct themselves in any way calculated to resume confidence and affection; and it was doubtless during some such period, when the cup of their domestic unhappiness was overflowing, that the testator was disposed to give vent to his feelings and indulge in unjust accusations against his wife's chastity in the manner described by some of his relatives. It was about this time, when the testator and his wife were estranged and not on speaking terms, although living together as husband and wife, that the conversation with Northcutt took place, in which that witness represents him as inveighing with great temper and acrimony against his wife's marital infidelity. There is no doubt that he was extremely jealous of his wife, and entertained a strong suspicion, if not conviction, of her infidelity and his own dishonor. But this was the time when their domestic troubles were hastening to a culmination which finally ended in separation. When they arrived in Missouri after leaving this State in 1865, Mrs. Wright, one of the daughters, gives an account of the separation of the testator and her mother. She heard her mother say to her father: "You have brought me here with the intention of leaving me here;" and father said: "No, I did not; if you want to go to Oregon with us you can;" and that her mother said she was going to Ohio; that as to



the children "he gave us the choice to stay or go with him; that mother left us and went to Ohio with Libby Potter [the contestant] and shortly after that we started for Oregon."

Mrs. White, the other daughter, testified to the same, substantially. The contestant remembered "that her mother and father had a conversation after they went back to Missouri about separating." She does not know the cause of it, except she thought they were in bad humor; nor had she ever heard of any insane delusion or insanity on the part of her father until after his death, and heard that from her attorneys; nor does she remember that she ever heard her mother say anything about it. She remembers that her father was not given to caressing his children,—never caressed her nor repulsed her. Thinks she disliked her father at the time her mother left him, and remembers that she preferred to go with her mother when she left her father in Missouri and went back to Ohio; that she slept with her mother and father on the trip at the foot of the bed; that he never whipped or abused her; that she saw him whip one of the children; that her father gave her mother some money when they left for Ohio, but does not think it exceeded \$300; that her mother received notice of the divorce proceedings in Oregon while she was living in Ohio; that neither her mother nor the contestant ever lived with their father afterwards; that she is married and has two children, is in good circumstances, and resides in Missouri. The evidence shows that the testator and his other two daughters returned to Oregon, and finally settled in Clackamas County, and lived there until his death, in 1887. The subscribing witnesses to the execution of the will were old acquaintances living in the neighborhood, who had traded with him, hunted and traveled together, had visited at his house, attended school-meetings together, met at the stores and other places, and they concur in the opinion that his mind was sound and free from all disturbing influences when he executed his will; that he mentioned the portions to be given to each of the children, and betrayed no bad humor, or anything to indicate that he was not rational; that he understood his business and the property he possessed and how he wished to have it distributed. His physicians, who had known him for years and who attended him, also express the opinion that he was rational, knew what he was doing and how he was doing it, and that he was competent at the time to execute a will, and that it was the product of his own free agency. They did not interrogate him in respect to his family matters. They never had had any conversation with him on this subject, and perhaps knew nothing about it, and only think from what they saw and observed that his mind was free from any disturbing influences, and that when he executed his will he knew and understood what he was doing. The evidence also shows that during the last twenty years—from the time he returned to Oregon until his death—he acquired property, was industrious and frugal, was a man of good judgment and business sagacity, attended to his own affairs, dealt extensively with numerous persons, took a proper interest in neighborhood matters, lived to a

ripe old age,—past threescore and ten,—and, with the children about him who had chosen to remain with him, made his will giving his property to them. His reasons for disposing of his property in the manner he did and of excluding the contestant from his bounty are, taking the statement of the witnesses together for brevity, that he had given to the contestant and her mother the shares to which they were entitled when they separated; that he understood his daughter (the contestant) was married and had a good home; that he told the children that all of them that wished to remain with him could do so, and that they did so except the contestant, but that he said nothing about her illegitimacy; that he had made up his mind that those who had remained with him and helped to earn it ought to have the benefit of it. Referring to the fact that he wished to will to his wife and the contestant one dollar, as he did when the will was executed, he was asked, "Why do you intend to make your will in that way?" and he said: "The reason is very simple. When I left Missouri the children all went with me except her, and I gave her [his wife] some money; and I came back here, and the children. I have made all that I have got now by my own hands, me and the children here, and that is the reason." That he was in good humor; did not seem to be annoyed, but felt that the children who had remained with and helped to earn the property which he had acquired were the rightful objects of his bounty and justly entitled to it under the circumstances. The evidence also shows that at the times mentioned he was as firm in the suspicion or belief that his son Calvin Jones was illegitimate as the contestant, and that he had indicated such belief by much more emphatic language than he had ever indulged in of the contestant; yet he did not exclude him from his share of the estate, but provided for him the same as he had the other children, guided by the principle that those who had remained with him and helped to accumulate the property which he was entitled to dispose of were the proper recipients of his bounty, and its application included his son Calvin, whom he had denounced in the days of his domestic troubles, and just before the separation from his wife, as a "tough-headed bastard."

In this review it will be seen nearly all the important facts in reference to his declarations of his wife's infidelity and the illegitimacy of the two children extend back nearly a quarter of a century, when their lives were embittered by estrangement and their paths rapidly diverging, which was soon to terminate in final separation and divorce. The latest evidence of real importance is Mrs. Jones', of what occurred about the time he procured his divorce in 1872, in which he reiterated his belief in his wife's infidelity and exhibited much temper in its asseveration. As to the circumstances upon which he predicates his belief in the infidelity of his wife and the illegitimacy of the two children, there is no evidence of their existence other than his declaration as stated by the witnesses; but we think the evidence shows that the testator believed that his wife was unfaithful to him, and so expressed himself to those whom he could talk with upon the subject as

late as Mrs. Jones' evidence, to which we have just referred.

After this there is little or nothing heard of it, and that of little consequence, and when he did refer to it just before making his will it was without temper or reference to his former suspicions or accusations, and, by his conduct, indicating that his sense of injury was apparently healed over and its effects passed away. The important question for our decision now is, Was his belief in the infidelity of his wife and the illegitimacy of the two children an insane delusion, and, if so, was he so affected by such delusion at the time of the execution of his will as caused him to deprive the contestant of all benefit in his estate? This necessarily leads to the inquiry, What is an insane delusion? *Sir John Nicholl* in the celebrated case of *Dew v. Clark*, 8 Add. Eccl. 79, defined "insane delusions" in these words: "Wherever the patient once conceives something extravagant to exist, which still has no existence whatever but in his own heated imagination, and whenever at the same time, having so conceived, he is incapable of being, or at least of being permanently, reasoned out of the conception, such a patient is said to be under a delusion in a peculiar, half-technical sense of the term, and the absence or presence of delusion, so understood, forms in my judgment the true and only test or criterion of present or absent insanity." In *Boughton v. Knight*, 6 Moak, Eng. Rep. 353, *Sir John Hannen* adopted this definition, and expressed the belief that it would solve most if not all of the difficulties which arise in investigations of this kind. In *Banks v. Goodfellow*, L. R. 5 Q. B. 580, Cockburn, Ch. J., says: "When delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound." *Chief Justice Denio* said: "If a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense is insanity." *American Seamen's Friend Soc. v. Hopper*, 88 N. Y. 624. See also 11 Am. & Eng. Encyclop. Law, p. 107, title *Insanity*. The belief of facts which no rational person would have believed is insane delusion. 1 Wms. Exrs. 85; 1 Redf. Wills, 71. And in a later case, *Middleitch v. Williams*, 45 N. J. Eq. 736, 4 L. R. A. 785, Van Fleet, Vice-Chancellor, said that "according to these definitions, it is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind, that can be regarded as furnishing evidence that his mind is diseased or unsound; in other words, that he is subject to insane delusions. If, without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would, in the absence of evidence, believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for is that it is the product of mental disorder. Delusions of this kind can be accounted for upon no reasonable theory except

that they are the creations of the mind in which they originate."

Tested by these definitions, can it be said upon the facts as disclosed by this record that the testator was beset with an insane delusion in respect to the legitimacy of the contestant and her brother? The circumstances which he relates and upon which his belief is founded fix the place, identify the person and the manner of the improper meeting, and there is no evidence to show, nor is there any attempt to deny, that there was such a place or person or that such a meeting might not have occurred, only that the adulterous purposes which he ascribed and professed to believe to be the object of such meeting were so absolutely inconsistent with her known character for chastity as to be utterly unworthy of belief, and only to be accounted for in him upon the theory of an unnatural dislike or aversion which amounted to an insane delusion. The evidence in contradiction of his belief proceeds on the assumption that there may have been such a place and man and meeting, and if so, her known character for chastity, her every-day walk and life, render it impossible that it could have occurred for the foul purposes which he imputes, or otherwise than accidentally and without concert, or evil design in thought or deed. But these facts, however falsely or unjustly he may have reasoned from them, or however absurd his conclusions as applied to the wife and contestant impugned by them, nevertheless furnished the evidence which inspired his suspicions, and the ground upon which his belief was founded. It is conceded that the conclusions he drew from the facts are wholly unwarranted and without any justification, indicating at least an unrelenting, jealous disposition; but unjust and absurd as they may be, they were not the pure creations of a perverted imagination without any foundation in reality. Delusions are conceptions that originate spontaneously in the mind without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. The mind that is so disordered imagines something to exist, or imputes the existence of an offense, which no rational person would believe to exist or to have been committed without some kind of evidence to support it. They are as baseless as the fabric of a dream conjured into existence by a disordered or perverted imagination without any sort of foundation in fact. As in *Smee v. Smee*, L. R. 5 Prob. & Div. 84, the testator imagined himself to be the son of George IV., and that when he was born a large sum of money had been put in his father's hands for him, but which his father in fraud of his rights had distributed to his brothers; or as in *Smith v. Tebbitt*, L. R. 1 Prob. & Div. 398, the testatrix imagined herself to be one of the persons of the Trinity, and her chief legatee to be another. In cases like these the belief is the offspring of a disordered mind, and not induced by the existence of any facts or occurrences which could lend any sort of countenance to it. The case at bar is not such. Here there is a claim of facts upon which the belief is founded; and unjust and unfeeling as may be such belief, in view of the known character of his wife for chastity, it is not the spontaneous product of pure fancy, but a grave error show-

ing a lack of judgment or a want of reasoning power, the outcome of an over-sensitive, jealous disposition, prone to exaggerate any trifling circumstance with which his wife may be connected into an unworthy and wicked importance, and to draw from them conclusions untenable, illogical and unworthy of belief. There is no doubt that the testator was extremely jealous of his wife, and, like all such, disposed to magnify any act or trifling occurrence into undue importance, and to make it the occasion to draw unworthy conclusions of her marital integrity. The experience of mankind has demonstrated that a wife may have a spotless character, she may be justly regarded in the estimation of her friends as without moral blemish and worthy of all confidence and affection, and yet it might happen to her to do some trivial act which would pass unnoticed by them, or anyone except the Argus eyes of an ever-watchful and jealous husband, who would stand ready to draw base conclusions from it derogatory to her chastity and character. To minds thus constituted, sometimes even a look of the wife, or perhaps a facetious or inadvertent remark, or some insignificant circumstance with which she may be associated, although it be wholly innocent, excites their distrust, and fills them with jealous rage; for it is as true now as when first uttered, that "trifles light as air are, to the jealous, confirmations strong as proofs of holy writ." To support the contention for the contestant, the belief or suspicion the testator entertained of his wife's infidelity and the illegitimacy of the children to be an insane delusion must have been wholly without foundation in reality, and the mere figment of his perverted imagination. But the evidence discloses that it was formed on an apparent cause, leading on his part to a view of his wife's conduct which we have admitted was erroneous, unjust and unnatural; yet this only shows an unfortunate error of judgment or a want of reasoning power, but not an absolute want of intellect upon the subject. The conclusion which he drew from the facts was untenable and erroneous, and showed that he formed a bad judgment upon an insufficient state of facts, but does not show that his conclusion or belief was formed without any foundation in fact whatever. But even if we assume that his belief was utterly groundless and without any cause, actual or apparent, to justify it, would that authorize us, in view of the circumstances of this cause, to declare the testator was the victim of an insane delusion? In *Re Cole's Will*, 49 Wis. 181, Lyon, J., said: "It must be conceded that the belief of the deceased in respect to the unchastity of his wife, persisted in as it was without evidence to support it, and against all reasonable probabilities of its truth, looks very much like insane delusion. Yet it is not necessarily so. Observation teaches us that there is a very large class of people, whose sanity is undoubted, who are unduly jealous or suspicious of others, and especially of those closely connected with them, and who upon the most trivial, even whimsical, grounds, will wrongfully impute the worst motives and conduct to those in whom they ought to confide. This insanity, which is developed in a great variety of forms, is altogether too common, and too many per-

sons confessedly sane are to a greater or less extent afflicted with it, to justify us in saying that because the deceased was so afflicted he was insane or the victim of insane delusion. The line between the unfounded and unreasonable suspicions of a sane mind (for doubtless these are such) and insane delusions is sometimes quite indistinct and difficult to be defined." Nor is it enough that a delusion may have existed, but its connection with the will must be made manifest, and shown to have influenced its provisions, before the will can be set aside and declared void.

Nor must it be generally overlooked, in considering this point, that the period of time when the principal witnesses express the opinion that he was the victim of an insane delusion about the chastity of his wife relates to conduct and conversation and circumstances that occurred many years ago; that he was divorced from his wife in 1872, and that in the years succeeding little or nothing of real importance is ever heard of his suspicions, and when he did speak of her or the contestant in relation to the matter in hand it was with composure, or without insinuations against her marital integrity or the legitimacy of the children. It is necessary, therefore, to show, not only that he was the subject of a delusion, an insane hatred or aversion to his daughter, but that it was present when he executed his will, and influenced him in the making of it and in excluding her from its benefits. Upon this point the evidence has already been detailed, and it will be sufficient to briefly advert to it to show that those who were present at the execution of the will, including the subscribing witnesses and his physicians, all concur in the opinion that he was in the possession of all his faculties and free from any mental disturbance impairing his free agency; that he understood the extent of his property, and specified those among whom he wished it to be distributed. Several other witnesses there are with whom he conversed just prior to the making of his will which show his reasons for excluding the contestant, and his appreciation of the claims of those upon whom he thought his property ought to be bestowed. Among these were that the contestant was then in good circumstances; that she had separated from him in early life and chose to remain with her mother; that the property he had acquired was earned by himself and those to whom he intended to will it; that they had helped to lighten his burdens, sympathized with him and cheered him in adversity and disappointment, and were partners in its accumulation,—the justice of whose claims entitle them to it. Among those to whom he distributed his property was Calvin Jones, whom he had considered, as the contestant, to be illegitimate in the years gone by, yet he gave him his share based upon the principle already stated, and which he conceived to be just, and not on account of any belief in his illegitimacy. It would seem if he had been beset by any delusion of this kind it would have operated against him, for its effect is to impair free agency and cause the testator to do what he otherwise would not have done but for the presence of such delusion. His conduct before and at the time of the execution of the will are inconsistent with the existence of such delu-

sion; no feeling of hatred or aversion is evinced; his mind acts from a sense of justice and affection which he feels he owes to those who have been his co-laborers, including Calvin, and influenced by that principle he distributes his estate accordingly. It may be harsh, and under some circumstances cruel, to disinherit one child and to distribute the estate among the others, but if the testator be of sound mind and execute his will as prescribed by law no court can interfere. "It may be contrary to the principles of justice and humanity, its provisions may be shockingly unnatural and extremely unjust, nevertheless, if it appears to have been made by a person of sufficient age to be competent to make a will, and also to be the free and unconstrained product of a sound mind, the courts are bound to uphold it." *Middle-ditch v. Williams, supra*. Sir John Hannen said: "He may disinherit either wholly or partially his children, and leave his property to strangers to gratify his spite, or charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued." *Boughton v. Knight, supra*. And among the considerations which turn the scale in favor of the exercise of this testamentary power which may disregard the claim of kindred and disappoint their expectations, Cockburn, *Ch. J.*, mentioned these: "Among those who, as a man's nearest relations, would be entitled to share the fortune he leaves behind, some may be better provided for than others; some may be more deserving than others; some, from age, sex or physical infirmity, may stand in greater need of assistance. Friendship and tried attachment or faithful services may have claims that ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; age secures the respect and attention which are its chief consolations." *Banks v. Goodfellow, supra*. The law is settled that if a testator, competent to make a will, executes it according to law, it cannot be disturbed for an inequality or unreasonableness in the distribution of his estate. He is under no obligation to devise it equally to his children or otherwise, but may devise it to a stranger. That fact may be considered as a circumstance in determining testamentary capacity, but, of itself, is not sufficient to set it aside. Where a delusion exists, and it is shown to have had an influence on the testamentary disposition of the property, as in *Dow v. Clark, supra*, consisting of an aversion to kindred, it is usually accompanied "with other signs," says Sir John Hannen, "which may be relied on to assist us in forming an opinion upon that point." In the case at bar we look in vain for them, but in that case it was the extraordinary importance the testator attached to medical electricity as a means of cure, which he conceived might be applied to almost every purpose. That case well illustrates the existence of a delusion, which consisted in an insane hatred without even the shadow of a cause of his child, persisted in through life, and his will, being shown to be the direct offspring of this delusion, was set aside and declared void. The facts in that case show that the testator entertained an unnatural dislike to his only daughter, whom he imagined vile and

profligate, and whom he treated with the utmost severity, stripping her naked and unmercifully flogging her, and then rubbing her back with brine, compelling her to do degrading work, denying her decent clothes, denouncing her whenever she came in his presence, when she was in fact amiable, of superior talents, dutiful and affectionate; indicating that his instincts and affection had become perverted, and his mind a prey to an insane delusion which had affected his will and cut her off with an inadequate provision. But what possible similitude can the case at bar bear to that case? It is true the father of the contestant did not caress her, nor does it seem that he did the other children; but he did not repulse her, and she owns that she disliked him, and perhaps justly; but he did not whip her, although he did some of the other children; nor did he maltreat her, or make any display of any unkind feeling. When his wife decided to leave him and the contestant chose to go with her he gave them money, and the preponderance of evidence is that he gave them their share of what he then possessed. He does not seem to have been a lovable man. He was sensitive and jealous, and, like all such, when brooding over some supposed wrong, indulged in a harsh and cruel judgment against the fidelity of his wife and the legitimacy of two of the children, but this conduct was marked by no course of harsh treatment, no bursts of violence, no display of outrages, or other indignities that we have noticed, and these were only denounced to a few, and generally to those in whom he had a right to confide. The truth is, after their separation, as time passed, his sense of injury seems to have gradually healed over and its effects to have passed away, for after this he begins to acquire property, to take an interest in the affairs of his community, and to command the respect and confidence of his friends and acquaintances for his probity and business character; and during all this time so little is said by him to anyone of his former grievances or belief, that his daughters are not aware of it until the commencement of this trial. Nor can we find any case upon facts analogous to these, in which it has been held fatal to the validity of the will.

In a recent case (*Barbo v. Rider*, 67 Wis. 600), in which it was held that the appellant was the victim of an insane delusion and mentally incompetent to care for himself or his estate, the evidence showed that his health had been impaired by excessive drinking; that after living happily with his wife for more than twenty years, suddenly and without cause he conceived the idea she had been untrue to him, that she submitted her person to the criminal embraces of a number of men, some of whom she scarcely knew, and that some of these men had begotten children upon her; that he charged her with it and repeated it to all who would listen to him, wrote an incoherent and indecent letter on the subject, became morose and sullen, ceased to take any interest in his family or business, and wandered aimlessly into the fields; that he begged for a division of the property, refused to take medicine, and believed that his friends were trying to poison him. As the court said: "No argument is required to prove that such a change in the nat

ure and conduct of Barbo, such unreasonable and unfounded hallucinations respecting the chastity of his wife, and his causeless hostility to his family, which yield to no reason or persuasion, are sufficient evidence that he is the unfortunate victim of insane delusion." These cases illustrate delusions, but they are essentially different from the case under consideration. While it seems harsh and cruel, so counter to all the feelings of our nature, that a parent should disinherit one of his children and devise his property to the others, or to cut them all off and devise it to strangers, from some unworthy motive, yet so long as that motive, whether from pride or aversion, spite or prejudice, is not resolvable into mental perversion, no court can interfere. Reliance can usually be placed on the affections, independent of the law, which parents have for their children, to recognize their claim in the testamentary disposition of their estate. But while this is so, the law recognizes the right of the testator to leave his property to whomsoever he chooses to bestow it, and in the exercise of that right, he may have reason satisfactory

to himself why some of his children should enjoy his estate while others are excluded. Some may be more deserving than others, — more needful of help for various causes; some may have contributed largely to its acquisition. These and various other reasons may exert an influence in favor of some and in exclusion of others. The law being so, upon the facts as disclosed by this record, we must give it as our judgment that the will of the testator, sought to be impeached by this proceeding, is valid, and not the product of an insane delusion; and in conclusion it is perhaps due to say that whatever suspicions or belief the testator entertained of his wife's infidelity are refuted by this record; that no wife or mother could be guilty of dishonoring the bed of her husband, and bastardizing her children, whose reputation for chastity and domestic duties were attested by so many respectable witnesses and contradicted by none.

*The decree must be reversed, and the cause remanded for further proceedings in accordance with this opinion.*

## UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF PENNSYLVANIA.

R. D. WOOD *et al.*

v.

CORY WATER WORKS CO. *et al.*

(44 Fed. Rep. 146.)

## 1. A corporation which has entered into and received the benefits of a contract

which it had the power to make will not be permitted to avoid paying the consideration money, by showing that in making the contract it did not conform to the statutory requirements and limitations imposed on it.

## 2. The fact that the constitutional requirement as to notice to stockholders was not complied with before the execution of a mort-

*NOTE.—Corporation estopped to deny liability on its contracts.*

A corporation which takes and retains the benefit of a contract made for it by its promoters, although made prior to its corporate existence, is estopped to deny that the contract is its contract. *McLaughlin v. Concordia College*, 2 West. Rep. 428, 20 Mo. App. 43.

If a private corporation has accepted and retained the full benefit of a contract, the same having been fully performed by the other party thereto, who has no adequate relief at his command, the defense of *ultra vires* may be disallowed. *Denver F. Ins. Co. v. McClelland*, 9 Colo. 11; *Camden & A. R. R. Co. v. May's Landing & E. H. C. R. Co.* 4 Cent. Rep. 801, 48 N. J. L. 530.

Having availed itself of the benefits of a contract of purchase by using the articles bought, it is estopped from setting up the fact that the agent exceeded his powers in making the purchase. *Ten Broek v. Winn Boiler Compound Co.* 2 West. Rep. 442, 20 Mo. App. 19, citing *Lungstrass v. German Ins. Co.* 37 Mo. 109; *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 644, 19 L. ed. 1013; *Southgate v. Atlantic & P. R. Co.* 61 Mo. 94; *Green's Brice, Ultra Vires*, 474, 784.

The courts have gone a long way to enable parties who have parted with property or money, on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use. *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176, citing *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 960; *Louisiana v. Wood*, 102 U. S. 394, 26 L. ed. 158; *Chapman v. Douglas County Comrs.* 107 U. S. 355, 27 L. ed. 381.

12 L. R. A.

Where the obligors in a bond were all members of a company, had all participated in the action of the company in giving a note secured by a bond and became guarantors of the notes, they are estopped from denying the authority, either of the company or of themselves, to do what they did. *Fourth Nat. Bank v. Olney (Mich.)* 5 West. Rep. 703.

A contract of a corporation, within the discretionary power of the directors, cannot be assailed by a stockholder as *ultra vires*. *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.

One becoming a stockholder is conclusively presumed to have contracted with reference to, and to have assumed, all liability described by the law of the domicile of the corporation. *McKim v. Glenn*, 5 Cent. Rep. 774, 66 Md. 479; *Canada South. R. Co. v. Gebhard*, 109 U. S. 537, 27 L. ed. 1029; *Glenn v. Claiborne*, 65 Md. 65.

A stockholder in the new company, knowing the purpose of its organization, which purpose the old organization had abandoned, is estopped from asserting any interest as a stockholder of the old company. *St. Louis & S. Coal & Min. Co. v. Sandoval Coal & Min. Co.* 2 West. Rep. 324, 116 Ill. 170, citing *Wade v. Bunn*, 84 Ill. 117; *Eldridge v. Walker*, 80 Ill. 270; *Noble v. Chrisman*, 88 Ill. 186; *Anderson v. Armistead*, 69 Ill. 453; *Lloyd v. Lee*, 45 Ill. 277; *Weaver v. Poyer*, 79 Ill. 417; 1 Story, Eq. Jur. 12th ed. §§ 385, 389; *Herman, Estoppel*, § 336. See notes to *People v. North River Sugar Ref. Co.* (N. Y.) 9 L. R. A. 33; *Jemison v. Citizens Sav. Bank* (N. Y.) 9 L. R. A. 703; *Portland L. & Mfg. Co. v. East Portland (Or.)* 6 L. R. A. 290; *Rockhold v. Canton Masonic Mut. Ben. Assn.* (Ill.) 2 L. R. A. 430; *Scranton Electric L. & H. Co's App.* (Pa.) 1 L. R. A. 335.

gage of the corporate property is not a valid defense to a suit on the mortgage, if every stockholder was present when the mortgage was determined on and voted in favor of it, and the corporation has received the benefit of the money raised thereby.

3. A corporation which has received and enjoyed the fruits of its mortgage bonds cannot assail their validity in the hands of a bona fide holder for value, on the ground that they exceeded in amount one half of the capital stock paid in, contrary to the provisions of the statute.

4. The State alone can complain of a completed contract entered into by a corporation in violation of constitutional or statutory requirements.

(November 24, 1890.)

**B**ILL in equity to enjoin the exercise of a power of sale contained in a mortgage bond to secure the payment of certain corporate bonds. *Dismissed.*

The facts are stated in the opinion.

*Messrs. Samuel Dickson and R. C. Dale* for complainants.

*Messrs. George Shiras, Jr., and Johns McCleave* for defendant the Farmers' Loan & Trust Company.

*Atcheson, J.*, delivered the following opinion:

On the 29th day of March, 1886, the firm of Samuel R. Bullock & Co. and the Corry Water-Works Company, a corporation of the State of Pennsylvania, entered into a contract whereby the former agreed to construct for the latter water-works in the City of Corry, Erie County, Pa., according to certain plans and specifications, and to pay all the expenses, legal fees and salaries which might be needed to maintain and operate the works for a period of six months after completion, and to pay the first six months' interest,—viz., \$3,000,—on the hereinafter-mentioned mortgage bonds of the Water-Works Company; and, in consideration thereof, the Water-Works Company agreed to issue and deliver to said Bullock & Co. \$100,000 in bonds, and \$125,000 in the full paid-up non-assessable stock of the Water-Works Company. Bullock & Co. proceeded to construct the water-works, and fulfilled their part of the contract, and the Water-Works Company issued and delivered to them the bonds and stock, as agreed on. The bonds bear date April 1, 1886, are each of the denomination of \$1,000, and are payable to Samuel R. Bullock & Co., or bearer, on the 1st day of April, 1916, with interest coupons annexed payable to bearer, semi-annually, and the bonds are secured by a mortgage, or deed of trust, of even date, covering all the property, real and personal, rights, privileges and franchises of the Water-Works Company, executed and delivered by said Company to the Farmers' Loan & Trust Company (defendant in this suit), a corporation of the State of New York, as trustee. The last-named Company accepted the trust, and the mortgage, or trust deed, was duly recorded in the County of Erie, Pa., on April 18, 1886. In the month of October, 1886, the National Water-Works Investment Company, a corporation of the State of New York, purchased from Samuel R. Bullock & 12 L. R. A.

Co. all of said bonds, together with \$50,000 of their said stock, for the cash price of \$90,000, which sum was paid to Bullock & Co. by said investment company upon the delivery of the bonds, and said bonds are still owned by that company. The Water-Works Company made default of the payment of the interest on said bonds, due April 1, 1889, and thereupon, and in accordance with the terms of the mortgage, or trust deed, the National Water-Works Investment Company, the holder of the whole issue of said bonds, elected, as it had the right to do, to declare the principal of the bonds to be due and payable; and, after such election, the default still continuing, the Farmers' Loan & Trust Company, the trustee, upon the written request of the holder of the bonds, took possession of the property embraced in the mortgage, or trust deed, for the purposes therein declared; and, in further execution of the power thereby conferred, advertised at public sale, and was about to proceed so to sell, the mortgaged property and the rights and franchises of the Water-Works Company, when the bill in this case was filed by the plaintiffs, R. D. Wood & Co., stockholders of the Corry Water-Works Company.

The main purpose of the bill is to enjoin the exercises by the Farmers' Loan & Trust Company of the power of sale given by the said trust mortgage, on the ground that the same is an invalid instrument, and conferred no estate or rightful authority upon the trustee. In support of this proposition, three reasons were assigned and urged by the plaintiffs' counsel at the final hearing, namely: "*First.* Because the issue of bonds which it attempts to secure was an increase of the corporate indebtedness without the consent of the persons holding the larger amount in value of the stock obtained at a meeting to be held after sixty days' notice. *Second.* Because the amount of mortgage bonds issued exceeded one half of the capital stock paid in, the evidence in the cause showing, substantially, that nothing was ever paid in on account of the capital stock. *Third.* Because it appears from the evidence that, by the attempted issue of stock and bonds to Bullock & Co., under the construction contract, there was a fictitious increase of stock and indebtedness, which, by the terms of the Constitution, are void."

The plaintiffs rely upon the provisions of the Corporation Laws of the Commonwealth of Pennsylvania, which limit the right of such a corporation to issue bonds secured by a mortgage to an amount not exceeding one half the capital stock paid in, and require the previous consent of the stockholders at a meeting called for the purpose, and upon section 7, art. 16, of the Constitution of the State, which provides: "No corporation shall issue stocks or bonds except for money, labor done or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased, except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting to be held after sixty days' notice given in pursuance of law."

Before approaching the consideration of the

legal questions involved, certain matters of fact must be stated. It appears that the meeting of the stockholders of the Water-Works Company, at which the issue of the mortgage bonds was authorized, was not called for that purpose, but to vote upon the proposition to increase the capital stock from \$20,000 to \$200,000. It is, however, shown that all the stockholders of the Company except one,—viz., Charles S. Wallace,—were present at that meeting, and voted in favor of the issue of the bonds and the execution of the mortgage, or trust deed, to secure them; and it is further satisfactorily established that Wallace was only the nominal owner of the stock standing in his name, and that the real owner thereof was Ellis Morrison, who was present at the meeting and voted in favor of the issue of the mortgage bonds. Furthermore, the trust mortgage on its face bears this recital: "And whereas, this form of mortgage, or trust deed, was at a meeting of the stockholders of the Water Company, held on the 29th day of March, A. D. 1886, duly approved and ratified, and the proper officers directed to execute the same in the name of the Water Company."

The bill alleges that the cost of the construction of the said water-works was only about \$60,000, but the proofs do not sustain this allegation. On the contrary, Samuel R. Bullock testifies that the entire cost, including the expenses the contractors assumed for the first six months after completion, etc., "was in the neighborhood of \$121,000," and I do not see why this estimate should not be accepted as substantially correct. The plaintiffs claim to be the owners of 1,420 shares of the stock of the Corry Water-Works Company. The whole of this stock, however, came from Samuel R. Bullock & Co. originally, and was part of the stock that firm received from the Water-Works Company, under their construction contract. The plaintiffs' title to 920 shares of this stock is under an assignment from said firm, dated November 10, 1888, and they have possession of the stock certificate for these 920 shares. But, in fact, that certificate had been surrendered to the Company for cancellation, and other certificates had been issued for at least part of this stock, and how much stock, if any, the plaintiffs are entitled to on this certificate is not shown. The plaintiffs' title to the other 500 shares of stock is good. They acquired those shares in February, 1889, from the National Water-Works Investment Company, at a valuation of \$1 per share, the transaction being this: The plaintiffs were creditors of Samuel R. Bullock & Co., and held, as collateral securities for their claims, stocks in various water-works companies; and the investment company was also the holder of such stock which had been acquired from said firm. Upon the failure of that firm, with a view to a severance of their interests, mutual stock transfers were made between the plaintiffs and the investment company, and the plaintiffs thus acquired said 500 shares of the Corry Water-Works Company's stock at the valuation mentioned.

Upon the undisputed facts, it is very difficult to see the standing the plaintiffs have in a court of equity, in virtue of any rights of their own, 12 L. R. A.

to assail the transaction between the Corry Water-Works Company and Samuel R. Bullock & Co., of which they complain. *Dimpfel v. Ohio & M. R. Co.* 110 U. S. 209, 28 L. ed. 121; *Columbia Nat. Bank's App.* 16 W. N. C. 357; *Graham v. La Crosse & M. R. Co.* 103 U. S. 148, 26 L. ed. 106; *Monroe v. Smith*, 79 Pa. 450. They were not shareholders of the corporation at the time of the transaction, and were not injured by what took place. The contract had been fully executed long before the plaintiffs acquired their shares of stock, and they took them with full knowledge that the bonds and mortgage of the corporation were outstanding and unpaid. Moreover, the very stock they now hold was part of the issue to Samuel R. Bullock & Co., under the construction contract which they now impugn. But in this controversy the plaintiffs may be considered as representing the corporation itself, and clothed with its rights. Is it then open to the corporation to defend against the bonds and mortgage, or trust deed, or to question their validity? At the outset of the discussion, it is to be borne in mind that the bonds are negotiable instruments, and were purchased before maturity in the open market, for a large price, by the National Water-Works Investment Company, without notice of anything affecting their validity. Furthermore, this is not a case of a total want of power in the corporation to act. Undoubtedly, the Corry Water-Works Company had the right to create an indebtedness for the purpose of constructing its works, and to issue therefor bonds secured by a mortgage or trust deed; and the utmost that can be said in impeachment of its action is that, in the exercise of the power, it did not conform to the requirements and limitations which the law imposed upon the Company. But, in *Oil Creek & A. River R. Co. v. Pennsylvania Transp. Co.*, 88 Pa. 160, it was distinctly ruled by the Supreme Court of Pennsylvania that where a corporation has entered into a contract which has been fully executed by the other party, and nothing remains to be done but for it to pay the consideration money, it will not be allowed to set up that the contract was *ultra vires*. And in *Wright v. Pipe Line Co.*, 101 Pa. 204, it was held that where a corporation, although prohibited by its charter, contracted for the purchase of stock in another corporation, and the contract was executed by the delivery of the stock, in an action on a promissory note given for the price of the stock, in the hands of a holder for value, it could not defend on the ground that the contract was beyond its corporate powers.

Turning now to the specific objections urged against the validity of the bonds and trust mortgage, we find that in the case of *Columbia Nat. Bank's App.*, *supra*, in which an issue of corporate stock was involved, the Supreme Court of Pennsylvania held that the only object of the prescribed notice of a proposed increase of stock was to give information to the shareholders, and if they had such knowledge from any source it was enough. Now, every shareholder of the Corry Water-Works Company was present when the issue of the bonds and trust mortgage was determined on, and all voted in favor of that measure. Again, in *Manhattan Hardware Co. v. Phalen*, 128 Pa.



110, where, to a *scire facias* on a mortgage of a corporation, the receiver of the corporation made defense that the debt was not authorized by a previous meeting and consent of stockholders, as directed by section 7, art. 16, of the Constitution, and the Act of April 18, 1874, the defense was overruled, the court holding that when a corporation has received the benefit of money borrowed on its mortgage, and the stockholders knew of it, and made no objection within a reasonable time to the lack of authority in the corporate officers to make the loan, neither the corporation, its stockholders nor its creditors can set up such want of authority in a suit on the mortgage, nor can the receiver of the company do so for them. In *Read's App.*, 123 Pa. 585, it was declared by the court that a contractor who had knowledge that under a trust mortgage of a corporation the issue of bonds was in excess of the capital stock paid in, and who was a participant in the fraud of such issue, could not attack the validity of the mortgage as in violation of the Statute. No more, in my judgment, is it competent for the corporation itself, which has received and enjoys the fruits of its mortgage bonds, to assail their validity in the hands of a bona fide purchaser for value, on such ground.

We have already seen that the consideration which passed from Samuel R. Bullock & Co. to the Corry Water-Works Company was largely in excess of the whole issue of the mortgage bonds, and this, too, without taking into consid-

eration a contractor's profit. Therefore, there is really no ground for the assertion that the indebtedness so created was fictitious, and, certainly, under the facts of this case, neither the corporation nor its stockholders can be heard so to allege to the prejudice of the innocent bondholder. If the construction contract, as a whole, offended against the constitutional and statutory provisions here invoked, the corrective power resides in the Commonwealth, which alone can now complain of the completed transaction. *Columbia Nat. Bank's App. supra.*

This principle, which indeed is decisive of the entire case, was recognized as sound, and was enforced, in *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. ed. 188, where a mortgagor sought to enjoin a sale of the mortgaged premises under a power contained in the mortgage, on the ground that it was taken in violation of the National Banking Law; and in *Pritts v. Palmer*, 193 U. S. 263, 38 L. ed. 817, where a foreign corporation had purchased land, and taken a conveyance thereof in direct violation of the laws of the State in which the land was situated, it was nevertheless held that the corporation took the title as against its grantor and his subsequent grantee, and that it was for the State alone to question the validity of the deed of conveyance to the corporation.

*Let a decree be drawn dismissing the bill of complaint, with costs.*

### MINNESOTA SUPREME COURT.

Mary B. LEE *et al.*, *Respts.*,  
v.  
H. E. FLETCHER *et al.*, *Appts.*  
(....Minn....)

- \*1. No particular form or ceremony is essential to constitute the delivery of  
\*Head notes by COLLINS, J.

a deed. Manual possession thereof by the grantee is not necessary. Whether there has been a delivery depends upon the intent of the grantor, and, if his intent to deliver is apparent, delivery for record, although not known by the grantee, is, if followed by his assent, good delivery.

2. The validity of a mortgage does not depend upon the description of the

#### NOTE.—Delivery of deed essential to transfer title.

The party who is to execute and deliver a deed should prepare it. *Willard v. Tayloe*, 75 U. S. 8 Wall. 587, 19 L. ed. 501; *Church v. Gilman*, 15 Wend. 656; *Elsey v. Metcalf*, 1 Denio, 822; *Gifford v. Corrigan*, 7 Cent. Rep. 277, 105 N. Y. 222. See note to *Standiford v. Standiford* (Mo.) 3 L. R. A. 239.

The delivery of a deed is essential to the transfer of the title. *Younge v. Guilbeau*, 70 U. S. 8 Wall. 699, 18 L. ed. 262; *Parmelee v. Simpson*, 72 U. S. 5 Wall. 81, 18 L. ed. 542; *Tompkins v. Wheeler*, 41 U. S. 16 Pet. 106, 10 L. ed. 908; *Dwinell v. Bliss*, 2 New Eng. Rep. 606, 58 Vt. 353; *Scobey v. Walker*, 12 West. Rep. 222, 114 Ind. 254; *Vaughan v. Godman*, 94 Ind. 191; *Fitzgerald v. Goff*, 99 Ind. 28; *Quick v. Milligan*, 4 West. Rep. 693, 106 Ind. 419; *The Lady Superior v. McNamara*, 3 Barb. Ch. 375, 3 L. ed. 939; *Stephens v. Buffalo & N. Y. Cent. R. Co.* 20 Barb. 389; *Roberts v. Jackson*, 1 Wend. 478; *Clark v. Gifford*, 10 Wend. 310; *Gilbert v. North American F. Ins. Co.* 23 Wend. 42; *Pain v. Smith*, 14 Or. 82.

A deed takes effect only from the time of its delivery. *Calhoun County v. American Emigrant Co.* 93 U. S. 124, 23 L. ed. 826.

A deed of which the consideration is marriage must be delivered, to be operative. *Scott v. Scott*, 14 West. Rep. 342, 95 Mo. 300.  
12 L. R. A.

#### Actual manual delivery not essential.

It is not necessary, to constitute a delivery of a deed, that there should be an actual manual delivery; if it is so disposed of as to evince clearly the intention of the parties that it should take effect as a conveyance, it is a sufficient delivery. *Conlan v. Grace*, 36 Minn. 276; *Ward v. Small* (Ky.) 12 Ky. L. Rep. 58, citing *Stevens v. Hatch*, 6 Minn. 64; *Schmitt v. Schmitt*, 31 Minn. 106; *Thompson v. Easton*, Id. 90; *Gaston v. Merriam*, 38 Minn. 271; *Newton v. Realer*, 41 Iowa 384; *Somers v. Pumphrey*, 24 Ind. 281, 248; *Orr v. Clark* (Vt.) April 22, 1890; *Hubbard v. Cox*, 78 Tex. 230.

Where the grantee in a deed of trust agreed to accept the trust, and the deed was put on record pursuant to directions of the grantor, the delivery was sufficient. *Steele v. Lowry*, 4 Ohio, 72, 19 Am. Dec. 583.

But a delivery of a deed not beneficial to the grantee, of property heavily incumbered, cannot be inferred from the bare record of the deed. *Gifford v. Corrigan*, 7 Cent. Rep. 277, 105 N. Y. 222. See *Jackson v. Phipps*, 12 Johns. 418; *Jackson v. Bodie*, 20 Johns. 184; *Church v. Gilman*, 15 Wend. 656; *Elsey v. Metcalf*, 1 Denio, 822.

The acknowledging and recording of a deed without grantee's knowledge or consent does not

debt, nor upon the form of the indebtedness; it depends rather upon the existence of the debt it was given to secure. It may be valid without a note or bond, although it purports to secure, and substantially describes, a note or bond. The true state of the indebtedness need not be disclosed by the instrument, but in cases free from fraud may be shown by parol.

3. It being evident that a claim asserted to certain real property by one of two defendants was admitted by the plaintiffs to be as determined upon the trial, it was error, as to such defendant, for the court below to grant plaintiffs' motion for a new trial.

(April 8, 1891.)

**A**PPEAL by defendants from an order of the District Court for Hennepin County granting plaintiffs a new trial in an action brought to determine adverse claims to certain real estate, in which judgment had been ordered in defendants' favor. *Reversed in part. Affirmed in part.*

of itself amount to delivery. *Weber v. Christen*, 9 West. Rep. 798, 121 Ill. 91, citing *Parker v. Hill*, 8 Met. 447; *Jackson v. Phipps*, *supra*; *Woodbury v. Fisher*, 20 Ind. 388; *Parmelee v. Simpson*, 72 U. S. 5 Wall. 81, 18 L. ed. 542; *Herbert v. Herbert*, 2 Ill. 278. Where the grantor shortly after the execution and record of his deeds repossessed himself of them, retaining possession until his death, and remaining in possession of the property, there was no delivery of the deeds. *Weber v. Christen*, *supra*.

But a mere execution of a voluntary deed, with neither the trustee nor the beneficiary present, and no publication of its contents made, will not be construed a delivery of it. *Wood v. Ingraham*, 8 Strobh. Eq. 105, 51 Am. Dec. 672. And see *Fisher v. Hall*, 41 N. Y. 422.

#### *Exception to rule.*

To constitute a delivery, the grantor must part with the possession of the deed, or the right to retain it. *Younge v. Guilbeau*, 70 U. S. 3 Wall. 636, 18 L. ed. 262.

But it is not necessary, to constitute complete delivery, that the instrument should leave the actual possession of the grantor. *Folly v. Vantuyl*, 9 N. J. L. 198; *Crawford v. Bertholf*, 1 N. J. Eq. 458; *Cannon v. Cannon*, 26 N. J. Eq. 319; *Ruckman v. Ruckman*, 33 N. J. Eq. 354.

Where a deed is sealed and delivered, and there is nothing to qualify the delivery except the keeping of the deed in the hands of the executing party, and nothing to show that he did not intend it to operate immediately, it is a valid deed. *Durauid v. Dych*, 7 Cent. Rep. 898, 116 Pa. 92.

The mere fact of the maker retaining the instrument in his own keeping, intending that it should be considered as executed and delivered, will not render it invalid for want of delivery. *Wall v. Wall*, 30 Miss. 97; *Squires v. Summers*, 35 Ind. 254; *Bogie v. Bogie*, 35 Wis. 688; *Porter v. Cole*, 4 Me. 25; *Blight v. Schenck*, 10 Pa. 235; *Welch v. Sackett*, 12 Wis. 244; *Wallace v. Berdell*, 97 N. Y. 22, hinted; *Fisher v. Hall*, 41 N. Y. 422. See *Payne v. Powell*, 5 Bush. 251; *Wallace v. Berdell*, 97 N. Y. 22.

If fully executed it is valid in the hands of the grantor, if there be nothing to qualify the delivery. *Roosevelt v. Carow*, 6 Barb. 195.

If both parties are present, and the contract to all appearances consummated, it is a complete and valid deed, notwithstanding it remains in custody of the grantor. *Rose v. Rose*, 7 Barb. 178; *McLean v. Button*, 19 Barb. 458.

A deed will take effect though found in grantor's 12 L. R. A.

The facts are stated in the opinion.

*Messrs. Gilliland, Belden & Willard* for appellants.

*Mr. M. B. Koon*, with *Messrs. Little & Nunn*, for respondents:

The mortgage, if there was anything whatever for it to secure, would stand for security for only the actual indebtedness of the mortgagor to the mortgagee. The indebtedness is the principal thing and the mortgage is an incident to the indebtedness, and without such indebtedness intended thereby to be secured there can be no valid mortgage.

*Hodgdon v. Shannon*, 44 N. H. 572; *Baker v. Collins*, 9 Allen. 253; *Bramhall v. Flood*, 41 Conn. 68.

The mortgagee or her assigns cannot tack to or substitute for the actual indebtedness intended to be secured other or different indebtedness though equally meritorious with that intended to be thus secured; much less an indebtedness that exists merely in conjecture.

*Edwards v. Dwight*, 68 Ala. 389; *Wilkerson*

deak, if circumstances indicate an intention to consider it delivered. *Linton v. Brown*, 20 Fed. Rep. 487; *Adams v. Adams*, 36 U. S. 21 Wall. 185, 22 L. ed. 504.

Undoubtedly the general rule is, a deed takes effect from its delivery and acceptance, and most generally mutual and concurrent acts. Where the exception to the general rule is most frequently recognized is in cases of voluntary settlements. In such cases a common rule of the law of general application is, the "first deed and the last will" shall stand. A will is most generally retained by the testator, and so a deed making a voluntary settlement may be retained by the grantor and still take effect. *Cline v. Jones*, 111 Ill. 574.

A voluntary settlement fairly made is always binding on the grantor, unless there be clear and decisive proof that he never parted nor intended to part with the possession of the deed, even if he retains it. *Shrader v. Bonker*, 65 Barb. 615; *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 404, 7 L. ed. 643; *Dempey v. Tylee*, 3 Duer. 96; *Brown v. Brown*, 1 Woodb. & M. 331.

There must be other facts to show that it was not intended to be absolute. *Wallace v. Berdell*, 97 N. Y. 22; *Van Valen v. Schomerhorn*, 22 How. Pr. 430.

Where a man declared his intention to convey lands to his minor son, and executed a deed and delivered it to a neighbor, saying to him, "You take that deed and file it for record," and on the latter's suggestion not to file it at present he responded, "You take that deed and keep it safely," the delivery must be held to have been absolute. *Standiford v. Standiford*, 3 L. R. A. 299, and *note*, 97 Mo. 321.

A subsequent filing for record, whether before or after the father's death, was merely the consummation of the delivery to the son as of the date of the delivery to the neighbor in trust. *Ibid*.

#### *Effect of retention by vendor till his death.*

If it be retained in the possession and control of the grantor until his death it cannot become effective by delivery thereafter by an agent, under his instructions. *Weisinger v. Cocke*, 67 Miss. 511. See *Cook v. Brown*, 34 N. H. 460; *Brown v. Brown*, 66 Me. 316; *Prutman v. Baker*, 30 Wis. 644.

There can be no valid delivery of a deed after the grantee's death. *McElroy v. Hiner*, 123 Ill. 139; *Stone v. French*, 37 Kan. 145; *Durauid v. Dych*, 7 Cent. Rep. 898, 116 Pa. 92.

Though both husband and wife have executed a deed, yet if it has not been delivered until after

v. *Tillman*, 66 Ala. 533; *Hamilton Bldg. Assn. v. Reynolds*, 5 Duer, 671; *Savage v. Scott*, 45 Iowa, 134; *Bacon v. Cottrell*, 18 Minn. 194 (Gil. 183); *Kelly v. Falconer*, 45 N. Y. 42.

The actual indebtedness is all that can be held to be secured by the mortgage.

*Nazro v. Ware*, 38 Minn. 448; *John v. New York Guaranty & L. Co.* 101 U. S. 632, 25 L. ed. 1080.

The debt and mortgage are inseparable.

*Wilson v. Eigenbrodt*, 30 Minn. 4.

The fact that the note was never executed has an important bearing upon the question of delivery.

*Brigham v. Brown*, 44 Mich. 60; *Jones, Mort.* § 614.

The delivery and acceptance must be the concurrent act of both parties. The registration of a deed by the grantor, without the grantee's knowledge or assent, does not of itself operate as delivery of a deed.

1 Devlin, Deeds, § 290; 3 Washb. Real Prop. 4th ed. p. 292; *Ruckman v. Ruckman*, 6 Fed.

her death, it will not be enforced against her heirs. *Shoenberger v. Zook*, 34 Pa. 24; *Shoenberger v. Hackman*, 37 Pa. 37; 1 Devlin, Deeds, p. 95.

A deed in due form, properly signed and acknowledged, but never delivered, its existence being unknown to the grantee until after the grantor's death, passes no title. *Miller v. Murfield*, 79 Iowa, 64. See *Otto v. Doty*, 61 Iowa, 28.

Where a deed was placed in a trunk by the grantor, to be taken possession of by his wife only in the event of his death, where it remained for twenty years, the grantee taking no possession of it until institution of a mechanics' lien suit against her, when she destroyed it, there was no delivery. *Price v. Hudson*, 135 Ill. 284.

Where the grantor lived in the family of his son, and made no effort to deliver the deed, and gave no authority to grantee to take it from the tin box in which it was placed, and never spoke of the deed, and the deed could not be found after the grantor's death, it cannot be held to have been delivered. The presumption is that the grantor destroyed it. *Anderson v. Anderson* (Ind.) June 6, 1890.

Where a deed which, although purporting to be absolute, was intended to operate only upon the grantor's death, after being retained for some time by the grantor, was delivered to the grantee to be deposited in a box for safe keeping, and not with a view of vesting in him a present ownership of the property, there is no delivery of it, as the deed of the grantor; and being an attempted testamentary disposition not in compliance with the Statute of Wills, the title never passes out of the grantor. *Bovee v. Hinde* (Ill.) Oct. 31, 1890. See *Stone v. French*, 37 Kan. 145.

But under the Arkansas statutes a deed conveying an estate of freehold to commence in future is valid; and a deed to grantor's son to take effect at grantor's death, duly signed, acknowledged and delivered, is a conveyance of the present title, with possession and use postponed, and not a will. *Bunch v. Nicka*, 50 Ark. 367.

#### Formal delivery not necessary.

No particular formality is necessary to the delivery of a deed. *The Lady Superior v. McNamara*, 3 Barb. Ch. 378, 5 L. ed. 989.

A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both. *Flint v. Phipps*, 16 Or. 437. See *Jackson v. Phipps*, 12 Johns. 421; *Byers v. McClanahan*, 6 Gill & J. 256; *Stewart v. Redditt*, 12 L. R. A.

Rep. 225-227; *Flannigan v. Goggins*, 71 Wis. 28; *Watson v. Hillman*, 57 Mich. 607; *Hawkes v. Pike*, 105 Mass. 560; *Maynard v. Maynard*, 10 Mass. 455; *Samson v. Thornton*, 3 Met. 275; *Patterson v. Snell*, 67 Me. 563; *Price v. Hudson*, 125 Ill. 284; *Barr v. Schroeder*, 32 Cal. 617; *Parmelee v. Simpson*, 72 U. S. 5 Wall. 81, 18 L. ed. 542; *Younge v. Guilbeau*, 70 U. S. 3 Wall. 641, 18 L. ed. 268; *Union Mut. L. Ins. Co. v. Campbell*, 95 Ill. 268.

The delivery of a deed after the death of the grantor is not sufficient to pass title.

*Jackson v. Leek*, 12 Wend. 107; *Fisher v. Hall*, 41 N. Y. 416; *Jackson v. Phipps*, 12 Johns. 418; *Walsh v. Vermont Mut. F. Ins. Co.* 54 Vt. 352; *Prutsman v. Baker*, 30 Wis. 644.

*Collins, J.*, delivered the opinion of the court:

This was an action to determine adverse claims made by the defendants to lots 4 and 5, block 34, in one of the additions to St. An-

3 Md. 79; *Bryan v. Wash*, 7 Ill. 537; *Gunnell v. Cook-erill*, 79 Ill. 79; *Byars v. Spencer*, 101 Ill. 429; 3 Washb. Real Prop. 4th ed. 236; *Tiedeman*, Real Prop. § 813; *Shep. Touch*, 58.

The form and manner of delivery are not important so long as it is the manifest intention of the grantor to deliver. *Hubbard v. Cox*, 78 Tex. 239; *Ward v. Small* (Ky.) 13 Ky. L. Rep. 58; *Conlan v. Grace*, 36 Minn. 273; *Devlin, Deeds*, §§ 231, 232, 233.

It is sufficient if it is so disposed of as to evince clearly the intention of the parties that it should take effect as a conveyance. *Orr v. Clark* (Vt.) April 22, 1890; *Conlan v. Grace*, *supra*; 3 Washb. Real Prop. 300.

To constitute a delivery of a deed there must be a complete surrender and parting with the control of the same by the grantor, and it must pass under the control and power of the grantee or some person in his behalf. *Anderson v. Anderson* (Ind.) June 6, 1890; *Stevens v. Stevens*, 150 Mass. 557.

#### Intention necessary to delivery of deed.

Intention is necessary to the delivery of a deed, and must exist in the minds of the parties, evidenced by words or acts. *Hill v. McNichol*, 6 New Eng. Rep. 445, 50 Me. 209; *Weber v. Christen*, 9 West. Rep. 790, 121 Ill. 91; *Stevens v. Castel*, 5 West. Rep. 727, 63 Mich. 111; *Bryan v. Wash*, 7 Ill. 537; *Gunnell v. Cockerill*, 79 Ill. 79; *Dwinell v. Bliss*, 2 New Eng. Rep. 605, 56 Vt. 353; *Cole v. Cole*, 24 S. C. 597.

There must be a clear manifestation of the intention of the grantor to give up control of it and that it shall at once become operative to pass the title. *Bovee v. Hinde* (Ill.) Oct. 31, 1890; *Byars v. Spencer*, 101 Ill. 429.

#### Delivery a question of intent.

The delivery of a deed is a question of intent. *McGrath v. Hyde*, 81 Cal. 38; *Hibberd v. Smith*, 67 Cal. 554.

And intention is a fact to be found by the trier; thus, a recorded deed was declared void, where the master found that the grantor merely left it in the possession of the grantee, but never delivered it as a deed. *Dwinell v. Bliss*, 2 New Eng. Rep. 605, 56 Vt. 353.

This intention may be made satisfactorily to appear, either from the circumstances of the transaction or from the acts or words of the grantor. *Crawford v. Bertholf*, 1 N. J. Eq. 467; *Folly v. Vantuyt*, 9 N. J. L. 198; *Cannon v. Cannon*, 26 N. J. Eq. 316; *Ruckman v. Ruckman*, 32 N. J. Eq. 256; *Brown v. Brown*, 66 Me. 319; *Armstrong v. Armstrong*, 19

thony, in the actual possession of plaintiffs. The defendant Gilfillan disclaimed any interest in lot 4, but set up a counterclaim of title to an undivided half of lot 5. The referee, by whom the case was tried, found him to be the owner of such undivided half, and this seems to be conceded by all parties. The defendant Libby was not served with the summons, nor did she appear on the trial. The issues raised by the answer of defendant Fletcher were passed upon by the referee, who ordered judgment on his findings of fact against the plaintiffs, and from an order of the district court granting a new trial the answering defendants Gilfillan and Fletcher appeal. There was but little dispute over the facts. Plaintiffs have the legal title to that portion of the property not owned by the defendant Gilfillan, having derived their title from a purchaser at a sale made by the administrator of the estate of James A. Lennon, deceased. Lennon was the owner in fee on July 10, 1877. He was then indebted to the defendant Sarah Libby, in the sum of \$700, at

least. Miss Libby was not then in the State of Minnesota, her residence being in Massachusetts. On the day last mentioned Lennon executed and acknowledged a mortgage in due form upon this and other real property to defendant Libby, to secure the payment to her, as was therein stated, of the sum of \$5,000, according to the conditions of his promissory note of even date. On the morning of July 12, Lennon left this mortgage with the register of deeds at his office, with instructions to place the same upon record, which was done. He gave no instructions as to a disposition of the instrument when recorded. In the afternoon of the same day Lennon took his own life. There had never been any agreement between him and Miss Libby that she should be secured by a mortgage, nor did the mortgagee know of the existence of the mortgage until some days after Lennon had suicided; nor was there a note of any amount executed by him to Miss Libby. In the year 1878 the attorney for the mortgagee obtained possession of the recorded

N. J. Eq. 387; Weber v. Christen, 9 West. Rep. 790, 121 Ill. 91.

Delivery of a deed is presumed from concurrent acts of parties recognizing a transfer of title. Gould v. Day, 94 U. S. 405, 24 L. ed. 232.

The delivery and acceptance of a deed is sufficiently proved by evidence of the grantor that she meant to execute a will, and thought the instrument executed by her was a will, together with the testimony by the judge before whom it was drawn that he read a portion and explained the rest of the deed to her, and that nothing was said about a will. Messelback v. Norman, 46 Hun. 414.

Deeds were duly delivered where they were handed with other papers to one of the grantees by the grantor, saying, "There are the deeds; put them away;" and, later, "Put these papers away carefully; they will be of use to you when I am gone." Lutes v. Reed (Pa.) Nov. 3, 1890.

Where a husband had a deed of land duly executed, and went home and threw it on the table, saying, "There is a deed of that property to you; put it away;" and the wife took it up and looked at it, and, after saying that it was not necessary to have it recorded, the husband put it away in his trunk,—it was held a sufficient delivery to the wife. McGrath v. Hyde, 81 Cal. 38.

#### *Delivery to third person sufficient.*

A delivery of a deed to a third person for the benefit of the grantee is a sufficient delivery, where there is no contingency. Rose v. Baker, 18 Barb. 233; Brown v. Brown, 1 Woodb. & M. 380; Munoz v. Wilson, 111 N. Y. 303; Murphy v. Briggs, 39 N. Y. 450; Peavey v. Tilton, 18 N. H. 151; Buffum v. Green, 5 N. H. 80; Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Jones v. Jones, 6 Conn. 111, 16 Am. Dec. 39; Bunn v. Winthrop, 1 Johns. Ch. 387, 1 L. ed. 103; Shrader v. Bonker, 65 Barb. 615; Ernst v. Reed, 49 Barb. 367; Brown v. Austen, 35 Barb. 341; Roosevelt v. Carow, 6 Barb. 190; Verplank v. Sterry, 12 Johns. 538; Rathbun v. Rathbun, 6 Barb. 98; Diefendorf v. Diefendorf, 29 N. Y. S. R. 122; Ward v. Small (Ky.) 12 Ky. L. Rep. 58.

Yet such a delivery will not be good, as against an intervening attachment, prior to the assent of the grantee. Derry Bank v. Webster, 44 N. H. 260.

A deed left unconditionally with a third person for the use of a grantee who is not under guardianship, and received by the grantee under circumstances indicating acceptance, is sufficiently delivered, and conveys title even though the grantee be of unsound mind. Campbell v. Kuhn, 45 Mich. 12 L. R. A.

516; Hoxley v. Holmes, 27 Mich. 416; Latham v. Udell, 38 Mich. 238; Gardner v. Collins, 3 Mass. 308; Gould v. Day, 94 U. S. 405, 24 L. ed. 232; Concord Bank v. Bellis, 10 Cush. 278; Regan v. Howe, 121 Mass. 424; Hastings v. Merriam, 117 Mass. 245; Buffum v. Green, 5 N. H. 71; Merrill v. Swift, 18 Conn. 267; Tibbals v. Jacobs, 31 Conn. 438; Jones v. Swayze, 42 N. J. L. 279; Mitchell v. Ryan, 3 Ohio St. 377; Berry v. Anderson, 22 Ind. 36; Kingsbury v. Burnside, 58 Ill. 310; Robinson v. Gould, 26 Iowa, 59; Kerr v. Birnie, 25 Ark. 225; Farrar v. Bridges, 5 Humph. 411; Wesson v. Stephens, 3 Ired. Eq. 557; Frost v. Peacock, 4 Edw. Ch. 678, 6 L. ed. 1016.

Where one brother sold land, executed a deed therefor, and left it with a sister, and received the purchase price from the grantee, the deed must be regarded as having been delivered to the grantee. McCormick v. McCormick, 71 Iowa, 379.

Under a contract to sell and convey to several persons, a delivery to one of the co-contractors is a delivery to all. Payne v. Bohols (Pa.) Oct. 20, 1896.

A deed to two trustees is sufficiently delivered when it is placed in the hands of one of them, who received and held it for some time, and then gave it to the party chiefly interested, for safe keeping. Hitz v. National Metropolitan Bank, 111 U. S. 722, 28 L. ed. 577.

There is a sufficient delivery of a written instrument executed by joint tenants for the purpose of conveying the fee to the survivor, where it is by mutual consent left in the possession of the tenant by whom it was drawn, with a declaration as to its purpose. Orr v. Clark (Vt.) April 22, 1890.

A deed delivered to a third party for the use and benefit of the grantee named therein will be operative upon its delivery after the death of the grantor, and such delivery will relate back to the prior delivery. Jones v. Jones, 6 Conn. 111, 16 Am. Dec. 40; Wheelwright v. Wheelwright, 2 Mass. 454, 3 Am. Dec. 66; Mather v. Corlies, 108 Mass. 568; Stone v. Duval, 77 Ill. 476; Thatcher v. St. Andrew's Church, 37 Mich. 264; Stephens v. Rinehart, 73 Pa. 434; Hathaway v. Payne, 34 N. Y. 92; Wallace v. Harris, 32 Mich. 380; Ellis v. Secor, 31 Mich. 185, 18 Am. Dec. 188; Goodpaster v. Leathera, 123 Ind. 121; Brown v. Danforth, 29 N. Y. S. R. 430.

Where a father purchases land and directs the conveyance to be made to his daughter, who is now *compos*, saying that he does it as a provision for her on account of her infirmity, a delivery of the deed to the father is a sufficient delivery to the daughter, whose assent will be presumed. Eastham v. Powell, 51 Ark. 530.

mortgage for her, it having previously been in the hands of the administrator before mentioned. The defendant Fletcher is the owner and holder of the mortgage, having purchased the same from defendant Libby, and it was this mortgage interest which he asserted against the plaintiffs' claim of title in fee to the real property described in the complaint. For several years prior to his decease Lennon and Miss Libby had been engaged to be married. During this engagement, at various times, she had sent him money to invest for her. He had accounted for this money in part; the indebtedness referred to was for the balance. The referee found that when Lennon executed the mortgage he intended to give to Miss Libby the difference between the amount of such indebtedness (the exact amount not being found) and the sum of \$5,000; and, further, that he intended to thus secure to her, by means of the mortgage, the amount of his debt and the amount of his gift. As a consequence, the referee held and declared the mortgage to be a

valid lien on plaintiffs' lots in the sum of \$5,000, with interest from date. It is this finding and conclusion which we shall consider, principally, as was the case in the district court when passing upon the motion for a new trial.

It was contended by the plaintiffs that the mortgage did not constitute a lien for any sum whatsoever upon their property for two reasons: *first*, it was never delivered to the mortgagee; and, *second*, that, as the note therein described was not made by the mortgagor, and the indebtedness therein mentioned never existed, the instrument itself must necessarily be invalid and of no effect. To render the mortgage effectual there must have been an actual or constructive delivery of the same to the mortgagee, prior to the death of the mortgagor. There was no actual delivery in this case; but the mortgagor, Lennon, owed Miss Libby, the woman to whom he was engaged, on account of money which she had sent him to invest, and which he may have used in the purchase of the property in question. She was

#### *Delivery in escrow.*

Where an instrument has been deposited as a writing or escrow of the grantor, it does not become a deed, and no estate passes, until the event has happened upon which it is to be delivered to the grantee, or until the delivery by the depository to the grantee. *Schmidt v. Deegan*, 69 Wis. 300; *Calhoun County v. American Emigrant Co.* 98 U. S. 124, 23 L. ed. 323.

A deed cannot be delivered in escrow to the grantee. *Darling v. Butler* (N. Y.) 10 L. R. A. 469, and *note*.

Where upon an exchange of lands both plaintiff and defendant execute deeds and place them with a third person in escrow, to be delivered upon conditions as to the title, which are not performed, the depository is justified in redelivering the defendant's deed to him. *Hayden v. Meeks* (Ark.) Nov. 22, 1890.

A real-estate agent is not necessarily incapacitated by his agency from acting as the custodian of an escrow between his principal and the purchaser. *McLaughlin v. Wheeler* (S. Dak.) Jan. 30, 1891. See *Cincinnati, W. & Z. R. Co. v. Hilt*, 18 Ohio St. 254.

The authority of the custodian of a deed delivered as an escrow need not be in writing. *Cannon v. Handley*, 72 Cal. 123.

Where a married woman joined with her husband in executing a deed, and intrusted it to him for delivery, he had authority to arrange the details of receiving payment and consummating the delivery. The placing it in escrow was a step in the delivery, and the wife's signature to the stipulation making the escrow was unnecessary. *Hughes v. Thistlewood*, 40 Kan. 232.

Where a deed which is delivered in escrow is afterwards delivered to the vendee, the fact that such delivery and lease did not take place until after the time provided in the preliminary agreement for such offense is immaterial. *McDonald v. Huff*, 77 Cal. 279.

Where a deed remains in escrow until the first payment is made, and is then delivered as the deed of the parties, this is equivalent to a mortgage to secure the first payment. *Brown v. Gilman*, 17 U. S. 4 Wheat. 255, 4 L. ed. 564.

A deed cannot be made in escrow by any other declarations of the grantor than are made at the time of signing and executing it. *Blight v. Schenck*, 10 Pa. 225, 51 Am. Dec. 481.

#### *Effect of delivery in escrow.*

A deed delivered in escrow cannot be revoked by 12 L. R. A.

the grantor. *Cannon v. Handley*, 72 Cal. 123; *Millet v. Parker*, 2 Met. (Ky.) 603.

Upon performance by a grantee of the condition upon which a deed is delivered in escrow, the depository becomes the custodian of the grantee, and his possession is the possession of the latter. *Cannon v. Handley*, *supra*; *Shirley v. Ayres*, 14 Ohio, 303.

The destruction or detention of the deed by the grantor, after being placed in the hands of the trustee, cannot divest grantee's title. *Regan v. Howe*, 121 Mass. 426; *Foster v. Mansfield*, 3 Met. 412; *Jacobs v. Alexander*, 19 Barb. 245; *Sorugham v. Wood*, 15 Wend. 546; *Moore v. Hazelton*, 9 Allen, 103.

A deed delivered in escrow does not by delivery to the grantee after the grantor's death take effect by relation, as against a devise of the land by the grantor. *Chadwick v. Tatem*, 9 Mont. 354.

#### *Delivery by act of recording.*

A deed may be delivered by the grantor's having it recorded, if his purpose be to effectuate a delivery. *Vaughan v. Godman*, 1 West. Rep. 547, 103 Ind. 499, citing *Taylor v. McClure*, 25 Ind. 39; *Somers v. Pumphrey*, 24 Ind. 231; *Mallett v. Page*, 8 Ind. 364; *Tallman v. Cooke*, 39 Iowa, 402. See *Ward v. Small* (Ky.) 12 Ky. L. Rep. 55; *Younge v. Guilbeau*, 70 U. S. 3 Wall. 636, 18 L. ed. 233.

A deed executed and recorded, if not delivered, will convey no title. *McGraw v. McGraw*, 4 New Eng. Rep. 415, 79 Me. 257; *Hill v. McNichol*, 6 New Eng. Rep. 445, 30 Me. 209; *Stone v. French*, 37 Kan. 145.

The execution and registration of a deed, and delivery of it to the register for that purpose, do not vest the title in the grantee, unless the register is his agent to receive it. *Parmelee v. Simpson*, 72 U. S. 5 Wall. 81, 18 L. ed. 542; *Maynard v. Maynard*, 10 Mass. 456; *Samson v. Thornton*, 3 Met. 231; *Younge v. Guilbeau*, 70 U. S. 3 Wall. 641, 18 L. ed. 233.

The delivery of a deed in which the grantees were numerous, to the clerk to be recorded, may be considered, if no condition is annexed, to be a delivery to the grantees. *Tompkins v. Wheeler*, 41 U. S. 16 Pet. 106, 10 L. ed. 903.

#### *Presumption of delivery.*

Possession by the grantee of a deed duly executed and acknowledged is presumptive evidence of its delivery. *Scott v. Scott*, 14 West. Rep. 343, 95 Mo. 800; *Green v. Yarnall*, 6 Mo. 533; *Ward v. Dougherty*, 75 Cal. 240; *Blair v. Howell*, 68 Iowa, 619;

some distance from him, residing in the State of Massachusetts. With much care he prepared with his own hands a mortgage, in which she was named as mortgagee, upon this and other real property, to secure the payment of a note, never executed, for a much larger sum than the amount of his debt. A few hours before he killed himself, and, undoubtedly, in contemplation of the act, he took this instrument to the proper office, and gave it to the register of deeds, with directions to record the same at his expense. When he placed the

mortgage in the hands of the officer for record it was clearly his intention to do all that he could, under the circumstances, towards delivering it, to put it beyond his own control, for the benefit of the mortgagee. No particular ceremony is essential to the delivery of such an instrument. It may consist in an act without words, or in words without any act. Manual possession of a deed by the grantee is not necessary. Whether there has been a delivery to him depends upon the intent of the grantor; and, if such an intent is manifest, de-

Den v. Farlee, 21 N. J. L. 280; Black v. Shreve, 18 N. J. Eq. 455; Benson v. Woolverton, 15 N. J. Eq. 158; Brown v. Brown, 38 N. J. Eq. 653; Dunn v. Games, 1 McLean, 523; Butrick v. Tilton, 2 New Eng. Rep. 248. 141 Mass. 93; Games v. Dunn, 39 U. S. 14 Pet. 323, 10 L. ed. 476; Sticard v. Davis, 81 U. S. 6 Pet. 124, 8 L. ed. 342.

But such presumption is rebutted where, after the asserted delivery, the property is treated in all respects by grantor and grantee as the land of the grantor. Scott v. Scott, *supra*.

Where a grantee is in possession of a deed which upon the face of it is regularly executed, and has had it recorded, the presumption is that it was duly delivered. Hanrick v. Neely, 77 U. S. 10 Wall. 354, 19 L. ed. 947; Carver v. Jackson, 29 U. S. 4 Pet. 1, 84, 7 L. ed. 761, 790; Ward v. Lewis, 4 Pick. 520.

Where a deed was made by a father to his children, the presumption of delivery thereof, arising from their possession of the deed, is not rebutted by proof showing that the deed was not recorded until after the grantor's death, and that (under a reservation in the deed) he remained in possession during his life, and that the land was assessed to him and the taxes paid by him, and that he, after the date and acknowledgment of the deed, offered the land for sale. Blair v. Howell, *supra*. See Stewart v. Stewart, 50 Wis. 443.

There is a strong implication that a deed duly executed, found among papers of grantee after his death, has been delivered. Griffin v. Griffin, 125 Ill. 480.

In the absence of evidence to the contrary, the production of a deed by the grantee is *prima facie* evidence of its delivery. Andrews v. Dyer, 3 New Eng. Rep. 223, 78 Me. 427, citing Maynard v. Maynard, 10 Mass. 456; Hatch v. Haskins, 17 Me. 301; 2 Greenl. Ev. § 297.

But no presumption of delivery arises where a deed running to Mercy A. is produced by Melissa A., whose deceased husband was the grantor. Andrews v. Dyer, *supra*.

Possession of an unregistered deed does not raise a presumption of its delivery, but it is a fact from which the jury may infer a delivery in the absence of rebutting evidence. Tuttle v. Rainey, 98 N. C. 613.

#### *Presumption as to time of delivery.*

Where a document purporting to be a duly acknowledged deed, with regular evidence of its execution, upon its face, is found in the hands of the grantee, or if such a deed is found upon the proper records, a presumption arises that it was delivered at the time it bears date, or at some time prior to the date of its acknowledgment. Vaughan v. Godman, 94 Ind. 191; Wheeler v. Single, 62 Wis. 380; Wallace v. Bordell, 97 N. Y. 13; People v. Snyder, 41 N. Y. 397; Canandarqua Academy v. McKechnie, 90 N. Y. 618; Knolls v. Barnhart, 71 N. Y. 474; McCurdy's App. 65 Pa. 290; Abb. Tr. Ev. 694; Steph. Dig. Ev. 154; Wood, Pr. Ev. 241.

In the absence of proof to the contrary, it will be presumed that a deed was delivered at its date. Purdy v. Coar, 12 Cent. Rep. 629, 109 N. Y. 448; Ward 12 L. R. A.

v. Dougherty, 75 Cal. 240; Cal. Civ. Code, § 1055; United States v. Le Baron, 60 U. S. 19 How. 73, 12 L. ed. 523; 2 Greenl. Ev. § 297; Van Rensselaer v. Vickery, 3 Lana. 59; Elsey v. Metcalf, 1 Denio, 322; Harris v. Norton, 18 Barb. 264.

Where there is no evidence beyond what is furnished by the instrument itself, showing the date of the delivery of the deed, the legal presumption must prevail that it was delivered on the day of its date. Walker v. Rand, 181 Ill. 27, citing Hardin v. Crate, 78 Ill. 538; Hardin v. Osborne, 60 Ill. 96; Deiminger v. McConnell, 41 Ill. 227; Jayne v. Gregg, 42 Ill. 413; Darst v. Bates, 61 Ill. 439.

But this presumption may be removed by evidence that it was delivered on some subsequent day. United States v. Le Baron, *supra*.

When a delivery on a subsequent day is shown, the deed speaks on that subsequent day, and not on the day of its date. United States v. Le Baron, *supra*.

Under the Maryland Act of 1766, a deed signed, sealed and delivered is complete, and will take effect as of that date, if subsequently acknowledged and enrolled, without regard to an intervening Bankrupt Act. Wood v. Owings, 5 U. S. 1 Cranch, 229, 2 L. ed. 94.

#### *The deed itself as evidence of delivery.*

The delivery of a deed complete on its face to the grantee is absolute, whatever conditions may be orally annexed to qualify or postpone its operation. Hargrave v. Melbourne, 35 Ala. 270.

A notary's seal is not essential to delivery. Robinson v. Robinson, 3 West. Rep. 849, 116 Ill. 360.

That a deed contains the words "signed, sealed and delivered," is not evidence of delivery. Hill v. McNichol, 6 New Eng. Rep. 445, 80 Me. 203.

The certificate of a proper officer, made under the Statute, that the grantor signed, sealed and delivered the deed or mortgage as his voluntary act and deed, is cogent evidence of delivery. Den v. Farlee, 21 N. J. L. 285.

#### *Parol evidence as to delivery.*

Delivery of deed may be proved by parol. Coia v. Coia, 24 S. C. 597.

So, it is always competent to show by parol that there has not been a delivery. Stephens v. Buffalo & N. Y. C. R. Co. 20 Barb. 536; Roberts v. Jackson, 1 Wend. 478; Clark v. Gifford, 10 Wend. 310; Gilbert v. North American F. Ins. Co. 23 Wend. 43; The Lady Superior v. McNamara, 3 Barb. Ch. 375, 5 L. ed. 599.

Where the only act looking toward a delivery is the recording of the deed, the effect of such recording is governed by the intention of the party recording, and is shown by what he said to the register of deeds when he left the instrument with him for record; and what he said is part of the *res gestae* and admissible to explain the character of his intent. Stevens v. Castel, 5 West. Rep. 724, 63 Mich. 111, citing Felt v. Amidon, 43 Wis. 467; Lund v. Tyngsborough, 9 Cush. 36.

Grantor's declarations in disparagement of grantee's title, in presence of the grantee, are admissible

livery for record, although not known by the grantee, is, if followed by his assent,—as was the case here,—a good delivery. *Stevens v. Hatch*, 6 Minn. 64 (Gil. 19); *Gaston v. Merriam*, 38 Minn. 271; *Conlan v. Grace*, 36 Minn. 276; *Nazro v. Ware*, 38 Minn. 448.

The finding of the referee as to delivery of the mortgage was abundantly supported by the testimony. But there was no note of any description executed by Mr. Lennon. A note corresponding with that described in the mort-

gage, had such a one been made, might have been evidence of his intent to present the amount thereof to Miss Libby, or of his intent to give to her the difference between the amount of his indebtedness and the sum of \$5,-000. It may have been, as determined by the referee, that Mr. Lennon intended this difference as an outright gift to Miss Libby, but there was no evidence of such an intent. As was said by the court below when granting the motion for a new trial, such a purpose rested

upon the question of delivery of the deed (*Spencer v. Robbins*, 3 West. Rep. 702, 106 Ind. 580); but such declarations made in the absence of the grantee are not admissible. *Spencer v. Robbins*, *supra*, citing *McSweeney v. McMillen*, 36 Ind. 236.

Evidence that an attorney, at the request of the grantee, prepared a deed, which was signed and acknowledged before him as notary, and handed it to the grantor, who retained it till the death of the grantee, is not sufficient to constitute delivery. *McElroy v. Hiner*, 133 Ill. 156.

Where a deed was made, and the grantor said that the land belonged to the grantee, but the deed never was recorded, and was found among the papers of the grantor after his death, there was no delivery. *Maddox v. Gray*, 75 Ga. 452.

Where grantee had actual possession of the deed, up to a short time before his death, and was in full possession of the land, and there is evidence tending to prove that he purchased and paid for the land, and that the deed was properly in his possession until his father obtained possession of it and destroyed it, this is sufficient evidence of delivery of the deed. *Robinson v. Robinson*, 3 West. Rep. 349, 116 Ill. 250. See *Teller v. Brower*, 14 Or. 405.

#### Acceptance by grantee.

A deed, to become effective, must be either delivered to the grantee or his agent, or such circumstances must be shown as will raise a reasonable presumption of its acceptance by the grantee. *Ward v. Small* (Ky.), 12 Ky. L. Rep. 58; *Moore v. Flynn* (Ill.) Nov. 5, 1890.

Acceptance by the grantee will be presumed from his conduct, without an express acceptance. *Ward v. Small*, *supra*.

Where a grant is to a child, by way of gift, and is beneficial in effect, acceptance of the deed will be presumed although retained by the grantor. *Vaughan v. Godman*, 1 West. Rep. 547, 108 Ind. 490, citing *Cecil v. Beaver*, 28 Iowa. 241, 4 Am. Rep. 174; *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112; *Guard v. Bradley*, 7 Ind. 600; *Squires v. Summers*, 85 Ind. 252; *Bryan v. Wash*, 7 Ill. 557; *Reed v. Douthitt*, 62 Ill. 348; *Rivard v. Walker*, 39 Ill. 413; 3 Washb. Real Prop. 4th ed. 234; *Jones v. Loveless*, 99 Ind. 317; *Fitzgerald v. Goff*, Id. 28; *Bremmerman v. Jennings*, 101 Ind. 253.

Where a deed from a woman to her daughter is delivered to the daughter's husband, and her grantor announces an intention to convey to her the property, a presumption of acceptance arises. *Crain v. Wright*, 114 N. Y. 307.

It seems that when a grantor, contracting to convey land in unequal proportions to several grantees as co-tenants, delivers a deed thereof to one of them, it must be presumed that he delivered it as a conveyance to all, and unless all accepted there was no delivery. *Smith v. Cole*, 12 Cent. Rep. 774, 109 N. Y. 436.

A delivery of a deed to one who had no express authority to receive it and was not empowered to act as the grantee's agent is sufficient where the grantee subsequently ratified the action of the agent by accepting. *Ward v. Small* (Ky.), 12 Ky. L. Rep. 58.

12 L. R. A.

#### Recording by grantee.

Where a deed is legally executed and regularly recorded by the grantee, delivery will be presumed where the transaction would otherwise stand without rational explanation, unless such presumption is repelled by other proofs. *Collins v. Collins*, 45 N. J. Eq. 513.

When a deed is delivered in the execution of the contract, with the intention that it shall be operative when the grantee approves of the title, he has the right to put the deed on record, on his approving of it and tendering the consideration money. *Ryan v. United States*, 126 U. S. 68, 34 L. ed. 447.

Recording a deed is equivalent to a delivery thereof, in the absence of any fraud on the grantor. *Levy v. Cox*, 22 Fla. 546.

#### Mortgage; sufficiency of description of mortgaged premises.

An insufficient description in a mortgage will not itself render it void; its office is not to identify the property, but to furnish means for identification. *Thomson v. Madison Bldg. & Aid Assn.*, 1 West. Rep. 263, 108 Ind. 279.

Parol evidence is admissible to identify mortgaged property. *Rubey v. Missouri Coal & Min. Co.*, 3 West. Rep. 758, 21 Mo. App. 159; *Jones, Chat. Mort.* § 64; *Cake v. Cake*, 127 Pa. 400.

Literal exactness in describing the title to be secured by a mortgage is not required. *Morris v. Murray*, 32 Ky. 36.

It is sufficient if the description be correct, as far as it goes, and full enough to direct attention to the sources of full and correct information. *Ibid.*; *Jones, Mort.* §§ 70, 34.

If the description be sufficient to identify the property, it is sufficient. *Winchell v. Coney*, 2 New Eng. Rep. 327, 54 Conn. 24; *Rochat v. Emmett*, 35 Minn. 420; *Worthington v. Hylier*, 4 Mass. 196.

A wrong description does not affect the rights of the parties where there is no question as to what property was intended to be mortgaged. *Koenig v. Schmitz*, 71 Iowa, 175.

A mistake in the number of the block in which property is situated is not sufficient to affect the validity of a mortgage or a sale of the property thereunder, where it could not have misled anyone. *Cake v. Cake*, 127 Pa. 400.

Where the lands conveyed by a mortgage are therein described as "320 acres of land known as the Middlebrooks Place, where the said H lived last year, and where T now lives," the mortgage is not void for uncertainty. *Tranum v. Wilkinson*, 61 Ala. 408.

A mortgagor cannot be heard to complain of an indefinite description of the mortgaged property, whatever might be the effect of a sale under the description. *Graham v. Stewart*, 63 Cal. 374, citing *Whitney v. Buckman*, 13 Cal. 538; *Tryon v. Sutton*, Id. 430.

Where a party points out a specific parcel of land to another, and represents that it is described in a particular way, the party to whom the statement is made has a right to rely upon it. *McCasland v. Aetna L. Ins. Co.*, 6 West. Rep. 274, 108 Ind. 405.



wholly in conjecture. The gift, if really contemplated, was never made; if intended, it was unexecuted, and hence invalid. But from the facts which did appear on the trial it might fairly be assumed that, although the mortgagor failed to make a note corresponding with that described by him, or for the amount of his actual indebtedness, he intended to secure his creditor for that amount, whatever it may have been. A note for the amount he owed, or even for a greater sum, would not have added to his indebtedness as such. It would have been evidence of it only. And if it satisfactorily appeared that, when giving the mortgage, it was the purpose of the maker to secure his debt, the non-execution of a note, or the execution of a note for a larger or smaller sum, would not, in the absence of fraud, invalidate the security. The validity of a mortgage does not depend upon the description of the debt, nor upon the form of the indebtedness; it depends rather upon the existence of the debt it was given to secure. It may be valid without any note or bond, although it purports to secure a note or bond, and substantially describes it. Jones, Mort. § 858, and cases cited in *notes*. The true state of the indebtedness need not be disclosed by the instrument itself, but, in cases free from fraud, may be shown by parol. In such cases the validity of the mortgage is not affected by the fact that it was given for a larger sum than that actually due, or that its condition misrepresents the obligation or liability in fact secured or intended to be secured. *Nastro v. Wars*, *supra*, and cases cited.

To the extent indicated—that is, to the amount actually due the mortgagees when the mortgage was executed—it was and is a valid lien upon the real estate covered thereby. Had this amount been found by the referee, so that a judgment on such finding could have been ordered, or had he simply declared that to this extent the mortgage was a lien, leaving the amount to be subsequently ascertained in an action brought by defendant Fletcher to foreclose or by plaintiffs to redeem, and, in addition, ordered judgment for the defendants,—as he did,—a new trial would have been un-

necessary. But the referee erred in finding as a fact that the mortgage was given not only to secure the amount of Lennon's indebtedness to Miss Libby, but also to secure to her as a gift the sum in excess of the indebtedness up to \$5,000, and also erred in his conclusion of law that to the amount of \$5,000, with interest, the instrument in question was a valid mortgage on plaintiffs' property. If permitted to stand without objection, such a finding would conclude the plaintiffs upon the fact, and on the conclusion of law, as found by the referee, judgment could be entered fixing the amount of the lien. The question would then be *res adjudicata*. The district court was correct in granting the plaintiffs a new trial as to defendant Fletcher, the sole owner and holder of the mortgage. The defendant Gilfillan claims, however, that as to him the order must be reversed. In his answer he had alleged ownership in fee to an undivided half of one of these lots, and had disclaimed all interest in the balance of the property. When proving their case plaintiffs made no attempt to show that they were the owners of this undivided half, and, immediately upon resting, stipulated that it was owned in fee by Gilfillan. The referee so found, ordering judgment in his favor as to an undivided half, and no one seems to question the correctness of this finding and conclusion. But, notwithstanding this, the plaintiffs' motion was for a new trial as to both defendants, and it was this motion which was granted. The motion as to Gilfillan may have been inadvertently made by counsel for respondents, and we have no doubt that the court below overlooked the situation with respect to him, but the fact remains that to avoid a new trial he has been obliged to appeal from the order. It was not incumbent upon him to ask that the order be modified by the district court.

*The order appealed from is reversed as to defendant Gilfillan.*

*As to the defendant Fletcher it is affirmed.*

Vanderburgh, J., took no part in this case. Mitchell, J., being absent when this decision was made and filed, did not participate therein.

## WISCONSIN SUPREME COURT.

Louis WETZLER, *Respt.*,

v.

Pauline A. DUFFY, *Appt.*

(....Wis.....)

1. The loss by fire of a house on land in the actual possession of a vendee as owner, he having secured part of the purchase money by mortgage and paid the balance, must be borne by him, although he holds under a defective deed, as he is the equitable owner of the premises.
2. Upon the correction by the court of a deed which defectively describes premises, the equitable title to which is in the vendee, his legal title relates back to its execution and delivery.

12 L. R. A.

3. Unless a party calls the attention of the court to a matter of fact upon which he desires a separate finding he cannot, on appeal, avail himself of the neglect of the court to make such finding, if the evidence sustains the findings made and is not sufficient to require additional ones as matter of law.

4. It will be presumed upon appeal that the court found against a counterclaim if it omitted to set out any finding in regard to it and the evidence clearly justifies a finding against it.

(November 25, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Ashland County in favor of plaintiff in an action brought to reform a deed and foreclose a mortgage. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Cole & O'Keefe*, for appellant:

Where the loss occurs before delivery of the title deed,—and it matters not that an erroneous deed was delivered, as vendee is entitled to a perfect deed properly describing the premises as well as one with all the necessary essentials according to agreement of sale,—the loss falls upon the vendor.

*Wells v. Calnan*, 107 Mass. 514.

Defendant had a right to have the issues raised on her counterclaim decided, and if the defendant would have the right to recover back the purchase money paid, the same would be a good counterclaim.

*Thompson v. Gould*, 37 Mass. 184.

If the defendant after the property was destroyed owed the balance of the purchase money, \$700 therein sued for, there was at the time such sum became due a failure of consideration and a part of defendant's title had failed, and the same would be an absolute defense to a suit for such purchase money.

Boone, Real Prop. p. 483; *Wells v. Calnan* and *Thompson v. Gould*, *supra*; *Bend v. Ruckman*, 17 Week. Dig. 153; *Wicks v. Bowman*, 5 Daly, 225.

The defendant is not required to accept the deed as the value of the property is reduced and changed, and she is entitled to recover back the purchase money.

Boone, Real Prop. p. 483; *Wells v. Calnan*, *Thompson v. Gould*, *Bend v. Ruckman* and *Wicks v. Bowman*, *supra*.

*Messrs. Sleight & Foster* for respondent.

*Taylor, J.*, delivered the opinion of the court:

The facts in this case are substantially as follows: On the 14th of May, 1887, the plaintiff agreed to convey to the said defendant a certain lot of land situate in Ashland County, described as follows: "Commencing at the northwest corner of lot No. one (1), in block No. six (6), of the Village of Hurley, according to the recorded plat thereof; thence east twenty-five (25) feet; thence south ninety (90) feet; thence west twenty-five (25) feet; and thence north ninety (90) feet to the place of beginning,"—for the consideration of \$2,500 agreed to be paid by the defendant. That on the same day the plaintiff executed a deed of conveyance to the said defendant, which both parties supposed contained a correct description of the property sold to the defendant; but, in fact, the description was imperfect, and does not describe the land sold and intended to be conveyed. The description in the deed is as follows: "The following described real estate situated in the County of Ashland, and State of Wisconsin,—to wit: commencing at the northwest corner of lot number one (1), in block number six (6), in the Village of Hurley, according to the recorded plat thereof; running thence west twenty-five (25) feet; thence south ninety (90) feet; thence east twenty-five (25) feet; thence north ninety (90) feet to the original point of beginning." Said deed was recorded in the proper recorder's office, and on the same day the defendant executed and delivered to the plaintiff a mortgage upon the property sold by the plaintiff to the defendant, in which mortgage the property is correctly

described, to secure the payment of \$1,000, part of the purchase money. The complaint alleges the nonpayment of a part of the money due upon the mortgage, and asks judgment, first to correct the description in the deed from the plaintiff to the defendant, and for a judgment to foreclose the said mortgage. The answer admits all the material allegations of the complaint, and further admits that, supposing the plaintiff's deed had conveyed to her the land she purchased, she went into the possession of the same, and paid \$300 of the sum secured by said mortgage; that on the 27th day of June, A. D. 1887, a fire broke out in the frame store building situate on said lot, and it was wholly destroyed by fire, the defendant having no insurance thereon, thereby destroying the greater part of the value of said lot to the defendant. It is admitted that this frame building was on the lot when the plaintiff agreed to convey the same to the defendant, and at the time the deed was in fact made, and the mortgage back to the plaintiff given to secure the \$1,000, part of the purchase price. The defendant also alleges in her answer that, at the time she purchased the lot of the plaintiff, the building on said lot was insured by the plaintiff for the sum of \$300, in a reliable insurance company; and that he agreed to transfer said insurance policy to the defendant, for the sum of \$40, to be paid by the defendant; and that the plaintiff neglected and refused to transfer said insurance policy to the defendant, to her damage. The defendant also alleges a refusal on the part of the plaintiff to make a good deed of conveyance of the property actually purchased by her, and sets up, as a counterclaim, a demand for the money actually paid by her upon such purchase. The action was tried by the court, and, after hearing the testimony offered by the respective parties, the court decided in favor of the plaintiff and gave judgment reforming the deed and for a foreclosure of the mortgage. The defendant excepted to the findings of fact and conclusions of law. After a careful reading of the testimony, we think it very clear that the findings of fact are fully sustained by the evidence, and the conclusions of law, and the judgment thereon in favor of the plaintiff, are clearly right.

The learned counsel for the defendant contends that the judgment is erroneous, because it clearly appears from the findings and the evidence that, before the commencement of this action, and before a perfect deed had been given by the plaintiff to the defendant, for the real estate in dispute, the building situate thereon had been burned; and so the plaintiff could not make a perfect title to the premises sold to the defendant, the house burned being a very material part of the lot sold. He argues that when a party agrees to convey real estate to another for a fixed price, and when a considerable portion of such price is paid for the buildings situate thereon, and such buildings are destroyed by fire, without the fault of the purchaser, before the title is conveyed to him, he may refuse to take a conveyance, and recover the purchase money already paid; and to this proposition he cites *Thompson v. Gould*, 20 Pick. 134, and *Wells v. Calnan*, 107 Mass. 514.

We think this case is clearly distinguishable

from the cases cited. In those cases the buildings on the premises were destroyed before the time for making the deed had arrived, and it does not appear in the case last cited that the purchaser had taken possession under his contract. In the case at bar, the contract was a sale to be paid for on delivery of a deed, and the deed was to be delivered immediately. A deed was delivered which was supposed to convey the land to the defendant, and she took actual possession, as owner thereof, gave back a mortgage to secure part of the purchase money, the other part having been paid in cash. We think it very clear that, when this imperfect deed was given, the purchase price paid, and possession taken of the property intended to be conveyed by the defendant, the whole equitable title, at least to the land, vested in the defendant; and while such equitable title was vested in the defendant, the house was destroyed by fire. Upon its destruction the defendant did not seek to avoid her contract, but rebuilt on the lot, and continued in the actual possession of the same up to the time of the commencement of this action. Under such a state of facts, we think the defendant must be considered the owner of the premises at the time of the fire, and the loss must fall on her. Whether we would feel bound to follow the decisions of the court of Massachusetts, had the defendant been in possession of the lot under a contract for a deed to be executed at some future time, and before that time had arrived the house had been destroyed by fire, without the fault of either party, need not be determined in this case. For all practical purposes, the defendant was the owner of the house and lot when the fire occurred, and the Massachusetts cases place their decision upon the ground that the actual owner must stand the loss. In addition to this, when the court by its judgment corrected the deed, the legal estate became vested in the defendant from the time of the execution and delivery of the deed.

The learned counsel for the appellant urges another point as error, viz.: That the court did not make any findings upon his counterclaim for damages for a breach of contract on the part of plaintiff to transfer to her the policy of insurance he held upon the building at the time the same was burned. We have looked into the testimony which bears upon that question, and think it is entirely insufficient to sustain a finding thereon in favor of the defendant. But the counsel for the defendant insists that, if it be admitted that the evidence is insufficient to sustain a finding in favor of the plaintiff, still, it was error for the court not to make a finding on the question. The exceptions of the defendant are not sufficient to raise that question in this court. The record does not show that he called the attention of the court to the matter, or that he asked the court to make a finding on that point. All he did was to except to the findings because there was no finding on that question. These exceptions are not made in court, and probably never came to the knowledge of the court until he was asked to sign the bill of exceptions in the case.

The rule was established in this court in *Wilkinson v. Wilkinson*, 59 Wis. 557, 560; *Barry v. Schmidt*, 57 Wis. 172; *Wrigglesworth v. Wrigglesworth*, 45 Wis. 255-257; *Mead v. 12 L. R. A.*

*Chippewa County Supra*, 41 Wis. 205; *Williams v. Stevens Point Lumber Co.*, 72 Wis. 487.—that, if a party to an action desires any particular finding of fact, he must call the attention of the court to the matter of fact upon which he desires a separate finding; otherwise, he cannot avail himself of the neglect of the court to make such finding. This rule is only applicable to a case where the testimony sustains the findings made by the court, and there is not sufficient evidence in the case to require, as a matter of law, a finding different from those found by the court upon some other material matter. In this case, the court having omitted to find for either party on the counterclaim made by the defendant in her answer, and the evidence being of such a character as would have clearly justified the court in finding against such counterclaim, we must infer, from his omission to make a special finding on that point, that he found against the defendant's claim. We think the case was fairly tried, and that the judgment is right.

*The judgment of the Circuit is affirmed.*

STATE of Wisconsin, ex rel. Patrick GRADY, Appt.,

CHICAGO, MADISON & NORTHERN R. CO., Resp't.

(....Wis....)

1. **Mandamus is the proper remedy to compel a railroad company to perform its statutory duty to construct a farm crossing.**

**NOTE.**—*Mandamus to compel performance of corporate duties.*

Mandamus is the appropriate remedy to compel a railway company to perform the public duties required of it by its charter, and imposed on it by law. *Railroad Comrs. v. Portland & O. Cent. R. Co.* 68 Me. 209; *Mobile & O. R. Co. v. Wisdom*, 5 Heak. 125. See *State v. New Haven & N. Co.* 41 Conn. 184.

*Duty of railroad company to fence its tracks.*

The Minnesota Statute requiring railroads to be fenced is not a law for line or partition fences. *Smith v. Minneapolis & St. L. R. Co.* 37 Minn. 103; *Gillam v. Sioux City & St. P. R. Co.* 26 Minn. 223.

The Revised Statutes of Wisconsin as amended, requiring railroad companies to fence their tracks, and making them absolutely liable for damages occasioned by their failure to do so, is valid, and it excludes the defense of contributory negligence. *Quackenbush v. Wisconsin & M. R. Co.* 71 Wis. 472.

The neglect of a railroad company to properly fence its track is sufficient negligence to make the company liable for animals killed by a train. *Talbot v. Minneapolis, St. P. & S. S. M. R. Co.* (Mich.) July 2, 1890; *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510; *Grand Rapids & I. R. Co. v. Southwick*, 30 Mich. 444.

Although the fencing of a track is not imposed upon a railroad company as a duty, yet the fact that the track is unfenced of itself conclusively establishes negligence of the company, where stock is killed or injured thereon. *Hindman v. Oregon R. & Nav. Co.* 17 Or. 614.

A railroad company is liable in damages for injury to stock through its negligence, where the owner contributed to the injury only by permitting

2. Neither the right to maintain actions for penalties or to file a bill in equity for a mandatory injunction, nor the fact that an indictment will lie because of the refusal of a railroad company to make a farm crossing, constitutes such an adequate remedy at law as to bar a writ of mandamus to compel the construction of a crossing.

3. A writ of mandamus is properly directed to a corporation in its corporate name.

(March 17, 1891.)

**A**PPEAL by relator from an order of the Circuit Court for Green County quashing an alternative writ of mandamus directing respondent to construct a farm crossing on relator's land or show cause why it should not do so. *Reversed.*

The facts are stated in the opinion.

*Mr. B. Dunwiddie*, for appellant:

The respondent Company having neglected to construct the crossing as required by statute, the relator was warranted in instituting mandamus proceedings on the authority of general principles, as adjudicated by the common-law courts.

See Crary, Spec. Pl. p. 273; *People v. New York*, 10 Wend. 895-897; *Adrian v. New York* Supra. 13 How. Pr. 224; *Boyce v. Cayuga Coun-*

*ty Supra.* 20 Barb. 204; *Re Williamsburgh Trustees*, 1 Barb. 84; *Lyon v. Green Bay & M. R. Co.* 43 Wis. 544; *Neilson v. Chicago, M. & N. W. R. Co.* 58 Wis. 519; *Ohio & M. R. Co. v. Peoria*, 11 West. Rep. 875, 121 Ill. 483; *Boggs v. Chicago, B. & Q. R. Co.* 54 Iowa, 435; High, Extr. Legal Rem. 1874, pp. 200-226.

*Massrs. B. J. Stevens and P. J. Clawson*, for respondent:

The Statute is designed to protect trains on railroads as much as domestic animals straying upon them. Its object is to protect the public generally.

*McCall v. Chamberlain*, 18 Wis. 687; *Blair v. Milwaukee & Pr. du Ch. R. Co.* 20 Wis. 254; *Curry v. Chicago & N. W. R. Co.* 43 Wis. 635; 1 Sanb. & B. Ann. Stat. 1085.

The discretion of determining what shall be "suitable and convenient" crossings is one for the Company, subject to review by the court.

*Jones v. Seligman*, 81 N. Y. 191.

For aught that appears in the petition, it may well be that the cut in question was so deep and wide as to render the cost of a bridge, such as would be proper to protect the public as well as the cattle of the appellant from danger, greater than either portion of the farm, and, hence, unwarranted, as a suitable crossing.

*Clarke v. Rochester, L. & N. F. R. Co.* 18 Barb. 350.

his stock to run at large. *Moses v. Southern P. R. Co.* 8 L. R. A. 135, and note, 18 Or. 368.

In such case the failure to fence will be considered the proximate cause of the injury. *Sullivan v. Oregon R. & Nav. Co.* (Or.) June 10, 1890.

Duty of railroad companies to fence tracks. See notes to *Gallagher v. New York & N. E. R. Co.* (Conn.) 5 L. R. A. 737; *Donnegan v. Erhardt* (N. Y.) 7 L. R. A. 527.

#### Constitutionality of statutes.

A statute making the failure of a railroad company to fence its track conclusive proof of negligence, and making it liable for stock killed in consequence of such failure, is not obnoxious to the constitutional provisions requiring due process of law and the equal protection of the laws. *Sullivan v. Oregon R. & Nav. Co. supra*; *Oregon R. & Nav. Co. v. Dacres* (Wash.) March 8, 1890; *Oregon R. & Nav. Co. v. Smalley* (Wash.) March 8, 1890.

It is only where a duty is specific and plainly imposed upon a corporation that the court may act by mandamus. *People v. New York, L. E. & W. R. Co.* 6 Cent. Rep. 30, 104 N. Y. 33; *People v. Dutchess & C. R. Co.* 53 N. Y. 152; *People v. Boston & A. R. Co.* 70 N. Y. 569; *People v. Rochester & S. L. R. Co.* 76 N. Y. 294; *Ohio & M. R. Co. v. People*, 9 West. Rep. 167, 120 Ill. 200.

The erection of a station-house, or its enlargement, not being a specific duty prescribed by statute, courts cannot enforce its performance by mandamus. *People v. Roma, W. & O. R. Co.* 4 Cent. Rep. 167, 103 N. Y. 93.

Mandamus is the proper remedy to compel a company to construct its fences in compliance with the Statute (*Ohio & M. R. Co. v. People*, 11 West. Rep. 875, 121 Ill. 483); or to build a bridge. *Ohio & M. R. Co. v. People*, 9 West. Rep. 167, 120 Ill. 200; *New Orleans, M. & T. R. Co. v. Mississippi*, 113 U. S. 12, 23 L. ed. 619; *People v. Boston & A. R. Co.* 70 N. Y. 569.

Mandamus lies to compel a company to operate its road as a continuous line, to compel it to run daily trains, and, where there is a statute expressly requiring it, to compel a stoppage of at least two of its trains each day at a particular station. *Ohio & M. R. Co. v. People*, 9 West. Rep. 167, 120 Ill. 200; 12 L. R. A.

*Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 423; *Re Brunswick etc. R. Co.* 1 Puga. & B. (N. H.) 697; *Com. v. Eastern R. Co.* 103 Mass. 254.

So it lies to compel a company to grade its tracks and crossings, and construct its road across a stream, so as not to interfere with navigation. *Ohio & M. R. Co. v. People*, 9 West. Rep. 167, 120 Ill. 200; *Chicago & N. W. R. Co. v. People*, 56 Ill. 325; *State v. North Eastern R. Co.* 9 Rich. L. 247.

But mandamus will not be granted in any case where it is clear it would prove unavailing; hence, a railroad company cannot be compelled to repair its road and put it in safe condition for passengers when the company has neither the funds nor the means of raising them. *Ohio & M. R. Co. v. People*, 9 West. Rep. 167, 120 Ill. 200. See *People v. Chicago & A. R. Co.* 55 Ill. 95; *People v. Lieb*, 85 Ill. 424; *People v. Trustees of Schools*, 86 Ill. 613; *Cristman v. Peck*, 90 Ill. 150; *People v. Hatch*, 38 Ill. 9.

A mandamus on the ground of a statutory duty must be to compel the very duty enjoined by the statute. *People v. Emigration Comrs.* 22 How. Pr. 291.

In such proceedings, where the question is one of public right, it is sufficient for the relator to show that he is a citizen of the county and as such is interested in the execution of the laws. *State v. Grace* (Or.) 81 Am. & Eng. Corp. Cas. 408; *State v. Ware*, 13 Or. 380.

#### Rule applied in other cases.

Mandamus will issue against the cashier of a bank or other officer having the custody of the books; and the bank, in its corporate capacity, is not a proper party defendant on a petition to compel a bank to permit access to and inspection of its books. *Winter v. Baldwin* (Ala.) April 30, 1890; *People v. Throop*, 13 Wend. 153; *People v. Mott*, 1 How. Pr. 247.

Mandamus will issue to restore to membership in an incorporated society one suspended for failure to pay a penalty not authorized by the constitution or by laws. *Erd v. Bavarian Nat. A. & L. Asso.* 11 West. Rep. 171, 67 Mich. 223.

Or, where a member has been expelled without being given the opportunities for defense provided

The Freeport road runs along on the east side of the two parts of relator's tract separated by the railroad, and connects the same, and it is in this road, where it crosses the railroad, that the highway bridge over the deep cut is constructed. The appellant's land extends to the center of this road, and hence to the center of the bridge. May not this bridge, situate in half-part lengthwise upon his own land, be, under the circumstances, the "suitable and convenient" farm crossing of the Statute?

See *Kimball v. Kenosha*, 4 Wis. 321; *Kneeland v. Van Valkenburgh*, 48 Wis. 434; *Hammond v. McLachlan*, 1 Sandf. 323; *Mariner v. Schulte*, 18 Wis. 693; *Arnold v. Elmore*, 16 Wis. 509; *Gove v. White*, 20 Wis. 425; *Norcross v. Griffiths*, 65 Wis. 599; *White v. Godfrey*, 97 Mass. 472.

The appellant had an ample and adequate remedy at law, and also in equity as well, and was under no necessity for resorting to mandamus.

*State v. Washington County Supra*, 2 Pinn. 553; *State v. Fond Du Lac*, 42 Wis. 287; *State v. Joint School Dist.* 65 Wis. 631; High, Extr. Legal Rem. §§ 42, 238.

The Statute gives to the owner the personal right to have constructed, in proper places,

farm crossings, and provides a method for enforcing the right by suit to recover the extraordinary penalty of \$10 for each passing locomotive; and this recovery can, of course, be had only at law. The rule is settled that where the Statute "confers a right and prescribes the remedy for its enforcement, such remedy must be pursued to the exclusion of all others."

*Burns v. Milwaukee & M. R. Co.* 9 Wis. 455; *Bohlman v. Green Bay & L. P. R. Co.* 30 Wis. 105; *Andrews v. Farmers L. & T. Co.* 23 Wis. 288; *Sherman v. Milwaukee, L. S. & W. R. Co.* 40 Wis. 645; *Hanlin v. Chicago & N. W. R. Co.* 61 Wis. 515; *State v. Milwaukee*, 20 Wis. 87.

In addition, there is the remedy by indictment.

*People v. New York Cent. & H. R. R. Co.* 74 N. Y. 302; *Gear v. C. O. & D. R. Co.* 43 Iowa, 83.

Not only has the appellant legal remedies which are adequate and ample, but the remedy in equity is far more appropriate and more efficient, and is of itself altogether adequate.

*Wademan v. Albany & S. R. Co.* 51 N. Y. 568; *Jones v. Seligman*, 16 Hun, 230, 81 N. Y. 191; *Jamestown v. Chicago, B. & N. R. Co.* 69 Wis. 649; *Johnston v. Providence & S. R. Co.* 10 R. I. 365.

for by the by-laws of the association, to compel his restoration to membership. *People v. Musical Mut. Prot. Union*, 118 N. Y. 101; *Sperry's App.* 8 Cent. Rep. 220, 118 Pa. 291; *People v. Musical Mut. Prot. Union*, 47 Hun. 273; *Wachtel v. Widows & Orphans Benev. Soc.* 84 N. Y. 23; *Loubat v. Le Roy*, 40 Hun. 546; *Murdock v. Phillips Academy*, 12 Pick. 244; *Hutchinson v. Lawrence*, 67 How. Pr. 38; *Fisher v. Keane*, L. R. 11 Ch. Div. 333; *Hopkinson v. Exeter*, L. R. 5 Eq. 62; *Labouchere v. Wharnclyffe*, L. R. 13 Ch. Div. 346; *Wood v. Woad*, L. R. 9 Exch. 190; *Innes v. Wylie*, 1 Car. & K. 262; *Willis v. Childs*, 18 Beav. 117.

The only ground on which the Michigan Supreme Court can interfere in aid of a member is that, as corporations, they are subject to judicial oversight to prevent their depriving members of corporate privileges. *Burt v. Michigan Grand Lodge, F. & A. Masons*, 9 West. Rep. 529, 66 Mich. 85. See *Burt v. Free Masons*, 44 Mich. 203.

Where execution on a judgment against a benefit association has been returned unsatisfied, further proceedings for collection should be in equity, and mandamus will not lie. *Miner v. Michigan Mut. Ben. Asso.* 8 West. Rep. 139, 65 Mich. 84.

The right of any person to a commutation ticket at rates equal to those offered by a carrier to the public may be enforced by mandamus. *State v. Delaware, L. & W. R. Co.* 2 Cent. Rep. 723, 48 N. J. L. 55; *State v. New Haven & N. R. Co.* 37 Conn. 154; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365; High, Extr. Legal Rem. § 322.

It lies to compel delivery of grain by a carrier to the elevator to which it is consigned, without discrimination. *Scofield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 825, 43 Ohio St. 571; *Chicago & N. W. R. Co. v. People*, *supra*; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33.

Where it is the duty of a gas company to furnish gas to a city at the rates fixed by an ordinance, it may be compelled by mandamus to do so, so long as it continues to exercise and enjoy its franchise as a gas company. *Zanesville Gaslight Co. v. Zanesville*, 47 Ohio St. 35.

The city solicitor may bring a suit to compel a gas company to furnish gas to a city at the rates fixed by the city council. *Ibid* 19 L. R. A.

A stockholder of a manufacturing company may compel the production of its books and papers, to enable him to prepare a bill for grievance by fraudulent mismanagement, after proper demand made. *Phoenix Iron Co. v. Com.* 5 Cent. Rep. 668, 113 Pa. 508; *Com. v. Allegheny County Comra.* 23 Pa. 222.

The trustees of a religious corporation will be compelled by mandamus to open the meeting-house to a minister regularly appointed to that place by an annual conference under the usages and discipline of the denomination. *People v. Conley*, 43 Hun. 98.

See generally, as to power of court over religious institutions, *Isham v. Fullager*, 14 Abb. N. C. 363; *First Ref. Presby. Church v. Bowden*, Id. 364; *Isham v. Trustees First Presby. Church*, 63 How. Pr. 465.

The right to a mandate to compel a telephone company to give telephone connections and facilities as required by statute is not abridged or taken away by the fact that the Statute fixes a penalty for violation of the law. *Central U. Teleph. Co. v. State*, 118 Ind. 194; *Central U. Teleph. Co. v. State*, 3 West. Rep. 773, 103 Ind. 1.

The right to a writ of mandamus requiring telephone companies to furnish telephone service to persons entitled thereto has been upheld in *State v. American U. Teleph. Co.* 36 Ohio St. 236; *Bell Teleph. Co. v. Com. (Pa.)* April 12, 1896.

It will lie to prevent a telephone company from making discrimination in its service, and to compel it to grant service to the relator, although respondent is a licensee of the telephone patents, and the licensor company is not a party. *Bell Teleph. Co. v. Com. (Pa.)* 3 Cent. Rep. 907. See *State v. Nebraska Teleph. Co.* 17 Neb. 126, 24 Am. L. Reg. N. S. 263; *Louisville Transf. Co. v. American Dist. Tel. Co.* 10 Chicago Legal News, 15; *American U. Teleph. Co. v. Bell Teleph. Co.* 1 McCrary, 175.

In proceeding to compel a telephone company to furnish petitioners a telephone instrument certainty to a common intent is all that is necessary in the pleadings, and an answer which, without ambiguity or evasion, responds to and denies the assertions of the petition is sufficient. *Central Dist. & Print. Teleph. Co. v. Com.* 6 Cent. Rep. 161, 114 Pa. 592; *Com. v. Allegheny County Comra.* 23 Pa. 216.

The writ should have been addressed to the directors of the Company.

High, Extr. Legal Rem. §§ 542-545; *State v. Mineral Point Supra*. 22 Wis. 396.

Cole, *Ch. J.*, delivered the opinion of the court:

The relator is the owner of a farm across which the defendant Company has constructed its railway track, dividing the farm into two separate parcels. The Company has been operating its road, running daily trains of cars over the same, for more than a year, but has neglected to construct suitable farm crossings for the convenience of the relator in passing with his teams and stock from one part of his premises to the other; and this application is for a mandamus to compel the Company to construct proper crossings. On motion, the alternative writ was quashed, and the appeal is from the order quashing the writ. In support of the decision of the circuit court, it is argued that the petition does not state facts showing that the relator is entitled to the relief demanded; in other words, that it fails to show that it is the duty of the Company to construct such farm crossings. This is a mistake as to the duty which the Statute imposes on the Company. Chapter 198, Laws 1881, which amends section 1810 of the Revised Statutes, provides, in effect, that every railroad corporation operating any railroad shall erect fences on both sides of its road of the height prescribed, with openings or gaps or bars therein, and suitable and convenient farm crossings of the road for the use of the occupant of the lands adjoining. Thus, it will be seen, the Statute imposes a distinct and absolute legal duty upon the Company to construct these farm crossings. The language of the Statute is clear and specific, and cannot be made plainer by illustration or argument. It is imperative or mandatory, requiring the corporation to perform its legal duty. It is said it appears from the petition that there is a public highway which runs along on the east side of the relator's farm, and connects the two portions thereof, and that where the railway crosses this highway a bridge has been built over a deep cut, which, it is claimed, answers every purpose of a farm crossing. We can make no such an inference from the matters stated in the petition, nor hold that the bridge meets the requirements of the Statute, and relieves the Company from the duty of constructing any other farm crossing. It is possible that the Company can show by evidence that this bridge on the highway fully answers the end and object of the Statute, but we cannot presume that it does. On the contrary, as the Statute, in absolute terms, makes it the duty of the Company to construct farm crossings for the use of the occupants of the adjoining lands, the Company is under obligation to show some valid excuse for neglecting to perform its duty. We therefore hold, as the duty of the Company was absolute and clear to make the proper farm crossings, unless there is some other objection to granting the writ, it was error to quash it on the facts stated. Again, it is said the court always refuses to grant a writ of mandamus where the party has another adequate legal remedy. But has the relator such a remedy? Section 1813 provides,

12 L. R. A

where a railroad corporation neglects to construct farm crossings proper for the use of the lands over which its road is operated, the owner or occupant may give the corporation written notice to construct such necessary farm crossings, and if the company, after being so notified, neglects for three months to construct the crossings, it shall be liable to pay the owner or occupant \$10 for each and every locomotive that may thereafter pass through the lands until the farm crossing is made. This provision enables the owner to sue the corporation and recover damages or penalties for its failure to perform its legal duty; but that will not secure the construction of the necessary farm crossing, nor will it afford an adequate remedy. The writ of mandamus would seem to be the most efficient, if not the only adequate, means for compelling the corporation to do its legal duty. It is true, in *Jamestown v. Chicago, B. & N. R. Co.*, 69 Wis. 648, and *Oshkosh v. Milwaukee & L. W. R. Co.*, 74 Wis. 584, a bill in equity for a mandatory injunction was sustained to compel a corporation to restore a highway or street to its former condition of usefulness. Perhaps that remedy might have been resorted to in the present case, but, though a party may have redress in equity, that of itself is not a conclusive objection to granting the writ of mandamus. It may possibly, and would, influence the court in the exercise of the discretion which it possesses in granting the writ under the facts and circumstances of the particular case, but does not affect its right or jurisdiction. Nor does the fact that the party is liable to indictment and punishment for his omission to do the act to compel the performance of which the writ is sought constitute any objection to granting the writ. *People v. New York*, 10 Wend. 393; *Short, Inform. Prohib. and Mand.* 235. It seems to us clear that mandamus is the only legal remedy to which the relator can resort in this case to enforce his rights to compel the corporation to perform the duty which the law imposes. The fact that the Company is liable to pay \$10 for each and every locomotive which passes over the land while it neglects, after notice for three months, to construct the proper farm crossing, constitutes no reason for denying the right. That does not take away the remedy, and does not profess to be exclusive of other means of redress. The learned counsel for the Company says, to entitle a person to the writ two things must concur: (1) a clear right to have the act done to compel the doing of which the writ is sought; and (2) that there is no other adequate legal remedy by which the performance of the specific duty can be enforced; and that the discharge of the duty is not discretionary. These conditions concur in the present case. The relator certainly has a clear legal right to have the farm crossings constructed for his use in cultivating the farm, and there is no other adequate legal remedy to compel the Company to do that act. If it shall appear on the hearing of the answer of the corporation that the making of the farm crossing is unnecessary because of the existence of a highway on the east side of the farm and the bridge over the cut furnishing all needful facilities for passing from one part of the premises to the other, or that the construction of a farm crossing would

be impracticable on account of the situation of the land, these facts can be made to appear on the hearing. But, upon the matters set forth in the petition, nothing is shown which excuses the Company from performing its statutory duty.

The writ is directed to the corporation in its corporate name, and it is insisted that it is misdirected; but we are inclined to hold the di-

rection good. Of course, the corporation must act through its officers and agents, but whose duty it is to see to the construction of farm crossings may not be known. We hold the direction is sufficient.

It follows from these views that *the order of the Circuit Court quashing the writ must be reversed, and the cause be remanded for further proceedings according to law.*

### TENNESSEE SUPREME COURT.

W. L. PATTON, Admr. of John C. Tip-ton, Deceased, *Appl.*,

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO.

(....Tenn....)

1. **Negligence of a railroad company in failing to use proper appliances and employ competent servants,** which results in the breaking in two of a moving train, will not warrant a recovery against it by one who, after waiting for the first section of the train to pass him, and without observing the approach of the other section, steps onto the track in front of it and is injured. Such negligence is not the proximate cause of the injury.

2. **When a railroad train breaks in two leaving servants of the company on the rear section,** which is permitted to continue on its way by force of gravitation, the company owes the duty, even to persons trespassing on its tracks, to station lookouts in such positions on the moving cars that they can watch the tracks ahead of them and warn persons thereon of their danger, a neglect of which may render the company liable for the injuries caused thereby.

3. **The jury must determine whether or not a person was guilty of such contributory negligence** as will prevent his recovering damages from a railroad company for injuries received while he was walking upon its tracks, where he had left the track to allow a train to overtake and pass him and then returned to it in front of a section of the train which had become detached and was following the first section by the force of gravitation, the approach of which he failed to discover because he was crossing a bridge over a waterfall the noise of which prevented his hearing the approaching cars.

4. **Going upon a railroad track without looking and listening,** even after a train has just passed, and continuing thereon unconscious of danger until overtaken and injured by a section of the train which had become detached and was being propelled by the force of gravitation, is negligence which must be allowed in mitigation of damages, even if the jury think it was not the proximate cause of the accident.

(November 5, 1890.)

NOTE.—As to duty of railroad company to persons trespassing on its tracks, see *notes to Toomey v. Southern Pac. R. Co.* (Cal.) 10 L. R. A. 189; *Cincinnati, I. St. L. & C. R. Co. v. Cooper* (Ind.) 6 L. R. A. 943.

As to effect of contributory negligence of 12 L. R. A.

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Washington County, sustaining a demurrer to the complaint in an action brought to recover damages for personal injuries resulting in death, and alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

*Messrs. Newton Hacker and Deaderick & Epps* for appellant.

*Messrs. Kirkpatrick & Williams*, for appellee:

Tenn. Code (M. & V.), § 1298 (4), requires lookout to be on locomotive and always looking ahead, or in the direction the train is going, and has no application here.

*Moran v. Nashville & O. R. Co.* 2 Bart. 379; *Louisville, N. & G. S. R. Co. v. Reidmond*, 11 Lea, 311.

Plaintiff's intestate was a trespasser on the track.

*Cooley, Torts*, 679; *East Tennessee, V. & G. R. Co. v. Fain*, 12 Lea, 43; *Kelly v. Michigan Cent. R. Co.* 65 Mich. 186, 3 West. Rep. 177, 3 Am. St. Rep. 376; *Blanchard v. Lake Shore & M. S. R. Co.* 126 Ill. 416, 9 Am. St. Rep. 630, and authorities.

His going upon the track in the manner shown was negligence. Even a traveler upon a highway, where he is as a matter of right, is required to look and listen.

*Cooley, Torts*, 664-666, 680; *Rorer, Railroads*, 1082; *Laverens v. O. R. L. & P. R. Co.* 53 Iowa, 321, 6 Am. & Eng. R. R. Cas. 274; *Hense v. St. Louis, K. C. & N. R. Co.* 71 Mo. 636, 2 Am. & Eng. R. R. Cas. 219.

The negligence of intestate was the proximate cause of the injury.

Cases cited *supra*; *Rupard v. Chesapeake & O. R. Co.* (Ky.) 7 L. R. A. 316; 2 *Rorer, Railroads*, 1083, 1089; 4 Am. & Eng. Encyclop. Law, 82, 98.

This negligence, the Statute not applying, does not merely mitigate damages, but bars a recovery.

*Nashville & O. R. Co. v. Smith*, 9 Lea, 470; *Railway Companies v. Foster*, 88 Tenn. 676; *Railway Company v. Hull*, Id. 33.

The intestate had no right to expect adaptations to be made in running trains in consequence of his probable presence, or any pre-

trespasser, see *note to Toomey v. Southern Pac. R. Co. supra*.

As to duty of person walking to look and listen, see *note to Freeman v. Duluth, S. S. & A. R. Co.* (Mich.) 3 L. R. A. 694.



cautions taken to meet, in advance, the contingency of his presence.

*East Tennessee, V. & G. R. Co. v. Fain*, 12 Lea, 43, 19 Am. & Eng. R. R. Cas. 102, and cases cited.

In a similar case, the Texas court held that the negligence of the defendant was not the proximate cause of intestate's death.

*Galveston, H. & S. A. R. Co. v. Chambers*, 73 Tex. 296.

In an identical case the Kentucky court held that plaintiff should be nonsuited.

*John v. Louisville & N. R. Co.* 10 Ky. L. Rep. 787.

The allegation that the peril of intestate ought to have been seen and could have been seen, by the servants of defendant, is not sufficient. He being a trespasser defendant's duty to him followed discovery of his dangerous situation.

Cooley, Torts, 674; *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257; *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286, 12 Am. & Eng. R. R. Cas. 77; *Louisville & N. R. Co. v. Howard*, 82 Ky. 212, 19 Am. & Eng. R. R. Cas. 98.

Even under the strict Missouri rule, this allegation is held insufficient where the person injured is a trespasser.

*Donohue v. St. Louis, I. M. & S. R. Co.* 8 West. Rep. 628, 91 Mo. 357, 28 Am. & Eng. R. R. Cas. 675; *Keim v. Union R. & T. Co.* 7 West. Rep. 144, 90 Mo. 314.

Intestate was in a place where he could not be expected to be, and injured in a manner which ordinary prudence could not have anticipated or averted.

*East Tennessee, V. & G. R. Co. v. Fain*, *John v. Louisville & N. R. Co.* and *Louisville & N. R. Co. v. Howard*, *supra*.

Larton, J., delivered the opinion of the court:

John C. Tipton was killed by collision with a train operated by defendant in error while walking upon the track. His administrator brought this suit to recover damages for the negligent killing of his intestate. A demurrer was filed to the declaration, and upon argument was sustained, and the suit dismissed. The first count of the declaration in substance alleges that the intestate was walking upon the track, about one mile west of Telford Station. That he was overtaken by a train of freight cars going west, and stepped aside until the train passed, when he returned to the track, and resumed his journey in rear of the train just passed. While passing over a bridge and waterfall, and unconscious of the approach of another train, he was overtaken and killed by some detached freight cars which belonged to the train just passed. That the freight train, while going down grade, had broken in two, and that the rear portion was following the front section by force of gravity at a distance of about 200 yards. That, though there were upon this detached portion servants and employees of the Company, there was no one upon the lookout ahead, to give warning of the approach of these cars, or to make an effort to stop them by putting down the brakes. It charges that intestate was in a position where he could have been seen if there had been any-

12 L. R. A.

one upon the front end of the detached cars, and that it was negligence not to have someone in such position that a person on the track could have been seen and warned of his danger or the train stopped. A second count charges that the breaking of the train into two parts was the result of defective machinery and unskillful servants.

The demurrer to the second count was properly sustained. The connection between this accident and the negligence by which this train became broken into two parts is too remote. Such negligence, upon the facts stated, was not the proximate cause of this injury. As observed by counsel for the Railway Company, "a proximate cause is indicated by a probable result, and not a result extraordinary, or which could not have been expected or anticipated."

Does the first count state such a case as entitles plaintiff to go to a jury? We agree with the learned circuit judge in holding that the statutory precautions prescribed by section 1168, subsec. 5, of the Code, do not apply to the movement of detached cars, such as those causing this death. The case provided for by the Statute is that of a train pulled by a locomotive, and the precautions are those required to be observed by those servants upon the engine, and have regard to obstacles on the track in front of or ahead of the engine. The persons required by the Code to be on the lookout are "the engineer, fireman or some other person upon the locomotive." He is to be on the lookout "ahead;" that is, in the direction in which the engine is moving. The precautions to be observed when any person or obstruction appears on the track are chiefly such as can only be found upon the engine. It does not at all follow that, because the statutory precautions do not apply to the movement of cars detached as these, therefore the Railway Company was under no responsibility to take care that in the movement of such cars it did no injury to persons upon its track. The principles of the common law govern in cases not within the purview of the Statute.

The first question, then, to be considered is as to the duty of the Railway Company with reference to the movement of trains or cars having no locomotive in front to warn persons upon its track. Obviously, if a person is seen upon the track, and so near as to be apparently in danger, the duty of the company, irrespective of the Statute, would be to do all that was possible to prevent an accident, by giving an alarm, and stopping the train; and so this court has frequently said that the common law is only re-enacted by our Statute with reference to the duty of the company when a person or obstruction is seen on the track. Knowledge of the danger imposes the duty to do all that is possible to stop the train and prevent the accident. *East Tennessee, V. & G. R. Co. v. Humphreys*, 12 Lea, 200; *Horne v. Memphis & O. R. Co.* 1 Coldw. 76; *East Tennessee, V. & G. R. Co. v. Pratt*, 85 Tenn. 18.

This much is clear. But it is argued that the declaration does not allege that the intestate was seen on the track, and that at the common law the duty to do all that is possible to prevent an accident only arises with reference to a trespasser upon the track when such person is seen to be on the track and in danger. Upon this

point the declaration charges "that while defendant's servants were upon said detached portion of said train, there was no one on the lookout ahead on the front portion thereof to give plaintiff's intestate warning of its approach, and defendant's employes on said train could have seen the plaintiff's intestate, and ought to have seen him, upon its track." While this is somewhat vague, yet we understand it in substance to charge that there were servants upon the cut-off cars, who could have seen plaintiff, if they had been on the lookout. When a train is thus broken in two by accident it ought to appear that after the breaking of the train there were servants upon the detached part, and that there was time sufficient for each servant before the happening of the accident to have taken such place and position on the front of the detached part so that the track could be watched ahead. The allegations of the declaration that there were servants upon the cars clearly meets the first requisition, and the further allegation that these servants "could have seen the plaintiff's intestate, and ought to have seen him," implies that they were at the time of the accident in such place as to have been able to keep watch over the track.

It is not charged that the deceased was upon the road at a public crossing, nor upon a part of the road commonly used by the public as a walkway, and, therefore, presumably by license. He must therefore be regarded as a trespasser. But it does not follow that this fact will preclude him from an action. "The mere fact that a party is a trespasser," says Judge Cooper in *East Tennessee, V. & G. R. Co. v. Fain*, "will not prevent him from recovering for injuries negligently inflicted by another, which might have been averted by ordinary and proper prudence on the part of the latter. And, therefore, although a person be injured while unlawfully on the track of a railroad, or while contributing to the injury by his own carelessness or negligence, yet, if the injury might have been avoided by the use of ordinary care and caution by the railroad company, the company will be liable for damages." 13 Lea, 41.

A railway company in the operation of its trains owes a duty to trespassers without regard to our Statute. "The rule is," says Mr. Wood, after a consideration of this subject in the light of the decisions, "that a railway company is bound to keep a reasonable lookout for trespassers upon its track, and is bound to exercise such care as the circumstances require to prevent injury." 2 Wood, Railway Law, 1267.

Where cars are being moved by gravitation, and therefore with comparatively little noise, we think the duty quite clear that a railway company should have someone on the lookout for the purpose of warning persons on the track. A decent regard for the sanctity of human life would seem to require that a reasonable watch should be kept over a track upon which a train is moving, and that a person upon the track, and near enough to be apparently in danger, should be warned of the approach of a train. If the usual warning is ineffective to arouse to a consciousness of danger, then the failure to use every possible means to stop the train would be inexcusable 12 L. R. A.

negligence. The more populous the neighborhood in which a train is moving, the greater the necessity for vigilance in observing the track at crossings and points where, by license, express or implied, the track is used as a walkway, the more imperative the duty. But the duty is not altogether relaxed by the fact that this injury probably occurred at a point where the public had no right. We think, upon the facts stated in this case, that it was negligence when this train parted not to have had someone in position to observe the track and warn persons on it of its approach. The duty of keeping a lookout we do not understand to rest alone upon our Statute. This provision is, under our decisions, but a re-enactment of the rule at common law. *East Tennessee, V. & G. R. Co. v. Fain*, 13 Lea, 41; *East Tennessee, V. & G. R. Co. v. Pratt*, 85 Tenn. 13.

In the latter case Judge Snodgrass, in delivering the opinion of the court, said, in considering the requirement of the Code concerning the avoidance of accidents: "This section imposes no duty on the railroad companies that would not have existed at common law. The duty to keep someone on the lookout, sound the alarm whistle when any person, animal or other obstruction appears on this road, then put down brakes, and use every possible means employed for such purposes to stop the train and prevent an accident, is but, in other words, the duty to watch the road, warn anyone who appears on it to get off by such noise or alarm as will most effectually do this," etc.

We have next to consider whether the deceased was guilty of such contributory negligence as should bar a recovery. That it is negligence to go upon a railroad track without taking the precautions to look and listen is well established. *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542. He is as a prudent man bound to look and listen, and take such measures as common prudence, in view of the danger and consequences of a neglect to do so, suggest. "This is a rule of law," says Mr. Wood, "and it is only in exceptional cases that the question as to whether his neglect to take such precaution is excusable is for the jury." 2 Wood, Railway Law, 1304, 1305. The authorities to this effect are numerous, and are collected in the work cited. It is not charged in this declaration that the intestate did look or listen before going on the track and resuming his journey, and this is one ground of demurrer. Ordinarily this would be fatal in a case not coming within the letter of our Statute, which allows damages upon failure of the railway company to observe the precautions therein prescribed, regardless of the negligence of the party injured, such negligence going only in mitigation of damages. *Railway Companies v. Foster*, 88 Tenn. 672, where all our cases are reviewed.

The case stated in the declaration makes an exceptional case, and one which should go to a jury. The deceased stepped off to permit the approaching train to pass him. When it had passed it was not unreasonable to suppose it had all passed. The duty to look and listen when going upon a railway track is a continuing duty so long as one continues upon it, using it as a walkway. The duty of a person so situated to continue to look out for himself,

in view of the consequence likely to result from inattention, cannot be less imperative than the duty of the employes operating a train to look out for him. The Statute not being applicable, the negligence of each may appear equal, and in that case there can be no recovery. The peculiar circumstances under which this intestate went upon the track, and the fact stated to account for his failure to observe this train, that he was crossing a bridge, under which was a waterfall, the noise of which probably prevented his hearing, alone prevent the negligence of the deceased from barring any recovery.

The fact that the deceased went on the track without looking or listening, and that he continued upon it unconscious of danger until overtaken and run down, is negligence which cannot be overlooked, and for this negligence he cannot be entirely exonerated, and this must be allowed in mitigation of damage, even if the jury shall think that it, under the peculiar facts of this case, was not the more immediate cause of the accident.

*The demurrer must be sustained as to the second count, and overruled as to the first. The case will be remanded for further pleading.*

### MISSOURI SUPREME COURT (2d Div.).

EB. ROZELLE, *Respt.*,  
v.

Jacob HARMON, *Appt.*

(....Mo.....)

1. There can be no executor *de son tort* where the statute laws of a State on the subject of administration, taken together as forming one entire system, are wholly repugnant to and inconsistent with the common law in that respect.
2. A creditor of a decedent cannot base a right of action against a third person on the latter's conversion of assets of the estate in a State where the law does not recognize executors *de son tort*.

(February 24, 1891.)

**C**ERTIFICATION by the Kansas City Court of Appeals for the consideration of the Supreme Court of an action appealed from the Circuit Court for Holt County, which was brought to hold defendant liable as executor *de son tort* for the payment of a debt of B. W. Ross, deceased, and which resulted in a judgment in favor of plaintiff, which judgment the Court of Appeals reversed. *Judgment of reversal affirmed.*

The facts sufficiently appear in the opinion.

#### NOTE.—Executor *de son tort*.

At common law an executor *de son tort* is one who, without authority from the deceased or the court of probate, does such acts as belong to the office of an executor or administrator. *Emery v. Berry*, 28 N. H. 481; *Edwards v. Harden*, 2 T. R. 597.

He is an executor subject to all the trouble of an executorship, without the profits or advantages. 2 Bl. Com. 507.

But merely doing acts of necessity or humanity will not amount to such an intermeddling as will charge a man as executor *de son tort*. *Audley's Case*, Dyer, 166; *Barasieu v. Odum*, 17 Ark. 125; *Bennett v. Ives*, 30 Conn. 329; *Wiley v. Truett*, 12 Ga. 582; *Barron v. Burney*, 38 Ga. 264; *White v. Mann*, 26 Me. 361; *Noon v. Finnegan*, 29 Minn. 421; *Harmon v. Short*, 8 Miss. 437; *Magner v. Rynn*, 19 Mo. 196; *Brown v. Leavitt*, 26 N. H. 495; *Winn v. Slaughter*, 5 Helak. 194; *Auderson, Law Diet.* 432.

He is chargeable with debts of the deceased so far as assets come into his hands. *Audley's Case*, *supra*.

An executor *de son tort* will be liable to an action, unless he has delivered over the goods of the intestate to the rightful administrator before action is brought against him, and he cannot retain the

*Messrs. L. R. Knowles, John Edwards and H. S. Kelley* for appellant.

*Messrs. E. Van Buskirk and T. C. Dungan* for respondent.

*Macfarlane, J.*, delivered the opinion of the court:

This suit was commenced in the Circuit Court of Holt County. Plaintiff was a creditor of one B. W. Ross, deceased. The suit was for the purpose of recovering the amount of the debt from defendant on the ground that he had wrongfully appropriated and converted the assets belonging to Ross' estate to his own use. Plaintiff recovered judgment in the circuit court, and defendant appealed to the Kansas City Court of Appeals, where the judgment was reversed. The case was certified to this court by the court of appeals on the ground that the decision rendered therein was in conflict with the decision of this court in the cases of *Foster v. Nowlin*, 4 Mo. 18, and *Magner v. Ryan*, 19 Mo. 196. The question presented by the record in this case is sufficiently stated by *Judge Phillips* (29 Mo. App. 578) to be "whether there can be, under the probate system in this State, an executor *de son tort*, in so far as to authorize a single creditor of the intestate to maintain an action of trover against

property of the intestate in discharge of his own debt, although it is a debt of a superior degree. *Curtis v. Vernon*, 3 T. R. 590; *Padgett v. Priest*, 2 T. R. 100, cited in 2 Bl. Com. 509, *note*.

Where, a short time after the death of a married woman, her executrix died, and no steps were taken for some time to have the will proved, the husband of the testatrix, having her estate in his hands and not causing the delay, cannot be treated as an executor *de son tort*. *Blodgett v. Converse*, 6 New Eng. Rep. 809, 60 Vt. 416.

One who intermeddles with the goods of deceased, or does any act characteristic of the office of executor, becomes an executor *de son tort*. *Swift v. Martin*, 2 West. Rep. 146, 19 Mo. App. 488.

The administrator of a deceased partner has no authority to meddle with the firm assets, or to introduce into the inventory the value of his intestate's share of them. *Shipe's App.* 5 Cent. Rep. 149, 114 Pa. 205.

If one who intermarries with the widow, who is administratrix, intermeddles with the assets by converting them into other property in his own name, he will be held as a trustee for the heirs, as to the property acquired by the conversion. *Graves v. Pinchback*, 47 Ark. 470.

him, as here sought, and thereby appropriate the whole assets to the payment of his debt."

The system provided by the laws of our State for the settlement of the estates of deceased persons was evidently intended to be exclusive of all others. The Constitution provides for the establishment of a probate court in each county, which shall have jurisdiction in all matters pertaining to probate business. The laws of the State governing the procedure in the management and settlement of estates are ample and sufficient to meet any emergency that may possibly arise during administration. They provide for the appointment of executors and administrators, for the preservation of the property, and the collection of the debts of the estate. They also provide summary and efficient proceedings for the discovery of assets, and for their recovery from the possession of one who intermeddles with them. Under them any creditor can have an administrator appointed. Each county is provided with a public administrator, already qualified, whose duty requires him summarily to take charge of all estates in which the property is left in a situation exposed to loss or damage; and the court is given power to require him to take charge of any other estates in case of necessity. Ample provision is made for the allowance and classification of debts, converting the assets into money, and paying the debts of all creditors *pro rata* according to classification. Executors and administrators alone, under these laws, can recover the assets or damages for its conversion. All these provisions of the law are wholly inconsistent with the idea of executors *de son tort* as at common law. The Administration Laws of the State do not recognize the right to wrongfully administer, nor the right of one creditor to secure payment of his debt to the exclusion of others. It is insisted by plaintiff that this State has adopted the common law, and that under the rules of the common law his action is authorized, and that the rules of the common law on this subject have not been abrogated by the statutes.

It is contended that under proper rules of construction a statute in derogation of the common law must be strictly construed, and that none of its rules can be changed, except by express terms of the statute, or by necessary implication therefrom. That rule of construction is not of universal application. It depends much upon the character of the law to be affected. In case of statutes penal in their character, or in derogation of common right, a strict construction is required; but in regard to statutes merely remedial in their character a fair, if not liberal, construction should be given. *Oster v. Rabeneau*, 46 Mo. 595; *Putnam v. Ross*, Id. 387; *Chamberlain v. Western Transp. Co.* 44 N. Y. 805; *Buchanan v. Smith*, 48 Miss. 90.

The Statute of this State, adopting the common law, itself limits or modifies the rule of construction insisted upon. Section 3117, Stat. 1879, provides that the common law, which is not repugnant to or inconsistent with the Constitution of this State or the statute laws in force for the time being, shall be the rule of action and decision in this State. The examination we have given shows conclusively that the statute laws of this State on the subject of administration, taken together as forming one entire system, are wholly repugnant to and inconsistent with the common law in respect to administrators *de son tort*. We must therefore conclude that the intention of the Legislature was to supersede the common law on that subject altogether. The early cases of this court referred to by the court of appeals do seem to have recognized and acted under the common-law doctrine invoked by plaintiff in this case, but since that early day the Administration Laws of the State have been greatly enlarged, the jurisdiction of the probate court extended, and the powers and duties of administrators and executors increased until there is no longer a place in the system for the inequitable, expensive and tedious proceedings required by the rules of the common law in bringing intermeddlers to settlement. The opinion of Phillips, P. J., in this case when

The next of kin of the decedent simply as such cannot maintain a suit against the executor *de son tort*, but in such a case the proper course is to procure the appointment of an administrator and have the suit instituted in his name. *Ferguson v. Barnes*, 58 Ind. 175; *Muir v. Trustees of L. & W. Orphan House*, 3 Barb. Ch. 477, 5 L. ed. 978.

#### *Rights and liabilities.*

An executor *de son tort*, who has paid a mortgage debt which is entitled to priority, with proper expenses of the sale, may be allowed credit therefor, when called to account for the proceeds of the mortgaged property. *Davega v. Henry*, 81 S. C. 413.

The estate of a widow who took possession of her husband's property without authority, and carried on the business left by him, should be credited for no more than the amount of debts of her husband which she paid. *Jenks v. Breen*, 4 Cent. Rep. 92, 42 N. J. Eq. 825.

A bill praying that a decree be rendered against the son of a person against whom a former decree was taken, and who was acting as executor *de son tort* for his father's estate, for the amount of the prior decree or for the value of the property con-

verted by the son, on demurrer, shows equity. *Ellis v. McGee*, 63 Miss. 168.

An executor *de son tort* is liable for the amount wrongfully collected by him, to the rightful representative of deceased; and after his death his estate is liable. A cause of action against him does not depend upon the debts, but upon their collection, and the Statute of Limitations has no bearing. *Swift v. Martin*, 2 West. Rep. 146, 19 Mo. App. 488.

He is liable only for what comes into his hands. *Blake v. Hawkins*, 98 W. S. 315, 25 L. ed. 139.

He is liable in an action, not only by the rightful executor, but also by a creditor of deceased. *Ibid.*

The effect of the Oregon Code of Civil Procedure is to abolish the common-law rule making one who wrongfully interferes with the estate of a deceased person an executor *de son tort*, and takes away the remedy which a creditor formerly had to charge the intermeddler as such. *Rutherford v. Thompson*, 14 Or. 236.

His remedy now is to procure the appointment of an administrator, and have a proceeding instituted in the name of the latter to recover the property misappropriated. *Ibid.*

In California there is no such officer recognized as an executor *de son tort*. *Bowden v. Pierce*, 73 Cal. 459.

before the court of appeals, and which is reported in 29 Mo. App. 570, with the authorities cited by him, is convincing and conclusive, and is adopted as the opinion of this court.

*The judgment of the Court of Appeals is affirmed, and that of the Circuit Court of Holt County reversed.*

All the Judges of this division concur.

## ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO., *Appt.*,

John T. HOPKINS.

(....Ark....)

1. The fall of a large wooden sign of its own weight from its position over a public sidewalk raises the presumption of negligence in respect to its fastenings.
2. It is the duty of one who knows that his office sign fastened over a sidewalk has been removed from its fastenings by workmen of an electric-light company, and replaced by them, to see that the fastenings are safely restored, and he is liable for failure to do so if anyone is injured by its fall.
3. An injury is not attributable to an act of God, but to neglect, where it is caused by the fall of a sign in a wind such as might be expected in the regular course of the seasons.

(February, 14, 1891.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Pulaski County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to

have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Dodge & Johnson*, for appellant:

The placing of the sign before the defendant's ticket office was the work of an independent contractor, for whose negligent acts the defendant cannot be held liable.

*St. Louis, I. M. & S. R. Co. v. Yonley*, 9 L. R. A. 604, 58 Ark. 503.

This action cannot be maintained on the ground of a nuisance, created, maintained or authorized by the defendant.

*Dickinson v. New York*, 92 N. Y. 588; *Nolan v. King*, 97 N. Y. 571; *Howard v. Robbins*, 1 Lans. 65; *Peckham v. Henderson*, 27 Barb. 207; *Griffith v. McCullum*, 48 Barb. 561; *Com. v. Passmore*, 1 Serg. & R. 219; *People v. Cunningham*, 1 Denio, 538; *Davis v. New York*, 14 N. Y. 524; *Reedie v. London & N. W. R. Co.* 4 Exch. 244; *Moore v. Gadsden*, 98 N. Y. 17; *Knappfe v. Knickerbocker Ice Co.* 84 N. Y. 491.

Negligence is never to be presumed, but must be proved by competent evidence.

*Brown v. Congress & E. St. R. Co.* 49 Mich. 153, 8 Am. & Eng. R. R. Cas. 883; *Allen v. Willard*, 57 Pa. 374; *Dobbs v. Murray County Justices*, 17 Ga. 624; *Lansing v. Stone*, 87 Barb.

**NOTE.**—*Liability of abutting property owner for injuries caused by materials falling into street.*

The general rule is that the owner of a building or structure abutting on a highway is liable for injuries caused by the fall therefrom into the street of materials composing part of the structure, or which the owner has attached thereto for his own convenience, as well as of those which have accumulated on or around the building from natural causes, which the owner ought to have foreseen and provided against. The only uncertainty appears to be as to how far the owner is relieved from liability by the acts of third persons, and as to how far negligence must be shown on the part of the landowner in order to fix his liability. Since the duty to keep the building in repair rests primarily on the landowner, it seems that if the building is actually in his possession, and is permitted to remain in a defective and dangerous condition, he is liable for injuries resulting therefrom, whether the defect is caused by the act of a third person or by that of an independent contractor, who has been at work on the building. Thus, in *Khron v. Brock*, 4 New Eng. Rep. 424, 144 Mass. 519, the court said it cannot be contended that if the work was completed, the owner would not be responsible for injuries resulting from the imperfect construction or dangerous condition in which it was permitted by him to remain, and ruled that an instruction that the defendant was not liable unless the zinc (by the falling of which the injury occurred) was unfastened by him and was negligently and carelessly left so unfastened, was properly refused.

So, where a stranger without the owner's consent attaches a wire to a chimney, by which the chimney is rendered unsafe and liable to fall, and it so

remains for some time, when it falls and inflicts injury, the owner is liable. *Gray v. Boston Gas Light Co.* 114 Mass. 153.

So where a former tenant attached an unsafe hoisting apparatus to the building and the landlord subsequently leased the building with such apparatus attached, he is liable for injuries caused by its fall. *Hungerford v. Bent*, 55 Hun, 4.

So where defendant had by a lease acquired practical ownership of premises for a term of years and erected a building thereon, which was subsequently burned, leaving a wall standing next to the street, and he sold the machinery, etc., in the ruins to a third person, who took possession of the premises for the purpose of removing it, and during such possession the building fell causing injury, both defendant and the third person were held liable therefor. *Grogan v. Pope I. & M. Co.* 8 West. Rep. 238, 87 Mo. 321. See also *Tarry v. Ashton*, L. R. 1 Q. B. Div. 320.

Upon the question whether or not proof of negligence is necessary, it has been held that if a landowner constructs his building so near the street with a roof of such a shape that at certain seasons of the year snow and ice will inevitably be precipitated upon the sidewalk below, he must at his peril keep the ice and snow from doing injury, and the question of whether or not he was negligent in not caring for it under the circumstances and with the roof in that condition is immaterial. *Shipley v. Fifty Associates*, 101 Mass. 252, 106 Mass. 199; *Hannem v. Pence*, 40 Minn. 127.

In a case where a brick fell from a dilapidated wall, causing injury, the court ruled that the duty is imposed upon abutting property owners of keeping their premises in such repair that persons lawfully using the streets shall do so without injury,

15; *Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind. 462; *Flannery v. Waterford & L. R. Co.* 11 Ir. C. L. 80; *Lindsay v. Connecticut & P. R. R. Co.* 27 Vt. 648; *Mynning v. Detroit, L. & N. R. Co.* 7 West. Rep. 824, 64 Mich. 98, 28 Am. & Eng. R. R. Cas. 318; *Buel v. New York Cent. R. Co.* 31 N. Y. 814; *Terry v. New York Cent. R. Co.* 22 Barb. 574; *Philadelphia W. & B. R. Co. v. Stebbing*, 62 Md. 504, 19 Am. & Eng. R. R. Cas. 86; *Cass v. Chicago, R. I. & P. R. Co.* 64 Iowa, 762, 19 Am. & Eng. R. R. Cas. 142; *Brown v. Congress & B. St. R. Co.* 49 Mich. 158, 8 Am. & Eng. R. R. Cas. 885; *Marquette, H. & O. R. Co. v. Kirkwood*, 45 Mich. 51; *Indiana, B. & W. R. Co. v. Hammock*, 12 West. Rep. 297, 118 Ind. 1, 82 Am. & Eng. R. R. Cas. 128.

Where one contracts to do a thing not necessarily a nuisance or dangerous, and he can do that thing without wrong or injury to anybody, yet, in so doing, by his negligent acts, he injures another or creates a nuisance, the principal is not liable, but the contractor is.

*Murfelt v. New York, W. S. & B. R. Co.* 8 Cent. Rep. 418, 102 N. Y. 708, 25 Am. & Eng. R. R. Cas. 144; *Wabash, St. L. & P. R. Co. v. Farmer*, 9 West. Rep. 621, 111 Ind. 195, 81 Am. & Eng. R. R. Cas. 184; *Hughes v. Cincinnati & S. R. Co.* 39 Ohio St. 461, 15 Am. & Eng. R. R. Cas. 100; *Hexamer v. Webb*, 2 Cent. Rep. 439, 101 N. Y. 377.

A person is not bound to anticipate remote and improbable contingencies, and it is for the plaintiff to show in such cases what precaution the defendant has failed to take which he might have taken.

*Shearm. & Redf. Neg.* §§ 4, 12; *Thomp. Neg.* §§ 12, 84; *Tutcin v. Hurley*, 98 Mass.

211; *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190, 10 Am. & Eng. R. R. Cas. 754.

*Mr. T. J. Oliphant*, for appellee:

The injury did not occur while the contractors were engaged in doing the work. When the work is done, then liability begins for maintenance, with the added duty to see that the work is properly done in the first instance.

*Wharton, Neg.* § 181; *Hexamer v. Webb*, 2 Cent. Rep. 439, 101 N. Y. 377.

The owner of a building under his control and in his occupation is bound, as between himself and the public, to keep it in such proper and safe condition that travelers on the highway shall not suffer injury.

*Gray v. Boston Gas Light Co.* 114 Mass. 149; *Milford v. Holbrook*, 9 Allen, 17; *Shipley v. Fifty Associates*, 101 Mass. 251, and cases cited.

The owner and occupier is only relieved by independent contractors, strangers, etc., for injury done by them at the time they are doing the work or interfering with the building.

See *Connors v. Hennessey*, 112 Mass. 96; *Rapson v. Cubitt*, 9 Mees. & W. 710; *Hilliard v. Richardson*, 8 Gray, 349; *Sturges v. Society for Promotion of Theological Education*, 130 Mass. 414; *Gorham v. Gross*, 125 Mass. 252; *Butler v. Hunter*, 7 Hurlst. & N. 826; *Sterra v. Utica*, 17 N. Y. 107, 72 Am. Dec. 437.

Where plaintiff is lawfully in the highway, and an adjoining building falls upon and injures him, on showing these facts he shall be entitled to recover.

*Whittaker's Smith, Neg.* p. 427; *Mullen v. St. John*, 57 N. Y. 567; *Gas v. Metropolitan R.*

and held the landowner liable. *Murray v. Mo-Shane*, 52 Md. 217.

So where a limb fell from an ornamental tree, causing injury. *Weller v. McCormick*, 8 L. R. A. 798, 52 N. J. L. 470.

So where the wall of a partially burned building was left standing until it fell, causing injury. *Rector of Church of Ascension v. Buckhart*, 3 Hill, 193.

So where timber was so piled by the side of the highway that it was thrown down by a passing team and injured plaintiff. *Pastene v. Adams*, 49 Cal. 87. See also *Maddox v. Cunningham*, 68 Ga. 431; *Earl v. Crouch*, 32 N. Y. S. R. 18.

So one who maintains a lamp over the highway has the duty to keep it in such state of repair as not to prejudice the public (*Tarry v. Ashton*, L. R. 1 Q. B. Div. 320); although one of the judges seems to limit the owner's responsibility to investigating from time to time and repairing defects when he became or ought to have become aware of their existence.

The New Hampshire court holds that a complaint in an action to recover damages for injuries caused by snow sliding from a roof into the street is not good if it fails to charge negligence on the part of the owner, stating that the case is within that class where a man will not be answerable for the consequences of enjoying his own property in the way such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill on his part. *Garland v. Towne*, 55 N. H. 56.

There is a distinction made in that case, however, in case the building is a nuisance, the court stating that it, under the law of the State, the erection or continuance of a building or any portion thereof

over a highway is a nuisance, and the caves project, so that snow and ice are precipitated therefrom into the street, liability exists without proof of negligence.

It has been held that any building which is allowed to become out of repair so as to endanger the safety of persons passing on the street is a nuisance. *Reg. v. Watts*, 1 Salik. 357.

And where a sign is hung over the street in violation of a city ordinance the fact that the owner used due care is immaterial. *Salisbury v. Herchenroder*, 106 Mass. 458.

Even though negligence is regarded as necessary to a recovery, the tendency of the courts is to apply the maxim *res ipsa loquitur* and hold that proof of the happening of the accident is sufficient proof of negligence in the absence of explanatory circumstances.

So held where the wall of a building fell into the street (*Mullen v. St. John*, 57 N. Y. 571); where a barrel fell from a window (*Byrnes v. Boadle*, 2 Hurlst. & C. 722); where bags of sugar fell (*Scott v. London Dock Co.* 3 Hurlst. & C. 596); where snow fell from a roof into the street. *Smethurst v. Independent Cong. Church*, 2 L. R. A. 685, 148 Mass. 261.

Where a railroad company carried its tracks over a highway by means of a bridge, which rested in part on a brick pier, the court held that the company was under the common-law liability to keep the bridge in safe condition for the public using the highway to pass under it, and the fact that the slight vibration caused by a passing train resulted in the fall of a brick, which injured plaintiff, showed negligence. *Kearney v. London, B. & S. C. R. Co.* L. R. 6 Q. B. 760. See also *Garland v. Towne*, 55 N. H. 56.

Co. L. R. 8 Q. B. 161, 5 Moak, Eng. Rep. 169; *Edgerton v. New York & H. R. Co.* 39 N. Y. 227; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 534; *George v. St. Louis, I. M. & S. R. Co.* 34 Ark. 613.

The sign was a nuisance.

Wood, Nuisance, 2d ed. § 275; *Shipley v. Fifty Associates*, 101 Mass. 251, 106 Mass. 194; *Bell v. Nye*, 99 Mass. 582; *Dygert v. Schenck*, 23 Wend. 447; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Jones v. Boston*, 104 Mass. 75; *Congreve v. Smith*, 18 N. Y. 81.

**Cockrill, Ch. J.**, delivered the opinion of the court:

The appellant maintained a ticket-office in City of Little Rock, and advertised the fact by means of a large wooden sign fastened to the wall over the entrance from the street, fifteen feet above the sidewalk. The sign fell upon the appellee, and injured him, without fault of his, while he was upon the sidewalk. This appeal is prosecuted to reverse a judgment for damages in the sum of \$750, recovered by the appellee for the injury. When the sign-board was first put up it was securely fastened. Its weight was supported by brick projections from the wall. Subsequently the servants of an electric-light company removed it from its fastenings in order to run electric wires into the railway office. That fact was known to the railway agent in charge of the office. He had been warned at the outset by the contractor who put the sign in position that the electric-light workmen would be compelled to loosen the fastenings if they were permitted to follow instead of preceding him. The sign was replaced in position by the electric-light workmen, and two months thereafter fell and injured the plaintiff. An inspection of it after the accident showed that the wires which were used to hold it on two of the three hooks had been cut with scissors close to the sign. The supposition of all the witnesses was that the cutting was done by the electric-light workmen. There was no positive proof of that fact. The sign fell in the month of March. There was testimony tending to show that the usual March winds of this latitude prevailed at the time, while other witnesses thought there was no disturbance of any object on the street from wind.

The Railway complains of the following part of the charge to the jury: "If you find from the evidence that the defendant caused the sign mentioned in this action to be placed on the side of and in front of its ticket-office, in the City of Little Rock, and over and above the sidewalk, which is a public highway, and that while the plaintiff was on said sidewalk, and under said sign, the same fell of its own weight from its place, and upon the plaintiff, and injured him, you are instructed that the fact of said falling of said sign in the manner aforesaid raises a presumption of negligence in maintaining said sign, and you would find for the plaintiff, unless you should find that said presumption is overcome by a fair preponderance of evidence going to show that a proper degree of diligence had been exercised by defendant." It is argued that the charge directs the jury to presume negligence without finding proof of it. If it had left the jury to find 12 L. R. A.

against the Railway merely upon proof that the plaintiff had been injured by the falling of a sign from a building in which the Railway was an occupant, it would be subject to the objection urged, and therefore erroneous. But the charge must be read in the light of the admitted facts and of the hypothesis upon which it is based. They are as follows: The sign was placed in a position where it was sure to fall upon the sidewalk, if it should fall at all, in a much frequented part of the city. It was maintained there by the defendant solely for its convenience. It was heavy, and required precaution in fastening it in position to prevent it from falling. It fell "of its own weight,"—that is, because of insufficient fastenings to hold it under ordinary circumstances,—and thereby an injury was inflicted upon one who was rightfully in the public street. Upon such a case found, negligence is an inference of law. The reason is as follows: The defendant was under a duty to the public to exercise common prudence to place and keep its sign in such position as not to endanger the safety of pedestrians in the street. As long as it performed that duty no injury would be inflicted, in the ordinary course of things. The happening of the accident is evidence, therefore, of the neglect of the duty, in the absence of proof that it happened out of the ordinary course. *Mullen v. St. John*, 57 N. Y. 567; *Kearney v. London, B. & S. C. R. Co.* L. R. 6 Q. B. 759, 10 Cent. L. J. 261, and numerous cases cited.

It is argued that the defendant is not liable, because the evidence shows that the sign fell, not from insecurity of the original fastening, but because the sustaining wires had been cut by a third person. We must take it as settled by the verdict that the wires were cut by the electric-light company's workmen. The testimony furnished no reasonable probability that it was done by another. The managing agent of the defendant's office knew that it was necessary for these workmen to cut or loosen the fastenings in order to complete the work the Railway Company desired to be done in its office, and knew that the sign had been removed for that purpose. It was the Company's duty, therefore, to see that the fastenings were safely restored. In no other manner could it guard against the danger to which the public would otherwise be exposed, and it is liable for the consequences of having neglected to do so. *Gray v. Boston Gas-Light Co.* 114 Mass. 149-153. The fact that the electric-light company was an independent contractor, and not the servant of the railway, in performing the work in the prosecution of which the wires were cut, did not relieve the Railway of its duty to the public to see that the sign was secure after the contractor had completed his work. *Khron v. Brock*, 144 Mass. 516, 4 New Eng. Rep. 424.

If the injury had been inflicted through the negligence of the contractor's servants while in the execution of the contract, no liability would have attached to the Railway. *St. Louis, I. M. & S. R. Co. v. Yonley*, 53 Ark. 503, 9 L. R. A. 604. But no such case was made by the proof. The court did not err, therefore, in rejecting the Railway's prayer to charge upon the subject of its non liability for work done by an independent contractor. The court re-



fused to instruct the jury that the defendant was not liable for the injury if the sign fell from the act of God. There was no testimony to base the charge upon. The strongest testimony for the defendant was that the accident happened on a windy day in March. But it was the defendant's duty to take such precaution in fastening its sign as to make it secure against the ravages of such winds as might be expected in the regular course of the seasons.

*Southern Exp. Co. v. Texarkana Water Co.* (Ark.) Jan. 17, 1891. An injury resulting from a failure to take such precaution is attributable to its neglect, and not the act of God.

Other requests to charge the jury preferred by the defendant were rejected, but all they contained that could legally be demanded to go to the jury was submitted in the court's charge.

As there is no error, *the judgment is affirmed.*

## PENNSYLVANIA SUPREME COURT.

George W. RYMER, *Appt.*,  
v.  
LUZERNE COUNTY.

(....Pa.....)

**A statute which applies only to a limited number of counties**, although not local or special for the reason that it applies to all of a certain class created by the Constitution itself, is not impliedly repealed by a general statute without negative words.

(April 27, 1891.)

**A** PPEAL by plaintiff from a judgment of the Court of Common Pleas for Luzerne County in favor of defendant upon a case stated for the opinion of the court, the object of which was to determine plaintiff's right to compensation for services performed as county auditor, the agreement being that if the court was of opinion that the Act of May 12, 1887, was in force in the County and repealed prior Acts, judgment was to be entered for plaintiff, if not, judgment was to be entered for defendant. *Affirmed.*

The opinion states the case.

*Mr. John McGahren* for appellant.

*Mr. Joseph Moore* for appellee.

**Per Curiam:**

Luzerne County has a population exceeding 150,000. Section 5, art 14, of the Constitution L. R. A.

tion provides that "in all counties containing over 150,000 inhabitants, all county officers shall be paid by salary, and the salary of any such officer and his clerks, heretofore paid by fees, shall not exceed the aggregate amount of fees earned during his term and collected by or for him." The 14th section of the Act of March 31, 1876 (Pub. Laws, 18), was intended to give effect to this provision of the Constitution, and provides that the salaries of county auditors in counties containing over 150,000 inhabitants shall be \$500 each. This fixes the salary of the county auditors of Luzerne at that sum. It was contended that the Act of 1876 was repealed by the Act of May 12, 1887 (Pub. Laws, 95), which fixes the compensation of county auditors at \$8 per day and mileage. It is not to be presumed, however, that the Legislature intended the Act of 1887 to operate in counties when a salary had been fixed by the Act of 1876 in obedience to the constitutional requirement. The Act of 1887 contains no repealing clause, and while the Act of 1876 is neither a local nor a special law for the reason that it applies to all counties of a certain class,—and that class created by the Constitution itself,—yet its operation is confined to a limited number of counties, and we think comes within the reason of the rule laid down in numerous cases, that a general statute without negative words does not repeal a previous statute which is particular, even though the provisions of one be different from the other.

*Judgment affirmed.*

## UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF OHIO.

CASEY

v.

CINCINNATI TYPOGRAPHICAL  
UNION, NO. 3, *et al.*

(45 Fed. Rep. 135.)

1. A boycott is an illegal conspiracy in restraint of trade.
2. An injunction may be issued to restrain the publication and circulation of posters, circulars, etc., for carrying out a conspiracy to boycott the complainant.
3. Statements of advertisers in a newspaper at the time of withdrawing their patronage that it was because they had been visited by a committee of a typographical union and were threatened with loss of business, are admissible as part of the *res gestæ* in an action to enjoin a boycott.
4. Upon the hearing of a motion for a preliminary injunction, the rules of evidence are applied less strictly than upon the final hearing of the cause, and consequently evidence that would not be competent in support of an application for a perpetual injunction may be admitted.

(January 31, 1891.)

**S**UIT to enjoin defendants from boycotting plaintiff's newspaper. On motion for temporary injunction. *Granted.*

*Note.—Conspiracy defined.*

A conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish a purpose not unlawful by unlawful means. *Owens v. State*, 15 Lea, 1; *Spies v. People*, 10 West. Rep. 701, 122 Ill. 1; *United States v. Wooten*, 20 Fed. Rep. 705; *United States v. Lancaster* (Ga.) 10 L. R. A. 333.

It is a joint willful and malicious common purpose. *People v. Petherane*, 7 West. Rep. 522, 64 Mich. 232.

To constitute a conspiracy the combination must be corrupt. *Wood v. State*, 1 Cent. Rep. 441, 47 N. J. L. 461.

Concurrence of sentiment and co-operative conduct in a criminal enterprise are the essential ingredients of a criminal conspiracy. *McKee v. State*, 9 West. Rep. 840, 111 Ind. 373, citing *Archer v. State*, 4 West. Rep. 723, 106 Ind. 423; 2 Wharton, *Crim. Law*, 1363.

As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete. *Spies v. People*, *supra*.

The offense is complete when the unlawful conspiracy, combination or agreement is made; and a criminal act done in pursuance of the conspiracy is not necessary to justify a conviction for the crime of conspiracy itself. *United States v. Lancaster*, *supra*.

*Coercing choice of employment.*

Every man has a right to determine the branch of business he will pursue, to make his contracts with whom he pleases or refuse to deal with any man or class of men, or to work under a certain price or without certain conditions. *Carew v. Rutherford*, 106 Mass. 1. See *Com. v. Hunt*, 4 Met. 12 L. R. A.

*Statement by Sage, J.:*

The complainant, proprietor and publisher of *The Commonwealth*, a daily and weekly newspaper published at Covington, Ky., sues to restrain the defendant, the Cincinnati Typographical Union, No. 3, which, the bill avers, is a corporation organized under the laws of Ohio as a trades union or labor organization, composed of type-setters and printers, and the individual defendants, who, it is averred, are its officers and managing agents, from "boycotting" the complainant and his newspaper.

A restraining order to remain in force until the hearing and disposition of complainant's motion for a temporary injunction having been granted when the bill was filed, the cause is now before the court upon that motion.

It appears from the bill that in September, 1890, and at various other times, the defendant, the Typographical Union, demanded that the complainant should unionize his office, that is to say, publish and conduct his paper according to the customs, rules and regulations laid down and prescribed by said Typographical Union, and that he should pay his employees wages at such rates as should be fixed from time to time by said Union, and discharge from his employment all persons not members thereof.

The bill further avers that upon complainant's refusal to comply with said demands, defendants illegally and unlawfully and with intent to injure complainant, and to destroy

111; *Boston Glass Mfrs. v. Binney*, 4 Pick. 425; *Bowen v. Matheson*, 4 Allen, 490.

If two or more persons combine to coerce a man's choice in the employment of his talents, industry and capital, it is a criminal conspiracy, whether the means employed are actual violence or a species of intimidation that works upon the mind. *State v. Stewart*, 4 New Eng. Rep. 573, 59 Vt. 373.

But a person has no right of protection against competition, and if disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*. *Walker v. Cronin*, 107 Mass. 555.

*Lawful combinations of workmen.*

Combinations of artisans for their common benefit, as for the development of their skill, or for protection from overcrowding of their trade, are not opposed to public policy. *Greenwood*, Pub. Pol. 643, citing *Snow v. Wheeler*, 118 Mass. 179; *Carew v. Rutherford*, 106 Mass. 1; *Com. v. Hunt*, 4 Met. 11; *Wolfe v. Mathews*, L. R. 21 Ch. Div. 104; *Reg. v. Rowlands*, 17 Q. B. 671.

It is not illegal for workmen to form and act as an association to protect themselves against "encroachments" of their employers. *Snow v. Wheeler*, 118 Mass. 179.

A combination between stevedores of a port to fix rates, and penalties for their violation, is not invalid. *Master Stevedores Assn. v. Walsh*, 3 Daly, 1; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Sayre v. Louisville Union Ben. Assn.* 1 Duvall, 143; *Hilton v. Bakersley*, 6 El. & Bl. 47; *Reg. v. Rowlands*, 17 Q. B. 671; & Cox, Cr. Cas. 426; *Reg. v. Duffield*, 5 Cox, Cr. Cas. 404.

The legality of an association depends on the means to be used for the accomplishment of its object, whether such object be innocent or otherwise. *Com. v. Hunt*, *supra*.

13

the circulation of his newspaper, and its value as an advertising medium, conspired and combined to boycott him and his newspaper, and to that end caused to be printed and posted, in conspicuous places, large hand-bills, calling upon all persons to withdraw their patronage from complainant's newspaper, and issued circulars, signed by said Typographical Union and addressed to advertising patrons of the complainant, requesting them to withdraw their advertisements from the said newspaper, threatening that upon failure to do so they would be visited with the ill will and incur the enmity of all organized labor, and that they would induce all members of labor associations to withdraw all patronage from them. It is also averred that said Typographical Union sent circulars to the news agents handling and selling complainant's newspaper, threatening that unless they ceased selling said paper they would in like manner lose the patronage of and be antagonized by the members of all labor organizations.

The bill further sets forth that said Typographical Union, through its agents and employes, visited persons regularly advertising in complainant's newspaper, and threatened them that unless they withdrew their advertisements they would incur the enmity, ill will and antagonism of all organized labor and of the friends of such labor, who would withdraw from them their entire business patronage.

The answers of the defendants have not yet been filed. The hearing of the motion was upon the bill, and upon affidavits filed on behalf of the complainant, and on behalf of the

defendants. There is not much dispute as to the facts. Excepting the averment that the Typographical Union, through its agents, visited the advertising patrons of The Commonwealth, or any other patrons of the complainant, and threatened to boycott them unless they withdrew their patronage, the averments of the bill are substantially admitted.

The complainant, in his affidavit, states that compliance with the demand made upon him in September by the individual defendants who acted in that behalf as a committee from the Typographical Union, that he should unionize his office, would have necessitated the discharge of all the printers employed by him and the substitution and the exclusive employment of what are known as "union printers," that is, members of some typographical union, and that there was not then, nor is there now, any complaint upon the part of his employes. He says that he refused to comply with the demands so made, and continued to run his office as before, paying his printers the price agreed upon, which was satisfactory to them.

The complainant further sets forth in his affidavit particulars of the boycott thereupon inaugurated against him, and his paper and job office, as set forth in the bill. Copies of the hand-bills and circulars referred to are filed with the affidavits, and the names of customers to whom they were sent are given.

The following is a copy of the hand-bill referred to in complainant's affidavit:

*"To Workmen and all Persons Interested in Organized Labor: The Covington Daily*

#### *Boycotting.*

The term "boycotting" was derived from the name of Captain Boycott, an agent of Lord Erne, and a farmer of Lough Mask, in the District of Connemara, Ireland. The people of his neighborhood took offense at him, and resolved not to have or allow others to have any communication with him England under Gladstone, by Justin H. McCarthy. See *State v. Glidden*, 3 New Eng. Rep. 849, 55 Conn. 48.

The boycott is not the remedy to adjust differences between capital and labor. *State v. Stewart*, 4 New Eng. Rep. 373, 59 Vt. 273.

An unlawful combination to prevent, by violence and intimidation, a certain company from retaining and taking into its employ certain workmen is an indictable conspiracy. *Ibid.*

Persons styling themselves the "Executive Board of the Ocean Association of the Longshoremen's Union," not in plaintiff's employ, who procured its workmen to quit in a body and declare a boycott on its business, to compel it to pay the wages demanded by them, were guilty of illegal and actionable acts, and were liable to arrest. *Old Dominion S. S. Co. v. McKenna*, 34 Blatchf. 244, 30 Fed. Rep. 48.

All associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular terms upon which their business shall be conducted, by means of threats, or by interference with their property or traffic, or with their lawful employment of other persons, are *pro tanto* illegal combinations or associations. *Ibid.*, citing *Johnston Harvester Co. v. Meinhardt*, 60 How. Fr. 168; *Slaughter-House Cases*, 69 U. S. 16 Wall. 38, 116, 21 L. ed. 394, 431; *Tarleton v. McGawley*, Peake, \*206; *Rafael v. Verelst*, 2 W. Bl. 1065; *Lumley v. Gye*, 2 Bl. & Bl. 316; *Bowen v. Hall*, 12 L. R. A.

L. R. 6 Q. B. Div. 383, 387; *Gregory v. Brunswick*, 4 Man. & G. 206; *Gunter v. Astor*, 4 Moore, 12. See *Greenhood*, Phil. Pub. 643, 663.

#### *Combination of persons, when a conspiracy.*

A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals, by unjustly subjecting them to the power of the confederates and giving effect to the purposes of the latter, whether of extortion or mischief. 1 Hawk, P. C. chap. 27, § 2; 2 Russ. Cr. 674; 2 Wharton, Crim. Law, § 282; 2 Bishop, Crim. Law, § 173; *Desty*, Crim. Law, § 11; 3 Chitty, Crim. Law, 1138; *Archb. Crim. Pr. and Pl.* 1880.

The offense has been held to consist in the conspiracy, and not in the acts committed in carrying it into effect, and the charge is sufficient if made in general terms describing an unlawful conspiracy to effect a bad purpose. *State v. Stewart*, 4 New Eng. Rep. 373, 59 Vt. 273, citing *People v. Fisher*, 14 Wend. 9; *State v. Donaldson*, 22 N. J. L. 151; *Snow v. Wheeler*, 113 Mass. 186; *State v. Noyes*, 25 Vt. 415; *State v. Burnham*, 15 N. H. 396; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476.

#### *Printers' unions.*

A combination of persons constituting a printers' union conspiring to use means of intimidation to compel a publishing company to abstain from keeping in its employ workmen of its own choice is clearly prohibited by statute. *State v. Glidden*, 3 New Eng. Rep. 849, 55 Vt. 44.

Where the purpose was to prevent the publishing company from carrying on its business in its own way, the motive being to gain an unjust advantage to themselves, the act was legally corrupt; and as the means adopted to carry out the purpose were

Commonwealth, after two years' promising repeatedly to unionize their office, stated to a committee from the Typographical Union that they would not employ union printers on their paper. Therefore the Typographical Union asks all workmen and women who sympathize with laborers to let The Commonwealth severely alone, and patronize those who employ union men, and who believe 'the laborer is worthy of his hire.'

The following is a copy of a circular:

*"To Workingmen:* The proprietor of The Covington Commonwealth (daily and weekly), after two years of opposition to organized labor, he having repeatedly promised to unionize his office, now refuses to keep his word, and says that he will not employ union printers. All working men and women who believe that the laborer is worthy of his hire will confer a favor on Typographical Union by withdrawing their patronage from The Covington Commonwealth."

In the Union Bulletin of October 1, 1890, issued under the auspices of Cincinnati Typographical Union, No. 3, and published at Cincinnati, is to be found the following:

**"TAKE NOTICE.**

"It is requested of all who are friendly to organized labor that they buy nothing from the following firms: . . . The Commonwealth (newspaper and job office), Covington, Kentucky."

A like notice is published in the Union Bulletin of October 29, 1890.

intended to harm the company, it was therefore malicious, and constituted an offense within the statute. *Ibid.*

An information charging the object of a conspiracy to have been to compel a newspaper company, against its will, by means of the boycott, to discharge workmen of its own choice and employ defendants and such persons as they should name, charges acts prohibited by statute. *Ibid.*

If defendants in their circular reading: "A word to the wise is sufficient. Boycott the company,"—used the word in its original sense, in its application to the company, there can be no doubt of their criminal intent. *Ibid.*

**Dictation to, and coercion of, employers and employees.**

A combination of employees whose aim is to dictate to an employer whom he should discharge from his employ is unlawful, as an unwarrantable interference with the conduct of his business. *State v. Donaldson*, 32 N. J. L. 186; *Rex v. Ferruson*, 2 Stark. 493; *Rex v. Ryckerdike*, 1 Mood. & R. 179.

A letter written by a "chairman" of an organized body to an employee in a shop that he might remain in it to do a particular kind of work, but to confine himself to work designated by the writer, is an unwarrantable interference with the business. *Re Wabash R. Co.* 24 Fed. Rep. 230.

It is an indictable conspiracy for several employees to combine and notify their employer that, unless he discharges certain enumerated persons, they will in a body quit his employment. *State v. Donaldson*, *supra*, following *State v. Norton*, 23 N. J. L. 44, and disapproving *State v. Rickay*, 9 N. J. L. 364; *Old Dominion S. S. Co. v. McKenna*, 24 Blatchf. 244, 30 Fed. Rep. 48.

Where shoemakers combine, agreeing not to work for anyone who employs men working below 12 L. R. A.

The complainant attaches to his affidavit a copy of a communication which, he stated, was sent by the Union to Messrs. Griffin, agents for sale of complainant's paper, and which reads as follows:

**"OFFICE OF TYPOGRAPHICAL UNION, No. 3.  
November 8, 1890.**

**"Messrs. Griffin:**

"Dear Sirs: About two years ago the union compositors employed on The Covington Daily Commonwealth quit working because Col. Casey, the proprietor, would not live up to the scale of prices of this Union. Mr. Casey afterwards promised to employ union men, and the Union, relying on the promise, looked for the fulfillment of the same.

"On Monday, September 23, 1890, a committee from Typographical Union, No. 3, waited upon Mr. Casey, and asked him to keep the promise he had so often made. Col. Casey informed the committee that he would not employ union printers.

"The committee then reported his answer to the Union. The Union now appeals to all in sympathy with labor to use their influence with Mr. Casey, try to show him the error of his way, and, failing in that, to withdraw their patronage from the 'rat' or 'scab' Commonwealth until it is unionized.

**"Very respectfully,**

**"Typographical Union, No. 3.**

"This Union will consider it a great favor for you to give up the agency of The Commonwealth. If you do not do so, we will have to consider you an enemy to organized labor."

the standard of wages fixed by themselves, the combination is void. *People v. Fisher*, 14 Wend. 9; *The Cordwainer's Case*, 1 Yates, Sel. Cas. 112; *People v. Tregulier*, 1 Wheeler, Crim. Cas. 142.

Where penalties are prescribed by a trades union to be paid by employers for violation of its rules in order to secure immunity from interference with the employers it is illegal. *Carew v. Rutherford*, 103 Mass. 1.

Rules which provide that no member shall call at any shop, where a dispute has arisen, and for reference to the executive council of such dispute, are illegal. *Hornby v. Close*, L. R. 2 Q. B. 153.

So an association formed under a rule which provides that a member binding his son in a shop where non-union men are employed should be fined is illegal. *Rigby v. Connol*, L. R. 14 Ch. Div. 482; *Hornby v. Close*, *supra*.

**Intimidation and threats.**

Displaying banners with devices as a means of threat and intimidation to prevent others from entering into a person's employment will be restrained by injunction at the suit of the employer. *Sherry v. Perkins*, 6 New Eng. Rep. 551, 147 Mass. 212; *Walker v. Cronin*, 107 Mass. 555; *Gilbert v. Mickle*, 4 Sandf. Ch. 357, 7 L. ed. 1132; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; *Boston Dyeing Co. v. Florence Mfg. Co.* 114 Mass. 68; *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. 142; *Saxby v. Easterbrook*, L. R. 3 C. P. Div. 339; *Hermann Loog v. Bean*, L. R. 26 Ch. Div. 808; *Thorley's Cattle Food Co. v. Massam*, L. R. 14 Ch. Div. 783; *Thomas v. Williams*, Id. 864; *Hill v. Hart-Davies*, L. R. 21 Ch. Div. 798; *Day v. Brownrigg*, L. R. 10 Ch. Div. 294; *Gaskin v. Balls*, L. R. 12 Ch. Div. 324.

To threaten or intimidate any person, to compel him against his will to do or abstain from doing any act which he has a legal right to do, is an of-

This was mailed at Cincinnati to Griffins' Novelty Bazar, 101 York Street, Newport, Ky.

Complainant also attaches a copy of the Union Bulletin of December 1, 1890, which contains the following article:

**"BOYCOTT THE COMMONWEALTH.**

"We understand that Mr. Casey is going around and telling his advertisers and subscribers that his office is now a union office; that the difficulty with the Typographical Union, No. 8, has been adjusted.

"Such is not the case, however. The boycott is still on, and will be until the proprietor of that 'rat' sheet employs union men.

"We request all K. of L. assemblies, unions and working men to bear in mind that Mr. Casey refuses to employ, or in any way recognize, organized labor. We ask your aid in compelling Mr. Casey to recognize the rights of labor. Withdraw your patronage from the 'scab' Commonwealth, and, if possible, let Mr. Casey know why you stop his 'rat' paper.

"Do not patronize a merchant who advertises in the 'rat' Commonwealth.

"If you see the paper in any place of business, refuse to buy goods unless the merchant immediately stops the 'rat' sheet.

"Typographical Union, No. 8, both in letter and spirit, has performed its part of the contract with Mr. Casey, and equal good faith is expected from the proprietor of The Commonwealth; but he persistently refuses to live up to promises made.

"Members of labor organizations in Covington, Newport, Dayton, Bellevue and Ludlow are requested to take a personal interest in our fight against the 'rat' Commonwealth.

"When you observe the Commonwealth imprint on any work in your locality, or run across any work that you think has been done in Covington, please inquire into the matter, and serve the interests of all concerned.

"The merchant who will patronize the 'rat'

Commonwealth, after the decided stand of the proprietor (Mr. Casey) has taken against organized labor, does not deserve your patronage.

"We call upon every friend of organized labor to get his printing done in the union printing offices. Beware of that 'rat' trap at Fifth and Scott Streets, Covington, Ky.

"Mr. Casey states that he publishes the only daily paper in Covington, and should not be discriminated against by the citizens.

"Did Mr. Casey think of discrimination when he shut out his union printers (three of them residents of Covington), in 1888, and compelled them to seek employment elsewhere?"

The complainant filed the affidavit of J. Plant, a member of a firm of jewelers at Cincinnati, Ohio. He states that the firm received by mail on or about December 1, 1890, the following circular:

"Dear Sir: We beg leave to call your attention to the trouble between The Covington Daily Commonwealth and Typographical Union, No. 8. In the spring of 1888 the proprietor of The Commonwealth refused to pay the scale of wages agreed upon, and the union men quit working. Mr. Casey afterwards promised to pay the scale, but kept putting it off, and now refuses to keep his promise.

"The Typographical Union, No. 8, has lived up to its part of the contract, but Mr. Casey refuses to recognize labor in any way. Therefore we request your aid in unionizing The Commonwealth.

"You are a business man, and no doubt rely upon the workmen for some trade. If you wish to retain the good-will of labor, withdraw your advertising from The Commonwealth, refuse to subscribe for the sheet, and your aid in our behalf will be highly appreciated.

"Very respectfully,

"Typographical Union, No. 8."

fense against the statute, and applies to all persons. *State v. Gidden*, 8 New Eng. Rep. 349, 55 Vt. 48.

A simple request to do or not to do a thing, made by one or more of a body of strikers under circumstances which convey a threatening intimidation, is not less obnoxious than the use of physical force, and is punishable as such. *Re Doolittle*, 23 Fed. Rep. 545.

Where one of the rules of a trades union provided for the intimidation of men employed to take the places of union men who have "struck" for higher wages, the association was illegal. *Carew v. Rutherford*, 106 Mass. 1; *Reg. v. Drutt*, 18 L. T. N. S. 855; *Reg. v. Rowlands*, 17 Q. B. 671, cited in *Greenhood*, Pub. Pol. 651.

A combination of employes formed for the purpose of preventing an employer from taking into his employ certain persons, or for intimidating such persons to prevent their employment, is an illegal conspiracy. *State v. Stewart*, 3 New Eng. Rep. 373, 50 Vt. 273.

An unlawful conspiring to terrify, intimidate and drive away by threats workmen, with the malicious intent to control and injure the company, is punishable. *Ibid*.

If large bodies of men collect by previous arrangement for concerted action, with the intention of compelling others to quit working, by force, threats and menaces of harm, such combination will be unlawful. *Newman v. Com.* (Pa.) 5 Cent. Rep. 407.

12 L. R. A.

*Conspiracies actionable.*

Conspiracy to do an illegal thing is actionable if injury proceed from it; and where the illegal purpose has been executed, it is false and malicious, wherever the motive for the conspiracy to execute it was false and malicious. *Smith v. Nipert*, 76 Wis. 84. See *Haldeman v. Martin*, 10 Pa. 370.

An action will lie for a combination or conspiracy, by fraudulent and malicious acts, to drive a trader out of business, resulting in damages. *Van Horn v. Van Horn*, 10 L. R. A. 184, 58 N. J. L. 224. See note to *People v. North River Sugar Ref. Co.* (N. Y.) 3 L. R. A. 33.

An action may be maintained against a corporation, to recover damages for conspiracy. *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 8 Cent. Rep. 607, 106 N. Y. 603, citing *Morton v. Metropolitan L. Ins. Co.* 84 Hun. 383, affirmed, 4 Cent. Rep. 307, 108 N. Y. 643; *Beed v. House Sav. Bank*, 120 Mass. 443; *Krulevitz v. Eastern R. Co.* 2 New Eng. Rep. 37, 148 Mass. 573; *Western News Co. v. Wilmart*, 58 Kan. 510.

An unlawful combination to injure, oppress, threaten and intimidate a citizen of the United States in the free exercise of a right and privilege secured to him by the Constitution and laws of the United States, and because of his having so exercised the same, is a conspiracy indictable and punishable under U. S. Rev. Stat., § 3608. *United States v. Lancaster* (Ga.) 10 L. R. A. 323.

The complainant also presents to the court the affidavits of sundry of his advertising patrons, prominent business men of the City of Cincinnati, and of the Cities of Covington and Newport, Ky., showing the receipt by them of the circulars above. These affidavits make it clear that by concerted action complainant's advertising patrons, who furnished him the bulk of his business in that line, were pried, through the mails, up to the issuance of the restraining order herein, with circulars calling upon them to withdraw their advertisements under penalty of the loss of the trade and the good-will of members of labor unions, and of all in sympathy with them.

There is also an affidavit of Henry M. Davis, advertising solicitor in Cincinnati for complainant. He states that Mabley & Carew and Fechheimer Bros. & Co., business firms in Cincinnati, were up to the 1st of October, 1890, regular advertisers in The Commonwealth, and that their advertisements were of the value of about \$150 per month to complainant. Early in October, 1890, he visited said firms, and, as usual, solicited their advertisements, which were refused, for the reason, as stated by their advertising managers, that they had been visited by a committee of said Typographical Union, and threatened that unless they withdrew their advertisements no member of any trades union or labor association would purchase from them; and that he had since then repeatedly visited and solicited them, and in each case met with the same refusal, stated to be for the same reason, and that the advertising patronage of said firms had been wholly withdrawn from said paper because of said threats.

The affiant mentions several other firms of Cincinnati, advertising in The Commonwealth, who reported to him that they were in like manner threatened.

On behalf of the defendants there was pre-

sented the joint affidavit of the defendants J. B. Sloop, Oscar Bailey and Frank L. Rist, who say that they are members of said Typographical Union, and connected with its management, and well acquainted with all the facts and acts of said Union, so far as they relate to matters alleged by the complainant.

They further say that in the fall of 1888, and at divers times between that date and September 29, 1890, committees of the Union, whereof one or more of the affiants in each instance were members, called upon complainant and urged and requested him to employ members of the Union in the publication of his newspaper and the carrying on of his business of job printing, and to pay the prices, which were fair and reasonable, fixed by the scale adopted by said Union, and that the complainant from time to time promised said committees, and in divers ways induced them to believe, that he would comply with their request.

They admit that they visited the complainant in September, 1890, as he alleges in his affidavit, and they say that they then reminded him of his promises as above stated, and requested him to comply with them, which he refused to do, and informed them that he would not employ union printers, that is to say, members of said Typographical Union, in his office at all.

They further deny that any of the circulars or other publications mentioned by complainant in his affidavit misrepresent the facts as they existed.

They further say that none of the firms mentioned in complainant's affidavit were at any time visited by a committee from said Typographical Union; that no such committee was ever appointed by said Union; and that the members of said Union individually, so far as is known to affiants, and known to the defendants named in the bill of complaint, have not

When there is a conspiracy, and the means of accomplishment are not specifically agreed upon, each becomes responsible for the means used by a co-conspirator, although there was no specific intent or malice against the person slain. *Spies v. People*, 10 West. Rep. 701, 122 Ill. 1. See *State v. McCahill* (Iowa) Dec. 3, 1893.

Everyone who enters into a common purpose or design is generally, in law, a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design. *Card v. State*, 7 West. Rep. 83, 109 Ind. 415; *McKee v. State*, 9 West. Rep. 383, 111 Ind. 378. See *Williams v. State*, 47 Ind. 508; *Jones v. State*, 64 Ind. 478; *Walton v. State*, 83 Ind. 9; *Archer v. State*, 4 West. Rep. 739, 106 Ind. 428; 1 Greenl. Ev. § 111.

All persons engaged therein will be guilty of conspiracy, whether actually present at the commission of any act of violence or not. *Newman v. Com. (Pa.)* 5 Cent. Rep. 497.

#### *Evidence, acts and declarations.*

When evidence has been adduced prima facie establishing a conspiracy among the several defendants, the acts and declarations of each in furtherance of the common design are the acts and declarations of all. *Spies v. People*, 10 West. Rep. 701, 122 Ill. 1; *Williams v. State*, 51 Ala. 1; *Brown v. Herr*, 21 Neb. 113; *Card v. State*, 7 West. Rep. 81, 109 Ind. 415; *State v. Glidden*, 3 New Eng. Rep. 242, 55 Conn. 42; *Tucker v. Finch*, 66 Wis. 17; *Owens v. State*, 16 Lea, 1.

13 L. R. A.

The same rule as to the admission of acts or declarations of one conspirator applies in criminal as in civil cases. *Card v. State*, *supra*, citing *Smith v. Freeman*, 71 Ind. 85; *Hogue v. McClintock*, 76 Ind. 205; *Wolfe v. Fugh*, 101 Ind. 238; *Daniels v. McGinnis*, 97 Ind. 542.

Only those declarations are admissible which were made during the progress of the conspiracy and in furtherance of its objects. *United States v. Gunnell*, 8 Cent. Rep. 764, 5 Mackey, 198; *Card v. State*, *supra*.

When the common design has been consummated, nothing said or done by one can affect the others. *Owens v. State*, *supra*, citing 1 Wharton, Crim. Law, § 732; 1 Greenl. Ev. § 111.

It is discretionary to admit proof of declarations before proof of conspiracy. *Spies v. People*, 10 West. Rep. 701, 122 Ill. 1, citing *State v. Winner*, 17 Kan. 298; 1 Greenl. Ev. § 111; *Rosecoe*, Cr. Ev. 7th ed. p. 415.

Evidence is admissible of a conversation between five or six members of the union, which inaugurated and prosecuted the boycott, that they were to pay fifty cents a week for the expense of the boycott, and that it would be paid for by the company. *State v. Glidden*, *supra*.

One conspirator cannot testify for another. A continuance will not be given to allow one conspirator who is evading arrest to testify for another. *Lisle v. Com.* 22 Ky. 250.

Joint assent of minds may be established by circumstantial evidence. *Spies v. People*, *supra*, citing 2 Bishop, Crim. Law, § 190, and note 7.

at any time visited said firms or any other persons in regard to the differences between the complainant and the said Union, or its members. Nor has said Union, or its members, in any manner, through its committees or agents, threatened said firms or any other persons as complainant has alleged in his affidavit; nor has said Union, or any committee therefrom, or any of its members, so far as is known to affiants, in any wise interfered with the printers employed by the complainant, or with any of his employes.

They deny that any committee, officer or agent of the Union has at any time visited the firm of Mabley & Carew, or the firm of Fechheimer Bros. & Co., in respect to said differences, or threatened said firms, or either of them, in any manner, through committees or agents, as is charged upon hearsay in the affidavit of Henry M. Davis.

They further deny that the posters, circulars and other publications mentioned in complainant's affidavit contained or were intended to express any threats or to seek by intimidation to interfere with the business of the complainant. They affirm that said posters and circulars and other publications were intended to present, and did in fact present, reasons why they should give their patronage to and employ the members of said Typographical Union; and to those employers who were friendly to and willing to employ members of said Union and like unions of organized labor.

Defendants also file the affidavit of Henry Curtin, the advertising manager of Mabley & Carew, and of Ed. Renau, advertising manager of Fechheimer Bros., who say that they have read the affidavit of Henry M. Davis, and that it is not true that they or their firm were threatened by said Union, or any committee thereof, with the loss of patronage if they continued to advertise in The Covington Commonwealth, and they deny that they so stated to Davis.

Appended to the affidavit of Renau is the affidavit of Jacob S. Fechheimer, of the firm of Fechheimer Bros. & Co., and with Renau in charge of the advertising matters of said firm. He states that he has read Renau's affidavit, and that it is true in its statements of facts.

**Messrs. Simrall & Mack and James W. Bryan** for complainant.

**Messrs. Kittredge & Wilby** for defendants.

**Sage, J.**, delivered the following opinion:

After the presentation of the facts upon the hearing of the motion, the court called upon counsel for the defendants to state the grounds of their objections to the granting of an injunction. They first challenged the jurisdiction in equity, citing *Kidd v. Horry*, 28 Fed. Rep. 778; *New York J. G. Soc. v. Roosevelt*, 7 Daly, 188, 190; *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. 142; *Richter v. Journeymen Tailors Union*, 24 Weekly Law Bulletin, 189; *Mayer v. Journeymen Stonecutters Assn.* (N. J.) 20 Atl. Rep. 492; *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476, and *Moore v. Bricklayers Union, No. 1*, 28 Weekly Law Bulletin, 48.

*Kidd v. Horry*, *supra*, was an application to 12 L. R. A.

restrain the defendant by injunction from publishing certain circulars alleged to be libelous and injurious to complainants' patent-rights and business, and from making and uttering libelous and slanderous statements concerning the validity of complainants' letters-patent or their title thereto, or concerning their business, during the pendency of a suit to restrain the infringement of said patents. Justice Bradley, who decided the case, in the course of his opinion said that the application rested principally upon a line of recent English authorities, which depended on certain Acts of Parliament, and not on the general principles of equity jurisprudence, but that neither the statute law of this country, nor the well-considered judgment of a court, had introduced this new branch of equity into our jurisprudence. "There may be a case or two looking that way, but none that we deem of sufficient authority to justify us in assuming the jurisdiction. . . . We do not think that the existence of malice in publishing a libel, or uttering slanderous words, can make any difference in the jurisdiction of the court. Malice is charged in almost every case of libel, and no cases of authority can be found, we think, independent of statutes, in which the power to issue an injunction to restrain a libel or slanderous words has ever been maintained, whether malice was charged or not."

This case was approved and followed in *Baltimore Wheel Co. v. Bemis*, 29 Fed. Rep. 95, by Judges Colt and Carpenter, in the United States Circuit Court of Massachusetts. To the same effect, see *Boston Diatite Co. v. Florence Mfg. Co.* 114 Mass. 69. Mr. Justice Gray was then the chief justice of the Supreme Court of Massachusetts, and pronounced the opinion, holding that "the jurisdiction of a court of chancery does not extend to cases of libel or of slander or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract." Upon the authority of this case, and of *Prudential Assur. Co. v. Knott*, the Supreme Court of Massachusetts held in *Whitehead v. Kitson*, 119 Mass. 484, that there was no jurisdiction in equity to restrain a person falsely representing that the plaintiff's patent infringed a patent owned by himself, and thereby deterring others from purchasing the plaintiff's invention.

The case in 7 Daly was upon a motion to vacate a preliminary injunction, which had been granted, restraining the defendants, as members or visitors of the state board of charities, from publishing the proceedings before them in their inspection and examination, under the Statute, of the affairs and conduct of the complainant and its officers, which proceedings, it was averred, were secret and *ex parte*, the society having been excluded from being present by counsel, and not allowed to cross-examine witnesses or produce testimony on its own behalf, or to know even, except from the publications of the proceedings, what charges were made against it or its officers. The court held that, conceding the facts as stated, and that the matter published was defamatory and libelous, the defendants could not be restrained by a court of equity, and that those injured must seek their remedy by a civil action, or by an indictment.



ment in the criminal courts; the exercise of any equitable jurisdiction to restrain publications being repugnant to the constitutional provision that every citizen may fairly speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and that no law should be passed to restrain the liberty of speech and of the press.

In *Prudential Assur. Co. v. Knott* the court was asked to restrain the publication of a pamphlet which, it was charged, contained false statements of the rates of premium charged by complainant, and represented the company as being managed with reckless extravagance, and as being in a state of insolvency, and unable to fulfill its engagements; and it was averred that the continued publication would be very injurious to the company's credit, and could not fail greatly to damage its business and diminish its profits. Hall, *V. C.*, refused to grant an injunction, and the plaintiff, by way of appeal, applied to Lord Cairns, *L. C.*, who held that there was no ground whatever for the interference of the court; that if the publications did not amount to libels, and were therefore innocuous and justifiable in the eye of the court of common law, he was at a loss to understand upon what principle the court of chancery could interfere; and if, on the other hand, the comments were libelous, it was clearly settled that the court of chancery had no jurisdiction to restrain their publication.

In *Richter v. Journeymen Tailors' Union* a similar rule was applied. In that case the petition set forth that the defendants unlawfully combined and conspired to break up and destroy plaintiff's business, and that in order to accomplish that purpose they maliciously compelled plaintiff's employes to quit working for him, and prevented others from working for him. The means by which this was accomplished were not specified. "Whether it was done by moral suasion, by argument, by reason or by intimidation and violence, is not shown by either the petition or the evidence." All that did appear was that the defendants printed and published circulars, and that the plaintiff had lost customers because the latter had heard that plaintiff was employing scab or inferior tailors. It was not shown from what source the alienated customers derived their information, but it was assumed by counsel for the plaintiff that it was from the circulars. The court held that the only question before it was whether it could enjoin the publication of a libel, and that the only remedy against such publication was at law. To the same effect is *Mayer v. Journeymen Stone Cutters' Assn.* Indeed, the law as stated in all these cases is so thoroughly established as to be beyond controversy, and it is not necessary to refer more particularly to other cases cited in support of it. *Francis v. Flinn*, 118 U. S. 885, 30 L. ed. 165, is quite as strong an authority as any cited.

The question with which we have to deal is whether this case falls within the rule. That the defendant, the Typographical Union, set on foot a boycott against the complainant, as stated in the bill, and in the affidavits on file, is not denied. That this boycott was to be enforced by threatening loss of business to those who, having no connection with the Union,

should continue to advertise with, or in any way patronize, the complainant, is clearly shown. True, it is claimed that no threats were used; but the language of the circulars has no doubtful meaning. The affidavits on file show that it was perfectly understood by those who received them; and the circumstances indicate that it was intended that it should be so understood. In *Brace v. Beane* (Pa.), 18 R. & Corp. L. J. 561, it was held that the word "boycott" is in itself a threat. "In popular acceptance it is an organized effort to exclude a person from business relations with others, by persuasion, intimidation and other acts which tend to violence, and thereby coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs." But it is insisted for the defendants that every representation of fact contained in their hand-bills and circulars is true; that is to say, that the complainant had, in 1888, broken with the Typographical Union, discharged all union employes, and had since that date employed only those who were not members of the Union; and that after repeatedly promising to unionize his office he had finally, in September, 1890, refused to do so, and declared that he would not employ any person who was connected with the Union. All these are conceded facts. Therefore, argue counsel for the defendants, this is only a case of lawful competition. The complainant having declared that he would not employ any member of the Union, the Union had a right to say that its members would not patronize the complainant. Nobody disputes that proposition. If that were all that is involved in this case, there would be nothing for the court to act upon. But it is not all by any means. Instead of "fair, although sharp and bitter, competition," as is contended by counsel, it was an attempt, by coercion, to destroy all competition affecting the Union. It was an organized conspiracy to force the complainant to yield his right to select his own workmen, and submit himself to the control of the Union, and allow it to regulate prices for him, and to determine whom he should employ and whom discharge. In other words, it was and is an organized effort to force printers to come into the Union, or be driven from their calling for want of employment, and to make the destruction of the complainant's business the penalty for his refusing to surrender to the Union. Whatever moral obligation may have been incurred by complainant by reason of his promises to unionize his office, they were wholly without consideration, and they amount to nothing whatever in law or in equity.

No case has been cited where, upon a proper showing of facts, an unsuccessful appeal has been made to a court of chancery to restrain a boycott. The authorities are all the other way. At common law an agreement to control the will of employers by improper molestation was an illegal conspiracy. In New York it has been held that the "boycott" is a conspiracy in restraint of trade. *People v. Wileig*, 4 N. Y. Crim. R. 403; *People v. Kostka*, Id. 429. So also in Virginia: *Com v. Shelton*, 11 Va. L. J. 824. And in Connecticut: *State v. Glidden*, 55 Conn. 46, 3 New Eng. Rep. 849. And in England: *Reg. v. Barrett*, 18 L. J. 430.

In *Emack v. Kans*, 34 Fed. Rep. 47, the United States Circuit Court for the Northern District of Illinois held that equity had jurisdiction to restrain an attempted intimidation by one issuing circulars threatening to bring suits for infringement against persons dealing in a competitor's patented article, the bill charging, and the proof showing, that the charges of infringement were not made in good faith, but with malicious intent to injure complainant's business. Judge Blodgett recognized, in his decision, the authority of *Kidd v. Horry* and *Baltimore Wheel Co. v. Bemis*, cited for the defendants in this case, but said that the case before him was fairly different and distinguishable from those cases in a material and vital feature. In those cases the interference of the court was sought to restrain the publication of libelous attacks upon the property of the complainant. In *Emack v. Kans* the gist of the complaint was that the publications were only means employed to carry into effect a malicious intent to injure and destroy the complainant's business. Judge Blodgett said: "I cannot believe that a man is remediless against persistent and continued attacks upon his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this by one man upon another's property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law, in most cases, would do no good, and ruin would be accomplished before an adjudication would be reached. True, it may be said that the injured party has a remedy at law; but that might imply a multiplicity of suits, which equity often interposes to relieve from. But the still more cogent reason seems to be that a court of equity can, by its writ of injunction, restrain a wrongdoer, and thus prevent injuries which could not be fully redressed by a verdict and judgment for damages at law. Redress for a mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious, can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers, and intimidate them from dealing with him, may wholly break up and ruin him financially with no adequate remedy if a court of equity cannot afford protection by its restraining writ."

This is a clear and forcible statement of the law, and is in accord with the general current of authority.

How strongly it applies in this case may be readily seen by referring to the editorials in the *Bulletin*, the organ of the Union, and to the hand-bills and circulars set forth in the statement of facts. The editorial in the *Bulletin* of December 1 declares that the boycott "is still on, and will be until the proprietor of the 'rat' sheet employs union men." It requests "all K. of L. assemblies, unions and workmen to bear in mind that Mr. Casey refused to employ or in any way recognize organized labor." It asks their aid in compelling complainant to recognize the rights of la-

12 L. R. A.

bor by withdrawing their patronage from his paper, and if possible let him know why. It calls upon them not to patronize any merchants who advertise in complainant's newspaper, and if they see the paper in any place of business to refuse to buy goods unless the merchant immediately stops the "rat" sheet. The communication sent by the Union on the 2d of November to Messrs. Griffin, agents for the sale of complainant's paper, contains the following: "This Union will consider it a great favor for you to give up the agency of *The Commonwealth*. If you do not do so, we will have to consider you the enemy of organized labor."

These are fair samples, and they indicate the method by which the boycott was to be made effective. Yet counsel say that there were no threats; that the defendants were only exercising their constitutional right to freely speak and publish their opinions; that what defendants have done is a necessary and natural and proper incident of bitter, but yet lawful, competition, and that this was only fair argument and persuasion. These propositions are in direct conflict with decisions made long ago, and recognized in all subsequent cases. In *Ree v. Eccles*, 1 Leach, 274, the defendants were indicted for conspiring to impoverish a tailor, and by direct means to prevent him from carrying on his trade. They were convicted, and upon a motion in arrest of judgment it was objected that the indictment ought to have stated the acts that were committed to impoverish the tailor and to prevent him from carrying on his trade in order that the defendants might thereby have notice of the particular charges they were called upon to answer. But *Lord Mansfield*, without hearing the prosecution, said that that was certainly not necessary. "The offense does not consist in doing the acts by which the mischief is effected,—for they may be perfectly indifferent,—but the conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offense." See also *Re Wabash R. Co.* 24 Fed. Rep. 217. In that case the following notice was sent to various foremen of the shops of the railroad company, during a strike organized to resist a reduction of wages, the railroad company being at that time in the hands of a receiver appointed by the United States circuit court:

"OFFICE OF LOCAL COMMITTEE.

"June 17, 1886.

"—, Foreman: You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employes. But in no case are you to consider this an intimidation."

"Held, that this was an unlawful interference with the management of the road by the receiver, and a contempt of court, for which the writer should be punished."

The court, in passing upon the case, said: "The statement in all these notices that they are not to be taken as intimidations goes to show beyond a doubt that the writer knew he was violating the law, and by this subterfuge sought to escape its penalty."

In *United States v. Kans*, 28 Fed. Rep. 748,

*Judge Brewer*, after stating that "every man has a right to work for whom he pleases, and go where he pleases, provided in so doing he does not trespass on the rights of others," by way of illustrating what is a threat, supposes that one of two workmen is discharged. The other is satisfied with his employment and wishes to stay. The discharged workman comes with a large party of his friends, armed with revolvers and muskets, and says: "Now my friends are here—you better leave—I request you to leave." In terms there is no threat, but it is a request backed by a demonstration of force, intended and calculated to intimidate, and the man leaves really because he is intimidated. Again, armed robbers stop a coach. One of their number politely requests the passengers to step out and hand over their valuables, and they do so. To the charge of robbery the defense is made that there was no violence; there were no threats; there was only a polite request, which was complied with. The court said that any judge who would recognize such a defense deserved to be despised, and the court was right.

In *State v. Glidden*, cited hereinbefore, *Judge Carpenter*, speaking for the Supreme Court of Connecticut, states that the defendants said in effect to the publishing company: "You shall discharge men you have in your employ, and you shall hereafter employ only such men as we shall name. It is true, we have no interest in your business; we have no capital invested therein; we are in no wise responsible for its losses or failure; we are not directly benefited by its success; and we do not participate in its profits—yet we have a right to control its management, and compel you to submit to our dictation."

The court said that the bare assertion of such a right was startling; that, if it existed, all business enterprises were alike subject to the dictation and control of those who asserted it, and upon the same principle and for the same reason the right to determine what business men shall engage in, and when and where and how it shall be carried on, will be demanded, and must be conceded to associations of workmen of the class of those whom it would be necessary to employ. The opinion in this case, although the case itself arose upon an indictment for conspiracy, is a well-considered discussion of the law with relation to boycotting. See also *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48.

In the light of these authorities it is idle to talk about the defendants' acts and publications as mere incidents of a competition set on foot by complainant's declaration that he would not employ union printers; that the publications are shielded by constitutional guarantees; or that, viewed in the most unfavorable light, they are nothing more than libels, and the only remedy for any injury resulting is by an action at law.

It is claimed that the recital in the affidavit of Davis of what was said to him by the man-

agers of the advertising department of Mabley & Carew and of Fechheimer Bros. & Co., when they withdrew their patronage from The Commonwealth, to wit, that it was because they had been visited by a committee of the Typographical Union, and were threatened with the loss of business, ought not to be considered, because it is hearsay.

There are two answers to this claim:

*First.* What was said is clearly admissible as part of the *res gestæ*, to show the state of mind of the persons in doing the act which their declarations accompanied.

*Second.* Upon the hearing of a motion for a preliminary injunction, the rules of evidence are applied less strictly than upon the final hearing of the cause, and consequently evidence that would not be competent in support of an application for a perpetual injunction should be admitted. *Buck v. Hermance*, 1 Blatchf. 523; *Matthews v. Iran Old Mfg. Co.* 19 Fed. Rep. 321. The reason for the rule is plain. Probability of right is sufficient to authorize a preliminary injunction. In many cases it is granted to preserve property *in statu quo* during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and oftentimes without having the means of forming, any opinion as to such rights. *Great Western R. Co. v. Birmingham & O. J. R. Co.* 2 Phil. Ch. 597.

The rule, with the reason for it, applies with peculiar force when it is sought to exclude the statements referred to from consideration. The advertising managers made haste to deny that any threats were uttered to them by anybody representing the Typographical Union. They did not, however, set forth what was said, nor did they deny that they withdrew their advertisements from The Commonwealth, nor intimate any reason for so doing other than that stated by Davis. It is not now the proper occasion to consider fully what prompted their denials. That should be reserved until the final hearing, after full opportunity to cross-examine Davis upon the one hand, and the advertising managers who made the denials upon the other hand, and to present to the court a full showing of all that was said when they were called upon by the committee of the Union. According to the logic of counsel for defendants almost anything might have been said without precluding the denials.

I have made the statement of the facts as they are set forth in the bill and affidavits quite full, and have entered somewhat at length upon the discussion of the questions involved, because of the request by counsel on both sides for a full statement of the case, with the reasons of the courts for its conclusions, inasmuch as the decision upon the motion may practically settle the entire controversy between the parties.

*The motion for a temporary injunction, to continue in force until the final decree in this cause, will be granted.*

## NORTH CAROLINA SUPREME COURT.

STATE of North Carolina, *ex rel.* Stacey  
VAN AMRINGE, *App't.*,

v.

John D. TAYLOR.

(.....N. C. ....)

1. An election is not valid, although conducted fairly and honestly, if the statutory provisions and rules are not substantially observed.
2. A mere intruder, who without color of authority simply assumes to act as an officer, is not an officer *de facto*, where the public knew or ought to know that he is a usurper and his acts are absolutely void for all purposes.
3. An election held by a mere usurper of the office of registrar, who had fraudulently obtained the books and set up his claim to the office for the first time on election day, when the lawful registrar publicly demanded the return of the books, is void.

(March 24, 1891.)

**A**PPPEAL by relator from a judgment of the Superior Court for New Hanover County in favor of defendant in an action brought to contest defendant's alleged election to the office of clerk of the Superior Court for New Hanover County. *Affirmed.*

Statement by Merrimon, Ch. J.:

The relator alleges in his complaint that he was duly elected clerk of the Superior Court of the County of New Hanover at the regular election held in that county in November of 1890; that nevertheless the county canvassing board of that county falsely and wrongfully ascertained and declared that the defendant, who was his competitor at the said election, was duly elected to said office, and afterwards he was inducted into and now holds and exercises and receives the fees and emoluments thereof, and refuses to surrender the same, etc.; that the said board so ascertained by refusing to count the vote cast at Cape Fear precinct, in said county, which, if the same had been counted, as it ought to have been, would have given him a just and clear majority of the whole number of votes cast in said county, etc. He demands judgment that he was so duly elected; that defendant was not; that he be inducted into office, etc. The defendant denies that plaintiff was so elected clerk; alleges that he was; admits that if the vote which purported to be cast at the said Cape Fear precinct had been lawful, and had been counted by the said canvassing board, then the relator would have been elected; but he alleges that the said election at said precinct was absolutely void, because it was not held by a registrar and judges of election, according to law, etc. On the trial the court submitted to the jury this issue: "Was the plaintiff, relator, S. Van Amringe, duly elected to the office of clerk of the Superior Court of New Hanover County

on the 4th day of November, 1890, and is he entitled to be inducted into said office?" There was a verdict and judgment for the defendant, and the relator appealed to this court, assigning as grounds of error: (3) The refusal of the court to submit issues offered by the relator. (4) Charging that if Thomas obtained the registration books fraudulently under promise to return them, and assumed to act as registrar, he was an intruder, and had no authority, and could perform no lawful official act, and in consequence the election held by him and his appointees was void. (5) In charging that if they found that Cowan continued to act as registrar, and employed Thomas, a clerk, to assist him, and that Thomas, while sustaining this relation fraudulently obtained, etc., as set out in above section No. 4.

**Mr. D. L. Russell**, for appellant:

Here was an election held by men possessing the insignia of office—the books and the boxes and the regular polling place. The electoral body, composed of both parties, recognized them as election officers by casting a full vote. General recognition is as good as color to constitute a *de facto* officer.

*State v. Orrroll*, 38 Conn. 449.

Thomas had color of appointment to act as registrar. The book was given to him by the lawful registrar "to represent him" on revision Saturday. On the morning of his appointment there were only two days of active service to be performed by the registrar—revision Saturday and election day. Thomas was appointed to act for the first day and held over wrongfully on the second. How does this differ in principle from the cases so often decided when the acts of an officer holding over after expiration of his term have been upheld?

*Den v. Reddick*, 4 Ired. L. 366; *Wilcox v. Smith*, 5 Wend. 281; *Threadgill v. Carolina Cent. R. Co.* 73 N. C. 178.

In almost every reported case in North Carolina the officer whose acts have been assailed has been held to be *de facto*, and hence his acts good as to third persons.

See *People v. McKee*, 68 N. C. 429; *State v. Tate*, 68 N. C. 546; *People v. Staton*, 73 N. C. 546; *Keeler v. Newbern*, Phil. L. 506.

The reasons of public policy upon which it is held that the acts of an officer *de facto* are not to be called in question collaterally, but are valid as to third persons, may apply to the case where such an officer is a usurper and intruder.

*Petersilea v. Stone*, 119 Mass. 467.

In face of the evidence of the *de facto* character exhibited by Thomas upon the day of the election no distinction can be drawn in respect to validity betwixt the votes of those voters that day who did and those who did not believe him to be the legal registrar.

*Jewell v. Gilbert*, 64 N. H. 13, 10 Am. St. Rep. 356.

The action of Thomas at the day of revision made his action on the day of election repeated action as registrar. And Coleridge, J., in *Reg. v. Murphy*, 8 Car. & P. 297, 309, said that even one previous official act (and that by an officer who had no insignia) was evidence to go to the

NOTE.—Officer *de facto*. See notes to *State v. Lewis* (N. C.) 11 L. R. A. 105; *State v. Peelle* (Ind.) 5 L. R. A. 228.  
12 L. R. A.

jury of his right to do the act in question: and in *State v. Hodgskins*, 19 Mo. 155, 36 Am. Dec. 742, the test is said to be that the person whose official character is in question had been either "in the habit of acting, or had acted."

*Messrs. Maraden Bellamy and George Rountree*, for appellee:

An election held by usurpers is void.

Paine, Elections, §§ 497, 499; *Blus v. Peter*, 40 Kan. 701.

The exercise of the right of suffrage shall be prescribed by previous law; its qualifications shall be prescribed by previous law; the manner of its exercise, under whose supervision (always sworn officers of the law), is to be prescribed. And then again the results are to be certified to the central power by some certain rule, by some known public officers in some clear and definite form.

Paine, Elections, p. 2.

The right to vote is not a "natural right," protected by the Bill of Rights, but it is a political right, the creature of positive law and must be exercised in subordination thereto.

*Minor v. Happersett*, 88 U. S. 21 Wall. 162, 22 L. ed. 627; Cooley, Const. Law, p. 248 *et seq.*; *Postor v. Scarff*, 15 Ohio St. 534; Cooley, Const. Lim. 4th ed. 751; *Luther v. Borden*, 48 U. S. 7 How. 1, 12 L. ed. 581. See also *Sawyer v. Haydon*, 1 Nev. 76; *People v. Waller*, 11 Cal. 49; Bright. Elect. Cas. 448.

The election will be void if held by improper persons, persons having neither right nor color of right to hold the election.

*Rex v. Lisle*, Strange, 1090; Bright. Elect. Cas. 451; *Juker v. Fisher*, 20 Pa. 484; *Com. v. County Comrs.* 5 Rawls, 75.

An election must also be conducted by the proper officers; an election held by mere intruders, without title or color of title, may be disregarded.

Bright. Elect. Cas. 451; Paine, Elections, p. 326; McCrary, Elections, § 217.

All official acts of usurpers are void.

*Cooke v. Cooke*, Phil. L. 583; *Keeler v. New Bern*, Id. 505; *People v. Cook*, 14 Barb. 289, 8 N. Y. 87; *People v. White*, 24 Wend. 286.

The mere assumption of office is insufficient to make one an officer *de facto*.

Hen. VI. pt. 3, Act I. Scene II. See *Hickman v. Jones*, 76 U. S. 9 Wall. 200, 19 L. ed. 553; *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716; *Stevens v. Griffith*, 111 U. S. 48, 28 L. ed. 348; *Lambert v. People*, 76 N. Y. 287, 238; *Den v. Reddick*, 4 Ired. L. 368; *Keeler v. New Bern*, *supra*; Paine, Elections, p. 322, note 6; *Parker v. Kett*, 1 Ld. Raym. 658; *Rex v. Bedford Level*, 6 East, 356.

There can be no officer *de facto* where there is an officer *de jure* in possession of the office.

*Abbott of Pontein's Case*, 4 Y. B. 9 Hen. VI. p. 25, pl. 21; *Boardman v. Halliday*, 10 Paige, 233, 4 L. ed. 957; *Brady v. Theritt*, 17 Kan. 468; *State v. Blossom*, 19 Nev. 312; *Jester v. Spurgeon*, 27 Mo. App. 477; McCrary, Elections, § 219.

Where a person assumes to be an officer, under an appointment or election, it is insufficient to constitute "color" unless the appointment or election proceeds from the person or persons having authority to appoint or elect.

*People v. Albertson*, 8 How. Pr. 363; *State v. Lewis*, 11 L. R. A. 105, 107 N. O. 967.

12 L. R. A.

*Merrimon, C. J.*, delivered the opinion of the court:

The ascertainment of the popular will or desire of the electors, under the mere semblance of an election unauthorized by law, is wholly without legal force or effect, because such election has no legal sanction. In settled, well-regulated government, the voice of electors must be expressed and ascertained in an orderly way, prescribed by law. It is this that gives order, certainty, integrity of character, dignity, direction and authority of government to the expression of the popular will. An election without the sanction of law expresses simply the voice of disorder, confusion and revolution, however honestly expressed. Government cannot take notice of such voice until it shall in some lawful way take on the quality and character of lawful authority. This is essential to the integrity and authority of government. Hence, if a person assumes to be a registrar of elections, and four others likewise assume to be judges of election, and purport and undertake to hold an election on election day, in an election precinct, and take and count the votes cast at it honestly, such action and proceeding would be no election, nor would it be accepted and treated as such by authority. An essential element of a valid election is that it shall be held by lawful authority, substantially as prescribed by law. It is not sufficient that it be simply conducted honestly; it must as well have legal sanction. The statutory provisions and regulations in respect to public elections in this State must be observed and prevail, certainly in their substance. Otherwise the election will be void, and so treated. Therefore the contention that if the election in question was simply conducted fairly and honestly it was valid, is unfounded.

The court instructed the jury that Thomas was registrar *de facto*, if they believed either of two aspects of the evidence, and the election would hence be valid. As to this there was no exception. But the court said further: "If you find from the evidence that Cowan continued to act as registrar, and employed Thomas as clerk to assist him, and that Thomas, while sustaining this relation to Cowan, fraudulently obtained possession of the books on the second Saturday preceding the election under a promise to return them, and assumed to act as registrar, he was an intruder, and had no authority, and could perform no lawful official act, and in consequence the election held by him and his appointees was void, and your answer to the issue should be 'No.'" This is made the principal ground of assignment of error. The instruction thus complained of must be taken in connection with the whole of the instructions given, and in view of all the evidence pertinent. The evidence tended to prove that one Cowan was duly appointed to be registrar; that he accepted the office, and acted as and claimed to be such continuously, until the day of the election; that he did not resign or profess to resign; that he did not appoint, or undertake to appoint, Thomas to be registrar; that he was employed and treated simply as his clerk; that Thomas fraudulently got the registration books from the registrar under the false promise to return the same; that he did

not do so, but on the day of election expressly refused to surrender the registration books, and then assumed to be registrar, acted as such and undertook and purported to appoint three judges of election, who, with a judge regularly appointed, co-operated with him in holding the election. The evidence fully warranted the instruction, if it was correct in point of law. It is difficult to define in precise terms what constitutes an officer *de facto* in all cases. Indeed, what may constitute such officer in one case may not in another. A variety of facts and circumstances tending to show authority of the person claiming and exercising it go to constitute such officer, and, upon grounds of necessity and public policy, to give his acts validity as to the public and persons taking benefit of his official acts. There must be something, some consideration, evidence, facts, circumstances or conditions, that reasonably lead those persons who, in the course of the administration and the discharge of the duties of the office, must in some way have relations or business with it, to recognize and treat the person claiming to be officer as the lawful incumbent. But, as was said by Chief Justice Ruffin in *Burke v. Elliott*, 4 Ired. L. 361: "The mere assumption of the office by performing one or even several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer *de facto*. There must at least be some colorable election and induction into office *ab origine*, and so long an exercise of the office, and acquiescence therein of the public authorities, as to afford to the individual citizen a presumption strong that the party was duly appointed, and therefore that every person might compel him for the legal fees to do his business, and for the same reason was bound to submit to his authority as an officer of the country." What was thus said was afterwards approved in *Den v. Reddick*, 4 Ired. L. 368; *Burton v. Patton*, 2 Jones, L. 124; *Trenton Comrs. v. McDaniel*, 7 Jones, L. 107, and in *People v. Staton*, 73 N. C. 546, in which case Mr. Justice Reade said: "I scarcely think it necessary to cite authority to show the distinction between mere usurpers and officers *de facto* and *de jure*. A usurper is one who takes possession without any authority. His acts are utterly void, unless he continues to act for so long a time, or under such circumstances, as to afford presumption of his right to act. And then his acts are valid as to the public and third persons. But he has no defense in a direct proceeding against himself. A *de facto* officer is one who goes in under color of authority." *Keeler v. Newbern*, Phil. L. 505. In a late case (*State v. Lewis*, 107 N. C. 967, 11 L. R. A. 105) Justice Avery cites with approval *State v. Carroll*, 38 Conn. 449, in which Chief Justice Butler reviews very thoroughly and ably the whole subject of officers *de facto*, and reaches substantially this conclusion: "An officer *de facto* is one whose acts, though not those of an officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, when the duties of the office were exercised: *first*, without a known appointment or election, but under such circumstances of reputation or acquiescence as

were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be; *second*, under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent, requirement or condition, as to take an oath, give a bond, or the like; *third*, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some irregularity or defect in its exercise, such ineligibility, want of power or defect being unknown to the public; *fourth*, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

This summary designates to a very large extent, if not altogether, the nature and extent of the circumstances, conditions, the character of the evidence and the recognition by the public essential in varying pertinent cases to constitute an officer *de facto*. A mere intruder or usurper is not ordinarily, but may become, an officer *de facto* in some cases. This can happen only by the continued exercise of the office by him, and the acquiescence therein by the public authorities and the public for such length of time as to afford to citizens generally a strong presumption that he had been duly appointed. But when, without color of authority, he simply assumes to act,—to exercise authority as an officer,—and the public know the fact, or reasonably ought to know, that he is a usurper, his acts are absolutely void for all purposes. The mere fact that, apart from his usurpation, his supposed official acts were fair and honest, could not impart to them validity and efficiency. *Burke v. Elliott*, *People v. Staton* and *State v. Carroll*, *supra*; *McCrory*, Elections, § 217; *Paine*, Elections, §§ 380, 381.

The citizen is justly chargeable with laches, does that which is in his own wrong and wrong to the public, when he recognizes, tolerates, encourages and sustains a mere usurper,—one whom he knows, or ought under the circumstances to know, to be such. In such case, neither justice, necessity nor public policy requires that the acts of the usurper shall be upheld as valid for any purpose. Indeed, these things, the spirit and purpose of government, strongly suggest the contrary. When, therefore, Thomas obtained from the registrar, Cowan, the registration books fraudulently, under promise to return the same, and assumed to act as registrar, he was simply an intruder, and had no authority and could perform no lawful official act as such, and the election which he and the supposed judges, his appointees, co-operating with him, held, was void. The instruction of the court to the jury excepted to was pertinent, and had reference to the evidence going to prove that Thomas so fraudulently obtained the registration books, and assumed to act as registrar, and the jury must have found that he did. The jury found that he was not registrar *de facto*, by reason of color of appointment. They found, also, that he was a fraudulent intruder; but they did not find, nor was there evidence to warrant such finding, that he was an intruder under such

circumstances and conditions as to constitute him registrar *de facto*. The evidence went to show that he had been the clerk of the registrar; that he did not claim to be or act as registrar until the day of election; that he had no such reputation, that the electors had not so recognized him; that no public authority had so recognized him at any time; and that on the morning of the day of the election, in the presence of electors, the lawful registrar had publicly demanded that he surrender to him the registration books, to the end that he and the lawfully appointed judges of election might hold the election according to law, and he refused to do so. The evidence went to prove, and the jury found, that Thomas was a naked intruder, with no attending circumstances and conditions that rendered him registrar *de facto*. The electors had notice that Cowan was the lawful registrar; that he had been duly appointed; that he acted as such. There was no notice that he had resigned his office, nor had he done so. On the contrary, on the morning of the election he claimed his right and authority to hold the election. This was notice—important notice—that Thomas was an intruder, and the election was not such in contemplation of law. The electors ought not to have recognized the intruder; they did so in their own wrong; they ought to have demanded and required that the registrar, and the lawful judges of election, hold the election according to law. It was their duty to themselves and to the public to have done so, and, falling in this for any cause, they ought not to have gone through an empty form that had no legal effect. They lost their votes and their voice, in part, through their own laches.

The issue of fact submitted to the jury was broad and comprehensive. It embraced the whole of the matter at issue. The relator could readily, as he did, put in all pertinent evidence, and avail himself of it before the jury. He was not necessarily prejudiced by it, nor can we see, nor does it at all appear, that he was. The other exceptions are without merit.

*Judgment affirmed.*

Basil DEVEREUX

v.

Michael McMAHON et al., Appts.

(.....N. C. ....)

1. An objection that there is a variance between the original deed and a copy of its record, which copy is made evidence by Code, § 1251, without accounting for the original unless upon a rule or order of court suggesting a variance or other sufficient ground, and which has been read to the jury, cannot, in case of the sub-

sequent voluntary production of the original without any order of court, be made available by objecting to the admission of the copy in evidence.

2. A cross-mark opposite a seal made by the grantor of a deed immediately under a clause containing his name and stating that he has "signed his name and affixed his seal," constitutes a sufficient signature and may be construed as an adoption of the name in such clause as a signature.
3. A mistake of the register of deeds in copying the true name of a witness to a deed on the records instead of the letters "D. S. C.," which constituted the actual signature of the witness, will not annul the probate or destroy the competency of a copy of the record as evidence.
4. The letters "D. S. C.," written by the witness to a deed, whose name is Solomon Davis, may constitute a sufficient signature as a witness.
5. The signing of a deed by the grantor and its possession by the grantee constitute prima facie evidence of delivery.

(February 24, 1891.)

**A** PPEAL by defendants from a judgment of the Superior Court for Halifax County in favor of plaintiff in an action brought to recover possession of certain real estate. *As affirmed.*

Statement by Avery, J.:

This was a civil action, brought for the recovery of possession of land, and tried at September Term, 1890, of the Superior Court of Halifax County before Armfield, J.

The plaintiff was introduced as a witness, and testified that the land was worth \$40 or \$50 a year. On cross-examination by the defendants' counsel he testified that Thomas Alexander was carried by him from his home in Halifax County to the plaintiff's home in Nash County, in order that he might take better care of him. "Tom wanted to go. He died about a week afterwards. He signed the deed about 12 o'clock in the day, and died about the same hour that night. They tried to read the deed to him, but he said it made no difference. He asked who wrote it, and was told it was Mr. Thorp. He asked if he was a lawyer, and was told 'Yes.' They tried to read it to him, but could not make it out. He asked if it stipulated that he (Basil) should take care of him and Frankie during their lives. Was told 'Yes;' and said that he was satisfied. I told him what was in the deed. Solomon Davis was the one who tried to read the deed. John Cobb was not then present. Davis witnessed the deed. Cobb came later in the day, and Tom acknowledged the deed again before him, and he wrote these words on it: 'John Cobb witness towards of what was ~~sd.~~ Thomas Alexander *did* agree to the Deed.'" The plaintiff then rested his case.

NOTE.—Deed; signature by mark or cross.

If a person is designated by his proper name in the body of a deed, the fact that he signs by a wrong name will not invalidate the deed. *Middleton v. Finley*, 23 Cal. 73.

—So a signature by a mark or cross is sufficient, the deed being in other respects regular, although the vendor could write. *Bickley v. Keenan*, 60 Ala. 295; *Truman v. Lore*, 14 Ohio St. 144; *Frost v. Deering*, 12 L. R. A.

21 Me. 186; *Jackson v. Van Dusen*, 5 Johns. 144; *Tonelle v. Hall*, 4 N. Y. 145.

So the absence of an attestation to such a signature would not detract from its sufficiency, although it might have the effect to render proof of the execution of the instrument much more difficult. *Wimberly v. Dallas*, 52 Ala. 196; *Bailey v. Bailey*, 36 Ala. 687. See 3 Washb. Real Prop. 244; *Baker v. Dening*, 8 Ad. & El. 94.



The defendants offered the paper purporting to be the original deed from Alexander to Devereux. In the attestation clause the words "Solomon Davis" are not written out, but the letters "D. S. C." are followed by certain flourishes. The defendants then introduced the will of Thomas Alexander, in which he devised the *locus in quo* to the defendants. The defendant M. McMahon was then introduced, who testified that he had known Thomas Alexander twenty-five or thirty years, and had had considerable dealings with him, and he could not read or write. The defendants then introduced W. T. Purnell, who testified that he knew Tom Alexander well. Saw him at Halifax depot on the day that he went to Nash. Tried to talk to him, but he was so sick that he could not talk,—was paralyzed,—and witness thought that he was dead. Was just as bad off as a man could be. His feet had been badly burned. He was at the depot in a bed, and feathers were all over him. W. D. Willcox was introduced by the defendants, and testified: "I saw Tom the day he was carried to Nash. He was in a bed. Looked very bad." Defendants then introduced Alfred Walters, who testified that the day before he left home he saw Tom Alexander, and helped to dress him on the morning he left. "He did not speak from his home to Halifax. He said that he would be back to-morrow. He was as bad off as he could be when I left him on the train. Tom is an uncle of the plaintiff, and raised him. Tom had no children. I married Tom's niece." Defendants rest.

The testimony of Solomon Davis, who was next introduced for plaintiff, is embodied in the opinion. Plaintiff introduced Simon Beckett, who testified: "I was there when Tom signed the deed. I got there about 11 o'clock. Tom talked with good sense. I saw Tom take the pen and have the paper. His mind seemed good then. He was talking about being burned; how he came to be there; said Basil would do more for him than anyone else, etc. I saw Basil give him the deed, and having it fixed up by Mr. Thorp. He said it was to be signed to-morrow. Tom said: 'Better fix it now; we can't tell what a day may bring forth.' Tom asked him what was in the deed, and Basil told him. I [witness] can't read or write. Tom was in the bed when he signed the deed. Davis had hold of the end of the pen when Tom signed." Plaintiff then introduced Nat. Alexander, who testified: "I am an illegitimate son of Tom Alexander. Before he went to Nash County he proposed to me to take him to my house, and take care of him and his sister, Frankie, during their lives, and he would give me a deed to the land. I told him I was not able to do it, and he said he was going to write for Basil to come. He wrote to Basil, and after that Basil came. He did not take him home that time, but did shortly after." Defendants objected to this. The objection overruled, and defendants excepted. The defendants objected, among other things, throughout the trial, that the deed was never signed; and, secondly, that plaintiff fraudulently induced Alexander to sign it. The plaintiff then introduced John Williams, who testified he had heard Tom say McMahon had failed to take care of him. Said he was going to write

Basil to come and take him in hand. Said he hadn't seen Basil in twelve years. This was in 1886. Basil came in 1887. The plaintiff was recalled, and testified that three or four years before Tom died he came up and attended to his matters for him; that he took Tom off just before Christmas, and he lived one week, and until Friday night of the next week. Mr. Thorp testified that he wrote the paper on the 18th and dated it on the 14th; that he gave the deed to Basil on the 18th. Defendants then introduced McMahon, who said that Basil's statement that he was inattentive to Tom's wants was false; that he did not know he was at the depot the day he went to Nash; and that he had several times sent him clothing and other things. The defendant's counsel claimed in his argument (1) that there was no sufficient signing of said deed or paper; (2) that it was not lawfully and properly registered; (3) that there was no evidence of its delivery. His honor charged the jury that if they found from the evidence that Thomas Alexander, after being made acquainted with the contents of the paper or deed, with intent to execute it, made the cross-mark opposite the word "[Seal]" freely and voluntarily, and then had sufficient mental capacity to understand the nature of the transaction and the situation of the property, and his circumstances, it was in law a sufficient signing. Defendants excepted. He further charged that if the jury believed from the evidence that Solomon Davis was in the habit of signing his name by the letters "D. S. C.," and made his signature in this way to said deed, at the request of Thomas Alexander, it was a sufficient attestation. Defendants excepted. His honor further charged that if the jury believe from the evidence that Alexander signed the deed for the purposes expressed, and Davis, after signing as a witness, handed it to Devereux, in his presence, and with his assent, or if Alexander handed it to Devereux, there was some evidence of delivery to be considered by them. Defendants excepted. Verdict for the plaintiff. Defendants move for a new trial for alleged errors above set forth. Motion refused. Defendants except. The material portions of the original deed and of the record in the registrar's office are incorporated in the opinion.

**Messrs. Thomas N. Hill and W. H. Day,** for appellants:

An illiterate person should be able to make a mark or device that he would know and recognize himself easily, and that others might know just as they might know the handwriting of any person.

*Tatom v. White*, 95 N. C. 460; *State v. Byrd*, 98 N. C. 624.

The mark must be a distinguishing one.

*Ingram v. Hall*, 1 Hayw. 194; 3 Washb. Real Prop. 243.

The deed was written by Thorp and on its face the signing of the name of Dexereux purports to have been made.

*Haughton v. Barney*, 2 Ired. Eq. 393.

There was no delivery.

*Baldwin v. Maultsby*, 5 Ired. L. 505; *Moore v. Collins*, 4 Dev. L. 864; *Clayton v. Liverman*, 4 Dev. & B. L. 288.

**Mr. R. O. Burton, Jr.**, for appellee, cited:

*Notes to Waller v. Waller*, 42 Am. Dec. 571; *Baker v. Dening*, 8 Ad. & El. 94; *Re Savory*, 15 Jur. 1043; *Re Redding*, 3 Rob. Eccl. 889, 14 Jur. 1053; *Re Clarke*, 4 Jur. N. S. 243; *Tiedeman*, Real Prop. § 807; *Truman v. Love*, 14 Ohio St. 154; 3 Washb. Real Prop. 243; Co. Litt. 171 b; 1 Wms. Exrs. 67, 73; 5 Lawson, Rights, Remedies and Practice, 2370; *Mutual Ben. L. Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Farborough v. Monday*, 3 Dev. L. 420; N. C. Code, § 1554; *Re Garner*, 10 Jacob's Fisher's Dig. 17022; 7 Mews, Dig. pp. 880, 881; 5 Am. & Eng. Encyclop. Law, 440; *State v. Byrd*, 93 N. C. 624; *Sellers v. Sellers*, 98 N. C. 18; *Tatom v. White*, 95 N. C. 480; *Pridgen v. Pridgen*, 13 Ired. L. § 260.

**Avery, J.**, delivered the opinion of the court:

It is provided by statute (Code, § 1251) that "the registry or a duly certified copy of the record of any deed, etc., may be given in evidence in any court, and shall be held to be full and sufficient evidence of such deed, etc., although the party offering the same shall be entitled to the possession of the original, and shall not account for the non-production thereof unless, upon a rule or order of the court suggesting some material variance from the original in such registry, or other sufficient ground, such party shall have been previously required to produce the original, in which case the same shall be produced, or its absence duly accounted for, according to the course and practice of the court." After the plaintiff had read the deed recorded in the register's book, which was made competent evidence by the Statute, he furnished at the request of the defendant, voluntarily, and not in obedience to an order of the court, the original. The latter could not then avail himself of the objection that there was a variance between the original and what purported to be a copy on the book of the register by objecting to the admission in evidence of the copy. If there had been any ground of complaint, the point intended to be raised was fairly presented by the exceptions to the charge of the court at a later stage of the trial, the defendant having meantime offered the original deed in evidence. The last clause of the original deed, and the attestation clause with signatures, were as follows:

"In witness whereof, the said Thomas Alexander hath hereunto signed his name and affixed his seal the day and date above written.

× [Seal.]

"Signed, sealed and delivered in presence of × John Cobb, witness towards of what was *sed*, Thomas Alexander *did* agree to the Deed. D. S. C."

The same portion of the deed was recorded in the register's office as follows:

"In witness whereof, the said Thomas Alexander hath hereunto signed his name and fixed his seal the day and date above written.

"Witness: × [Seal.]

"Signed, sealed and delivered in the presence of × John Cobb, witness toward of what was *sed*, Thomas Alexander *did* agree to the deed. Solomon Davis."

The defendant contended that the deed was not signed in accordance with the requirements of our Statute of Frauds (Code, § 1554), 12 L. R. A.

and that the judge below should have instructed the jury that the plaintiff had failed to adduce any evidence tending to show title in himself, and could not, therefore, recover.

Under the Saxon rule in England, it was only required that deeds should be subscribed with the sign of the cross. It was not necessary that a seal should be attached. After the Norman conquest, sealing became a requisite, but signing of all kinds ceased to be required. 3 Washb. Real Prop. 242; Co. Litt. 171b; 2 Bl. Com. 309.

After the Statute of Frauds was enacted it became essential that every deed purporting to convey land, and every other instrument required under its provisions to be in writing, should be signed by the party to be charged therewith. It is now an established rule that the name of the party to be charged may be written by an agent, in his presence, and under his direction; the act of the authorized agent being theoretically the act of the principal. *Tiedeman*, Real Prop. § 807; *Pierce v. Hakes*, 23 Pa. 281; *Mutual Ben. L. Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Browne*, Stat. Fr. 12; *Kims v. Brooks*, 9 Ired. L. 218; *Frost v. Deering*, 21 Me. 156; *Gardner v. Gardner*, 5 Cush. 483.

Under the provisions of our Statute (Code, § 1554) all of the instruments enumerated are required to be in writing, and signed by the party, etc., while in the statutes of some of the other States the word "subscribed" is substituted for "signed." Modern text-writers generally concur in the opinion that it is not essential that the signature should be placed at the end of the deed or other instrument, where the law requires signing only. *Martindale*, Conv. § 6; 5 Am. & Eng. Encyclop. Law, 441; *Tiedeman*, Real Prop. § 807.

In the construction of statutes in reference to wills a similar rule has been generally adopted. Signatures in the body of the will have been declared to constitute a sufficient compliance with the requirement that there should be a signing, and the courts have gone so far as to sustain the validity of the execution of a will where the name of the testator was written under the names of the witnesses to the attestation clause after having been written also as a part of that clause by him. 7 Mews, Com. Law Dig. 879; 1 Wms. Exrs. 60.

It is conceded that, where another person has already written the signature of one who is illiterate, the latter may adopt the signing subsequently by attaching a cross or other mark used by him as a substitute for an actual signature, though he could not so ratify the act of an agent who signed his name not in his presence except by attaching such mark. The grantor in this case inquired who had written the deed, and was told that it was written by Mr. Thorp, a lawyer, and, in substance, what were its contents. It was insisted with much force by the learned counsel on the argument that when Thomas Alexander made the cross-mark opposite to the seal and beneath the clause reciting his name, he adopted the signing of his name in that clause, the name being in close proximity to the cross and seal. It is well established that any number of grantors may by delivery adopt a seal opposite to the name of the first of the number, who signs the

deed, there being a recital in it that they had attached their seals; while, on the other hand, where there is no such recital, a seal attached to the name will be deemed sufficient to constitute the instrument a deed. 8 Washb. Real Prop. 244, 245; Tiedeman, Real Prop. § 808; *Tarborough v. Monday*, 2 Dev. L. 496.

It seems not unreasonable to be guided by the principle so often invoked in the construction of deeds and wills, that the law will favor those who are *inopis consilii* and illiterate, and attempt to arrive at and carry out their true intent by a liberal application of technical rules. Washburn, *supra*, at page 244, says: "Affixing a mark by the grantor against his name, though written by another, is a signing, although it do not appear that he could not write his own name."

It being settled, then, that our Statute does not require that the name should be subscribed at the end of the instrument, when written by the party to be charged in his own handwriting, it would seem to be an unreasonable discrimination against, instead of in favor of, an illiterate person to declare his conveyance null and void because he attempted, by a mark placed in proximity to the seal, at the end of the deed, to adopt a signing of his name in the last clause of the instrument. The courts, since the enactment of the Statute of Frauds (29 Car. II.), have used the maxim "*qui facit per alium, facit per se*," with great liberality, especially in making auctioneers, by implication of law, the agents of those who bid for land at sales. In construing the act of making the mark in this case as an adoption of the signature just above it in the body of the deed, we can foresee no greater danger of opening a door for the evasion of the Statute of Frauds than in any other case where the mark is used and placed in juxtaposition to the written name. In either case the execution of the instrument must be ordinarily shown by the acknowledgment of the maker, or the testimony of a witness who saw it made, and even where both the maker and subscribing witness may have died, the necessity for proving the genuineness of the signature of the witness, or some distinguishing feature in the mark made by the grantor, is an ample guaranty that the opportunity or incentive to evade the Statute of Frauds will not be enhanced by sustaining the validity of the signing by Thomas Alexander. *Davis v. Higgins*, 91 N. C. 383.

If there had been no witness to the deed, then it could not have been admitted to probate without proof that the mark was habitually used by Alexander as a substitute for signing his name, and that there was some peculiarity in its appearance which distinguished it from other marks, and enabled the witness to recognize it as he would the peculiarities of handwriting. *Sellers v. Sellers*, 98 N. C. 16; *State v. Byrd*, 93 N. C. 624; *Howell v. Ray*, 92 N. C. 510.

In support of this view Justice Merrimon, delivering the opinion of the court in *State v. Byrd*, *supra*, said: "While, generally, a mere cross-mark employed by a person who cannot write as evidence that he executed a paper writing to which it is affixed cannot be proven, yet a person may have a mark so peculiar and so uniformly used by him for such purpose as

that it may become well known as his mark, and may be proven, just as the signature of one who writes may be proven to be in his own handwriting. A mark like the signature of a party is intended to be evidence of the fact that the party making it made it, and identifies himself with the paper writing signed in the way and for the purpose indicated in it; and it is just as binding ordinarily without a subscribing witness as with one, but it may be proven, as a signature may be by one who saw it made, or who heard the maker acknowledge it to be his, and the maker himself is generally a competent witness to prove that he made it." *Howell v. Ray*, 92 N. C. 510.

We have reproduced this extract to make it clear that we are sustained by an adjudication of this court, in which it is laid down as a principle, in the most explicit way, that an instrument purporting to be a deed, and required to be in writing and signed by the party charged thereby, is not void upon its face because the maker or grantor has signed by making a simple cross, nor even if there is no witness to such signing. The law still leaves the way open for proof of its execution by showing it to be a peculiar substitute habitually used by the grantor, instead of an ordinary signature, or for evidence from an eye-witness that he saw the mark attached, just as he could testify to the act of subscribing the name. Our view of the subject is sustained by reason and the current of authority. While it is not probable that any case precisely similar in all respects to that under consideration has ever arisen, the principle announced finds abundant support in the adjudications of other courts, and the conclusions deduced from them by leading writers upon the subject of deeds and conveyances. 5 Lawson, Rights, Remedies and Practice, § 2270, says a person physically unable or too illiterate to write his name may sign by making a cross, a straight or crooked line, a dot or any other symbol. In Martindale, Conv., § 190, the rule is stated as follows: "As to what will constitute a sufficient signing, it may be observed that it is not necessary that the party should write his own name. His mark is sufficient though he be able to write." In section 6 the same author says: "It seems that putting initials to a document, the name appearing elsewhere, is a sufficient signing to satisfy the requirements of the Statute." If the initial letters of one's name be allowed to serve as a substitute for a formal signature because the name is signed in full in the body of the deed, why should we hold that a mark, the making or distinctive character of which is susceptible of proof, is insufficient under similar circumstances?

The second ground of exception was that the deed was not lawfully and properly registered. The certificate of probate and fiat are as follows: "State of North Carolina, Nash County. I, John T. Morgan, clerk of the superior court, do hereby certify that the execution of the annexed deed was this day proven before me by the oath and examination of Solomon Davis, the subscribing witness thereto, who says that the deed was signed and delivered in his presence, January 13, 1888, to the grantee for the purposes therein expressed. Witness my hand and official seal, this 20th

day of January, 1888." (Signed and sealed by the clerk.) "State of North Carolina, Halifax County. In the superior court, February 9, 1888. The foregoing certificate of John T. Morgan, Clerk of the Superior Court of Nash County, duly attested by his official seal, is adjudged to be correct: Let the instrument, with the certificates, be registered. [Signed] John T. Gregory, Clerk Superior Court." "Filed for registration, February 9, 1888. [Signed] L. Vinson, Register of Deeds."

If the objection to the probate is based upon the ground that the original deed shows that Solomon Davis, instead of signing his full name to the attestation, wrote the letters "D. S. C.," and the register recorded the signature "Solomon Davis," we think it is clearly untenable. Registrations are not rendered void by reason of a mistake by the officer in recording deeds, but the registration is presumptively correct; and the remedy for such defective record is to demand the original, which, if legible, is the highest evidence of the form of the deed and probate. *Davis v. Inacos*, 84 N. C. 386; *Loe v. Harbin*, 87 N. C. 249.

When this case was brought to this court by a former appeal, *Devereux v. McMahon*, 102 N. C. 284, we held that the fact that a witness had made a cross-mark in attesting a deed did not affect his competency to prove its execution. See also 5 Lawson, Rights, Remedies and Practice, § 2271; *Nelius v. Brickell*, 1 Hayw. 19.

Upon the principle already announced in discussing the signature of the grantor, there can be no further controversy as to his eligibility when it appears that he used characters so peculiar, as a substitute for signing his name. *Tatom v. White*, 95 N. C. 458; *State v. Byrd and Sellers v. Sellers*, *supra*; *Martindale*, Conv. § 6. His testimony was as follows: "I witnessed the deed. I saw Tom sign the deed, and he handed it to me, and asked me to witness it. That is my name. D. S. for Davis, C. for Solomon. That is the way I sign it. The rest was put there merely to fill in. I thought the old man was in his right mind. I did not hear anyone read the deed to Tom. Tom asked Basil if he had got the deed fixed up. He said 'Yes.' Tom asked who fixed it. He said, 'Mr. Thorp, a lawyer;' and told him what was in it. Tom signed the deed about twelve o'clock in the day, and died about twelve o'clock that night. I handed the deed either to Basil, in Tom's presence, or back to Tom, and he handed it to Basil."

We think that, though there was a mistake in recording the deed, it did not affect the right given by statute to the plaintiff to read the record, as already stated, subject to the right of defendant, if the original could be produced, to correct such mistakes by its introduction. The deed was properly proven by Solomon Davis, who was a competent witness. The effect of showing the mistake of the register of deeds was not to annul the probate, not even to destroy the competency of the copy upon the book as evidence, but simply to rebut the presumption that the copy was correct, and open the way for the consideration and discussion of the question whether the paper writing, in its original shape, was upon its face an instrument that under our statute might be probated and admitted to registration. Defendant's counsel insisted that there was no evidence of delivery. Though neither proof of possession of the deed by the grantees alone, nor evidence of the handwriting of the bargainor, unconnected with the facts, will raise a presumption of delivery, so as to dispense with actual proof of it, yet, when both the signing by the grantor and possession of the grantees are shown, there is *prima facie* evidence of delivery. *Williams v. Springs*, 7 Ired. L. 884; *Whitell v. Mebane*, 64 N. C. 345; *Ingram v. Hall*, 1 Hayw. 198.

But the witness Davis testified that when the deed was handed to him by the grantor he either handed it, in his presence, and with his acquiescence, to the grantee, Basil Devereux, or he returned it to Alexander, who handed it to Devereux. That was evidence, if believed, of an actual delivery. The failure to read a deed, or the misrecital of its contents to an illiterate grantor, who asks to know what it contains, constitutes a fraud in the *factum*, and on proof of the facts the instrument was formerly treated as void in a court of law, and can now be attacked without initiating a direct proceeding to impeach it. But where a grantee, though an illiterate man, does not demand that the deed shall be read, and all of the testimony tends to show that a witness told him in substance what its provisions were, there is no evidence of fraud to be submitted to the jury. *School Committee v. Keeler*, 67 N. C. 448; *Nicholls v. Holmes*, 1 Jones, L. 360; *Canoy v. Troutman*, 7 Ired. L. 155.

There is no error, and the judgment must be affirmed.

## COLORADO SUPREME COURT.

Charles C. BRACE, Admr., etc., of Ella A. Rouse, Deceased,  
v.

Mary E. CHARTRAND et al., Appts.

(.... Colo. ....)

\*1. The society known as the "Ancient Head notes by HAYT, J.

NOTE.—Certificates of membership in benefit society in effect insurance policies.

A certificate issued by a mutual aid society entitled I. R. A.

"Order of United Workmen," so far as it is engaged in the business of life insurance, must be treated in law as a mutual life insurance company.

2. The certificate of insurance is to be regarded as a written contract, and, so far as it goes, it is the measure of the rights of all parties.

3. It is the policy of the law to favor vested, rather than contingent, estates.

ting the holder on his death to \$1,000 to be paid from a fund to be raised by assessments is in legal effect a policy of life insurance. *Elkhart Mut. Aid*

4. A policy of life insurance is in the nature of a testament, and, although not a testament, in construing it the courts will so far as possible treat it as a will.

5. Under a certificate providing that upon the death of a member the insurance shall be paid to his wife, and in case of her death to his children, the right to the fund vests in the surviving wife immediately upon the death of the husband, and upon her death the fund passes to the administrators as a part of her estate.

(*Elliott, J., dissents.*)

(February 12, 1891.) \*

**A**PPPEAL by defendants from a judgment of the District Court for Boulder County in favor of plaintiff in an action brought to recover the amount alleged to be due on an insurance policy, in which defendant had paid the money into court and procured other claimants of the fund to be substituted in its stead. *Affirmed.*

Statement by *Hayt, J.:*

It appears from the record in this case that

\*An opinion was handed down in this case April 12, 1890, reversing the judgment below. After a rehearing the court withdrew from its former position and affirmed the judgment of the lower court. The former opinion therefore becomes unimportant, especially since the material portions of it are set out in the dissenting opinion, and it is therefore omitted. [*Rep.*]

*B. & R. Asso. v. Houghton*, 1 West. Rep. 224, 108 Ind. 224.

Whatever may be the terms of payment of the consideration by the assured or the mode of estimating or securing payment of the insurance money, it is still a contract of insurance by whatever name it may be called. *Com. v. Wetherbee*, 105 Mass. 149; *State v. Farmers & M. Mut. Benev. Asso.* 18 Neb. 281.

Where the primary purpose of the association of the Ancient Order of United Workmen is to provide a beneficiary fund to be paid on the death of each member, and the avowed fraternal character of the organization is merely incidental thereto, it is a life insurance company. *State v. Bankers & M. Mut. B. Asso.* 23 Kan. 499; *Folmer's App.* 87 Pa. 138; *Illinois Mason's Ben. Soc. v. Winthrop*, 36 Ill. 537; *Illinois Mason's Ben. Soc. v. Baldwin*, 36 Ill. 479; *State v. St. Louis Citizen's Ben. Asso.* 6 Mo. App. 163; *Bolton v. Bolton*, 73 Me. 299; *Bacon, Ben. Societies*, § 51.

#### *Distinction between certificate and life policy.*

The essential difference between a certificate of membership in a beneficiary association and a life policy is, that in the latter the rights of the beneficiary are fixed by the terms of the policy, while in the former they depend upon the certificate and the rights of the member under the constitution and by-laws of the society. *Holland v. Taylor*, 9 West. Rep. 608, 111 Ind. 131; *Hellenberg v. District No. 1 of Ind. Order of B. B. 94 N. Y.* 589; *Kentucky Mas. Mut. L. Ins. Co. v. Miller*, 13 Bush. 499; *Com. v. Wetherbee*, 105 Mass. 149; *Masonic Mut. Ben. Asso. v. Burkhart*, 7 West. Rep. 529, 110 Ind. 189.

In the one case the rights of the beneficiary are fixed and vested from the moment the policy takes effect. In the other they are subject to such changes as the law of the association authorizes the member to make. All that a beneficiary has during the lifetime of the member, owing to his right of revocation, is a mere expectancy dependent upon the will and pleasure of the holder of the

certificate. This expectancy is not property. *Durian v. Central Verein of Hermann's 85th Regt.* 7 Daly. 168; *Tennessee Lodge v. Ladd*, 5 Lea. 716; *Swift v. Railway Pass. & F. C. Mut. Aid & Ben. Asso.* 96 Ill. 309; *Knights of Honor v. Watson*, 6 New Eng. Rep. 883, 64 N. H. 517; *Supreme Conclave Royal Adelpheia v. Cappella*, 41 Fed. Rep. 1.

A life policy for the benefit of the family, though not a testament, is in the nature of a testament, and in construing it the courts should treat it, as far as possible, as a will. *Duval v. Goodson*, 79 Ky. 224; *Continental L. Ins. Co. v. Palmer*, 42 Conn. 65; *Thomas v. Leake*, 67 Tex. 469; *National Asso. of the Nat. Am. Asso. v. Kirgin*, 28 Mo. App. 80.

As wills take effect upon the death of the testator and are treated as speaking from that time (*Shotts v. Poe*, 47 Md. 513; *Davidson v. Dallas*, 14 Ves. Jr. 576), so by analogy upon the death of the member of a benevolent association the benefit certificate takes effect so far as to vest in the beneficiary an absolute right to the benefit money. *Union Mut. Asso. v. Montgomery*, 14 West. Rep. 377, 70 Mich. 337; *Thomas v. Leake*, 67 Tex. 469.

On December 30, 1886, said Starling D. Rouse died, leaving his said wife and children him surviving. In less than one month thereafter, January 28, 1887, and before any portion of the insurance money had been paid to the wife, she also died. Appellee, Braca, having

certificates. This expectancy is not property. *Durian v. Central Verein of Hermann's 85th Regt.* 7 Daly. 168; *Tennessee Lodge v. Ladd*, 5 Lea. 716; *Swift v. Railway Pass. & F. C. Mut. Aid & Ben. Asso.* 96 Ill. 309; *Knights of Honor v. Watson*, 6 New Eng. Rep. 883, 64 N. H. 517; *Supreme Conclave Royal Adelpheia v. Cappella*, 41 Fed. Rep. 1.

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The general rule applicable to beneficiary or charitable associations is that the beneficiary acquires no vested right to the benefits which are to accrue upon the death of a member until the death of the member occurs. During his lifetime the member may therefore exercise the power of appointment, without other limits or restrictions except such as are imposed by the Organic Law, or by rules and regulations of the society, duly adopted in compliance therewith. *Splawn v. Chew*, 60 Tex. 532; *Expressmen's Aid Soc. v. Lewis*, 9 Mo. App. 412; *Ballou v. Gile*, 50 Wis. 614; *Dietrich v. Madison Relief Asso.* 45 Wis. 84; *Richmond v. Johnson*, 28 Minn. 447; *Eastman v. Provident Mut. B. Asso.* 62 N. H. 555, 20 Cent. L. J. 266; *Gentry v. Supreme Lodge K. of H.* 23 Fed. Rep. 715, 20 Cent. L. J. 323. See notes to *Lawler v. Murphy* (Conn.) 5 L. R. A. 113; *Milner v. Bowman* (Ind.) 5 L. R. A. 98; *Marsh v. Supreme Council Am. L. of H. (Mass.)* 4 L. R. A. 323.

been appointed administrator of said Ella A. Rouse, commenced this suit in the county court against the Order of United Workmen, to recover the insurance, as part of said Ella's estate. The children named in the certificate also claimed the benefit of the insurance. The defendant appeared, and requested to be permitted to deposit said sum of \$2,000, "subject to the order of the court, according to the very right of the case;" and it was accordingly so ordered, and the defendant was dismissed as a party. Mary E. Chartrand, formerly Mary E. Rouse, Clara D. Rouse and Anna L. Rouse, minors (said last two appearing by John H. Nicholson, their guardian), were substituted as parties to the action in place of defendant, for the purpose of enabling them to assert in this action their claim to the insurance money. Judgment having been rendered in the county court, the action was appealed to the district court, where an amended answer was filed in behalf of said children and their guardian, claiming the insurance money. The amended answer shows, *inter alia*, that the children named in the certificate of insurance are the children of said Starling D. Rouse by his first wife, who died many years before; that they were his only children, and with his said wife, Ella, were the only members of his family dependent upon him for support; that his said wife, Ella, was, and had been for years, an invalid, and left no surviving children. The amended answer further shows: "That said Grand Lodge of the A. O. U. W. is a voluntary beneficiary association, not incorporated; that its constitution and laws in force at the time said Starling D. Rouse became a member, and when he died, provided, among other things, that the beneficiary or beneficiaries named in the certificates issued to members should be confined to one or more of the family of the members, or some person or persons related to him by blood, or who shall be dependent upon him; that the amount of the beneficiary certificate upon the death of its members shall be collected by assessments upon its members, the assessment to be made upon the first day of the next month after receiving notice from the recorder of the lodge of which the deceased was a member, and payment by the members is voluntary, and cannot be enforced, except by suspension of the members; that notice of the death of said Starling D. Rouse was received by the grand recorder of the said Grand Lodge of the A. O. U. W., January 11, 1887; that the assessment to pay the beneficiaries named in his certificate was not in fact made until and on March 1, 1887, and the money to pay the same was not collected and in the treasury of said grand lodge, and proper officers ready to draw warrant and pay the same, until the 27th day of March, 1887."

Upon motion of the administrator, the district court rendered judgment upon the pleadings in his favor, from which judgment this appeal is taken.

**Meurs.** Charles M. Campbell and James M. North, for appellants:

Ella A. Rouse, the wife of the assured, dying before the assessment was made to pay the beneficiary certificate, the contract to pay the fund, when collected, to the children, was com-

plete, and the money, when due and collected by the process marked out in the laws of the order, was payable to them.

*Connecticut Mut. L. Ins. Co. v. Burroughs*, 84 Conn. 805; *Richmond v. Johnson*, 28 Minn. 447.

The vesting in this case was not and could not be until the fund was *in esse*; then, when received by said grand lodge it vested in the children and should have been paid to them.

*Chapin v. Fellowes*, 86 Conn. 182, 4 Am. Rep. 49; *Connecticut Mut. L. Ins. Co. v. Burroughs*, 84 Conn. 805. See *Re Protectives F. Ins. Co.* 9 Biss. 188; May, Ins. § 550, and note.

In cases like this courts will construe the rules and regulations of an association like the A. O. U. W. liberally, in order to effect its benevolent purpose.

*Ballou v. Gile*, 50 Wis. 614; *Com. v. Wetherbee*, 105 Mass. 149; *Kentucky Mas. Mut. L. Ins. Co. v. Miller*, 18 Bush, 489; *A. O. U. W. v. Moore* (Ky.) 19 Ins. L. J. 589.

Contracts should be so construed as to give effect to the intention of the parties, and when that intention is sufficiently apparent, effect should be given to it, even though violence be thereby done to its words; for greater regard is to be given to the clear intent of the parties than to any particular words they may have used in the expression of their intent.

*Walker v. Douglas*, 70 Ill. 445; 1 Chitty, Cont. 4th Am. ed. 104, 105; *St. Clair County Benev. Soc. v. Pietsam*, 97 Ill. 474; *Bozkowitz v. Baker*, 74 Ill. 264; *Aurora F. Ins. Co. v. Eddy*, 49 Ill. 108.

The charter, constitution and laws of the order, and not the beneficiary certificate, contain the real contract.

*Highland v. Highland*, 109 Ill. 866; *Presbyterian Mut. Assur. Fund v. Allen*, 4 West. Rep. 712, 106 Ind. 593; *Stephenson v. Stephenson*, 64 Iowa, 584; *Swift v. Railway Pass. & F. Co. Mut. Aid & Ben. Assn.* 96 Ill. 809.

The performance of contracts must be such as is required by the spirit and meaning of the contract and the intention of the parties as expressed therein.

*Rhodes v. Wilson*, 12 Colo. 65; *Moffatt v. Corning*, 14 Colo. 104; *Bates v. Wilson*, Id. 140; *Heinssen v. State*, Id. 228.

Contracts of insurance are to be construed as other contracts in order to carry out the intention of both parties.

*State Ins. Co. of Des Moines v. Taylor*, 14 Colo. 499.

The thought intended to be conveyed—the intention of the contractor—is to be effectuated if it can be discovered.

*People v. May*, 9 Colo. 80; *Wilson v. Hawthorne*, 14 Colo. 580.

Granting that the fund did vest in Mrs. Rouse at the instant of S. D. Rouse's decease, which vesting would meet and satisfy the settled policy of the law, it was subject to be divested and was divested by her dying not having used it, sold it or touched it, and appellants then and ever since surviving and being named in the contract. Vested estates and fees simple may be divested.

*Greer v. Pate*, 85 Ga. 553; *Oyster v. Knull*, 187 Pa. 448; *Lewis v. Pitman*, 101 Mo. 282; *Hills v. Barnard*, 9 L. R. A. 211, 152 Mass. 67; *Kilgore v. Kilgore* (Ind.) Dec. 18, 1890.

Many vested estates are only life estates.

*Larsen v. Johnson* (Wis.) Dec. 16, 1890.

Courts in construing wills will give due regard to the natural impulses and feelings of mankind.

*Henry v. Thomas*, 118 Ind. 28.

The paramount object to be reached in the construction of a will by a court, is so to construe it as to express the true intention and meaning of the testator.

See *Kilgore v. Kilgore* and *Hills v. Bernard*, *supra*.

In *Oyster v. Knull*, *supra*, we read: "A testator bequeathed to his son a farm 'for his support and if he should be spared to have family I desire the above estate to go to the use of his children.' Held that the son took a life estate only . . . also that the word 'children' in a will is primarily and generally a word of purchase."

See *Lewis v. Pitman*, *supra*; *Smith v. Bell*, 81 U. S. 6 Pet. 68, 8 L. ed. 322; *Harbison v. James*, 7 West. Rep. 298, 90 Mo. 411; *Giles v. Little*, 104 U. S. 291, 26 L. ed. 745; *Siegwald v. Siegwald*, 87 Ill. 485; *Green v. Hewitt*, 97 Ill. 118.

Mr. Oscar F. A. Greene, for appellee:

The certificate in a benefit association is a contract.

*National Ben. Assn. of Indianapolis v. Bowman*, 9 West. Rep. 186, 110 Ind. 855.

It is the business of the courts to pass on the rights of parties as they find them, and not to make contracts for parties.

*Blatchley v. Coles*, 6 Colo. 349.

The argument that this contract is to have some peculiar method of construction on account of the manner of the payment of the benefit and on account of the benevolent character of the lodge is not tenable.

*Aurora F. Ins. Co. v. Eddy*, 49 Ill. 106; *Com. v. Wetherbee*, 105 Mass. 149; *Wiggin v. Knights of Pythias*, 81 Fed. Rep. 123.

A written contract of insurance must be taken to contain all the essential elements of the contract and no verbal agreement made before or at the time of the written contract is admissible to vary its terms.

*National Mut. Ben. Assn. v. Heckman*, 86 Ky. 254.

When the assured dies the right to the benefit vests at once in the properly designated beneficiary.

*Richmond v. Johnson*, 28 Minn. 447; *St. Clair County Benev. Soc. v. Fietsam*, 97 Ill. 474.

With the vesting of the right in the wife, the operative purpose of the lodge was exhausted in the premises. After such vesting it mattered not what became of the woman or money so far as any contract with the lodge was concerned.

See *Maneely v. Knights of Birmingham*, 7 Cent. Rep. 683, 115 Pa. 305.

Even on the assumption that the alleged intention did exist in the mind of the assured at the time of the execution of the instrument and was subsisting in an operative form in his mind until time of his death, it would only be a case of mistaken conception of the legal significance of the terms of a contract that he had accepted. A mistake at law pure and simple is not adequate ground for relief.

*Bibbs v. Lumley*, 2 East, 469; 2 Pom. Eq. Jurisp. p. 304.  
12 L. R. A.

In such a case as this the right vests at once in the beneficiary upon the death of the assured, and the manner and time of payment and delay in the payment do not affect the interest so vesting.

*Union Mut. Assn. of Battle Creek v. Montgomery*, 14 West. Rep. 877, 70 Mich. 587; *Nitzgerald v. Equitable Reserve Fund L. Assn.* 18 N. Y. S. R. 914.

The death of Starling D. Rouse, and not the death of the wife, Ella H. Rouse, fixed the rights of the beneficiaries.

See *United States Trust Co. v. Mutual Ben. L. Ins. Co.* 23 N. Y. S. R. 597, 24 N. Y. S. R. 1; *Titusworth v. Titusworth*, 40 Kan. 571; *Darrou v. Family Fund Soc.* 43 Hun. 245.

Upon the death of the member then the benefit certificate takes effect, so far as to vest in the beneficiary an absolute right to the benefit money.

*Thomas v. Leake*, 67 Tex. 409; *Union Mut. Assn. of Battle Creek v. Montgomery*, *supra*; 2 Jarman, Wills, 5th Am. ed. from the 4th London ed. 406; Bacon, Ben. Societies, par. 291; *Bolton v. Bolton*, 78 Me. 299; *Atina L. Ins. Co. v. Mason*, 14 R. I. 588; *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 436.

When property is devised or bequeathed to a party, and in the case of the death of such party then to some other named party, the first party surviving the testator, the interest in the property vests absolutely in the party so first named immediately upon the death of the testator.

3 Redf. Wills, 3d ed. 224, 253, 254, 260; Cent. L. J. p. 160, Aug. 22, 1890; *King v. Frick*, 185 Pa. 575.

The certificate must govern.

*Supreme Lodge K. of H. v. Nairn*, 60 Mich. 44; *Foot v. Atina L. Ins. Co.* 61 N. Y. 571; *Worley v. Northwestern Masonic Aid Assn.* 10 Fed. Rep. 237.

*Hayt, J.*, delivered the opinion of the court:

The amended answer admits, by failing to deny, the facts as stated in the complaint, and, for the purposes of this appeal, the new matter set up in this answer must also be taken as true. Upon these facts, the position of appellee is that upon the death of the insured the right to the fund vested absolutely in the wife, Ella A. Rouse, and that upon her death the right to the uncollected fund passed as part of her estate to her administrator, to be by him disposed of as other assets of the estate. The contention of appellant is that, as the fund had not been paid over or collected at the time of the death of the wife, the right thereto became vested in the children, under the terms of the policy. The certificate is, in legal contemplation, a policy of life insurance, and to be construed as such. That the amount can only be collected by assessment upon members of the association, after due notice of death, and the payment of such assessment is purely voluntary, can make no difference. The association, so far as it is engaged in the business of life insurance, must be treated in law as a mutual life insurance company. The certificate is to be regarded as a written contract, and, so far as it goes, it is the measure of the rights of all parties. *Bolton v. Bolton*, 78 Me. 299; *Com. v. Wetherbee*, 105 Mass. 149; *State v. Farmers*



*& M. Mut. Ben. Assn.* 18 Neb. 281; *Wiggin v. Knights of Pythias*, 81 Fed. Rep. 122; *Supreme Lodge K. of H. v. Nairn*, 60 Mich. 44; *State Ins. Co. v. Horner*, 14 Colo. 391.

Turning to the policy executed in this case, we find the disposing clause to be couched in the following language: "Which sum shall, at his death, be paid to his wife, Ella A. Rouse, and, in case of her death, to Mary E., Clara D. and Anna L. Rouse, children." It would be difficult to find language to more clearly and definitely fix the time at which the right to this money vested in Ella A. Rouse than the words "at his death." It is claimed, however, that the words following, "in case of her death, to Mary E., Clara D. and Anna L. Rouse, children," qualify the words immediately preceding, and that, when construed together, they give to the children a right to the fund so long as the same is capable of practical identification and control, and has not been otherwise appropriated by the wife, although the wife in fact survives the husband. But the plain intent of the language of the policy is against such construction. The words, "which sum shall, at his death," fix the time at which the right to the fund is to be determined, and the words following provide for the payment to the children in case the wife shall not be living at that time. The children were only to receive the money upon the happening of certain contingencies. The risk taken by the association was upon the life of the assured. By his death the policy became fixed, and the right to the fund vested. The wife having survived the husband, her right became absolute by the express terms of the policy. This construction finds support, not alone in the language of the contract, but is also in accordance with the settled policy of the law, which is to favor vested, rather than contingent, estates; the first, rather than the second, taker. *King v. Frick*, 185 Pa. 575; *Smith's App.* 28 Pa. 9; *Womrath v. McCormick*, 51 Pa. 504; *Felton v. Stuyver*, 41 N. H. 203; 2 Redf. Wills, \*253; *Union Mut. Assn. of Battle Creek v. Montgomery*, 70 Mich. 587, 14 West. Rep. 877.

A policy of life insurance is in the nature of a testament, and, although not a testament, in construing it the courts will so far as possible treat it as a will. *Bolton v. Bolton*, *supra*.

In *King v. Frick*, *supra*, an absolute devise was made by a father to his son, followed by a proviso to the effect that, in case the devisee should die without children, grandchildren or wife, living, the estate should go over. The words "die without children," etc., were held to refer to the death of the son in the lifetime of the testator, and the son, having survived the testator, was declared the owner of the fee.

The case of *Union Mut. Assn. of Battle Creek v. Montgomery*, *supra*, is in some respects quite analogous to the case at bar. It was provided by the certificate issued in that case that the insurance should be paid to the son and daughter of the insured equally, if living, and, if not living, to his heirs; in case of the death of either the son or daughter, the full amount was to be paid to the survivor; and the court held the provision as to survivorship related to the time of the death of the donor. And it appearing that both beneficiaries were living at that time, although one had died before the payment of

the benefit, his executor was entitled to the share, and not the survivor. In the course of the opinion the court said: "The scheme of the corporation is to raise a fund which shall pass to designated beneficiaries at the death of a member. The right, which before was inchoate and contingent, becomes upon the death of the member fixed and certain in the beneficiaries. . . . The time of payment provided for, namely, ninety days after the death of the member, has no reference to who shall take as survivor." So, in the case at bar, we are of the opinion that, by the express terms of the policy, the right to the fund became vested in Ella A. Rouse upon the death of her husband. Consequently, upon her death, the fund should pass to the administrator as a part of her estate. There is nothing in the constitution or by-laws of the association, as pleaded, to change this result. Whatever rights, if any, may have been reserved to the society by these instruments, have been waived by it, and the fund deposited subject to the order of the court. While we feel that our conclusion as to the party entitled to the fund must necessarily follow as a matter of law, in answer to the argument of counsel based upon the duty of the deceased father to provide for his children, it may be said that it was equally his duty to provide for his invalid wife. She was the person having the strongest claim upon his estate and bounty. If the construction contended for by counsel be adopted, the wife could not use the fund, no matter to what extremity she may have been driven in the final sickness intervening between the death of her natural and legal protector and her own death. She could not, by anticipating the payment of the legacy, surround herself with the things that might have been absolutely necessary to sustain her life from day to day. In addition to this, it would place the beneficiary primarily entitled to the fund to a great extent within the power of the insurer. For instance, by withholding payment, the beneficiary would be compelled to bring suit for the money, the ultimate decision of which might be delayed for years; and if, during the time, the wife should die, others would receive the reward of her endeavors without sharing the expense. Under such circumstances, it is easily to be seen that the insurance corporation or association could compel the wife in many instances to accept less than the face of the policy, rather than institute a suit, no matter how clear her right of recovery might be.

*We think the judgment of the District Court is right, and it is accordingly affirmed.*

*Elliott, J.*, dissenting:

I cannot concur in the foregoing opinion. In the original investigation of this case the various questions involved in the record were carefully considered. By the reargument nothing essentially new has been presented. Hence I now feel constrained to refile the former unanimous opinion of this court as an expression of the reasons for my present dissent. The part relating to the construction of the certificate was as follows: "While the certificate is to be construed as a contract, nevertheless, it being in the nature of a policy of insurance,—a *post mortem* provision for the benefit of those de-

pendent upon the assured for support,—it is, like the provisions of a will, to be liberally construed in favor of those who may naturally be presumed to have been the objects of their father's bounty. In order to correctly understand and give effect to the contract over which this controversy has arisen, certain rules for the interpretation and construction of written instruments will be noticed. Primarily to be considered is the intention of the husband and father in effecting the insurance, and this is to be ascertained from the language of the certificate itself, construing its words according to their common and reasonable signification, so as to give effect to the entire instrument as far as practicable; *secondly*, the language of the instrument is to be construed in the light of extrinsic circumstances attending its execution, considering the situation and relations in life of the several parties therein mentioned, and the objects and interests to be thereby secured. We are not unmindful of the rule which excludes the proof of contemporaneous oral language to vary the terms of valid written instruments. 2 Bl. Com. pp. 379-381; 1 Redf. Wills, pp. 421, 668; 1 Greenl. Ev. §§ 275-277; *St. Louis & D. L. & Min. Co. v. Tierney*, 5 Colo. 582; *Ballou v. Gile*, 50 Wis. 614; *Clarke v. Johnston*, 85 U. S. 18 Wall. 502, 508, 21 L. ed. 906; *McDermott v. Centennial Mut. L. Assn.*, 24 Mo. App. 73; *Walker v. Douglas*, 70 Ill. 445; *St. Clair Co. Ben. Soc. v. Fietsam*, 97 Ill. 474. What, then, was the intent of the assured in causing to be inserted in the certificate of insurance the provision that the money should, 'at his death be paid to his wife, Ella A. Rouse, and, in case of her death, to Mary E., Clara D. and Anna L. Rouse, children?' It is claimed by counsel for the administrator that by the terms of the certificate the right to the insurance money vested in Ella A. Rouse immediately upon the death of her husband. This claim is based upon the words of the certificate that the money shall 'at his death be paid to his wife, Ella.' But these are not the only words of the instrument relating to that subject. It also contains the words, 'case of her death'; that is, it is further provided that in case of the death of the wife, Ella, the money shall be paid to Mary, Clara and Anna, children of the assured. In argument, however, counsel have sought to maintain the administrator's claim by construing the certificate: *First*, as though the children were not named therein as beneficiaries; and, *second*, as though they were only entitled to the insurance in case the wife should die before the death of the assured. The argument is not well founded. It violates an elementary rule for the construction of contracts, in that it does not give effect to the whole language of the instrument. In the first instance it omits, and in the second adds, important words. The effect of the addition, as well as the omission, is to defeat the clearly expressed intention of the assured. It is true the certificate was framed so that the wife's right vested immediately upon her husband's death, but such right was not indefeasible. On the contrary, it was subject to be devested by her own death. The certificate expressly provides that, in case of the wife's death, the insurance shall be paid to the children; and thus provision was made for the

12 L. R. A.

vesting of the children's rights just as surely as for the vesting of her own. This last provision is in no way limited or qualified as to the time of her death; it is direct and unequivocal to the effect that, in case of the wife's death, either before or after the death of the assured, the money shall be paid to the children named in the certificate. The intention is clear that, in the event of the wife's death at any time while the insurance money should be unpaid, so as to be capable of practical identification and control, it should be paid to the children, thus giving them the greatest advantage that could arise from such a contingency, so long as the fund should not be otherwise appropriated by the wife. Thus effect is given to the entire certificate without doing violence to its obvious meaning or to any of its words; and thus a construction is reached in accordance with well-settled legal rules, as well as in harmony with the dictates of reason and humanity. The adjudicated cases cited in behalf of the administrator's claim do not necessarily militate against the foregoing construction. In the case of *Richmond v. Johnson*, 28 Minn. 447, the wife only was named as the beneficiary in the certificate. In the case of *Connecticut Mut. L. Ins. Co. v. Burroughs*, 84 Conn. 805, the policy was made payable to the children only in case the wife should die before her husband's death should occur; and in *Chapin v. Pellones*, 86 Conn. 182, the policy contained a similar provision. In each of the Connecticut cases the wife died before the husband. In the former case the wife had made an absolute assignment of her interest in the policy for a valuable consideration, but the children nevertheless were allowed to recover against the claim of the assignee. In the latter case the children were protected against the claims of the creditors of the husband. Thus it appears how jealously the rights of beneficiaries of such insurance, even in the second degree, are guarded by the courts. Our attention has not been called to any case where the provisions of the policy or certificate of insurance were identical, or so nearly analogous to the one under consideration as to affect our conclusion. It is always safer to be guided by legal principles, founded on justice and equity, than to attempt to follow case precedents based on facts or circumstances not strictly analogous or controlling. In this connection we quote the language of an eminent author upon the construction of instruments of this character: 'Precedents ought never to be allowed an arbitrary and unbending control of any case not precisely analogous; we might say, not strictly identical. And while all analogies, however remote, must be, and should be, allowed to have their just and proper weight, and the more weight in proportion to the nearness of the analogy, in determining future cases, we ought never to forget that mere analogies never rise above the character of assistants. We should not, therefore, allow ourselves to become slaves to them.' Again, after adverting to the fact that the English courts follow precedents in matters of this kind more strictly than do the American tribunals, the same author adds: 'But, at the same time, when cases occur, as will always be the fact in regard to the largest proportion, which have to be determined upon their peculiar circum-

stances, the English courts manifest no reluctance to grapple with the difficulties which present themselves, however formidable or embarrassing, and to place all cases upon their proper basis of truth and justice, without regard to the entire want of precedent to maintain them. . . . And the same tendency is observable in decisions of the American courts.' 1 Redf. Wills, p. 428. Reading the certificate in the light of the extrinsic circumstances as shown by the amended answer, and considering the condition of the assured and of the different members of his family, and the relations they sustained to each other at the time of effecting the insurance, no one can doubt for a moment that it was the father's intention that the insurance money should be paid to his infant daughters in case his invalid wife should die either before his own death should occur, or before the money should be paid to her. These children were his legitimate heirs, dependent upon him for support, and, next after his wife, the natural objects of his bounty. They were not the children of his wife, Ella, and could not inherit from her; hence we perceive his prudent foresight, as well as fatherly care, in causing their names to be inserted as beneficiaries in the certificate, contingent upon his wife's expected death. If anything further were needed to strengthen the construction we have given this instrument, the objects, purposes, rules and regulations of the benevolent order from which this certificate of insurance emanated might be considered. But it is scarcely necessary to invoke cumulative authority to confirm the view that it was the father's intention, in case of his wife's death, that the insurance money should go to his doubly orphaned minor children, instead of the administrator of the deceased wife, either for the payment of her debts, or for the benefit of her heirs, who were to him as strangers, having no special claim upon his fortune, his benevolence or the fruits of his labor." *Henry v. Thomas*, 118 Ind. 27.

In the opinion on the rehearing, the majority of the court place great reliance upon the case of *Union Mut. Assn. of Battle Creek v. Montgomery*, 70 Mich. 587. That case, to use the language of Judge Redfield, quoted in the former opinion, is neither "precisely analogous" nor "strictly identical" with the one now under consideration. In that case the certificate was for \$1,500 upon the life of Edward C. Franklin, payable ninety days after satisfactory proof of his death, and the concluding clause was as follows: "The said union mutual association agrees to pay to his son and daughter, N. Lyon and Charlotte A. Franklin, equally,—in case of death of either, full amount to go to the survivor,—one thousand five hundred dollars, if living; if not living, to the heirs of said member." Both beneficiaries were living at the death of the assured. Satisfactory proofs of the death of the assured were made, and both beneficiaries claimed payment of their respective moieties; but before the money was paid one of the beneficiaries died leaving a will by which his interest in the certificate was disposed of. The court held that the words "if living" and "if not living" refer to living at the time of the assured's death; and that the share of each beneficiary vested abso-

lutely at the death of the assured, for the reason that the policy of the Michigan statutes favors vested estates in preference to contingent, unless an intention appears to the contrary, and that the share of the deceased beneficiary could be disposed of by his last will.

It is unnecessary to question the correctness of the Michigan decision in construing the instrument before us. In that case it was necessary to construe the words "if living" and "if not living" with reference to some particular date or event connected with the vesting of the fund specified in the certificate. No such necessity exists in the case before us. The certificate does not contain the words "if living" or "if not living," or other equivalent words; but, as was said in the former opinion, the provision in regard to the children's interest "is in no way limited or qualified as to the time of the wife's death;" so that, whether the wife be living or not living at the death of the assured, the direct and unequivocal provision of the certificate is that, "in case of her death," the money shall be paid to the children named therein. It does not appear in the record before us that the wife, either by will or otherwise, ever attempted to dispose of the insurance money, or of her interest in the certificate. If she had needed the fund to provide for her necessities while living, and had actually disposed of or hypothecated it for that purpose, as indicated in the present opinion of the majority of the court, and such fact had been properly pleaded, perhaps the claim of the children might have been defeated in whole or in part for that reason. But it is vain to speculate as to matters not set forth in the record.

Much stress is laid upon the rule that the law favors vested estates in preference to contingent, unless an intention appears to the contrary. It will be noticed that the rule thus stated is pregnant with two very important and significant admissions: *first*, that contingent estates may be created; and, *second*, that the intention of the parties creating an estate is to be considered in determining its character. Let us test the certificate in the light of this rule. It cannot be denied that a contingent estate is contemplated by its express terms; indeed, a series of contingencies are contemplated. In the first place, the very object of procuring the certificate of insurance was to provide for the family of the assured in the contingency of his own death while they, or some of them, were living. The first contingency was that the insurance money should be paid to his wife. Thus far there is no dispute. It is also undisputed that in a certain contingency the insurance should be paid to his children. What was the latter contingency? It is plainly stated in the certificate to be the contingency of the wife's death,—no more, no less. There are no other words limiting or qualifying the latter contingency. *First*, then, the husband, anticipating his own death, procures the insurance for his wife's benefit. *Second*, knowing that his wife, according to the course of nature, must certainly die sometime, he provides that, in case of her death, the insurance shall be paid to his children. The wife being an invalid, and presumably older than his minor children, it is reasonable to presume the assured expected them to survive her death. In

the light of such facts and circumstances, what intention is conveyed by the terms of the certificate? The entire operative words have been considered. Nothing has been added thereto or subtracted therefrom. Legitimate facts and circumstances only have been taken into consideration in construing the language of the written instrument. The reasonable legal inference to be drawn from such language, under the circumstances, is that the father intended the insurance should go to the invalid wife for her use while living, with remainder to his own children in the contingency of the wife's death whenever it should occur; and so he used the unlimited words, "in case of her death to be paid to the children," inasmuch as they could not inherit from their step-mother. Words might have been inserted in the certificate providing for the payment of the insurance to the children only in the contingency of the wife's death before the death of the assured. If such words had been inserted, they would necessarily have controlled the interpretation of the instrument. But such words were not inserted, and they certainly should not be supplied by implication, when, from all the facts and circumstances legitimate to be considered in construing the instrument, the obvious effect of supplying them, as contended by appellee, would be to defeat, not to effectuate, the intention of the assured.

In the many elaborate briefs and arguments of counsel for the administrator it is nowhere claimed that Starling D. Rouse could or did have any intention of making provision for strangers to the exclusion of any member of his own dependent family. But the contention is that a certain "formula of words" used in the certificate has been construed by the courts to have a certain and definite significance, and that this court should feel itself bound by such precedents. As heretofore shown, no case has been cited in which the language was "precisely analogous" or "strictly identical" with the certificate under consideration; nor has any case been cited where the circumstances and relation of the parties to be affected by the

instrument were either precisely or substantially analogous to those under consideration. It has been before observed, and it can scarcely be made clearer by repetition, that the courts, especially the American courts, will not allow themselves to become slaves to "arbitrary and unbending" precedents, when the effect of such servility is to do manifest injustice. But they will rather "grapple with the difficulties which present themselves, however formidable and embarrassing," in each particular case, and determine the same with reference to its "peculiar circumstances," placing the decision "upon the proper basis of truth and justice, without regard to the entire want of precedent." 1 Redf. Wills, *supra*.

The law is not, and in the nature of things cannot be, an exact science, like mathematics. Long ago able jurists gave up the idea of formulating specific rules adapted to the exigencies of each particular case. At the best, the law is but a rational science, founded on general principles of right and justice. Experience has shown that these principles, when intelligently and conscientiously applied, insure substantial justice in the larger proportion of litigated controversies. In mere matters of procedure, which are but the means to the end, specific rules of comparative uniformity may be formulated, and many precedents may be thereby established, though, even in this branch of the law, much must necessarily be left to sound judicial discretion. But in the great field of jurisprudence, relating to rights of persons and rights of property, arbitrary and unbending precedents have ever been found too narrow for the multitude of vexatious and complicated controversies arising from the varied transactions of an enlightened and progressive people. Precedents are valuable aids to those who can utilize them with intelligent discrimination; but to those who are dependent upon such assistants, precedents are liable to become uncertain and misleading guides.

Petition for second rehearing overruled.

## PENNSYLVANIA SUPREME COURT.

Mary RODGERS

v.

Joseph LEES *et al.*, Appts.

(...Pa....)

**1. A child of tender years may be a trespasser and be subject to the consequences of his trespass.**

**NOTE.—Contributory negligence of infant of tender age.**

The rule of law in regard to the negligence of an adult and of an infant of tender years is different as to the measure and degree of care the omission of which would constitute contributory negligence, which is to be graduated by the age and capacity of the individual. *Washington & G. R. Co. v. Gladmon*, 82 U. S. 15 Wall. 401, 21 L. ed. 114; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Birge v. Gardiner*, 19 Conn. 507; *Daley v. Nor-* 12 L. R. A.

**2. A boy six or seven years old, who gets upon a ball attached to a chain used as a hoisting apparatus for a mill while it is in motion for the express purpose of riding upon it, although warned by a companion not to do it, is chargeable with the consequences of his recklessness, and no recovery can be had for his death by falling.**

**3. A millowner is not liable for injury**

*wich & W. R. Co.* 28 Conn. 591; *Powell v. New York Cent. & H. R. R. Co.* 22 Hun, 55; *Reynolds v. New York Cent. & H. R. R. Co.* 58 N. Y. 249; *Thurber v. Harlem Bridge M. & F. R. Co.* 60 N. Y. 328; *McGovern v. New York Cent. & H. R. R. Co.* 67 N. Y. 417.

In Massachusetts it has been held that if a boy was in the exercise of such care as could reasonably be expected of one of his age and capacity he might recover. *Dowd v. Chloopee*, 116 Mass. 94; *Plumley v. Birge*, 124 Mass. 87; *Lynch v. Smith*, 194 Mass. 52; *Carter v. Towne*, 96 Mass. 597; *Munn v.*

to a boy, who was a trespasser, by a fall from a ball and chain used for hoisting material, where the boy got upon it while it was in motion only a moment after it had been in use, the ball having been stopped and hung up out of reach, but in some way having gotten in motion again and not having been left carelessly dangling in condition to move.

(Clark, J., dissent.)

(March 9, 1891.)

**A**PPEAL by defendants from a judgment of the Court of Common Pleas for Montgomery County in an action brought to recover damages for the death of plaintiff's son, which was alleged to have resulted from defendants' negligence. *Reversed.*

Defendants were owners and operators of woolen mills, in one of which was a hoisting apparatus consisting of machinery, pulleys, etc., inside the building and chain terminating in hooks on the outside where the hoisting was done. Above the hooks and fastened to the chain is an iron ball for the purpose of keeping the chain taut and perpendicular.

The deceased, a boy six or seven years old, attempted to ascertain how high he dared to permit the apparatus to carry him and was taken to the third story of the building, when he became frightened and unable longer to cling to the chain and fell to the ground and was killed.

The defendants requested *inter alia* instructions to the effect, (1) that the boy was a trespasser and plaintiff could not recover, and (8) that the verdict must be for defendants, both of which were refused.

Beed, 4 Allen, 431. See *Meibus v. Dodge*, 36 Wis. 300.

In an action brought by an infant, as a general rule the same defense may be interposed as in case of an adult plaintiff; so it has been held that in an action for personal injuries by negligence contributory negligence may be shown in defense. *Hartfield v. Roper*, 21 Wend. 615; *Honegsberger v. Second Ave. R. Co.* 33 How. Pr. 193.

But this rule will hardly be applied against an infant of such tender age as to be incapable of self-control and personal protection to the same extent as to an adult. *Mangan v. Brooklyn R. Co.* 35 N. Y. 455; *Robinson v. Cone*, 23 Vt. 213; *Lynch v. Nurdin*, 1 Q. B. 423, cited in *Tyler, Infants*, 194.

It has been held in Pennsylvania that parents who permit their children to trespass upon the property of a railroad company are guilty of negligence, and that when a child of tender age is allowed so to do the company owes it no duty and is not liable to either party for the injury. See the earlier cases of *Mulherrin v. Delaware, L. & W. R. Co.* 81 Pa. 386; *Little Schuylkill Nav. R. Co. v. Norton*, 24 Pa. 463; *Philadelphia & N. R. Co. v. Long*, 73 Pa. 235.

A distinction is made between the case of a boy who uses the highway solely for the purpose of playing and who meets with an injury from a defect in the highway. *Bodgett v. Boston*, 8 Allen, 237; *Tighe v. Lowell*, 119 Mass. 472; *Gulline v. Lowell*, 4 New Eng. Rep. 236, 144 Mass. 491, a case where a boy did not cease to be a traveler, but merely stepped aside for an instant to clasp in play a post in the highway and almost in his path. In that case he was entitled to recover.

Where a father had given permission to his son, a lad seven years of age, to cross the bridge, and the father was fully acquainted with its condi-

Further facts appear in the opinion.

*Mr. Charles Hunsicker*, for appellants: The boy was a trespasser and no recovery can be had.

*Gillespie v. McGowan*, 100 Pa. 144; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258; *Philadelphia & R. R. Co. v. Hummel*, 44 Pa. 875; *Flower v. Pennsylvania R. Co.* 69 Pa. 310; *Duff v. Allegheny Valley R. Co.* 9 Pa. 458; *Osuley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 93 Pa. 426; *Hestonville Pass. R. Co. v. Connell*, 88 Pa. 520; *Moore v. Pennsylvania R. Co.* 90 Pa. 301; *Oil City & Petroleum Bridge Co. v. Jackson*, 5 Cent. Rep. 324, 114 Pa. 321; *Gaughan v. Philadelphia*, 13 Cent. Rep. 143, 119 Pa. 503.

*Messrs. N. H. Larzelere and M. M. Gibson*, for appellee:

A child injured while trespassing has no right of action, unless injured by the negligence of defendants, when the injury might have been avoided by ordinary care on defendants' part. But when a child of tender years commits a mere technical trespass, and is injured by agencies that to an adult would be open and obvious warnings of danger, but not so to a child, he is not barred from recovering, if the things instrumental in his injury were left exposed and unguarded, and were of such a character as to be likely to attract children, excite their curiosity and lead to their injury, while they were pursuing their childish instincts.

4 Am. & Eng. Encyclop. Law, p. 53, § 26; *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. 300; *Smith v. O'Connor*, 48 Pa. 230; *Kay v. Pennsylvania R. Co.* 65 Pa. 269; *Schilling v. Abernethy*, 8 Cent. Rep. 168, 112 Pa. 437; *Bid-*

tion, the father could not recover. *Oil City & Petroleum Bridge Co. v. Jackson*, 5 Cent. Rep. 324, 114 Pa. 321.

Where a boy was found drowned in a hole alongside of a sewer on private lands, fifty or sixty feet from the street, and where the city was under no obligation to keep the place in a safe condition, the city is not liable. *Murphy v. Brooklyn*, 118 N. Y. 575.

Where a boy for his own amusement left a traveled track sufficiently prepared for travel, and went upon a part of the highway not so prepared, and fell into a hole filled with water, and was drowned, the town is not liable; it was not the duty of the town to prepare the highway its whole width. *Goelts v. Ashland*, 75 Wis. 643, citing *Kelley v. Fond du Lac*, 81 Wis. 179; *Hawes v. Fox Lake*, 33 Wis. 443; *Matthews v. Baraboo*, 39 Wis. 677; *Prideaux v. Mineral Point*, 48 Wis. 523; *James v. Portage*, 43 Wis. 681; *Cartright v. Belmont*, 58 Wis. 373.

Contributory negligence of infant. See *note to Slattery v. O'Connell* (Mass.) 10 L. R. A. 654.

That an infant is not chargeable with contributory negligence, see *notes to Cleveland Rolling Mill Co. v. Corrigan* (Ohio) 8 L. R. A. 389; *Chicago City R. Co. v. Robinson* (Ill.) 4 L. R. A. 127; *Winter v. Kansas City Cable R. Co.* (Mo.) 6 L. R. A. 583.

Infant, when chargeable with contributory negligence. See *note to Winter v. Kansas City Cable R. Co. supra*.

Suit by parent for damages. *Wymore v. Mahaska County*, 6 L. R. A. 545, 73 Iowa, 393.

Negligence of parent not imputable to child. See *note to Chicago City R. Co. v. Wilcox* (Ill.) 8 L. R. A. 495.

Suit by infant for personal injuries. See *note to Chicago City R. Co. v. Robinson, supra*.

*die v. Hestonville, M. & F. Pass. R. Co.* 8 Cent. Rep. 404, 112 Pa. 551; *Lynch v. Nurdin*, 1 Q. B. 39; *Woodbridge v. Delaware, L. & W. R. Co.* 105 Pa. 484; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Harriman v. Pittsburgh, O. & St. L. R. Co.* 9 West. Rep. 488, 45 Ohio St. 11; *Hydraulic Works Co. v. Orr*, 83 Pa. 383.

**Green, J.**, delivered the opinion of the court:

If the chain and ball at the defendants' mill had been running regularly in the actual business of raising or lowering grain or flour, and the plaintiff's son had jumped upon the ball to ride up in the air, and fallen, it certainly could not be held that the defendants would be liable for the consequences. They would have been in the lawful prosecution of their business, with an apparatus proper for such uses, and owing no duty of protection to passing children against the consequences of their reckless acts in rushing into so manifest a danger. So if a boy of tender years attempts to climb upon a train of cars while in active movement, regardless of the dangerous results likely to ensue, and is injured, he certainly cannot recover damages from the company upon the theory that he cannot be guilty of contributory negligence. If in the present case the chain and ball had not been in motion, but were at rest, and the boy had jumped upon the ball precisely as he did, and his act had set the chain to running, and started the ball upward, there would be plausibility in the argument for a recovery that the boy was ignorant of the effect of his act. The case then would, perhaps, have come within the decision of this court in the case of *Hydraulic Works Co. v. Orr*, 83 Pa. 383. That decision was put expressly upon the ground that there was nothing to indicate the dangerous character of the platform, which was so placed that it was liable at any moment to fall and crush children beneath it like mice in a dead-fall.

In the case of *Gillespie v. McGowan*, 100 Pa. 144, we said that case "was decided upon its own peculiar circumstances," and we also said "it was not intended to assert the doctrine that a child cannot be treated as a trespasser or wrong-doer, and so far as it appears to sanction such a doctrine it must be considered as overruled." We also said: "*Hydraulic Works Co. v. Orr*, is authority only for its own facts." We further said: "It is settled by abundant authority that, to enable a trespasser to recover for an injury, he must do more than show negligence. It must appear that there was a wanton or intentional injury inflicted on him by the owner." That a child of tender years may be a trespasser, and be subject to the consequences of his trespass, has been decided by this court so many times, and in so many varying circumstances, that the question is no longer open to discussion. *Philadelphia & R. R. Co. v. Hummel*, 44 Pa. 375; *Flower v. Pennsylvania R. Co.* 69 Pa. 210; *Duff v. Allegheny Valley R. Co.* 91 Pa. 458; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 898, 98 Pa. 498; *Hestonville Pass. R. Co. v. Connell*, 88 Pa. 520; *Moore v. Pennsylvania R. Co.* 99 Pa. 301; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258; *Gillespie v. McGowan*, 100 Pa. 144; *Oil City & Petroleum Bridge Co. v. Jackson*, 114 Pa. 321, 12 L. R. A.

5 Cent. Rep. 324; *McMullen v. Pennsylvania R. Co.* 193 Pa. 107.

In *Cauley v. Pittsburgh, C. & St. L. R. Co.*, 98 Pa. 498, we held that where a boy seven years old, who was playing upon a sand-car, was ordered off the car by the conductor while the car was moving slowly, and who, in getting off, was injured, there could be no recovery. When the case was first heard in this court (reported in 95 Pa. 898) we said: "In regard to the suit brought for the child by his father as his next friend it is sufficient to say that, the child being unlawfully upon the car, the defendant company owed it no duty, and is not liable for the injury."

In *Hestonville Pass. R. Co. v. Connell*, 88 Pa. 520, where a child six years and nine months old was injured in attempting to get on the front platform of a car while in motion, we held there could be no recovery. *Mr. Justice Gordon*, in delivering the opinion, said: "Nevertheless it may be assumed that a child old enough to be trusted to run at large has wit enough to avoid ordinary danger, and so persons who have business on the streets may reasonably conclude that such a one will not voluntarily thrust itself under the feet of his horses, or under the wheels of his carriage; *a fortiori* may they conclude that they are not to provide against possible damages that may result to the infant from its own willful trespass."

In the case of *Moore v. Pennsylvania R. Co.*, 99 Pa. 301, a boy of ten years was walking along the track on the sleepers, and was run over by a passing train and killed. We held there could be no recovery because he was a trespasser. We said: "The circumstance that the trespasser in this instance was a boy ten years of age cannot affect the application of the rule. The defendant owed him no greater duty than if he had been an adult. They are not subject to an obligation to take precautions against any class of persons who may walk on and along their tracks."

In *Oil City & Petroleum Bridge Co. v. Jackson*, 114 Pa. 331, a boy of seven years, while crossing upon defendant's bridge, got upon a gas-pipe, five inches in diameter, at a place where there was an opening in the floor, and while walking on the pipe fell into the river below and was drowned. We held there could be no recovery. *Mr. Justice Paxson*, delivering the opinion, said: "The child who was killed was not using it [the bridge] in the ordinary way. He was walking upon the gas-pipe, where he ought not to have been, and which was so dangerous that his younger brother remonstrated with him, and warned him to get off. It is not necessary to impute negligence to the child; it is sufficient that he was injured, not as the result of the use of the bridge, but as the consequence of his venturing in his childish recklessness where no one, child or adult, had any business to be."

These principles are precisely applicable to the present case. The chain and ball were not at rest; they were in actual motion, and the boy, fully knowing that, and intending to do exactly what he did do, jumped upon the ball for the very purpose of riding upward on it. The boy who was with him, and who testified for the plaintiff, said: "The ball was down. When both of us met he said: 'Hello, Kinnin-'

I bet I can go up higher on the ball than you." I told him he had better not, he would fall. I did not hear him say anything then. He got on the ball, and sat on the ball and held the chain. Then when he was going up he tried to get down. He got down from the ball, and the hook caught him,—I think that the hook caught him,—and then when he was going up higher the hook gave way when he was going up. Then he hung with his hands on the ball. Then Tom McCormick came out of the door of the mill, and when he saw the boy going up he ran to leave the ball down. Then the boy fell before he had time." It is thus fully proved by the plaintiff, and not contradicted, that the boy got upon the ball for the express purpose of riding up on it, and notwithstanding his companion warned him not to do it, saying he might fall. His death was caused solely by his own rash and reckless act while in a place where he had not the least right to be. Of course he was a trespasser, in every sense of the word. The ball and chain were not used for any purpose of conveying persons up or down, and the case is therefore stronger than either *Cauley v. Pittsburgh, C. & St. L. R. Co.* or *Hestonville Pass. R. Co. v. Connell*. We can see no reason why the principle of those cases is not strictly applicable to this, only in a greater degree. And the doctrine of *Baltimore & O. R. Co. v. Schwindling, Philadelphia & R. R. Co. v. Hummel* and *Oil City & Petroleum Bridge Co. v. Jackson*,—that the boy was in a place where he had no right to be, and where he was not entitled to any protection from the defendants against his own reckless trespass,—is, if anything, still more applicable. In the *Bridge Case* the boy had a right to be on the bridge for the purpose of crossing it, and in the *Schwindling Case* the boy was not necessarily a trespasser by being on the platform; but here the trespass was absolute, and very gross. There was no right or justification or excuse of any kind for the presence of the boy, or of any other person, on the ball for any purpose whatever, much less for the purpose of riding on it. In point of fact, the ball and chain had been in use for hoisting up material until almost the moment of the accident. One of the men was still in the mill. A number of the defendants' hands testified that the ball was stopped, and hung up out of reach, but in some way they could not account for it had got in motion again, showing that the ball was not carelessly left dangling and in a condition to move. In this momentary interval it happened that the plaintiff's son came along and jumped upon it. Upon the whole case we think the defendants' first and second points should have been affirmed.

*Judgment reversed.*  
**Clark, J.,** dissents.

Barclay JOHNSON et al., Appts.,

vs.  
 Thomas ASH.

(....Pa....)

A reservation of ground rent in "Spanish milled silver dollars"

without specifying their weight or fineness at a time when they were legal tender by Act of Congress is presumed to be for the benefit of the owner of the rent, and a tender of such dollars for the rent is good even after Congress has demonetized them and Spain has ceased to coin them and provided for their withdrawal, substituting a new coinage, the use of which is obligatory.

(April 27, 1891.)

**A** PPEAL by plaintiffs from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County in favor of defendant upon a case stated for the opinion of the court the object of which was to determine the sufficiency of a tender of ground rent. *Affirmed.*

This is an action to test the sufficiency of a tender of Spanish milled dollars in payment of arrears of ground rent due in September, 1890, on premises in Philadelphia.

The most important parts of the case stated are as follows: In 1792 Congress adopted the Spanish milled silver dollar as the standard of value of the United States dollar authorized to be coined by that Act. In 1806 Congress made Spanish milled silver dollars (of 17 pwts. 7 grs. in weight) a legal tender for all debts at the rate of one hundred cents of United States currency; and they so continued until demonetized in 1857. In 1806, at which time Spanish milled dollars were a legal tender and a part of the money current in the United States, the ground rent in question was reserved in "Spanish milled silver dollars and two thirds of a dollar" without specifying their weight or fineness; and in other parts of the ground-rent deed the word "dollars" was used without specifying the kind of dollars referred to. In 1857 Congress demonetized Spanish milled silver dollars. In 1868 Spain adopted the currency of the Latin Union in which the dollar had no place, made the new coinage obligatory and provided for the withdrawal of the old currency. In 1890 quarterly payments of the ground rent fell due and payment thereof was tendered in Spanish milled dollars and United States cents, which tender was refused.

*Messrs. Samuel Hinds, Thomas & Henry Pleasants,* for appellants:

No weight or fineness is specified for the coins, and the word "dollars," without further designation, is used throughout the deed, except in the reservation clause. These features distinguish the case at bar from *Mather v. Kintke*, 51 Pa. 425; *Christ Church Hospital v. Fueschel*, 54 Pa. 78; *Perot v. Eichholz*, 35 W. N. C. 527, and *Dutton v. Pailaret*, 52 Pa. 109.

If the court should be of the opinion that the tender of the forty-one Spanish milled silver dollars and one cent was a sufficient tender, then judgment was to be entered in favor of the defendant; otherwise judgment was to be entered in favor of plaintiffs for \$41.01 lawful money of the United States of America, with costs.

Judgment was entered by the court in favor of the defendant upon the case stated.

The absence of designated weight for the dollars reserved in the case at bar indicates that the reservation was intended simply as a



reservation of such Spanish dollars as were lawful money; and "contracts for lawful money" are contracts for the payment of the legal tender of the country.

*Butler v. Horvitz*, 74 U. S. 7 Wall. 261, 19 L. ed. 150; *Mather v. Kinike*, 51 Pa. 429.

The legal tender Spanish dollar was intended to be reserved in this deed.

*Dutton v. Pailaret*, 52 Pa. 112.

The fact that coins were stipulated for becomes in this case an important consideration, as evidencing that the reservation was not of a mere commodity, since in this case the dollars reserved were "coins that our land recognizes as money."

*Mather v. Kinike*, 51 Pa. 429.

The Spanish milled dollars contemplated in the reservation clause in this deed were such Spanish milled dollars as were a legal tender under the Act of Congress of 1806, and the reservation is not for a specific article or a mere commodity, but for lawful money; and as these Spanish dollars were demonetized in 1857, the rent reserved could no longer be paid in such dollars, but must be paid in such legal tenders as the government provides and sanctions when the time for payment arrives.

*Knox v. Lee*, 79 U. S. 12 Wall. 487, 20 L. ed. 806; *Perot v. Eichholz*, 25 W. N. C. 525; *Mauls v. Stokes*, 3 W. N. C. 878; *Morris v. Bancroft*, 9 Phila. 277.

In every reported case where the contract has been held to be for a specific article and not for lawful money legal tenders are "expressly excluded" by the terms of the contract "unless they should happen to correspond with the standard adopted by the parties as a law unto themselves."

*Dutton v. Pailaret*, 52 Pa. 112.

A tender of demonetized or obsolete coin is no more a payment of the debt contracted than would a present tender of notes of the late Confederate States be payment of a contract lawfully made in the insurgent States during the civil war. Under such circumstances the rule has been clearly enunciated by the Supreme Court of the United States that the value of the demonetized or obsolete currency is to be estimated "in lawful money of the United States at the time when and place where such contracts were made."

*Effinger v. Kenney*, 115 U. S. 566, 29 L. ed. 495.

*Mr. Joseph M. Pile* for appellee.

#### Per Curiam:

The court below properly held that the plaintiff was obliged to receive the kind of money his contract called for. It is to be presumed that when the ground rent was created the reservation of the rent in "Spanish milled silver dollars" was for the benefit of the owner of the rent. It was certainly not for the benefit of the ground tenant. The plaintiff, having enjoyed what benefit there was under the contract, may well take the disadvantages thereof, if there are any.

*Judgment affirmed.*

13 L. R. A.

#### WILLIAMSPORT & NORTH BRANCH R. CO.

v.

#### PHILADELPHIA & ERIE R. CO., Appt.

(...Pa....)

**A railroad is located so as to exclude the appropriation of the land selected by third persons for other uses when a definite location has been adopted by the action of the company, but the act of an engineer in staking out the line is not a sufficient location.**

(April 6, 1881.)

**A PPEAL** by defendant from a decree of the Court of Common Pleas for Lycoming County in favor of plaintiff in an action brought to enjoin defendant from locating its railroad upon land alleged to have been previously appropriated by plaintiff. *Reversed.*

The facts sufficiently appear in the opinion.

*Messrs. Henry C. Parsons and Wayne MacVeagh*, for appellant:

The location of a railroad is the act of the corporation and must be with the bona fide intention of building the road.

*Pittsburgh, V. & O. R. Co. v. Com.* 101 Pa. 196.

The location of the road is the actual taking of the land for the purpose of a railroad, and not a mere survey.

*Neal v. Pittsburgh & O. R. Co.* 2 Grant, Cas. 188.

**NOTE.**—Location of railroad; what sufficient to exclude appropriation of land by rival road.

The question what constitutes an appropriation by a railroad company of particular land for use as a right of way which will exclude other companies from occupying the same land does not appear to have received much attention by the courts. The doctrine stated in *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 380, that priority of location and appropriation gives priority of right, is not questioned in the absence of statutes which either directly or by implication give one of the claimants the better right. See *Barre R. Co. v. Montpelier & W. River R. Co.* 4 L. R. A. 785, and *note*, 61 Vt. 1.

If such statutes exist they of course control the matter. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 1.

The question seems to have been more frequently passed upon in Pennsylvania than elsewhere, but as the principal case settles the law there and many of the expressions of opinion by judges of that State are *obiter* they will not be noticed.

*Morris & E. R. Co. v. Blair*, 9 N. J. Eq. 645, holds that mere experimental surveying of a route will not confer any vested or legal right until it shall have been adopted, and that the company which first adopted a route and first filed its survey in the office of the secretary of state had the better right.

In *Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co.*, 27 Fed. Rep. 770, defendant set forth its claim to the land in controversy by stating that in the summer of 1881 it caused surveys to be made for such line, and in the fall of 1881 it located the same; that in June, 1885, it retraced its located line and permanently located it, marking it with stakes driven in the center line, and alleged that it was

*Meers, Addison Candor and C. La Rue Munson*, for appellee:

On a question of location between two rival companies, that which has first made a survey and staked out a centre line is entitled to priority of right.

*Davis v. Titusville & Oil City R. Co.* 5 Cent. Rep. 908, 114 Pa. 812. See *O'Hara v. Pennsylvania R. Co.* 25 Pa. 448; *Pittsburgh, Y. & C. R. Co. v. Com. supra*; *Titusville & P. O. R. Co. v. Warren & V. R. Co.* 12 Phila. 642; *Heiss v. Pennsylvania R. Co.* 62 Pa. 72.

*Williams, J.*, delivered the opinion of the court:

The important question presented by this appeal is, What constitutes a valid location on the ground of a projected line of railroad? It is singular that such a question should be to any extent an open one in a State remarkable, as Pennsylvania is, for the number and extent of its railroads. The act of location is an appropriation of private property by virtue of the right of eminent domain with which the State has invested the railroad company, either by the Act of incorporation or by virtue of general laws.

The requisites of a valid location may be considered, first, with reference to the private owners upon or over whose lands the location is made, and next, with reference to third parties and other corporations.

The successive steps contemplated by the Act of 1849 and subsequent legislation as necessary to vest a title to the roadway in the corporation are these:

First. A preliminary entry on the lands of private owners for the purpose of exploration.

This is made by engineers and surveyors who run and mark one or more experimental lines, and who report their work with such maps and profiles as may be necessary to present it properly to the company that employs them.

Second. A selection and adoption of a line, or one of the lines so run, as and for the location of the proposed railroad. This is done by the corporation and it requires the action in some form of the board of directors. This makes what was before experimental and open a fixed and definite location. It fastens a servitude upon the property affected thereby and so takes from the owner and appropriates to the use of the corporation.

Third. Payment to the owner for what is taken and the consequences of the taking, or security that it shall be made, when the amount due him is legally ascertained.

The title of the owner is not divested until the last of these steps has been taken. *Levering v. Philadelphia, G. & N. R. Co.* 8 Watts & S. 450; *McClinton v. Pittsburgh, Ft. W. & C. R. Co.* 66 Pa. 404; *Dimmick v. Brodhead*, 75 Pa. 464; *Buffalo, N. Y. & Phila. R. Co. v. Harvey*, 107 Pa. 819; *Gilmore v. Pittsburgh, V. & C. R. Co.* 104 Pa. 275.

As against him the corporation can acquire only a conditional title by its act of location, which ripens into an absolute one upon making compensation. As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title. For this reason in several of the United States provision is made by law for recording the action of the company and the line adopted by it, so as to give notice to the public, and to settle questions of priority of title. We

permanently located in June, 1885. Complainant claimed to have located its line in October, 1885, and alleged that on the 17th of the preceding August it had purchased the land in controversy. The court held that at that time defendant's line was permanently located and marked on the tract, and that defendant had the better right to construct its road over the same.

In *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463, 25 L. ed. 483, it was held that surveying and staking a route is not a sufficient location and appropriation of it to exclude the subsequent appropriation of part of it by a rival company, unless the survey was followed by actual occupation and use for railroad purposes. But in that case occupation for the purpose of construction in 1878 of a route surveyed in 1871 and 1872, the actual occupation being prior to that of the rival company and early enough to satisfy the requirements of the claimant's charter, was held sufficient to establish the claimant's title to the route.

Where two street railway companies were each granted the right to extend its track through a certain street to reach a ferry, the company which first actually took a qualified possession of the middle of the street by locating and constructing its extension therein until interfered with by the other company was held to have acquired the right to finish and operate its road as thus located free from interference by the other company. *Waterbury v. Dry Dock, R. R. & B. R. Co.* 54 Barb. 408.

The question as to what is a sufficient appropriation as against a rival company is frequently made to depend on the construction of state statutes; thus in *Barre R. Co. v. Montpelier & W. River R. Co.*, 4 L. R. A. 788, 61 Vt. 1, the statute provided that before a company commences proceedings for the 12 L. R. A.

purpose of acquiring title to real estate or an interest therein it shall cause the location of its road signed by a majority of its directors, defining the courses, distances and boundaries of the same . . . to be recorded in the respective town clerks' offices of the towns through which it passes; and the court held that when such location had been signed and filed the company acquired the right to the location as against subsequent purchases or locations. The court intimated, however, that this right might be lost by a neglect to follow up the first steps with proper diligence.

The New York Statute provides that before constructing any part of its road the company must make and file a map and profile of the route intended to be adopted and give written notice to all occupants of the land affected, of the time and place of filing and that the route designated passes over the land of such occupants. In *Hochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.*, 110 N. Y. 128, the court held that compliance with those requirements fixed the company's right to the route as against other companies, and in *New York & A. R. Co. v. New York, W. S. & B. R. Co.*, 11 Abb. N. C. 386, it was decided that merely filing the map was not sufficient.

Where two rival companies have each received permission to construct a railway system in the streets of a city the one which first begins work on a line involving a certain street in good faith and acting within the terms of its grant has the better right to the use of that portion of the street which its tracks will cover, and this right will continue so long as money is expended and work diligently prosecuted with a view to its completion. *Indianapolis Cable Street R. Co. v. Citizens Street R. Co. (Ind.)* 8 L. R. A. 589.

have no such statute and the action of the company must be proved by other competent evidence. *Heiss v. Pennsylvania R. Co.* 63 Pa. 72. But when proved it has the same effect upon all interested as though it had been recorded. It settles the date of actual appropriation, and shows the exact location of the line of the road proposed. An examination of our own case will show that the conclusions we have reached are fairly deducible from them. In *New York & E. R. Co. v. Young*, 33 Pa. 175, it was held that the location of the line of its road is intrusted by the law to the company alone; and after it has exercised the discretionary power confided to it its action is final as to third persons and cannot be reviewed. The same doctrine was again asserted in *Cleveland & P. R. Co. v. Spear*, 56 Pa. 325, and it has been adopted in many subsequent cases. The effect of a location when made so far as the line and the ground covered by it are concerned was considered in *Pittsburgh, V. & O. R. Co. v. Com.*, 101 Pa. 192, and it was held the act of the company in adopting a definite and permanent location for its road was an appropriation of the ground covered by it whether such ground was within the inclosure of a private owner or in the public highway; in other words, this is the method by which the corporation exercises the power of eminent domain with which the State invested it at its creation, and takes what before belonged to others for its corporate use. It may acquire land by purchase, if its charter authorizes it to do so, before a location of its road; but if it does so it holds the land as any other purchaser would, subject to the right of anyone having the right to do so, to enter and appropriate it by virtue of the right of eminent domain. That a corporation cannot exercise the power to appropriate land until it has located its line is well settled. Thus, if a company has an option between two or more lines or routes it must make its election by an actual adoption of one of them before it can acquire title by appropriation upon either. 1 Redfield, Railways, 240. The reason for this is that the act of location is at the same time the act of appropriation. The space covered by the line as located is thereby seized and appropriated to the purposes of the construction and operation of the railroad by virtue of the power of eminent domain, and nothing remains to be done except to compensate the owner. After the act of location by the company, the owner or the company may proceed at once to secure an ascertainment of damages. Until such act neither can do so, for no right to damages vests in, or accrues to, the owner until there has been an appropriation of his property by the corporation. *Davis v. Titusville & Oil City R. Co.* 114 Pa. 308, 5 Cent. Rep. 908.

There should be no unnecessary delay in completing the preliminary exploration and making a location, if priority is to be secured. In *New Brighton & N. C. R. Co's App.*, 105 Pa. 18, private parties in contemplation of securing a charter caused a preliminary survey to be made over a route for a railroad projected by them. They afterwards secured a charter and the corporation adopted the line of the preliminary survey as the location of its road. In the meantime another corporation had made a pre-

liminary survey over the same ground and made a final location of its road. It was held that the latter company had the better title, and that the adoption by the former company of the line run before its incorporation could not carry its title back to the date of the preliminary survey.

The application of the rule now laid down as to what constitutes a valid location to the case before us disposes of this appeal. The plaintiff Company has the right under its charter and subsequent legislation to build its road from its present terminus at Halls to Williamsport and connect with the Philadelphia & Erie Railroad.

In 1886, and again, a year or more before the bill was filed in this case, the engineer of the plaintiff ran over a route from Halls to Williamsport connecting with the road of the Philadelphia & Erie Company, near the lot described in the bill as the Metzgar lot and set stakes along it. It does not appear in the bill or in the evidence that this preliminary survey was ever reported to the plaintiff Company or that any action was ever taken by the Company to fix the location of its road between Halls and the intersection with the Philadelphia & Erie in Williamsport.

In the meantime the latter Company in locating a branch of its road had run and adopted a line crossing one corner of the Metzgar lot over which the plaintiff claimed to have made a location by the act of its engineer, and was proceeding to have an assessment of the damages made in the manner provided by law when this bill was filed and an injunction obtained in the court below restraining the defendant from proceeding further in its effort to perfect its title to the location made for its branch over the Metzgar lot. The answer denied the plaintiff's title in these words: "The defendant denies that the said plaintiff ever made a valid and legal location of the line of its railroad upon the lot of the said John Metzgar." The plaintiff was thus called upon to show the fact of the location of its road upon the land or upon some part of the land which the defendant claimed the right to occupy under its location of its branch. It did not show or make any effort to show the location of the line of its road. When this want of title in the plaintiff was urged upon the attention of the learned judge of the court below he seemed to recognize its importance as a general proposition, but to think that it was rendered of no consequence in this case by the state of the pleadings. He said: "It is urged by the defendant that there is no evidence that the directors of the plaintiff ever authorized the location of this road. It might be sufficient answer to this allegation to say that there was no such issue raised by the pleadings." But we have seen that it was distinctly raised. The learned master found that the plaintiff's road had been located by an engineer. He did not find that the Company had ever taken any action whatever either before or after the engineer ran over the route. He could not from the evidence. An engineer may make explorations in advance of a location, or he may re-mark the line or adjust the grades after the adoption of a location, but an engineer alone cannot locate a railroad so as to give title to the company that employs him. He is not the company. The right of eminent domain does not reside in him.

Until the plaintiff was able to show that it

had acquired title to the Metzgar lot or some portion of it by the location of its road upon it, it had no standing ground in a court of equity from which to ask an injunction in this case, and it should not have been granted. It sought to restrain the defendant from making an entry on the Metzgar lot because that lot had been already appropriated by itself to its own corporate uses. The fact on which its right to be heard rested was clearly and flatly denied by the defendant. No effort was made to show it, and without it the plaintiff was without a foundation on which his prayer for an injunction could rest.

*The decree of the court below is reversed, the injunction is dissolved and the bill dismissed at the costs of the plaintiff, the appellee.*

### APPEAL OF THIRD NATIONAL BANK of Philadelphia et al.

#### *Re* Distribution of Assets of VAN HAAGEN SOAP MANUFACTURING CO.

(....Pa....)

**A loan of money to a corporation will render it liable** for the debt although the note of individuals, instead of the note of the corporation, was taken therefor because it was supposed to be better security. The test is, whether the note was received as a consideration for the money or only as a security.

**NOTE.**—*The one receiving credit, the one responsible for the debt.*

The doctrine seems to be universal that the one to whom and upon whose credit money is loaned or property advanced is liable for the debt regardless of the fact that his name may not appear on the security taken, if such security is regarded by the parties purely as collateral. Thus, if a sale is made to and upon the credit of a partnership concern, the concern will be liable for the debt although the individual paper of one of the partners was taken as collateral security. See *Emly v. Lye*, 15 Best, 7; *Siffkin v. Walker*, 2 Campb. 308; *Burns v. Pariah*, 3 B. Mon. 8; *Cunningham v. Smithson*, 12 Leigh, 32; *Beebe v. Rogers*, 3 G. Greene, 519; *Spaulding v. Ludlow Woolen Mills*, 26 Vt. 150.

Likewise money borrowed by one partner and secured by his individual note is not a partnership debt although afterwards put into the business of the firm. *Pritchett v. Pollock*, 82 Ala. 189; *Graeff v. Hitchman*, 5 Watts, 454 (citing *Bevan v. Lewis*, 1 Sim. 376; *Stokes v. Whitaker*, 1 Sim. 370; *Maclink v. Crutcher*, 6 Bush, 403; *Willis v. Hill*, 2 Dev. & B. L. 281).

When a member of a partnership borrows money on his own account the partnership is not liable for it although the lender is given to understand that it is to be used in the partnership business. *Ah Lep v. Gong Choy*, 18 Or. 205.

The prima facie liability of partners for a debt contracted by one partner may be rebutted by evidence that credit was given to the individual partner alone. *Tyler v. Waddingham*, 8 L. R. A. 557, 58 Conn. 375.

So in the case of credit obtained by an agent, if it was given to him alone the principal cannot be held liable, but if given to the principal, he must pay the debt, although the agent's paper is taken as collateral. See *Pentz v. Stanton*, 10 Wend. 271.

So the indorsee of a dishonored check, who has used it, is liable for money borrowed to pay the 12 L. R. A.

(April 6, 1891.)

**A** PPEAL by certain creditors of the Van Haagen Soap Manufacturing Company from a decree of the Court of Common Pleas, No. 1, for Philadelphia County sustaining exceptions taken by the National Security Bank of Philadelphia and William H. Lambert to the report of the auditor appointed to distribute the assets in the hands of the assignee of such Company which disallowed a claim made by the exceptants to share in such assets, and recognizing their claims. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Theodore F. Jenkins, E. Cooper Shapley and George Northrop*, for appellants:

The National Security Bank must be excluded from participating in the fund.

*Ex parte Blackburne*, 10 Ves. Jr. 204; *North Penna. Coal Co's App.* 45 Pa. 185; *Bond v. Aitkin*, 6 Watts & S. 155; *Graeff v. Hitchman*, 5 Watts, 454; *Story*, Partn. §§ 184, 186.

The auditor found "that the relation of debtor and creditor was not created and at no time existed between Mr. Lambert and the 'Soap Company.'"

The facts found by an auditor are conclusive unless clear mistake be shown.

*Bedell's App.* 87 Pa. 510.

*Messrs. Henry N. Paul, Jr., S. S. Hollingsworth and Edward H. Weil*, for appellees:

The receipt of a note or check, either of the debtor or a third party, for a debt, does not

check if the loan was made to him as the debtor. *Bailey v. Hurlbut*, 40 Fed. Rep. 414.

The person to be held liable seems to be purely a matter of agreement (*Partee v. Bedford*, 51 Miss. 84); consequently if money is loaned or goods delivered to one with the understanding that the note of another should be taken as payment no recovery can be had by the creditor against the one receiving the money or goods. *Bonnell v. Chamberlin*, 26 Conn. 487.

To whom the credit was actually given is a question for the jury depending upon the intent, understanding and agreement of the parties. *Smith v. Collins*, 115 Mass. 388 (citing *Taylor v. Wilson*, 11 Met. 44; *Allen v. Coit*, 6 Hill, 518; *Thompson v. Percival*, 5 Barn. & Ad. 225; *Pentz v. Stanton*, 10 Wend. 277 (citing *Bentley v. Griffin*, 5 Taunt. 356; *Leggat v. Reed*, 1 Car. & P. 16).

It would seem that to be bound by his election the creditor must act with a full knowledge of the facts, as is evidenced by the familiar example of the creditor's seeking payment from the principal, for whose benefit the contract was made, but who was not disclosed at the time by the agent.

*Effect of taking security as influenced by kind taken and time of taking.*

The form of the security taken does not in general preclude the creditor from showing to whom the credit was actually given. *Allen v. Coit*, 6 Hill, 518 (citing *Denton v. Rodie*, 3 Campb. 493; *Ex parte Bolitho*, Buck, 100; *Bank of South Carolina v. Case*, 8 Barn. & C. 427; *Duvall v. Wood*, 3 Lane. 491).

If the jury or the court should find as a fact that the money was borrowed by and loaned to the firm and upon its credit, then the taking of the individual note of one member of the firm would not be a payment of the firm debt, unless it was affirmatively shown that such note was taken in payment of the same. *Hoefflinger v. Wells*, 47 Wis. 631 (citing *Sheehy v. Mandeville*, 10 U. S. 6 Cranoh, 263, 3 L. ed.

operate as payment or satisfaction unless expressly so agreed. In case the note or check is disallowed the original indebtedness revives.

*Sheehy v. Mandeville*, 10 U. S. 6 Cranch, 258, 264, 3 L. ed. 215, 218; *Hart v. Boller*, 15 Serg. & R. 162; *Davis v. Desauque*, 5 Whart. 529; *Weakly v. Bell*, 9 Watts, 280; *Mason v. Wickersham*, 4 Watts & S. 100; *Leas v. James*, 10 Serg. & R. 307, 315; *Tams v. Hitner*, 9 Pa. 441, 448; *McIntyre v. Kennedy*, 29 Pa. 448; *Tyson v. Pollock*, 1 Penr. & W. 876; *Patton v. Ash*, 7 Serg. & R. 116; *Stone v. Miller*, 16 Pa. 450.

Even a higher security for a debt given by different parties or for a different sum, in the absence of proof of the intention of the parties, is presumed to have been accepted as collateral security, and not in satisfaction of the debt.

*Jones v. Johnson*, 8 Watts & S. 376; *Eby v. Eby*, 5 Pa. 440; *Eby v. Hoopes*, 1 Pennyp. 176.

Some cases have recognized an exception to this rule when the note of a third party is taken for a contemporaneous debt, holding that a presumption arises that the note was taken in payment of the debt, and that the debt was merged into the note. This, however, is only a presumption. It may be rebutted by showing the actual intention of the parties to have been otherwise; in other words, by showing that it was intended that the pri-

mary debt should remain, and that the note was only given as an additional security for the same.

*Rew v. Barber*, 3 Cow. 279; *Torry v. Hadley*, 27 Barb. 196; *Gordon v. Price*, 10 Ired. L. 383; *Youngs v. Stahelin*, 34 N. Y. 258, 265; *Bond v. Atkin*, 6 Watts & S. 165, 166; *Bayard v. Shunk*, 1 Watts & S. 92, 95.

Many cases, however, are to the effect that no such distinction as to the presumption of payment exists.

*Johnson v. Weed*, 9 Johns. 310; *Bartsch v. Atwater*, 1 Conn. 409; *Porter v. Talcott*, 1 Cow. 359, 383; *Monros v. Hoff*, 5 Denio, 363; *Randolph, Com. Paper*, § 1543; *Parsons, Bills and Notes*, § 337.

In order that the supposed exception may apply the note must be that of a third party, and the acknowledged and known agent of the principal debtor is not such a third party.

*Everett v. Collins*, 2 Campb. 515; *Porter v. Talcott*, 1 Cow. 383. See *Maffet v. Leuckel*, 93 Pa. 468.

Clark, J., delivered the opinion of the court:

The controversy in this case arises upon the distribution of the assets of the Van Haagen Soap Manufacturing Company, in the hands of John H. Connellan, assignee for creditors, in

218; *Folk v. Wilson*, 21 Md. 548; *Glenn v. Smith*, 3 Gill & J. 506; *Maryland & N. Y. Coal & Iron Co. v. Wingert*, 3 Gill, 176; *Whitney v. Goin*, 20 N. H. 354; *Wright v. Crockery Ware Co.* 1 N. H. 281; *Johnson v. Weed*, 9 Johns. 310; *Schemmerhorn v. Loines*, 7 Johns. 311; *Monroe v. Hoff*, 5 Denio, 360; *Porter v. Talcott*, 1 Cow. 383; *Vail v. Foster*, 4 N. Y. 312; *Muldon v. Whitlock*, 1 Cow. 290; *Breed v. Cook*, 15 Johns. 241; *Willson v. Foree*, 6 Johns. 110; *Read v. Hutchinson*, 3 Campb. 351; *Onwenson v. Morse*, 7 T. R. 64; *Soffe v. Gallagher*, 3 E. D. Smith, 507; *Blunt v. Walker*, 11 Wis. 384; *Ames v. Ames*, 5 Wis. 163; *Williams v. Starr*, 5 Wis. 584; *Davenport v. Schram*, 9 Wis. 119; *Eastman v. Porter*, 14 Wis. 36; *Ford v. Mitchell*, 15 Wis. 304; *Webster v. Stadden*, 14 Wis. 277; *Lindsey v. McClelland*, 18 Wis. 481; *Williams v. Ketchum*, 21 Wis. 423; *Paine v. Voorhees*, 26 Wis. 522; *Aultman v. Jett*, 42 Wis. 488).

There is some tendency in the authorities, however, to make an exception to the rule in the case of the taking of a bond from one partner. In such cases it has been held that the one giving the bond was alone liable for the debt which it was given to secure, and some have even held that it could not be afterwards shown that the credit was given to the firm. Thus it was held in *Tom v. Goodrich*, 3 Johns. 221, that the surety upon a bond given by one partner to the United States for duties on goods imported by the firm, could not look to the firm for reimbursement in case he was compelled to pay the debt; that he could look only to his principal. And in *United States v. Astley*, 3 Wash. C. O. 513, a recovery by the obligee against the firm was refused where one partner had given his bond for the duties. The reasoning of that case is, however, quite technical. It attempts to distinguish *United States v. Lyman*, 1 Mason, 422, in which *Tom v. Goodrich* is doubted, upon the ground that in *United States v. Lyman* the bond was that of a third person and unquestionably no more than collateral security, thereby implying that the bond of a partner could not be taken as collateral for the debt of the firm. *Tom v. Goodrich* was followed in *Krafts v. Creighton*, 3 Rich. L. 273.

12 L. R. A.

And in *Moore v. Stevens*, 60 Miss. 803, one partner became a surety on a forthcoming bond for the benefit of the firm, and it was held that the firm was not liable to meet the obligation thereby incurred, placing its ruling upon the ground that the giving of such bond was not within the objects of the partnership; but there is an implication that had the transaction been within such objects a liability might have been incurred.

On the contrary, in *Weaver v. Tapscott*, 9 Leigh. 424, where one partner gave a bond for the hire of a slave used by the partnership and the surety thereon was compelled to pay it, he was held entitled to recover the amount from the firm.

The Pennsylvania doctrine seems to be that if the bond of one partner is given at the time of the loan as a consideration therefor it must be presumed to be the individual debt of the obligor unless there is positive evidence showing an agreement to the contrary. *Bond v. Atkin*, 6 Watts & S. 166; *North Penna. Coal Co's App.* 45 Pa. 181.

There is now no dissent from the position that as to pre-existing debts there is no presumption that the giving to the creditor of the note of a third person was intended as payment. See *Randolph, Com. Paper*, § 1536; *Stevens v. Anderson*, 30 Ind. 391; *Kephardt v. Butcher*, 17 Iowa, 240; *Am. notes to Cumber v. Wane*, 1 Smith, Lead. Cas. 148.

The exception as to contemporaneous debts mentioned in the appellee's brief in the principal case appears to exist. See *Stephens v. Thompson*, 23 Vt. 77.

But, as stated in the brief, if there is such exception it can amount to no more than a presumption that the obligor on the paper is the true debtor; and the distinction was practically ignored in *Porter v. Talcott*, 1 Cow. 383; *Sutherland, J.*, saying that the taking of the note of a third person at the time of making the contract is not payment unless there is an agreement that it shall be, and citing *Clerk v. Mundall*, 12 Mod. 206; *Ward v. Evans*, 2 Ld. Raym. 390; *Onwenson v. Morse*, 7 T. R. 64; *Johnson v. Weed*, 9 Johns. 310; *Whitbeck v. Van Ness*, 11 Johns. 409.

the Common Pleas, No. 1, of Philadelphia. At the hearing before the auditor, the National Security Bank of Philadelphia presented a claim for \$5,000, the amount of a loan alleged to have been made to the Company in June, 1885, for which the Bank, at the time of the loan, took the note of Anthony Van Haagen, payable to the order of John Hunter, and by him indorsed. William H. Lambert also presented a claim of \$5,000, a loan alleged to have been made on the 15th of May, 1885, for which he took the note of John Hunter. Both of these notes were from time to time renewed until February, 1887, the interest thereon being paid by John Hunter. Both claims were objected to, on the ground that they were loans, not to the Van Haagen Soap Company, but to Anthony Van Haagen and John Hunter respectively, and that there was no liability on the part of the Soap Company to pay them.

The appellants' contention, however, is that the respective loans were in fact negotiated for and in behalf of the Company, and although the notes of Van Haagen and Hunter were, for supposed prudential reasons, taken as a security for payment thereof, the Company actually incurred the debt and is liable therefor, and that the claims should therefore be allowed in this distribution.

The auditor apparently determined the question of the Company's liability upon the fact that upon neither of the notes did the name of the Van Haagen Soap Manufacturing Company appear, either as maker, indorsee or otherwise; he was of opinion, therefore, "that the relation of debtor and creditor was not created, and at no time existed between these claimants and the Soap Company." Referring to the Lambert claim he says, in substance, there was some testimony that the money was wanted for the Soap Company, but as the Company was known to be in a not very promising state, he could readily understand why, although having a friendly feeling for the Company Lambert would see to it that the person to whom he advanced the money would be able to repay it when it became due. This he thinks Lambert did. "At the date of these transactions," he says, "Mr. John Hunter's name and credit in the commercial world were without blemish. He occupied the position of receiver of taxes of Philadelphia, was in receipt of a large annual salary, and was otherwise supposed to be a man of great influence and large wealth. It is very certain that at the time indicated he had not the slightest premonition of the financial and family calamity by which he was subsequently overwhelmed. It is quite natural, therefore, that individuals and banks could be found who would be willing to lend their money upon the faith and credit of John Hunter's paper, whilst they would be unwilling to advance it to a corporation which was admittedly hanging on the ragged edge of a stoppage of its operations." "A man who lends his money to another may or may not approve of the use to which his debtor intends to devote the money, but he has the right to say, before he parts with the cash, and he generally does say, upon what terms and on what security he will make the loan. When he stipulates and exacts terms and security, clearly and distinctly expressed in writing, it would be taking great

liberty with him and his contract to say that he did not mean what he had caused to be written, but he meant something else of an entirely different character." This is substantially the view taken by the auditor; he fails to find, in any explicit form, what is the controlling fact in the cause,—whether the loan of the money in each case was in fact to the Company or to the parties on the note; that is to say, whether the notes were received as a consideration for the money, or as a security merely.

It is undoubtedly true, if in June, 1885, Hunter had taken the note of Van Haagen to the Bank and there had it discounted, the proceeds passing to his individual credit, without more, the Bank would have been obliged to rely upon the parties to the note for payment; or, as stated in *Ex parte Blackburne*, 10 Ves. Jr. 204, cited by the appellants: "If there is no antecedent debt, and A carries a bill to B to be discounted, and B does not take A's name upon the bill, if it is dishonored there is no demand, for there was no relation between the parties except that transaction, and the circumstance of not taking the name upon the bill is evidence of a purchase of the bill." It is true, and the appellants contend, that an analogous principle should prevail here, that if a partner borrows a sum of money and gives his own security for it, it does not become a partnership debt merely because it is applied to partnership purposes. *Graeff v. Hitchman*, 5 Watts, 454.

"It is entirely competent for one partner to borrow money or to buy goods, or to enter into contracts on his sole and exclusive credit with third persons; and on the other hand it is equally competent for them to rely on that exclusive credit, and either to refuse to contract with the firm, or to exonerate the firm from all liability upon any contract which would otherwise bind the firm, as being for their account or benefit." Story, Partn. 184-186.

It may be, also, as was held in *Bond v. Atkin*, 6 Watts & S. 165, and *North Penna. Coal Co's App.*, 45 Pa. 181, that when there is no antecedent debt, and the partner executes his bond, which is a security of a higher nature, as a consideration for money loaned, it would require stronger proof to establish an express agreement by parol that the partnership was nevertheless to be held for the debt.

Similar principles perhaps apply in certain cases to companies or corporations. "It may therefore be taken to be established," says Lindley on Partnership, 864, "that a partnership or company not liable on a contract when entered into does not become liable upon it by reason of having benefited by it; and further, that a company or partnership which has benefited by a contract, not binding on it, is not to be deemed to have thereby ratified that contract, nor to have incurred an obligation *quasi ex contractu*, similar to that which would have been incurred if the contract had been binding on the firm or company in the first instance."

As the giving of the note was in this case contemporaneous with the creation of the debt, the presumption, we think, was, that the note was discounted, or that it was given as a consideration, and not as a security for the money.

But this is only a presumption of fact, and may be rebutted by showing the actual intent of the parties to have been otherwise. It is not disputed that Van Haagen and Hunter had the power to bind the Company for borrowed money; it was competent, therefore, for the National Security Bank to show that the money was, in fact, loaned to the Company for the Company's use; that the transaction was not the discount of a note, but a loan of money to the Company, the note being in the nature of a collateral security for the repayment thereof. *Maffet v. Leuckel*, 98 Pa. 468.

In the case cited, the facts found by the referee were as follows: Maffet & Rhoads, the defendants, during the year 1866 were partners, engaged in building a section of the Lehigh & Susquehanna Railroad. Rhoads applied to the plaintiff, Leuckel, for \$200, representing that he wished the same for the purpose of paying the men in the defendants' employ, and thereupon the said amount was advanced by the plaintiff, and the sum was used by Rhoads for the purpose mentioned, he giving the plaintiff his own individual note for the amount. Suit was brought, not upon the note, but for the recovery of the money advanced, and judgment was entered for the plaintiff. When the cause came here this court, in a *per curiam*, said: "There was nothing in the form of the note produced in evidence to preclude the plaintiff from showing that it was given for a partnership debt; that it was not accepted in satisfaction, but merely as a collateral security. It matters not that the making of the note was contemporaneous with the partnership debt. On the facts found by the referee we are of opinion that the judgment was right."

There can be no doubt but that the money in both cases at bar was borrowed for the use of the Company. Both loans were solicited in the first instance by Van Haagen, to provide means for the purchase of stock and materials for the Company. It is of no consequence that the money was put to the credit of John Hunter, for John Hunter was the Company's banker. He owned practically all of the stock, and the Company's funds were, up to that time at least, supplied from, and deposited in, his private account. The testimony of Van Haagen, Lambert and Connellan in the one case, and of Van Haagen, McGuire, Connellan and Cox, the cashier, in the other, is clear and convincing on this point. The only contradiction is by John Hunter, whose answers to questions put to him are so manifestly equivocating and evasive as to render his testimony very unsatisfactory. But from the tenor of the testimony, as a whole, there can be no conclusion of fact more clear than that both of these loans were effected for the use and benefit of the Van Haagen Soap Manufacturing Co. It is equally clear, not only from what occurred at the time, but before, and after, that this was the understanding of all the parties concerned, not only of Van Haagen, Hunter and the Soap Manufacturing Company, on the one side, but of the Bank and Lambert on the other; and also,

that the money ultimately went into the Company and was used in the business. It is unnecessary for us to refer in detail to the evidence. In so doing we would be obliged to extend the bounds of this opinion to an undue extent. What we have said is the result of a careful study of the testimony, and it is only required that we should state our conclusions.

In rebuttal of the presumption which is supposed to arise, in such a case, we have to begin with the fact that the loans were for the Company's use, that all the parties concerned so understood it and that the money was in fact so applied. As to the contemplated liability of the Company to repay the debt, we may, in addition to what has already been said, refer briefly to the testimony. The bank officers regarded Van Haagen and Hunter as the Company. Mr. Gilbach, at the time of the loan, when Cox, the cashier, expressed surprise that the Company's name was not on the paper, replied that the parties to the note were the whole Company. When McGuire came to renew the note, the last time, he asked Cox if the Bank would be willing to renew it. Mr. Cox inquired how the Soap Manufacturing Company was getting along. McGuire replied that they were getting along very well, and that the "Company" would not want the note renewed again; that this was the last. Mr. Connellan, the assignee, testified that shortly after his appointment as assignee, in June, 1889, he had a conversation with Mr. Hunter in the president's room of the Keystone National Bank, and that Hunter said he was very sorry for the National Security Bank; that they had been very kind to him, and the note, which they discounted at the request of Mr. Van Haagen, was really for the benefit of the Van Haagen Soap Manufacturing Co., and should be a claim on the fund in his hands, as assignee. "He also told me," says Mr. Connellan, "there was another note, which had been given to Mr. Van Haagen's son-in-law, Mr. William H. Lambert, and that that should also be a claim on this fund. I told him that I had been over the books of the Company, and that, on the face of the matter at least, the Company was not liable for this loan. He said that Mr. Lambert, at the time he took this note, thought that he, Mr. Hunter, was stronger than the Company, and that that was why the note was signed that way, instead of the Company's note being given."

That the notes were taken for greater security than if signed by the Company cannot be questioned, but if the contract was with and for the Company, the notes would stand as a collateral security for the Company's debt. The learned judge of the court below was of opinion that the testimony was sufficient to rebut the presumption that the notes were taken as a consideration for, or in payment of, the debt, and we are satisfied that he was right.

*The decree of the Common Pleas is affirmed, and the appeal dismissed at the cost of the appellants.*



Re ESTATE OF James M. VANCE, Deceased.

APPEAL OF CONTRIBUTORS TO  
PENNSYLVANIA HOSPITAL.

APPEAL OF James Vance QUINTON.

APPEAL OF PRESBYTERIAN HOSPITAL in Philadelphia.

(....Pa....)

1. The election of a widow to take against her deceased husband's will is equivalent to her death as respects the payment of legacies and the distribution of that part of the estate which is to be distributed under the will upon the happening of that event.
2. The residuary estate must bear the whole loss caused to the beneficiaries by the widow's election to take against the will, and cannot share it with specific legacies if there remains enough to pay the latter, unless there is a plain intention in the will that the residuary legatee is a preferred object of testator's bounty.

(Sterrett, J., dissents.)

(April 6, 1891.)

**A** PPEALS from a decree of the Orphans' Court for Philadelphia County dismissing exceptions filed to the distribution ordered by the adjudication in the matter of the account of the executors of James M. Vance, deceased. *Reversed.*

James M. Vance died July 23, 1887, distributing his estate of upwards of \$400,000, by will, as follows: The real estate and the income of his personal estate, after paying certain annuities, to his wife for life. At her death he gave certain specific legacies to nephews and charities, and directed that the residue be distributed among his brothers and sisters and their heirs.

The widow elected to take against the will and was awarded one half of the personal estate absolutely.

The auditing judge decreed that the pecuniary legacies should abate one half in common with the residuary estate and should be paid immediately, and directed distribution on that basis.

These appeals call in question the legality of such distribution.

Messrs. E. F. Hoffman and Biddle & Ward for appellants.

Mr. John G. Johnson for appellees.

*NOTE—Wills; rule of election between inconsistent rights.*

A person cannot accept and reject the same instrument; and this is the foundation of the Law of Election. *Morrison v. Bowman*, 29 Cal. 348; *Apperson v. Bolton*, 29 Ark. 418; *Alling v. Chatfield*, 48 Conn. 278; *George v. Bussing*, 15 B. Mon. 558; *Young v. Pickens*, 49 Ind. 28; *Metteer v. Wiley*, 34 Iowa, 214; *Smith v. Guild*, 34 Me. 447; *Weeks v. Patten*, 18 Me. 42; *Parker v. Sowerby*, 4 DeG. M. & G. 321; *Padbury v. Clark*, 3 Macn. & G. 208; *Dummer v. Pitcher*, 3 Myl. & K. 202; *Ustick v. Peters*, 4 Kay & J. 427; 1 Pom. Eq. Jur. 535.

The doctrine of election is the same when applied to a widow claiming a devise under the will of her husband, as it is when applied to any other devisees in the will. *Leonard v. Steele*, 4 Barb. 22.

The election which a widow is required to make is between rights, and not between benefits; and the choice does not depend on the mention or omission of her in the will, or on the quantum of benefits she receives or renounces under it. *Cunningham's Estate*, 187 Pa. 621.

The right of a widow to elect between her statutory dower or under her husband's will is a strictly personal right, which can be exercised by her alone, and expires with her death, although it occurs before the expiration of the time for election. *Fosher v. Guilleams*, 120 Ind. 173, citing 1 Woerner, Administration, 270.

A widow surrendering rights under Intestate Law, and accepting under will, is treated as a purchaser. *Finney's App.* 3 Cent. Rep. 594, 113 Pa. 11; *Reed v. Reed*, 9 Watts, 203.

*Election to take under will.*

The widow is deemed to have elected to take under the will, unless within one year after her husband's death she begins proceedings to recover her dower, or enters on the lands assigned for dower. *Lewis v. Smith*, 9 N. Y. 504, 511; *Jackson v. Churchill*, 7 Cow. 287; *Bull v. Church*, 5 Hill, 208; *Church v. Bull*, 3 Denio, 430; *Leonard v. Steele*, 4 Barb. 20; 1 Pom. Eq. Jur. 532.

By electing to take under the will a widow accepts the benefit conferred by it, and at the same time signifies her intention to assume the trust im-

posed, under which she is legally responsible only for the original amount,—the principal. *Cassidy v. Hynton*, 6 West. Rep. 808, 44 Ohio St. 530.

Where a widow in Indiana elected to take under her husband's will, and gave a note for a debt against the estate, which was a charge on the property, her liability on the note is not affected by subsequent proceedings whereby the court releases her from her election to take under the will. *Kayser v. Hodopp*, 116 Ind. 428.

The fact that the widow did not renounce the provisions in a will only bars her as to those interests as to which such provisions take effect. *Ward v. Ward*, 9 West. Rep. 173, 120 Ill. 111.

A widow who has acquiesced in a sale of lands under the will of her deceased husband, and made claim to the proceeds, thereby relinquishes her dower, but the fund is to be treated as still realty for the purpose of determining the quantum of her interest therein, which is for life only. *Cunningham's Estate*, 137 Pa. 621.

She may release all her claims, both at law and under the will, for a specific sum, payable out of the general residue. *Stewart's App.* 1 Cent. Rep. 580, 110 Pa. 410, citing *Sandoe's App.* 65 Pa. 314; *Galagher's App.* 87 Pa. 200.

An election to take under the law, instead of under the will of her husband, is not a contest of his will, within the meaning of Civil Code, making the probate of the will conclusive unless contested within one year. *Re Gwin's Estate*, 77 Cal. 813.

She is not estopped to make her election to take under the law by causing the will to be probated and becoming the administratrix thereof. *Ibid.*; *Frey's Estate*, 53 Cal. 958. See *note* to *McQuerry v. Gilliland* (Ky.) 7 L. R. A. 454.

*Election, how made.*

In making her election the widow must either acquiesce in her husband's will, or disregard it and assert her legal rights, there being no middle course. *Cunningham's Estate*, 137 Pa. 621.

Whether her filing of a formal paper was voluntary or under the stress of an order from the court is immaterial, such writing, although proper for convenience and certainty of evidence, being otherwise unimportant. *Ibid.*, citing *Light v. Light*, 22

Mitchell, J., delivered the opinion of the court:

These appeals are ruled by *Ferguson's Estate* (Pa.), 27 W. N. C. 63, decided since the adjudication in the court below. That case was the necessary sequence of *Coover's App.*, 74 Pa. 143; *Gallagher's Estate*, 76 Pa. 296, and *Heineman's App.*, 92 Pa. 95; and these appeals might be rested on its authority. But out of deference to the opinion of the learned court below and the argument of counsel, we have reviewed the ground there taken as if the question were still open.

The widow's statutory rights in her husband's estate are paramount to his will, and he is presumed to know that fact. It is therefore not accurate to say that his whole scheme of disposition of his property is destroyed by the widow's election. It is disarranged *pro tanto*, but, in the absence of any reference to such contingency or provision for it in the will, there is ordinarily nothing on which to found a presumption that he would have made any specific difference in distribution had he known she would exercise her right—certainly not that he would have decreased any of the defi-

nite pecuniary legacies to swell the amount going at the end of the list to the residuaries. No court is authorized to make a new distribution for the sake of equality. The testator's scheme must be carried out as he made it, except so far as that has been rendered impossible by the widow's action, and in so far a court of equity interferes to preserve an intent which would otherwise be sacrificed. Such interference is the pure creation of equity, and had its origin in the doctrine of equitable election, which compelled one taking a benefit under a will to acquiesce in other provisions of the same instrument which for any reasons were not binding upon him. Equity compelled him to elect, and if he chose to assert his prior rights against the will, the chancellor treated the provision of the will in his favor as forfeited, and then used the benefit created by such provision as a fund to be administered so as to carry out as nearly as might be the purposes of the testator, which would otherwise fail. In England the point arose most frequently in cases where the testator, having only a life estate or a qualified interest or power over the subject, undertook to dispose of a

Pa. 407; *Bradford v. Kents*, 43 Pa. 474; *Kennedy v. Johnston*, 65 Pa. 451.

Her right of election to take is a statutory privilege which must be exercised in substantial compliance with the statute. *Fosher v. Gulliams*, 120 Ind. 172; *Ewing v. Ewing*, 44 Mo. 22; *Dougherty v. Barnes*, 64 Mo. 159.

She may make her election to claim dower, some years after her husband's death, even where she has received that which was intended to be in lieu of dower, if she acted in any degree in ignorance of her rights. But where she has acted with a full knowledge of her rights, in the acceptance of the testamentary provision instead of her dower, she will be bound by her acceptance. *United States v. Duncan*, 4 McLean, 100; *Re Nagel's Estate*, 35 N. Y. S. R. 245.

The object of the Statute undoubtedly was to compel the widow to make her election to take her dower, instead of the jointure or other provisions made in lieu thereof, within a limited period after the death of her husband. *Akin v. Kellogg*, 39 Hun, 200.

A widow cannot take a portion of her deceased husband's real estate under the will, and also her distributive share under the statute, when to do so would be to take all the real estate, and defeat a devise to a daughter of a portion thereof. *Severson v. Severson*, 68 Iowa, 656.

By electing to take under the will giving her a life estate, she divests herself of her statutory right to take one third of his lands, but not of her right of inheritance as his heir in respect to a portion of the land as to which he died intestate because a devise thereof had lapsed. *Collins v. Collins* (Ind.) Nov. 11, 1890.

#### *Election, how manifested.*

Where a party is bound to elect between two inconsistent rights, and the contention is that an election has been made by conduct, it must be shown that the party acted with a knowledge of his rights and the real value and condition of the property; that, knowing that he could not hold the property which he was entitled to, and that given to him by the will, he acted with the intention to relinquish the former and accept the latter. 1 Pom. Eq. Jur. 560; *Wilson v. Thornbury*, L. R. 10 Ch. 239; *Dillon v. Parker*, 1 Swanst. 359, 373, 380; *Padbury v. Clark*, 2 Macn. & G. 298; *Spread v. Morgan*, 11 H. L. 19 L. R. A.

Cas. 536; 1 Jarman, Wills, 471; 2 Jarman, Wills, Band. & T. ed. 47; *Macnet v. Macnet*, 29 N. J. Eq. 54; *Dabney v. Bailey*, 43 Ga. 521; *Richart v. Richart*, 30 Iowa, 466.

Where the wife and children accept the provisions of the will and carry them out by partition, it will be held, after the death of the wife, that she elected to take under the will, and the remainder given after her life estate will be valid. *Rogers v. Trevathan*, 67 Tex. 403.

The portions of the real estate which the son was entitled to receive under testator's will, at different periods of his life, would thereupon be segregated from the estate, and the income therefrom would be no longer paid to the beneficiaries named in the will. *Ford v. Ford*, 70 Wis. 12.

Where a deed was made to plaintiff's husband, and her own name omitted therefrom, which she did not know until his death, by accepting under his will a devise of dwelling-house and other property, with the sum of \$10,000, in lieu of dower, the rest of his estate being all willed to others, she must be held to have elected to take under the will, and thereby lost her right to resort to the other remedy. *Haack v. Weiken*, 43 Hun, 483. See *Theilhuson v. Woodford*, 13 Ves. Jr. 224; *Ker v. Wauchope*, 1 Bligh, 21, 22; *Tibbits v. Tibbits*, 19 Ves. Jr. 633; *Havens v. Sackett*, 15 N. Y. 355.

#### *Acts which determine an election.*

The acts which determine an election are generally of a very decided character. Receiving of a legacy for five years, entering on property and receiving the rents and profits, and an entry into possession and exercising acts of ownership, were held sufficient to constitute an election. *English v. English*, 3 N. J. Eq. 512, 29 Am. Dec. 736; *Ardesoiffe v. Bennet*, 2 Dick. 463; *Buttrick v. Broadhurst*, 1 Ves. Jr. 178; *Northumberland v. Aylesford*, Amb. 640; *Sanger v. Wood*, 3 Johns. Ch. 416, 1 L. ed. 603.

Where there is no obligation to elect, conduct indicating an election is explainable and acts done under it revocable. *King v. Legrange*, 80 Cal. 323.

As to mistake of party's legal rights, see *Light v. Light*, 21 Pa. 407; *Bradford v. Kents*, 43 Pa. 475; *Adsit v. Adsit*, 2 Johns. Ch. 448, 1 L. ed. 446.

To constitute an election by the wife to take under the will of her husband instead of her interest in the community property, it must appear that

greater interest to the prejudice of the legatees' legal right. *Streetfield v. Streetfield*, Cas. t. Talb. 176, 1 White & T. Lead. Cas. in Eq. 897; and see the cases cited in Story, Eq. §§ 1082, 1083, *note*.

In this country such cases are rare; but the statutory rights of widows as to personalty, as well as dower, have frequently created the same situation, and the same doctrine has been uniformly applied. It was long a debatable question whether the refractory legatee forfeited absolutely all the benefits intended for him by the will, or only so much as might be required to make good that part of the scheme of the testator which his action had disappointed. The question can hardly be said to be entirely at rest yet; but though the foundation of the chancellor's action is a forfeiture by the assertion of a conflicting right, yet the better opinion now certainly is that such forfeiture will be enforced only so far as may be necessary to make good the failure of the testator's other intent; in other words, it is forfeiture only for the purpose and to the extent of compensation.

The American cases, as already noted, arising

chiefly from the assertion by a widow of her statutory rights against the provisions of the husband's will, have uniformly treated the benefits intended by the will for her as a fund which could be sequestrated, and used as a trust to carry out the other provisions of the will. But the precise limits of the interference of equity, by way of rearrangement of the distribution of the decedent's estate, do not appear to have been much discussed. None of the cases cited by counsel touch the exact point, how far equity will interfere in behalf of mere residuary legatees, and such research as I have had opportunity to make has found but one. In *Firth v. Denny*, 2 Allen, 468, there was a fund provided for the widow for life, and after her death one half of it to certain specified legatees, and the residue of the estate, including the other half of the widow's fund, to trustees for charity. The widow elected to take against the will, and thereby took more than the fund set apart for her, but there was enough estate to pay all the definite legacies and leave a balance for the residuaries. The court held that the ultimate loss must of course fall on the residuaries, but

she accepted some benefit under the will inconsistent with her claim to one half of the estate. *Mayo v. Tudor*, 74 Tex. 471, citing *Philleo v. Holliday*, 24 Tex. 45; *Little v. Birdwell*, 37 Tex. 691; *Morrison v. Bowman*, 29 Cal. 347; 4 Kent, Com. 68.

If the widow accepts devises and bequests provided for her by the will of her husband, which disposes of the entire community property, she thereby makes her election and affirms the disposition made by her husband of the community property. *Re Stewart*, 74 Cal. 66, citing *Noe v. Spilvaks*, 54 Cal. 502; *Morrison v. Bowman*, 29 Cal. 347.

An agreement by the widow and the sons, who were the beneficiaries in a will, to sell the house, not carried out, is not an election by the legatees to take the land instead of the proceeds. *Baldwin v. Vreeland*, 9 Cent. Rep. 667, 43 N. J. Eq. 443. See *English v. English*, 3 N. J. Eq. 504.

#### Notice of election by widows.

Where the widow gives a written notice of such election to the person who is in the possession of the land in which she is entitled to dower, or is in possession of the rents and profits thereof, claiming title to the land, and such person thereupon admits her right, and voluntarily pays her a part of the rents and profits of the premises as and for her dower therein, it must, in this court at least, be considered as an assignment of her dower, or an entry on the lands, within the intent and meaning of the statutory provision. *Zaegel v. Kuster*, 51 Wis. 22.

Where a widow, within a week after the filing of letters testamentary, filed in the probate office a paper stating that she "waives and declines to accept" the provision of her husband's will, and "hereby gives notice that she will claim her dower," it was an election to claim dower, and not merely a waiver of the will; and a subsequent written claim, filed more than two years thereafter, claiming the statutory interest, cannot control the first election. *Mathews v. Mathews*, 2 New Eng. Rep. 357, 141 Mass. 511.

Where she fails to file her election to accept the provision made for her in the will, within the six months after notice, as required by law, her interest in the personal property under the will being only for life, it is subject to distribution as if there had been no will. *Re Foster's Will*, 76 Iowa, 366.

Under the Wisconsin Statutes notice of the widow's election must be filed within one year after the death of the husband; and such time is not extended by a stay of proceedings during the pendency of an appeal from an order refusing to admit the will to probate. *Albright v. Albright*, 70 Wis. 523.

A widow for whom her husband made provision in his will in lieu of dower is bound to know that the law compels her to make her election within a year, and ignorance of the law is no excuse. *Akita v. Kellogg*, 48 Hun, 459, affirmed in 119 N. Y. 441.

#### Widow, when put to her election.

To exclude the widow from her legal right either there must be an express declaration to that effect or it must clearly appear that it was testator's intention to give her some interest wholly inconsistent with the enjoyment of that legal right. *Young v. Boyd*, 64 How. Pr. 215; 1 Pom. Eq. Jur. 541; *Fuller v. Yates*, 6 Paige, 325, 4 L. ed. 446; *Sanford v. Jackson*, 10 Paige, 293, 4 L. ed. 971; *Smith v. Kniskern*, 4 Johns. Ch. 2, 1 L. ed. 745; *Savage v. Burnham*, 17 N. Y. 561, 577; *Tobias v. Ketchum*, 23 N. Y. 319, 323; *Vernon v. Vernon*, 23 N. Y. 361, 363; *Lefevre v. Lefevre*, 59 N. Y. 435; *Leonard v. Steele*, 4 Barb. 20; *Leaser v. Leaser*, 13 Barb. 106; *Mills v. Mills*, 23 Barb. 454; *Vedder v. Saxton*, 46 Barb. 183; *Evans v. Webb*, 1 Yeates, 424; *Hamilton v. Buckwalter*, 2 Yeates, 389; *Duncan v. Duncan*, Id. 303; *Webb v. Evans*, 1 Binn. 555, 572; *Cauffman v. Cauffman*, 17 Serg. & R. 16, 26; *Preston v. Jones*, 9 Pa. 459, 460; *Fulton v. Moore*, 25 Pa. 468; *Cox v. Rogers*, 77 Pa. 160; *Giddings v. Eastman*, 5 Paige, 599, 3 L. ed. 583.

It requires a strong, unequivocal expression or indication of an intent on the part of the testator to bestow the entire property, and not simply his own interest in it, or to bestow the property freed from its incumbrances and charges, in order to raise the necessity for an election between her dower and the legacy in the will. *Randlife v. Parkyns*, 6 Dow. 135; *Maddison v. Chapman*, 1 Johns. & H. 470; *Wintour v. Clifton*, 8 DeG. M. & G. 641; *Dummer v. Pitcher*, 2 Myl. & K. 262, 5 Sim. 36; *Shuttleworth v. Greaves*, 4 Myl. & C. 36; *Stephens v. Stephens*, 1 DeG. & J. 62; *Wilkinson v. Dent*, L. R. 6 Ch. 389; *Grisell v. Swinhoe*, L. R. 7 Eq. 391; *Havens v. Sackett*, 15 N. Y. 365; *Lewis v. Smith*, 9 N. Y. 502; *Bull v. Church*, 5 Hill, 206; *Sanford v. Jackson*, *supra*; 1 Pom. Eq. Jur. 533; *Fuller v. Yates*, *supra*.

ordered the payment of the definite legacies to be postponed until the actual death of the widow, and the interest upon the fund in the meantime to be paid to the residuaries; and this was done without question, apparently, though the opinion says: "It does not appear exactly to what extent the election made by the widow left the residue of the estate less than it would have been if she had accepted the provision made in the will in her behalf." It was argued by distinguished counsel that the special circumstances showed that the residuary legatees, though lowest in the list, were in truth the chief objects of the testator's bounty, and as they seem to have been given the bulk of the estate there was fair argument for such view; but the court did not put its

decision on that ground. The opinion is not fortified by the citation of a single authority, nor is it reasoned out from principles. As already said, the result seems to have been accepted as the unquestionable consequence of the mere fact of the disappointment of the residuary legatees in the amount of the fund coming to them. It may be, however, that the doctrine of acceleration of the time of payment of legacies dependent on the life of the widow, by her election to take against the will, does not obtain in Massachusetts. The opinion of the court in *Brandenburg v. Thorndike*, 189 Mass. 103, looks in that direction, and if so, it is clear why the judge in *Firth v. Denny*, *supra*, thought it unnecessary to go into reasons for the decision. It would, however, at

A bequest, "I give and bequeath unto my beloved wife one-half part of my whole estate, according to law, with the exception of her interest in two indentured servants, and one bay mare hereinafter mentioned," will put the widow to her election. *Warren v. Morris*, 4 Del. Ch. 238; *Burton v. Burton*, 4 Harr. (Del.) 38; *Horsey v. Horsey*, 1 Houst. 438.

The only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility arising on the face of the will, between a claim of dower and a claim to the benefit given by the will. *Konvalinka v. Schlegel*, 6 Cent. Rep. 38, 104 N. Y. 130.

*Provisions in will must be inconsistent with dower right.*

Where the provisions in a will are clearly inconsistent with the right of dower, the widow will be put to an election. It must be reasonably clear that the provisions were intended in lieu of dower. *Wright v. Jones*, 2 West. Rep. 354, 105 Ind. 17, citing *Kelly v. Stinson*, 8 Blackf. 387; *Young v. Pickens*, 49 Ind. 23; *Holdich v. Holdich*, 3 Younge & O. 18; *Strahan v. Sutton*, 3 Ves. Jr. 242; *Lasher v. Lasher*, 12 Barb. 108; *Carroll v. Carroll*, 20 Tex. 731; *Fuller v. Yates*, 8 Paige, 325, 4 L. ed. 446; *Brown v. Caldwell*, 1 Speer, Eq. 322; 2 Redf. Wills, 738; 1 Pom. Eq. Jur. 541. See *Bond v. McNiff*, 3 Jones & S. 94; *Sanford v. Jackson*, 10 Paige, 271, 4 L. ed. 974.

So where the management of the estate and the power to make repairs are given to trustees they are inconsistent with the right of dower. *Wright v. Jones*, 2 West. Rep. 354, 105 Ind. 17, citing *Parker v. Sowerby*, 4 DeG. M. & G. 321; *Butcher v. Kemp*, 5 Madd. Ch. 61; *Roadley v. Dixon*, 3 Russ. 122; *Miall v. Brain*, 4 Madd. Ch. 119; *Goodfellow v. Goodfellow*, 18 Beav. 354.

The terms and provisions of the will must be totally inconsistent with her claim of dower in the property in which such dower was claimed; so that the intention of the testator in relation to some part of the property devised to others would be defeated if such claim was allowed. *Church v. Bull*, 3 Denio, 431; *Irving v. DeKay*, 9 Paige, 533, 4 L. ed. 805.

The devises in the will must be so repugnant to the claim of dower that they cannot stand together. *Lewis v. Smith*, 9 N. Y. 511.

Where the provisions of the will manifest a clear and unequivocal intention on the part of the testator to bar his wife's dower, it is sufficient, without express words, to put her to her election between the provision made for her in the will and that made for her by law. *Stark v. Hunton*, 1 N. J. Eq. 216; *Colgate v. Colgate*, 23 N. J. Eq. 372; *Stewart v. Stewart*, 31 N. J. Eq. 309; *Brokaw v. Brokaw*, 4 Cent. Rep. 845, 41 N. J. Eq. 304.

Although the provisions in a will are not declared

to be in lieu of dower, yet an authority given to the executors to sell the real estate not devised to the wife, at a price fixed, is inconsistent with a claim for dower, and the widow is put to her election. *Vernon v. Vernon*, 53 N. Y. 332.

Where the will worked an equitable conversion of the realty into personalty, and vested the executors with the title, the income of a portion of the proceeds, when sold, to be paid to the widow for life, the remainder of the proceeds being absolutely disposed of the widow must elect. *Young v. Boyd*, 64 How. Pr. 315; *Savage v. Burnham*, 17 N. Y. 561; *Tobias v. Ketchum*, 33 N. Y. 319; *Adett v. Adett*, 2 Johns. Ch. 443, 1 L. ed. 446.

*When not put to her election.*

A devise to the widow for life, or during widowhood, of a dwelling-house, with bequest of certain household furniture and cattle, dividing the rest of the real and personal estate between testator's two sons, who were to aid in the widow's support, on request, does not put the widow to her election. *Jackson v. Churchill*, 7 Cow. 237, 17 Am. Dec. 513; *Kennedy v. Nedrow*, 1 U. S. 1 Dall. 413, 1 L. ed. 303; *Evans v. Webb*, 1 Yeates, 494, 1 Am. Dec. 303.

A devise to the wife of lands in another State will not bar her dower to lands lying in this State. *Van Arsdale v. Van Arsdale*, 26 N. J. L. 415; *Smith v. Kniskern*, 4 Johns. Ch. 9, 1 L. ed. 745; *Harrison v. Harrison*, 1 Keen, 705; 3 Story, Eq. § 1003, note 4; *Staigg v. Atkinson*, 4 New Eng. Rep. 351, 144 Mass. 554.

Nor would it affect her right of dower in other lands, which the husband had alienated during coverture. *Braxton v. Freeman*, 6 Rich. L. 33, 37 Am. Dec. 776; *Cunningham v. Shannon*, Eq. Mas. H. 407; *Borland v. Nichols*, 13 Pa. 33, 51 Am. Dec. 573; *Gray v. McCune*, 23 Pa. 449.

In case of a legacy to the widow with no other mention of her in the will and nothing which by common law or under the statutes of this State put the widow to an election, she was entitled to the legacy in addition to her rights at law in the real estate of her husband. *Brown v. Brown*, 55 N. H. 103; *Parker v. Sowerby*, 4 DeG. M. & G. 321; *Jackson v. Churchill*, 7 Cow. 237; *Strahan v. Sutton*, 3 Ves. Jr. 242; *Ellis v. Lewis*, 3 Hare, 310.

Where the testator gave to his wife a legacy of \$400 and made no other mention of her in his will and, after other bequests, made B his residuary legatee, the widow was not put to an election, but was entitled to the legacy in addition to her rights at law in the real estate of her husband. *Brown v. Brown*, *Parker v. Sowerby*, *Jackson v. Churchill* and *Ellis v. Lewis*, *supra*; *Bull v. Church*, 5 Hill, 206; *Fuller v. Yates*, 8 Paige, 325, 4 L. ed. 446; 3 Story, Eq. § 1003; 2 Redf. Wills, chap. 2, § 6.

Where the testator did not declare in express terms that the devise should be in lieu of dower, nor is any such intention deducible by clear and

the same time, be ample reason why *Firth v. Denny* should not be authority in this State, where the doctrine of acceleration is firmly established. *Coover's App.* 74 Pa. 143.

But the time of payment being held to be accelerated, sound reason requires us to hold that the widow's election shall be treated in all its results as equivalent to her death. The testator's disposition of his estate is interfered with *pro tanto*, but the court must carry it out as nearly as possible in all other respects. No departure from it can be admitted except from necessity, and then only to the extent that necessity absolutely requires.

The amount of the legacies actually coming to the legatees is only one incident of a will. The order of precedence is another, and it does

not seem necessary that the latter should be disturbed because of a change in the former. Hence no provision of the will ought to be interfered with by the court except for the preservation of one of superior, or at least equal, rank in the testator's scheme, and as residuary gifts are from their nature ordinarily the lowest in rank, no others can be interfered with for the sake of benefiting them. From their very definition they come in last, and the testator, with knowledge of this fact, declares that they shall get nothing until after all others are paid in full. Mere diminution of the amounts coming to the residuaries does not in any way justify interference in the regular and established order of priority. When, therefore, it is said, as in *Sandoe's App.*, 65 Pa. 314, that equity will

manifest implication from the provisions of the will, she is not compelled to elect between her dower and the devise in her favor, but is entitled to both. *Stewart v. McMartin*, 5 Barb. 446; *Wood v. Wood*, 5 Paige, 593, 3 L. ed. 844; *Tompkins v. Fonda*, 4 Paige, 448, 3 L. ed. 510.

Where a provision in a will is declared to be in lieu of any other interests which the widow might have in testator's estate, the declaration is a condition in her acceptance of the provision made for her: and her election to take under the will is, in legal effect, an abandonment of all other claims against the estate. *Langley v. Mayhew*, 3 West. Rep. 723, 107 Ind. 193. See *Morrison v. Bowman*, 29 Cal. 337.

A devise of the testator's whole estate to his widow for life, with remainder over, is not a provision in lieu of dower itself. *Lewis v. Smith*, 9 N. Y. 512.

But if her acceptance of his bounty be not repugnant to the provisions of the will, she might accept of the donation without the surrender of her right to the half of the community estate. *Morrison v. Bowman*, 29 Cal. 343.

If the husband makes provision for her by his will, and does not declare that it shall be in lieu of dower, she is, as a general rule, entitled to both the provision and dower. *Dodge v. Dodge*, 31 Barb. 417, 21 How. Pr. 65, 10 Abb. Pr. 405.

A will made in a State where a gift to the wife would be in addition to dower unless the contrary was expressed does not acquire a new meaning upon the subsequent removal of testator into a State where testamentary gifts are in lieu of dower, unless shown to be in addition to it. *Staigg v. Atkinson*, 4 New Eng. Rep. 351, 144 Mass. 584; *Holmes v. Holmes*, 1 Russ. & M. 600.

An estate for life given to a widow by will does not prevent her from taking dower, unless the claim for dower is inconsistent with, and will defeat, some provision of the will. *Howard v. Watson*, 78 Iowa, 223, citing *Dougherty v. Dougherty*, 60 Iowa, 677.

If no notice is served upon a widow, she is not bound to make any election, under Iowa Code, in order to enjoy the provision made for her in the will. *Howard v. Watson*, *supra*.

An annuity or rent charge in favor of the widow, upon lands in which she is otherwise dowerable, or upon real and personal property devised and bequeathed to others, is not in itself inconsistent with the widow's claim to dower in the same lands. 1 Pom. Eq. Jur. 551; *Lasher v. Lasher*, 13 Barb. 103; *Hatch v. Bassett*, 53 N. Y. 359; *White v. White*, 18 N. J. L. 203, 211.

Where the annuity abated, any election the widow had made should not impair her right to dower. *Hone v. Van Schaick*, 7 Paige, 233, 4 L. ed. 126, 20 Wend. 544; *Howland v. Hecksher*, 3 Sandf. Ch. 519, 7 L. ed. 943; *Hindley v. Hindley*, 29 Hun, 123 L. R. A.

313; *Manice v. Manice*, 1 Lana. 343, 43 N. Y. 303; *Akin v. Kellogg*, 39 Hun, 255.

Where a testator owning an estate in lands only for the life of another makes a will providing for the support during her life of his granddaughter, who was the owner of the estate in remainder, there is no case for an election by her. *Bairne v. Von Ahlefeldt*, 33 W. Va. 663.

A clause in a will "I give to my mother and to my aunts M. and S. jointly all my interest in the estate on Broad Street, in the City of Providence, where I now reside, to them, their heirs and assigns forever," will not put the widow to her election. The clause devises only the testator's interest, and his interest does not include her interest or right of dower. *Durfee, Petitioner*, 14 B. L. 54; *Charter v. Otis*, 41 Barb. 533; 2 Jarman, Wills, 5th Am. ed. 22 *et seq.*; *Drummer v. Pitcher*, 2 Myl. & K. 263, 274.

#### Effect of election by widow.

If a widow whose interest in the community property was devised by her husband has received no benefit under the will inconsistent with her right to claim one half, the heirs of one of the testator's children cannot complain of her election to take her share of the community property, on the ground that such children did not receive a full share of the estate. *Mayo v. Tudor*, 74 Tex. 471.

The provisions in the Mississippi Code for the renunciation by the widow of a devise or bequest, so that she may secure her dower right, apply only when she is a co-heir, and not where the testator devises only a part of his estate to her, leaving at his death no children or descendants of children. *Wall v. Dickens*, 66 Miss. 655.

The fact that the widow refuses to take under the will giving her a life estate, with remainder over to residuary legatees, will not invalidate the will as to the latter, who are entitled to take upon satisfying the widow's claim of dower and paying debts of the estate. *Re Rawling's Estate* (Iowa) Jan. 27, 1891.

Equity treats substituted devises and bequests to the widow as a trust in her for the benefit of the claimants disappointed by her election to take at law to the amount of their interest therein; and the court will sequester the benefit intended for the refusing wife, in order to secure compensation to those whom her election disappoints. *Batstone's App.* 126 Pa. 307, citing *Sandoe's App.* 65 Pa. 314; *Gallagher's App.* 87 Pa. 200.

Devises or bequests subordinate to a life estate in the widow and contingent upon her death, or payment of which is postponed until that time, become presently payable upon her election to take under the Intestate Laws; and such election is, in its effect upon all claims under the will, equivalent to her death. *Ferguson's App.* (Pa.) 37 W. N. C. 63; *Coover's App.* 74 Pa. 143.

sequester the benefit intended for the wife to secure provision for those who are disappointed by her action, the disappointment to be understood is the failure of the testator's intent in regard to other beneficiaries. These will be protected, not for their own sakes, but of necessity in order to preserve the wishes of the testator, and such necessity does not extend to the interference with any beneficiaries prior in rank for the sake of the residuaries. One of the chances the latter take from the nature of their position is that the share coming to them may undergo changes in amount before the period of distribution.

There is no force in the argument that the general pecuniary legatees have no cause of complaint at being postponed until the death of the widow, as their legacies by the terms of the will are not payable until that event; for neither are the residuary legatees. The advancement of the time of payment is the legal consequence of the termination of the purpose of the postponement, and both the definite and the residuary legatees share this advantage in common. To postpone the definite legatees and transfer the income of their legacies to the residuaries during the widow's life, is not in furtherance of any direction of the will, but in direct violation of the testator's intent that the definite legacies should be paid in full before the residuaries get anything. Nor is it in pursuance of the equitable doctrine of sequestration of the benefits intended for the widow, for, as already said, that never ought to reverse the testator's order of priority. Nor does it even accomplish, except by accident, its nominal purpose of preserving the relative amounts as they were at the testator's death. The exact figures in the present case we have not before us, but the possibilities of the plan adopted were shown very forcibly by the illustration of one of the appellant's counsel at the argument. If the general legacies were \$100,000, and the residue at the time of the testator's death \$5,000, the sequestration of the interest on the former for

the benefit of the latter would give the latter an income of one hundred per cent a year during the widow's life. Of course no court of equity would apply the plan without modification to such a case, and the omission of the court in *Firth v. Denny*, *supra*, to require the exact figures was probably because it was understood all around that even with the income during the widow's life the residuaries would still be the losers. But such a possible result could only be avoided by a balancing of accounts in each case that would be beyond the sphere even of a court of equity. How far a sum in hand is preferable or otherwise to a larger sum at an indefinite future date is a problem with too many elements of personal preference, necessity and circumstance, to be solved by a court upon the rates of interest and tables of the expectancy of life. As said in *Ferguson's Estate*, *supra*, the law must have a settled and uniform rule, and it is that as to provisions in a will for legacies subordinate to a life interest in the widow and contingent upon her death, or payment of which is postponed till then, her election to take against the will is equivalent to her death. By such election the widow takes her share as if the husband had died intestate, and the will then operates on the residue of the estate precisely as if the widow were dead. A court of equity will interpose, if necessity requires, to preserve the intention of the testator from destruction, but such interposition never should take place in favor of a subordinate as against a preferred or superior intent, and therefore never in favor of a residuary as against a definite legatee unless upon a plain implication in the will that the residuary legatee was in fact a preferred object of the testator's bounty. There is nothing in the will of the testator, Vance, to require any departure from the general rule thus expressed.

*Decree reversed, and record remitted for distribution to be made as herein indicated.*

*Sterrett, J., dissents.*

## ALABAMA SUPREME COURT.

James T. HOLLAND, Admr., etc., *Appt.*,  
v.  
TENNESSEE COAL, IRON & R. CO.

(....Ala....)

1. If work may be well done by unskilled and inexperienced persons, a master is not negligent in respect to his duty to other employes by employing them.
2. Evidence that many well regulated furnaces habitually employ inexperienced men for a particular service is admissible on the question of negligence in employing such men for that kind of work in a furnace.
3. A master need not instruct his employes as to an open and unobscured

NOTE.—As to master's duty to instruct his servant, in regard to dangers incident to the employment, see *notes to Brennan v. Gordon* (N. Y.) 8 L. R. A. 818; *Brazil Block Coal Co. v. Gaffney* (Ind.) 4 L. R. A. 880.  
12 L. R. A.

danger from a boiler of iron so situated that the melted iron would flow into the trench where the men are working, if a wall of earth between the trench and the boiler was broken through.

4. The danger of flying molten iron when a boiler of iron is punctured should be pointed out to employes working in a trench into which the iron would flow if a wall of earth was punctured, and who would be instantly enveloped by the flying metal if it should be thrown out.

5. The fact that one is panic stricken and his energies paralyzed by the awful nature of an impending catastrophe will not relieve him from the duty of exercising diligence in attempting to escape or condone negligence in case he is guilty of it, but it may be considered in determining what effort would amount to due diligence or what omission of effort would amount to negligence under all the circumstances.

6. An instruction subject to criticism in the abstract is not prejudicial if it was

correct when tested by the only evidence in the case to which it could relate.

(December 2, 1890.)

**A**PPPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

Defendant owned and operated a smelting furnace. Plaintiff's intestate was employed by defendant in the capacity of a stock-house man. Help was needed at the furnace to dig a trench to draw off a "boil" of iron, and the superintendent of the furnace sent to the stock-house for the needed assistance. Plaintiff's intestate and two other stock-house men were delegated for that service. The men so delegated were unfamiliar with the work assigned to them. Such work involved no special danger, as the trench is never dug so close to the "boil" but that a sufficient wall of earth is left between the "boil" and the trench to confine the molten metal until the men are out of the trench, when the remaining wall is punctured.

The superintendent directed the men how to do the work, and at the proper time told them to get out of the ditch, at the same time telling them not to puncture the wall confining the molten metal. Notwithstanding this instruction one of the men in some way did puncture it before the men were out of the trench, and the molten iron ran out and upon the men, burning plaintiff's intestate so severely that he died.

The further facts appear in the opinion.

*Messrs. J. M. Chilton and Cabaniss & Weakley*, for appellant:

The law imposes on the master the duty of seeing to it that only suitable and competent persons are employed to discharge his work, and that incompetent servants are not retained. This duty he owes to each of his servants, with regard to fellow servants, and is answerable for injuries resulting from his want of care or skill in these respects.

*Tyson v. South & North Ala. R. Co.* 61 Ala. 554; *Smoot v. Mobile & M. R. Co.* 67 Ala. 18; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Walker v. Bolling*, 23 Ala. 294; 7 Am. & Eng. Encyclop. Law, 838; Beach, Contrib. Neg. § 127.

It is not necessary in order to charge the master that he should have known of the incompetency of the servant. If by the use of due care and diligence he could have discovered it he is liable.

*Alabama & F. R. Co. v. Waller*, 48 Ala. 459; 7 Am. & Eng. Encyclop. Law, 832; Shearm. & Redf. Neg. 86.

If the master orders the servant into danger or into service other than that for which he is employed, his obedience will not, as matter of law, be negligence.

Beach, Contrib. Neg. 132; *Luebke v. Chicago, M. & St. P. R. Co.* 59 Wis. 127, 48 Am. Rep. 483.

The servant takes the risk of seen dangers only, and is entitled to have pointed out to him distinctly any danger connected with the employment which ordinary inspection and care on his part will enable him to avoid.

12 L. R. A.

Beach, Contrib. Neg. 132; *Smith v. Peninsular Car Works*, 60 Mich. 501, 1 Am. St. Rep. 542; 7 Am. & Eng. Encyclop. Law, 838.

*Messrs. Hewitt, Walker & Porter and R. H. Pearson* for appellee.

**McClellan, J.**, delivered the opinion of the court:

This is an action for damages for personal injuries to appellant's intestate resulting in his death. The complaint contains three counts, each of which relies upon the negligence of the defendant Company, and not upon that of fellow servants. The case is therefore not brought under the Employe's Act (§ 2590 *et seq.*, Code). The first count alleges that the defendant, being engaged in the business of operating a furnace for the purpose of smelting iron ore, so negligently conducted said business as to cause molten iron to come in contact with the person of plaintiff's intestate, inflicting injuries from which he died a few days afterwards. The second and third counts proceed on the theory that the defendant negligently employed incompetent servants in the particular work upon which they and the intestate were engaged at the time of the accident, and the injury resulted from the incompetency of these co-servants of the intestate. The trial developed three controverted issues: (1) whether defendant was negligent in employing stock-house men having no special knowledge, skill or experience to do the work in which the injury occurred; (2) whether defendant was negligent in failing to instruct said employes as to the perils incident to the work they were put to do; and (3) whether plaintiff's intestate was himself guilty of negligence which proximately contributed to the injury.

1. With respect to the care a master or employer must exercise in the selection of servants and in the use of machinery and appliances in his business, our own decisions, following long and well established principles, leave no room for doubt. The master is in no case an insurer of the absolute safety of the appliances and machinery employed in the business. He is in no case held to an undertaking to select absolutely competent and careful servants. The rule requires of him no more than the exercise of reasonable care in either case—such care only as men of reasonable and ordinary prudence exercise; and when he has done this he cannot be held responsible for injuries which result from the incompetency of servants, or latent defects in machinery so selected and employed. The only further duty then upon him is the exercise of care in ascertaining any incompetency of the servant or defect in the machinery which the service may develop, and thereupon discharging the one and discarding the other. The selection of a servant must, of course, be made with a view to the nature of the employment. If it involves special knowledge or experience, only men of special knowledge and experience should be employed. If the work may be well done by the unskilled and inexperienced, it cannot be said that the master was lacking in the measure of care he owes to other employes should he employ unskilled and inexperienced men upon it. *Mobile & O. R. Co. v. Thomas*, 43 Ala. 672;



*Smoot v. Mobile & M. R. Co.* 67 Ala. 18; *Tyson v. South & North Ala. R. Co.* 61 Ala. 354; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245.

2. The men employed in the work of cutting a trench for the purpose of drawing off the boil of molten iron were stock-house men. It appears that the ordinary duties of such men were not such as to afford them any training or experience with respect to the work these employes were put to do, and it did not appear in fact that they had had any experience or training. As bearing on the question of defendant's care and diligence in employing them for this purpose, evidence was received, against plaintiff's objection, that many well-regulated furnaces habitually employed this class of men for this particular service. The assignments of error bring under review the ruling of the court in this regard. It is admitted in argument, and fully established in our decisions, that the custom and usage of other well-regulated businesses of the like kind as to the use of certain machinery and mechanical appliances may always be adduced in evidence as tending to negative the charge of negligence when that charge is based upon the use of such machinery or appliances by the defendant. *Louisville & N. R. Co. v. Allen*, 78 Ala. 494; *Georgia Pac. R. Co. v. Propst*, 88 Ala. 518; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159.

But it is insisted that the same rule does not apply with respect to the employment of human beings. We are unable to perceive any sound reason for this insistence, at least as applied to this case. The presumption is that well-regulated furnaces exercise due care in the conduct of their business. If it is customary for them to employ a particular class of men for a particular purpose, the further presumption is that that class of men is competent for the work in hand; and their competency may be the result either of special knowledge or experience with respect to the particular thing to be done, or from the work being such as to require no special knowledge or experience. In either case, the fact of the custom or usage of prudently managed furnaces to employ that class of men is some evidence that the defendant Company was not guilty of negligence in their employment.

Whether the defendant was negligent or not in failing to notify and instruct the intestate and his fellow servants as to the dangers of the work they were directed to do depends upon the further consideration whether the peril involved in it was patent or latent,—such as could be seen and known by ordinary care and prudence in the use of the senses, or such as was obscured and could not be seen or appreciated. If the former, the law is well settled that the master need not advise his servants of its existence, and instruct them as to the means necessary to its avoidance, since they, equally with himself, are held to know both the fact of peril and how to avoid or escape it. *Wood, Mast. and S. § 836; Perry v. Marsh*, 25 Ala. 659; 2 Thomp. Neg. p. 971, § 2, p. 979, § 9; *Shearm. & Redf. Neg. § 203*. On the other hand, it is the imperative duty of the master to inform the servant of all latent dangers incident to the service, and instruct him as to their avoidance. *Wood, Mast. and S. § 854*, and authorities *supra*.

12 L. R. A.

The evidence tended in some degree to show two distinct elements of danger incident to the work upon which the plaintiff's intestate was engaged when the injury was suffered,—one open to ordinary observation and capable of being measured and judged of by men of no special knowledge or instruction in the premises; and the other latent in character, with nothing which could be seen and understood by the unskilled and uninstructed to give warning of its presence, or suggest means of avoiding it. The boil of iron, while its lower part had sunk down considerably—two and a half or three feet, may be—into the earth, yet protruded above the surface, and was visible to those engaged in cutting the trench. It was common knowledge, appreciable by inexperienced as well as experienced persons, that if the ditch was open entirely up to the melted mass, its bottom being below the lowest estimated point of the boil, the iron would immediately flow into and along the trench, thus imperiling those who should be in there at the time. This was the open and unobscured danger which was sought to be guarded against by leaving a wall of earth between the trench and the boil of from eight to twelve inches thick, the purpose being to break down this wall by piercing it with a long crow-bar after the laborers had left the trench. Of such a patent danger there was no duty on the defendant to give the employes warning. The other peril arose from the fact, supported by a tendency of the evidence here, that a boil of iron, upon being punctured and having its shell broken, bursts and throws out molten metal in all directions—"explodes," as some of the witnesses stated as to this one, though this term was said to be inapt and inaccurate by others. Of this peril,—the danger of this flying molten iron,—resulting from unseen and unappreciated conditions and forces, the inexperienced man would know nothing by the exercise of his senses. It was a state of things which would not address itself to his comprehension, and of which he could only come to a knowledge by being instructed in regard to it. We are of the opinion that plaintiff's intestate and his fellow servants should have been advised of this latent danger when they were put to work so near the boil as that the lack of ordinary prudence and care on their part might not only have started the flow of iron into the trench—this they could see and perhaps could have escaped from—but also have instantly enveloped them in the flying metal—which they could not anticipate, and from which there was no time to escape. *Smith v. Peninsular Car Works*, 60 Mich. 501.

Whether, in point of fact, however, this latent danger did exist, was a question for the jury. It was also for their determination whether, conceding its existence, the injury resulted from it, from the natural flow of the metal along the trench, or from both combined. They might have reached either one of the four possible conclusions in this connection. If they found the latent danger referred to did exist, then they could not have rendered a verdict against the defendant for negligence in failing to give notice of the patent danger, since no such duty rested on the defendant. If their conclusion was that, although the latent

peril was incident to the thing being done, yet that the men were burned to death by the metal flowing down along the ditch—the injury thus being produced by the patent danger, in respect to which there was no duty of instruction upon the defendant—it still cannot be said that the accident was chargeable to defendant's negligence in failing to give proper warning of the unseen peril, which did not cause the injury complained of. We assume that the jury were correctly instructed as to defendant's liability, if they found the existence of the unseen danger, that the injury resulted from it, and that there was a negligent failure on the part of those who represented the furnace company to instruct its servants in regard to it, since the record indicates nothing to the contrary. The instructions which were given, as shown by the record, for the defendant, and which proceeded on the theory, supported by one aspect of the evidence, that the only danger incident to the work was an open and unobscured one, or that whether the only one or not, it produced the injury, were to the effect that if the jury found the danger to be one that could be readily seen by common observation, and this danger was set in motion, so to speak, by an act of intestate's co-laborer, against which he had been warned and instructed, the defendant was not liable, etc., are correct expositions of the law applicable to that phase of the facts.

3. The action being for the negligence of the master, and not under the statute for that of a fellow servant, it follows, of course, that the defendant is not liable for an injury produced by an act of intestate's fellow servant, done not only beyond the scope of his employment, but against the express orders of the defendant's agent in charge of the work. We understand charges 1 and 2 to assert this doctrine. There was evidence tending to support the facts they hypothesize. If there was another state of facts which the evidence tended to support, and upon which the defendant would be liable for the act referred to, and the plaintiff apprehended the charges as given might mislead the jury by obscuring this other aspect of the evidence, he should have asked an explanatory charge, or an independent instruction, upon that phase; and, for aught the record shows, such a charge may have been asked and given.

4. It only remains to be considered whether the instructions given in respect of the alleged contributory negligence of plaintiff's intestate were correct. Charges 7 and 8 on this subject, to the effect, respectively, that the jury "cannot find for the plaintiff if you believe from the evidence that the injury to plaintiff's intestate was in part caused by his own negligence, and that such negligence on his part proximately

contributed to his injury," and that "it was the duty of plaintiff's intestate to have used due diligence in trying to get out of the way of the molten iron, when he saw it flowing towards him in the ditch (if you believe he saw it, or could have seen it by the exercise of due care), and if he failed to do so, and because of such failure he was burned and injured, then you must find for the defendant," are manifestly sound statements of the doctrine of contributory negligence. The fact, if it be one, that the intestate was panic-stricken, and his energies paralyzed, by the awful nature of the impending catastrophe, might be proper to be considered by the jury in determining what effort would amount to due diligence, or what omission of effort would be negligence under all the circumstances, but no such consideration can relieve from the duty of diligence on the one hand, or condone negligence on the other.

5. Charge 5, given for defendant, is in the following language: "If you believe from the evidence that the plaintiff's intestate was guilty of negligence, I charge you that however slight that negligence on his part may have been, if it was such that but for that negligence the accident could not have happened, the plaintiff cannot recover." There are very respectable authorities which hold that the abstract proposition of this instruction is sound. *Murch v. Concord R. Corp.* 29 N. H. 9; *Potter v. Chicago & N. W. R. Co.* 21 Wis. 873.

We apprehend, however, that the language employed is open to criticism, if not to condemnation, for that a case may be conceived in which the negligence of the party injured, while such as that without it the injury would not have been inflicted, yet is not the proximate cause of accident. We need not decide this, however. The charge may be sustained on another consideration. All charges must be referred to and tested by the evidence in the cause. Applying that principle here, and looking to the testimony, it is seen that the only negligence on the part of plaintiff's intestate which finds any lodgment in the tendencies of the evidence, and, therefore, the only negligence to which the charge can be held to relate, consisted in the injured party's failing to get out of the ditch when he was ordered to do so, or when he saw or should have seen the molten iron flowing towards him. Unquestionably, this was proximate contributory negligence (*Columbus & W. R. Co. v. Bradford*, 86 Ala. 574), and the charge, construed with reference to it, becomes a proper statement of the law, or at least is shorn of all capacity to work prejudice to the plaintiff before the jury.

*The judgment of the Circuit Court is affirmed.*

## INDIANA SUPREME COURT.

Andrew C. JOHNSTON *et al.*, *Appts.*,  
v.  
STATE of Indiana, *ex rel.* Oliver C. SEFTON.  
(.....Ind.....)

1. Election officers may be compelled by mandamus to perform a statutory duty of

determining by lot the person entitled to an office in case of a tie vote; and they cannot by adjourning evade the performance of such duty.

2. Constitutional provisions are to be construed with reference to prior well-known practices and usages.

3. A statute providing that a tie vote

NOTE.—See notes to Maynard v. Board of Censors (Mich.) 11 L. R. A. 385; People v. New York 13 L. R. A.

Infant Asylum (N. Y.) 10 L. R. A. 331; Lawrence v. Ingersoll (Tenn.) 6 L. R. A. 303.

may be determined by lot does not violate a constitutional provision that all elections shall be by ballot.

4. A candidate is not estopped from obtaining a writ of mandamus to compel election officers to decide a tie vote by lot according to law, by the fact that he requested them not to do so, since all parties had equal knowledge of the law and the duty was to the public and not simply to the candidate.

(April 8, 1891.)

**A**PPPEAL by defendants from a judgment of the Circuit Court for Decatur County in favor of relator in a proceeding instituted to compel defendants to determine by lot the person entitled to a certain office as the result of an election at which a tie vote was cast. *Affirmed.*

The facts sufficiently appear in the opinion.

*Messrs. D. A. Myers and Bonner, Tockett & Bennett* for appellant.

*Messrs. Miller & Gavin and Ewing & Ewing* for appellee.

**ELLIOTT, J.**, delivered the opinion of the court:

The relator, Oliver C. Sefton, William A. Williams and James Parker were candidates for the office of township trustee. Alexander C. Johnston was the inspector, and Samuel T. Meek and John Foley were the judges of the election. At the close of the election the votes cast were counted and canvassed by the election board, and it was found that the relator had received eighty-nine votes, Williams eighty-nine votes and Parker two votes. The election officers certified that the relator and Williams had received the highest number of votes cast at the election. They refused, however, to determine by lot which of the two candidates were entitled to the office; and, although requested in writing, refused to re-assemble and determine which of the two candidates who received the highest number of votes should be declared entitled to the office of township trustee. Our Statute provides that, "if two or more have the highest and an equal number of votes for the same office, such judges shall, when the result is certified, determine by lot the person entitled to the office; and the next day the inspector shall make out and deliver to the person elected, when demanded, a certificate to each person elected to any office in said township, except justices of the peace." Rev. Stat. § 4786.

Assuming that the statutory provision quoted is valid, the remedy adopted by the relator, mandamus, is appropriate. The duties of election officers when prescribed by statute, as in this instance, are imperative, and performance may be coerced by the writ of mandamus. Nor can the election officers evade their duties by adjourning without taking the action required by law. In discussing this question the Supreme Court of Michigan said, in the case of *Atty-Gen. v. Iron County Board of Canvassers*, 64 Mich. 607, in speaking of the members of the election board, that "until they have done so they have no right to dissolve their meeting. They can only get out of their office by completing their work. It would be worse than absurd to allow a board of canvassers to defeat the popular will and destroy an election by

neglecting to do what the law requires them to do."

The cases are harmonious upon the proposition we have asserted. *Brouwer v. O'Brien*, 2 Ind. 423; *Kistler v. Cameron*, 89 Ind. 498; *Moore v. Kessler*, 59 Ind. 153; *State v. Gibbs*, 18 Fla. 55, 7 Am. Rep. 233; *Hagerty v. Arnold*, 13 Kan. 367; *Lewis v. Marshall County Comrs.* 16 Kan. 102, 23 Am. Rep. 275; *People v. Schidlein*, 95 N. Y. 124; *State v. Stearns*, 11 Neb. 104; *State v. Peasock*, 15 Neb. 442; *People v. Nordheim*, 99 Ill. 553.

The question upon which the case hinges is, whether the statutory provision quoted is valid. The appellant's counsel ingeniously and plausibly argue that the provision is invalid for the reason that it is in conflict with the provision that all elections shall be by ballot. Const. art. 2, § 13.

We cannot concur with counsel that where an election is held and results in a tie vote for opposing candidates, the General Assembly may not provide for determining the right to the office otherwise than by making provision for another election.

Constitutions are framed by existing and organized society, and are to be construed with reference to well-known practices and usages. *State v. Noble*, 118 Ind. 350-361, 4 L. R. A. 101; *Durham v. State*, 117 Ind. 477; Cooley, Const. Lim. 5th ed. 73.

We know that the practice of determining a tie vote by lot prevailed before our Constitution was adopted, and it is our duty to presume that the framers of that instrument were not ignorant or unmindful of this ancient usage. It is therefore no more than reasonable to hold that a statute providing for an election by ballot is valid, although it also provides for determining a tie vote by lot, for the framers of the Constitution may well be deemed to have had this usage in view and to have intended that it should be resorted to in case where an election should result in a tie between opposing candidates. Such a statute as the one before us does give the electors an opportunity to vote by ballot, and affixes to each vote all the force it is possible to assign it. In no respect is the elector's right abridged or limited; all that is done is to provide that in cases where the electors fail to make a choice the choice may be determined by lot between the candidates who have received the highest number of votes. This course gives to all the votes cast full weight and force, and prevents the nullification of the election where a tie vote results. Unless there is power in the General Assembly to provide for the determination of a tie vote, an incumbent of an office might hold far beyond his term, since it is conceivable that many elections might result in a tie.

The authorities give full support to our assertion that the Legislature may provide that a tie vote may be determined by lot. *Webster v. Gilmore*, 91 Ill. 824; *People v. Robertson*, 27 Mich. 118; *People v. Sutherland*, 41 Mich. 177; *State v. McKinnon*, 8 Or. 501; *State v. Wilkinson*, 28 Neb. 711; *Hammock v. Barnes*, 4 Bush, 891.

We have found no judicial decision conflicting with the cases to which we have referred, nor have we been referred to any by appellant's counsel. The report of the congressional com-

mittee to which we are referred cannot be regarded as authority.

While we are satisfied that no statute can be upheld which assumes to destroy the right of the inhabitants of a township to elect their own trustees, yet we are also satisfied that where a full opportunity is given them to make a choice, and they equally divide their votes, it is within the power of the General Assembly to make provision for determining the result of the election. Our Constitution provides that "such other county and township officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law." Art. 6, § 3.

It seems clear to us that, taking this provision in connection with the general one respecting elections, and construing them in accordance with the principles to which we have referred, the General Assembly did not transcend its power in enacting the Statute under consideration.

Counsel's argument that the policy of determining the right to an office by lot is an evil

one might have weight with a legislative assembly, but it can have none with the courts. Questions of policy and expediency are legislative and not judicial. *Beauchamp v. State*, 6 Blackf. 299; *Hedderich v. State*, 101 Ind. 564, and authorities cited.

The appellant's position that the relator cannot successfully urge his claim to the office for the reason that he created an estoppel against himself by requesting the election officers not to determine the result of the election cannot be defended. The duties of the election officers were prescribed by a public law, and all the interested parties had equal knowledge so that no estoppel could possibly arise. But more than this, the public had an interest in having the election officers perform the duty enjoined upon them by law, and it was not for the relator to relieve them from that duty, and this they were bound to know. *School Dist. No. 8 v. Root*, 61 Mich. 878.

*Judgment affirmed.*

Miller, J., did not take part in the decision of this case.

## NEW YORK COURT OF APPEALS.

Oliver T. HOPPER, *Resp't.*,

v.

Mary C. HOPPER, *Exrx.*, etc., of Inalee  
A. Hopper, Deceased, *Appt.*

(....N. Y.....)

1. A foreign executor becomes a domestic executor liable to be sued as such in the State in which he takes out ancillary letters.
2. A nonresident plaintiff may sue a foreign executor who has taken out ancillary letters although the precise force and effect of the judgment in such a case is not determined.

(January 27, 1891.)

**A**PPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, reversing a judgment of the New York Special Term dismissing the complaint in an action brought to charge the estate of a deceased partner with a partnership debt. *Affirmed.*

The facts sufficiently appear in the opinion. Mr. Robert T. B. Easton for appellant. Mr. Horace Secor, Jr., with Mr. Charles B. Page, for respondent.

Finch, J., delivered the opinion of court:

The last will of Inalee A. Hopper, a resident of New Jersey, was admitted to probate in that State, and letters testamentary issued thereon to Mary C. Hopper. The testator had been engaged in business as a broker in connection with other parties in the City of New York, and the executrix, presumably because there were assets in this State, took out ancillary

letters testamentary within our jurisdiction. The plaintiff was and is a resident of the State of Georgia. He had dealt with the firm in the City of New York of which the testator was a member, and claimed, as a result of that dealing, that it became indebted to him in a large amount. Coming into this State, and finding the executrix here, clothed with testamentary authority under our law, and seeking to recover a debt which originated here, he brought this action against her, in her representative capacity, alleging the insolvency of the surviving members of the firm, and asking judgment for the amount which he claimed to be due. He was defeated at the special term, but, on appeal, that judgment was reversed, and from that reversal the executrix appeals to this court. Her counsel advocated here the doctrine which prevailed in the trial court—that the ancillary executor, by reason of the temporary purpose of his appointment, and the restricted limitation of his duties, does not become a domestic executor, liable to be sued here, and that the defendant, who was a foreign executor by the issue of her original letters, remained such, notwithstanding her ancillary appointment in this State.

By the phrase "foreign executor," the courts never mean the mere nonresidence of the individual holding the office, but the foreign origin of the representative character. That is the sole product of the foreign law, and, depending upon it for existence, cannot pass beyond the jurisdiction of its origin. The individual may come here and acquire rights or incur liabilities which our tribunals will defend or enforce, but he can have no representative rights or liabilities, since we recognize in him no representative character. The foreign executor may make a contract here which our courts will compel him to perform because it is his contract, but, where it is the testator's only, he cannot sue or be sued upon it, since the right or the liability is purely representative, and

NOTE.—As to powers, duties and liabilities of ancillary administrators, see *notes* to *Gara v. Austin* (Iowa) 9 L. R. A. 218; *Welch v. Adams* (Mass.) 9 L. R. A. 242; *Schluter v. Bowery Sav. Bank* (N. Y.) 6 L. R. A. 542.  
12 L. R. A.

exists only by force of the official character, and so cannot pass beyond the jurisdiction which gave it. *Johnson v. Wallis*, 112 N. Y. 230, 2 L. R. A. 828.

And thus it is not the residence of the executor out of the State which makes him a foreign executor, but the creation of his official character under and by force of a law foreign to our own. He may, nevertheless, become an executor, and clothe himself with a representative character under our law, and by force of an authority conferred within our jurisdiction. The provisions of the Code of Civil Procedure indicate when and in what manner. By the terms of section 2695, the surrogate having jurisdiction may, upon production of an exemplified copy of the foreign will, and the foreign letters and probate, issue to the executor ancillary letters testamentary. He thereby necessarily acquires an official and representative character under our law, and becomes an executor here.

In *Cummings v. Banks*, 2 Barb. 603, he is correctly described as "an officer of our State, acting under our laws." As a consequence he gains a standing in our courts which in the character of foreign executor merely was denied to him. Having thus become the lawful representative of the testator in our jurisdiction, he may sue in our tribunals as such representative. It seems to follow that in that character he may also be sued. The courts are thrown open to him, when he sues as an executor here, representing the estate by our authority. He has become a domestic executor. Is he any the less so when some creditor of the estate sues him? Before the Code and before the Revised Statutes the foreign executor who came into our jurisdiction, and intermeddled with assets here, could be sued as executor *de son tort*. The law regarded him not as foreign executor, but as executor here, having made himself such by his own wrongful conduct. *Campbell v. Tousey*, 7 Cow. 65. Now that such remedy is abolished, and a way opened for a rightful possession of assets, founded on an official character, granted by our law to the ancillary executor, the right to sue him in that representative character would seem to be still more certain and plain. I do not understand that to be denied where the plaintiff is citizen of our own State, but only where he is a non-resident. What has been said allows of no such discrimination. The ground of the citizen's action is that the defendant is not a foreign executor whom he cannot sue, but an executor here, whom he can sue. How is the defendant any the less an executor here because the creditor is a nonresident? Let us suppose that the transaction in New York upon which this suit was brought had been with the testator alone, instead of with a firm of which he was a member; that the citizen of Georgia came here to settle up the account, and that the ancillary executor, claiming he was a debtor in the dealing, had sued him in our courts. Nobody doubts or disputes the right to do so. But can it then be true that, the balance being the other way, the nonresident cannot sue the ancillary executor to establish his claim? A nonresident may sue a domestic executor in this State beyond any question. Does it alter the rule that the domestic executor has become

such by receiving ancillary instead of original letters? The Code provides (section 2703) that all the provisions of its 18th chapter, relating generally to surrogates' courts, and proceedings therein, and to the rights, powers, duties and liabilities of an executor or administrator, shall, with some minor exceptions, apply to a person to whom ancillary letters are granted, and thus puts him upon a level, so far as his official character is concerned, with the ordinary executors appointed by our courts.

Two things are said, however, as peculiar to the case of a nonresident plaintiff. One is that he must show some statutory authority for the right to sue, and without it can have none. I do not think the right was ever denied where the cause of action accrued within our boundaries. Indeed, it has been said that one nonresident may sue another in our courts for a tort committed abroad, so far as the question of actual jurisdiction is concerned, and that we simply decline the jurisdiction from motives of policy and convenience, not that we do not have it. *Gardner v. Thomas*, 14 Johns. 184.

The provisions of the Code do not originate, but simply restrain, the original jurisdiction. Thus it is provided by section 1780 that an action may be maintained against a foreign corporation by another foreign corporation, or by a nonresident, "in one of the following cases only." The word "only" is inserted as a word of restriction, and implies a general jurisdiction, purposely narrowed and restrained. *Robinson v. Oceanic Steam Nav. Co.* 112 N. Y. 815, 2 L. R. A. 686.

One of the cases is where the action is for breach of a contract made within the State, and, in the case last cited, it was declared that permitting the suit, irrespective of residence, where the cause of action arose here, is a rule of comity, of natural justice and of convenience. Why, when there is an executor here, where the transaction arose, and the witnesses are at hand, should we send the nonresident to New Jersey to sue the same person in the same representative character there? The answer made to that inquiry is the second position taken by the appellant, and grows out of the restricted duty enjoined upon the ancillary executor. He must remit all collected assets to the original probate jurisdiction, unless there are creditors who are citizens of our own State, in which event a distribution may be ordered here. Code, §§ 2700, 2701. And it has been doubted whether a creditor, not a citizen of this State, can prevent such transmission, or obtain any relief against the assets here. *Moyer v. Weil*, 1 Dem. 71. While I feel the force of that doubt, I am unwilling to yield to it as in all cases conclusive. But, assuming that to be the truth, the argument is that a judgment against the ancillary executrix would have no possible force or effect, and our courts do not sit to decide a mere abstract question, or perform an idle ceremony. If the judgment is utterly ineffective, at least the defendant may view its recovery with equanimity. But it is not ineffective, as the general term points out. While we are not required for present purposes to decide upon its legitimate force and effect, and that question should be left until it arises, it is enough to say that the judgment may avail the plaintiff in two direc-

tions, even if it were certain that he could not reach assets here. If he should be driven to the forum of original probate jurisdiction, the case of *Hill v. Tucker*, 84 U. S. 18 How. 458, 14 L. ed. 223, indicates that the judgment would be at least prima facie evidence of the indebtedness, and, while not conclusive, would, at least, bar the Statute of Limitations, which otherwise might apply. In that case the testator, a resident of Virginia, died in that State, leaving a will, by which he appointed two residents of Virginia, and two of Louisiana, executors. The will was proved in both States, the Virginia executors taking out letters there, and one of the Louisiana executors qualifying in that jurisdiction. In a suit against the latter, by a creditor who had obtained judgment in Virginia against the executors there, the federal court held the judgment admissible, and

an answer to the Statute of Limitations. Much more would it seem to be true, where the executors in the two jurisdictions were not different persons, but the same individual, who himself, in his representative character, had appeared and defended in the one jurisdiction, that, in the other, the judgment would at least prima facie establish the claim, and answer a plea of the Statute of Limitations. And so, while we do not feel bound to determine, at present, the precise force and effect of the judgment, we are satisfied that its recovery ought not to be defeated on the ground that it is ineffective for any purpose.

*The judgment of the general term should be affirmed, and judgment absolute on her stipulation be awarded against the defendant, with costs.*

All concur.

### OREGON SUPREME COURT.

W. S. FRINK, *Appt.*,

John THOMAS, *Respnt.*

(....Or.....)

\*1. Time is not of the essence of a contract for the sale of real estate unless made so by the express agreement of the parties, or by

\*Head notes by BMAN, J.

NOTE.—*Specific performance; action to enforce.*

"Specific performance" is the actual accomplishment of a contract,—such a performance as will do justice to the parties. *Connaway v. Wright*, 5 Del. Ch. 472.

Even where time is made material by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not defeat his right to specific performance if the condition be subsequently performed without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief. *Cheney v. Libby*, 124 U. S. 68, 33 L. ed. 518.

If the parties have expressly treated time as of the essence of the agreement, or if it necessarily follows from the nature and circumstances of the agreement, courts of equity will not enforce it specifically, regardless of the limitation of time. *Coleman v. Applegarth*, 10 Cent. Rep. 149, 68 Md. 21; 2 Story, Eq. Jur. § 776.

A default at the day specified, without any just excuse, or any acquiescence or subsequent waiver by the other party, will defeat the suit. *Benedict v. Lynch*, 1 Johns. Ch. 370, 1 L. ed. 176; *Hayes v. Caryl*, 5 Vin. Abr. 528, pl. 18; *Pincke v. Curteis*, 4 Bro. Ch. 329; *Fordyce v. Ford*, Id. 494.

#### Enforcement in discretion of court.

The specific enforcement of contracts to convey lands is not a matter *ex debito iustitiae*. It is an appeal to the sound discretion of the court. Relief of this character rests not upon what the court must do, but rather upon what, in view of all the circumstances, it ought to do. *Page v. Martin*, 46 N. J. Eq. 325; *Alexander v. Wunderlich*, 11 Cent. Rep. 378, 118 Pa. 610; *Jackson v. Torrence*, 33 Cal. 521.

It will not be decreed where it will result in great hardship and injustice to one party without any consideration, gain or utility to the other, or where

the nature of the contract itself or of the circumstances under which it was made. Courts of equity will ordinarily infer that interest on the deferred payments will be a sufficient compensation for the delay.

2. Although there is no stipulation in the contract that time shall be essential, nor anything in the nature or circumstances of the agreement to make it so, it can nevertheless be made so by a performance or tender of performance by one party and a demand of the other.

the public interest would be prejudiced thereby. *Conger v. New York, W. S. & B. R. Co.* 120 N. Y. 22, citing *Clarke v. Rochester, L. & N. F. R. Co.* 18 Barb. 360; *Columbia College Trustees v. Thacher*, 87 N. Y. 311-317; *Murtfeldt v. New York, W. S. & B. R. Co.* 3 Cent. Rep. 418, 108 N. Y. 708; *Day v. Hunt*, 112 N. Y. 191-195.

So denial of a specific performance is in the discretion of the court where performance is onerous and would cause little or no benefit. *Murtfeldt v. New York, W. S. & B. R. Co. supra*. See *Columbia College Trustees v. Thacher, supra*.

A vendee in an executory contract for the purchase of land has not an absolute right to a specific performance of the contract, but such relief is granted or refused according to the circumstances of each case. *Hayes v. Nourse*, 114 N. Y. 605; *Peters v. Delaplaine*, 49 N. Y. 822; *Day v. Hunt*, 112 N. Y. 191; *Fry, Spec. Perf.* 3d Am. ed. 10, § 26; *Pom. Spec. Perf.* p. 4, § 4, p. 47, § 35.

#### Forfeiture clause in contract.

Many decisions have treated a clause of forfeiture as rendering the stipulated time of payment essential, and as therefore binding according to its letter, and have refused to give any relief. *Sanborn v. Woodman*, 5 Cush. 33; *Remington v. Irwin*, 14 Pa. 143; *Jones v. Robbins*, 29 Me. 351; *Clark v. Lyons*, 25 Ill. 105; *McClartey v. Gokey*, 81 Iowa, 606; *Steele v. Branch*, 40 Cal. 2; *Rogan v. Walker*, 1 Wis. 527; 1 Pom. Eq. Jur. 498; *Wells v. Smith*, 3 Edw. Ch. 78, 6 L. ed. 315, 7 Paige, 22, 4 L. ed. 43, 45; *Edgerton v. Peckham*, 11 Paige, 352, 5 L. ed. 159.

But the clause in an agreement providing that plaintiffs were to pay as herein provided, or forfeit the one hundred dollars this day paid, does not operate to make the day fixed essential. *Austin v. Wacks*, 30 Minn. 240; 1 Pom. Eq. Jur. 498; *Edgerton v. Peckham, supra*.

Where time is of the essence of the contract, the

3. Where the payment of the purchase money and the making of the deed are to occur simultaneously they are regarded as concurrent acts, which disable either party from putting an end to the contract without performance, or a valid offer to perform, on his part.
4. In a suit by a vendor for a rescission of a contract for the sale of real estate, on account of a failure to pay purchase money, the complaint must allege that he has tendered to the vendee a valid deed, conveying to him all the land, according to the terms of the agreement, and demanded performance on the part of the vendee.
5. Mere failure to pay the purchase money, according to terms of the contract, will not entitle vendor to have contract rescinded.
6. Where the vendor is prevented from complying with his contract by the wrongful act of the vendee in obtaining an outstanding title to a portion of the land, so far as that portion of the land is concerned, in a suit by vendor to rescind, the vendee is estopped from claiming that no tender of deed has been made.
7. When the vendee has paid part of the purchase money and given his notes for the balance, before the vendor can rescind a contract he must return or offer to return money paid, with legal interest, less reasonable rental value of premises if vendee has been in possession, and also all unpaid notes.
8. Where a controversy concerning the title to government land is still pending in and undetermined by the land department of the United States, the courts of this State will not interfere.
9. Where a vendee enters into possession

of land, under a contract of purchase, he will not be permitted to obtain an outstanding title and assert it against his vendor, but such title will inure to the benefit of vendor.

(January 6, 1891.)

**A**PPEAL by plaintiff from a decree of the Circuit Court for Polk County dismissing his complaint in an action brought to cancel a contract for the sale of certain land and to enjoin its sale by the vendee. *Affirmed.*

Statement by Bean, J.:

This is a suit in equity to cancel a contract for the sale of land by plaintiff to defendant. For the purpose of this case it is sufficient to state that the complaint alleges that on the 18th day of February, 1880, the plaintiff and defendant entered into a contract for the sale of certain real estate therein described, and containing 860 acres. By the terms of said agreement, defendant was to pay the plaintiff the sum of \$1,600 for said land, in accordance with the tenor of seven certain promissory notes of that date, therein set out, the last of which to become due and payable on the 13th of February, 1886. That in consideration of said notes, and the payment thereof by said defendant, according to their tenor, the plaintiff agreed to transfer to him, at the time of the last payment, all said lands in fee. That defendant entered into the possession of said lands, and has remained in possession ever since. That at the time of making the contract for the sale plaintiff only had a contract of purchase from the Oregon & California Railroad

complainant may lose his right under the contract by not performing at the day. *Bruce v. Tilson*, 25 N. Y. 197.

Where the parties had made the payment at the day an essential part of the contract, the vendee, who had failed to make the payment at the time specified, was not entitled to a decree for a specific performance of the contract. *Grigg v. Landis*, 21 N. J. Eq. 505.

Where one contracts to sell real estate to which he at the time has no title, he cannot forfeit the contract for nonpayment while he is not in a position to perform on his part, so as to enable him to oust the purchaser from possession. *Getty v. Peters* (Mich.) 10 L. R. A. 485.

#### *Incapacity to perform defeats the action.*

The court will not direct specific performance where the party is unable to perform his contract. *Martin v. Colby*, 42 Hun. 1.

If the impossibility of performance exists from the beginning, as where defendant had no title to, interest in or authority over the particular land, etc., and no legal means of acquiring the title or authority, performance will not be decreed. *Columbine v. Chichester*, 2 Phill. Ch. 37; *Hills v. Colman*, 4 Jur. N. S. 350; *Hallett v. Middleton*, 1 Russ. 248; *Pom. Spec. Perf.* § 294.

An incapacity to perform a contract which did not exist when the contract was made may subsequently arise from the defendant's own act or default. *Denton v. Stewart*, 1 Cox, Ch. 258; *Greenaway v. Adams*, 12 Ves. Jr. 395; *Ferguson v. Wilson*, L. R. 2 Ch. 77; *Helling v. Lumley*, 3 De G. & J. 493; *Gupton v. Gupton*, 47 Mo. 37; *Smith v. Kelley*, 56 Me. 64.

So if a vendor, after having agreed to sell the land to plaintiff, sells it to a third party under such circumstances that the latter is not a bona fide

purchaser without notice, specific performance can be enforced against such purchaser. *Bird v. Hall*, 80 Mich. 874; *Cole v. Cole*, 41 Md. 301; *Snowman v. Harford*, 57 Me. 397; *Bryant v. Boose*, 55 Ga. 428; *Fullerton v. McCurdy*, 4 Lans. 123; *Haughwout v. Murphy*, 23 N. J. Eq. 531; *Gregg v. Hamilton*, 13 Kan. 333; *Johnson v. Bowden*, 37 Tex. 621; *Youell v. Allen*, 18 Mich. 103.

If the purchaser is one bona fide and without notice, so that defendant has incapacitated himself from performance, equity, after getting jurisdiction of the case, may award the legal remedy of damages. *Woodcock v. Bennet*, 1 Cow. 711; *Greenaway v. Adams*, 12 Ves. Jr. 395.

Where an award of damages will not put the party in a situation as beneficial to him as if the agreements were specifically performed, equity will enforce the performance. *Phyfe v. Wardell*, 2 Edw. Ch. 47, 6 L. ed. 304; *Richmond v. Dubuque & R. C. R. Co.* 33 Iowa, 423; *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43; *McGarvey v. Hall*, 23 Cal. 140; *Somerby v. Sutin*, 118 Mass. 279; *Bogan v. Daughdrill*, 51 Ala. 512; *Willard v. Taylor*, 75 U. S. 8 Wall. 557, 19 L. ed. 501.

The inability of vendor to make a good title will not authorize a court of equity to rescind the contract when the parties have an adequate remedy at law. *Hepburn v. Dunlop*, 14 U. S. 1 Wheat. 179, 4 L. ed. 65.

#### *Materiality of time as an element.*

Time of performance of a contract is always material when either of the parties chooses that it shall be. *Dominick v. Michael*, 4 Sandf. 426; *Mitchell v. Wilson*, 4 Edw. Ch. 697, 6 L. ed. 1023.

The time of performance becomes material where a day was fixed on which defendant was bound to give a deed of the land free from all incumbrances with full covenants of warranty, and



Company for 160 acres of the land, which he agreed to convey to defendant, but defendant knew the condition of his title, and accepted the contract with the understanding that plaintiff might and would perfect his title so that by the time the last payment became due he might be in a condition to transfer the legal title thereof to the defendant, according to his agreement. That about March 1, 1883, it was ascertained that there was some question as to whether the 160-acre tract of land was lands of the United States, subject to homestead entry, or whether the same, in fact and law, is within the grant of the Oregon & California Railroad Company. Upon such information coming to defendant, he thereupon filed an application in the proper land-office to enter the same as a homestead, at the same time assuring plaintiff that he made the application for the protection and benefit of plaintiff, and that he had expended for his use and benefit, in making such application, the sum of \$13, which, at his request, plaintiff repaid to him. That afterwards, contriving to cheat, wrong and defraud plaintiff, he claimed and asserted that said application was made for his own use and benefit. That he has since made final proof of his continued residence and occupation, and a certificate for a patent for said land has been issued to him by the local land-officers. That at the time of defendant's application to make proof of his residence and occupation, plaintiff appeared, and interposed his objections thereto, and set forth the facts and reasons therefor, but, notwithstanding the claim of plaintiff, the certificate for the patent to said lands was issued

to defendant. That plaintiff thereupon duly appealed to the land department at Washington, D. C., which appeal is still pending and undetermined. That defendant is threatening to sell and dispose of said 160 acres to innocent purchasers, and will, unless enjoined, make such a disposition thereof as will tend to greatly hinder the plaintiff in maintaining his legal rights concerning the same against the claim of defendant and his intended grantees. That defendant has failed to comply with the terms of said agreement of purchase on his part, or make any of the payments therein provided for, except the sum of \$340, paid soon after the execution of said contract. That on the 1st day of October, 1883, the said defendant abandoned and repudiated his said contract with the plaintiff, and refused to pay the purchase money of the said lands, or any part thereof, and has since failed and refused to pay the same, or any part thereof, and the same is now wholly due and unpaid; and the said defendant further, in consummation of his fraudulent intentions and designs, has forbidden and prevented the said plaintiff from perfecting the title to the said 160 acres of land; and, but for the said wrongful act of the said defendant, the plaintiff would have perfected the same, and complied with the terms of said contract, according to the terms thereof, as hereinbefore stated. The prayer for relief in the complaint is: (1) that defendant be enjoined from disposing of the 160 acres of land during the pendency of the appeal before the interior department; (2) for an accounting of the rents and profits of the lands during the time defendant

he was never in a condition to perform on his part owing to continued subjection of the land to mortgages and outstanding leases, he was prevented from availing himself of any delay on the plaintiff's part. *Jerome v. Souder*, 2 Robt. 174; *Benedict v. Lynch*, 1 Johns. Ch. 374, 1 L. ed. 177; *Fletcher v. Butten*, 4 N. Y. 596; *Burwell v. Jackson*, 9 N. Y. 555; *Seaward v. Willock*, 5 East, 202; *Lovelock v. Franklyn*, 8 Q. B. 371.

#### *Time, when of the essence of the contract.*

Time is of the essence of the contract when it is material that it should be performed at the time, or when the contract, by express stipulations, makes it of the essence, and releases the other party upon failure to comply within the time. *Grigg v. Landis*, 19 N. J. Eq. 354; *Garretson v. Vanloon*, 8 G. Greene, 123, 54 Am. Dec. 494; *Benedict v. Lynch*, 1 Johns. Ch. 370, 1 L. ed. 175; *Lloyd v. Collett*, 4 Bro. Ch. 469; *Harrington v. Wheeler*, 4 Ves. Jr. 683; *Omerod v. Hardman*, 5 Ves. Jr. 722; *Guest v. Homfray*, Id. 818; *Alley v. Deschamps*, 12 Ves. Jr. 225; *Garnett v. Macon*, 2 Broek. 125; *Taylor v. Longworth*, 30 U. S. 14 Pet. 173, 10 L. ed. 406; *Hatch v. Cobb*, 4 Johns. Ch. 559, 1 L. ed. 636; *More v. Smedburgh*, 8 Paige, 601, 4 L. ed. 559; *Jackson v. Ligon*, 3 Leigh, 161; *Scott v. Fields*, 7 Ohio, pt. 2, 90; *Tufts v. Tufts*, 3 Woodb. & M. 474; *Wells v. Smith*, 7 Paige, 22, 4 L. ed. 48; *Kirby v. Harrison*, 2 Ohio St. 381; *King v. Buckman*, 20 N. J. Eq. 354; *Longworth v. Taylor*, 1 McLean, 389, 39 U. S. 14 Pet. 173, 10 L. ed. 406.

But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it. *Secombe v. Steele*, 61 U. S. 20 How. 94, 15 L. ed. 338; *Hipwell v. Knight*, 1 Younge & C. Exch. 416. See note to *Whiting v. Gray* (Fla.) 11 L. R. A. 528.

12 L. R. A.

#### *Ordinarily not of the essence of the contract.*

Time must be of the substance or essence of the agreement, otherwise it will generally in this respect be considered that the agreement should still be performed. *Renwick v. Renwick*, 1 Bradt. 237; *Eaton v. Lyon*, 3 Ves. Jr. 692; *Pincke v. Curteis*, 4 Bro. Ch. 329; *Davis v. Hone*, 2 Sob. & Lef. 347; *Leannon v. Napper*, Id. 684; *Maxwell v. Ward*, 11 Price, 17; *Edgerton v. Peckham*, 11 Paige, 352, 5 L. ed. 159; *Pinckney v. Hagadorn*, 1 Duer, 82.

In all ordinary cases equity treats the provision as to time of performance as formal rather than essential, and permits the party who has suffered the period to elapse to perform such acts after the prescribed date, and to compel a performance notwithstanding his own delay. *Hull v. Sturdivant*, 46 Me. 34; *Dressel v. Jordan*, 104 Mass. 407; *Quinn v. Roath*, 37 Conn. 18; *Hubbell v. Von Schoening*, 49 N. Y. 323; *Van Campen v. Knight*, 63 Barb. 205; *Sharp v. Trimmer*, 24 N. J. Eq. 422; *King v. Buckman*, 20 N. J. Eq. 318; *Smoot v. Rea*, 19 Md. 399; *Bodine v. Glading*, 21 Pa. 54, 59 Am. Dec. 751; *Scarlett v. Stein*, 40 Md. 512; *Brook v. Hidy*, 13 Ohio St. 306; *Keller v. Fisher*, 7 Ind. 718; *Shaffer v. Niver*, 9 Mich. 253; *Snyder v. Spaulding*, 57 Ill. 490; *Spaulding v. Alexander*, 6 Bush, 160; *Walton v. Wilson*, 30 Miss. 576; *Morgan v. Bergen*, 3 Neb. 209; *Prince v. Griffin*, 27 Iowa, 514; *Knott v. Stephens*, 5 Or. 235; *Steele v. Branch*, 40 Cal. 3; *Seton v. Blade*, 7 Ves. Jr. 235; *Decamp v. Peay*, 5 Serg. & R. 323; *Vyse v. Foster*, L. R. 7 H. L. 318; *McMurray v. Spicer*, L. R. 5 Eq. 537; *Tilley v. Thomas*, L. R. 8 Ch. 61; *Parkin v. Thorold*, 2 Sim. N. S. 1; 3 Pom. Eq. Jur. 454.

Time is not of the essence of a contract unless the parties expressly so stipulate, or unless it follows by necessary implication from the nature of the property dealt with, or the avowed objects of the seller or purchaser. *Dynan v. McCulloch*, 48 N. J. Eq. 11; *King v. Buckman*, 21 N. J. Eq. 592; *Tay-*

has been in possession thereof, and, in the event the interior department should determine that said 160 acres of land belonged to defendant, then a decree that defendant is the trustee of plaintiff; (8) for a cancellation of the contract under which defendant entered into possession of said lands; (4) for a decree that plaintiff is the owner of all the land described in the complaint, and that he be let into the possession thereof, and for such other and further relief as may be just. A general demurrer to the complaint, being interposed, was sustained, and the complaint dismissed, from which decree this appeal was taken.

**Messrs. Richard Williams and Bonham, Holmes & Hayden**, for appellant:

The respondent here, being the grantee of the appellant, could not under any circumstances buy up a superior and outstanding title; if he did so, equity would declare him our trustee.

*Bush v. Marshall*, 47 U. S. 6 How. 284, 12 L. ed. 440.

**Messrs. A. M. Hurley and B. F. Hoke**, for respondent:

This contract by its very terms was an entire contract, and the appellant must be willing and able to perform his entire contract before he can proceed in equity against the defendant.

*Banks v. Crow*, 8 Or. 477; *Southwell v. Beasley*, 5 Or. 458; *Butler v. Butler*, 77 N. Y. 472; *De Beers v. Paige*, 36 N. Y. 537; 2 Chitty, Cont. 1060.

The appellant had not and could not give us

ior v. Longworth, 39 U. S. 14 Pet. 172, 10 L. ed. 405.

Where a contract by its very terms contemplated and provided for a contingency by which the deed might be delivered after the date specified, time was not originally of the essence of the contract. *Myers v. DeMier*, 4 Daly, 380.

#### *How made of the essence of the contract.*

Time, although not ordinarily of the essence of a contract in equity, yet may be made so by clear manifestation of the intent of the parties in the contract itself, by subsequent notice from one party to the other, by laches in the party seeking to enforce it, or by a change in the value of the land, or other circumstances which would make a decree for the specific performance inequitable. *Barnard v. Lee*, 97 Mass. 32; *Wells v. Smith*, 2 Edw. Ch. 32, 6 L. ed. 317, 7 Paige, 22, 4 L. ed. 48; *Bullock v. Adams*, 20 N. J. Eq. 372; *Morgan v. Bergen*, 3 Neb. 214; *Moore v. Moore*, 47 Barb. 290; *Wiswall v. McGowan*, Hoffm. Ch. 125, 6 L. ed. 1087; *Carter v. Phillips*, 3 New Eng. Rep. 910, 144 Mass. 190.

Time will be held of the essence when, from the nature of the subject matter or the object of the parties, the time of performance was intended to be such. *King v. Buckman*, 20 N. J. Eq. 354; *McKay v. Carrington*, 1 McLean, 50; *Holt v. Rogers*, 18 U. S. 8 Pet. 420, 8 L. ed. 935; *Young v. Rathbone*, 36 N. J. Eq. 224; *Bullock v. Adams*, 20 N. J. Eq. 372.

Time of payment, if a substantial, and not merely formal, circumstance, enters into the essence of the contract, and must be observed. *Hollingsworth v. Fry*, 4 U. S. 4 Dall. 345, 1 L. ed. 360.

It may be made of the essence of the contract by changes of the circumstances and special circumstances of hardship and loss (*Crane v. Decamp*, 21 N. J. Eq. 420), or by a new agreement extending the time (*King v. Buckman*, 20 N. J. Eq. 355); or it may be waived by the conduct of the party. *Wiswall v. McGowan*, 3 Barb. 290.

12 L. R. A.

a title to the land, and until he was ready, willing and able to perform his part of the contract he had no standing in equity, either to have the contract rescinded or for performance.

2 Chitty, Cont. note 11, p. 1058; 8 Pom. Eq. 152; *Powell v. Dayton*, S. & G. R. R. Co. 12 Or. 458, 14 Or. 356.

**Bean, J.**, delivered the opinion of the court: The grounds upon which it is sought to cancel the contract in this case are (1) the failure of defendant to pay the purchase price at the time provided in the contract, and (2) the conduct of defendant in attempting to secure a title from the United States for the 160 acres of land in his own name and in fraud of the rights of plaintiff. The first ground proceeds upon the theory that time is of the essence of the contract, and that when defendant failed or neglected to make the payments as he agreed to do plaintiff was entitled to rescind the contract. Time is of course an indispensable ingredient of every contract, but it is not ordinarily of the essence of the contract for the sale of real estate, unless made so by the express agreement of the parties, or by the nature of the contract itself, or of the circumstances under which it was made. When the vendor, by his contract to convey, has not affirmatively provided that time shall be of the essence of the contract, a court of equity will ordinarily infer that interest on the deferred payments would be a sufficient compensation for the delay. "Compensation" and not "forfeiture" is a favorite maxim with a court of equity. *Knott v. Stephens*, 5 Or. 285; *Brook v. Hidy*, 13 Ohio

So it was held to be waived by the vendee's giving the vendor time, after the day fixed for performance of a contract for sale of land, to perfect his title. *Stevenson v. Polk*, 71 Iowa, 373.

It may be made of the essence of the contract by express stipulation, or by implication. No particular form is necessary, but any clause will have the effect which clearly provides that the contract is to be null, if the fulfillment is not within the prescribed time. *Hudson v. Bartram*, 3 Madd. 440; *Barnard v. Lee*, 97 Mass. 32; *Quinn v. Roath*, 37 Conn. 18; *Baldwin v. Van Vorst*, 10 N. J. Eq. 577; *Bullock v. Adams*, 20 N. J. Eq. 372; *Reed v. Breeden*, 61 Pa. 460; *Kirby v. Harrison*, 3 Ohio St. 233; *Kimball v. Tooke*, 70 Ill. 533; *Davis v. Stevens*, 3 Iowa, 158; *O'Fallon v. Kennerly*, 45 Mo. 124; *Morgan v. Bergen*, 3 Neb. 206; *Snider v. Lehnher*, 5 Or. 335; *Gray v. Tubbs*, 48 Cal. 339; 3 Pom. Eq. Jur. 455; *Carter v. Phillips*, 3 New Eng. Rep. 910, 144 Mass. 100; *Hays v. Hall*, 4 Port. (Ala.) 397, 20 Am. Dec. 535; *Cheney v. Libby*, 134 U. S. 65, 33 L. ed. 512; *Taylor v. Longworth*, 39 U. S. 4 Pet. 172, 10 L. ed. 405; *Secombe v. Steele*, 61 U. S. 29 How. 94, 15 L. ed. 333.

As where the terms specified in the resolution made a part of the bonds, by indorsing the resolution upon the bonds, before they are put in circulation. *Griffin v. Macon City Bank*, 68 Ga. 538; *Hale v. Gouverneur*, 4 Edw. Ch. 207, 6 L. ed. 354.

So when a debt is divided into several payments and the parties contract that, upon the failure to make one when it becomes due, the whole amount shall become due and payable, the court is bound to give effect to it. *Pope v. Hooper*, 6 Neb. 122; *Noyes v. Clark*, 7 Paige, 179, 4 L. ed. 114; *Valentine v. Van Wagner*, 37 Barb. 60; *Stanolift v. Norton*, 13 Kan. 222.

Where the condition is that in case of default in the payment of any installment the whole principal sum shall become due and collectible at the option of the mortgagee, it is necessary for the

St. 306; *King v. Buckman*, 20 N. J. Eq. 316.

In this case the agreement does not provide that time shall be of the essence of the contract, nor is there anything in the nature of the contract itself, or the surrounding circumstances, from which the court can infer that it was so intended by the parties at the time the contract was made. Although there is no stipulation in the contract that time shall be essential, nor anything in the nature or circumstances of the agreement to make it so, it could nevertheless have been made so by a tender of performance on the part of plaintiff and demand of payment. *Knott v. Stephens*, *supra*; 2 Warvelle, Vend. and P. 848.

As a general rule, a party who asks for the rescission of a contract for the sale of real estate must be himself without fault; and when, as in this case, the payment of the purchase money and the making or tender of the deed are to occur simultaneously, they are regarded as mutual and concurrent acts, which disable either party from putting an end to the contract, without performance or a valid offer to perform on his part, and, so far as the question of time is concerned, both parties, after the day provided for the consummation, may be considered equally in default, and neither can hold himself discharged from the obligation of complete performance, until he has tendered performance on his own side and demanded it on the other. *Powell v. Dayton*, 8 & G. B. Co. 14 Or. 356; *Knott v. Stephens*, 5 Or. 235; *Rummington v. Kelley*, 7 Ohio, pt. 2, p. 97.

When the vendor insists that the vendee is

in default, to such an extent as to entitle him to have the contract rescinded, he must allege and prove that he has tendered to the vendee a deed conveying to him all the land according to the terms of the agreement, and demanded performance on the part of the vendee, and must have notified him that the contract would be rescinded unless purchase money was paid within a reasonable time. The mere failure to pay the purchase money according to the terms of the agreement will not be held a repudiation of the contract so as to authorize a suit by the vendor to have it rescinded. *Gregg v. English*, 38 Tex. 189; *Johnson v. Jackson*, 27 Miss. 498; 2 Warvelle, Vend. and P. 849, 880.

Ordinarily, in a contract of this character, the vendee is entitled to a deed conveying to him the entire land according to agreement, as soon as the purchase money is paid, and he is under no obligation to pay the money except on receipt of the deed. The obligation of the defendant to pay the purchase money is dependent on the duty of the plaintiff to convey the land, so far as to disable him from putting an end to the contract, without performance or a valid offer to perform on his part. *Watson v. Wilson*, 30 Miss. 576.

In this case plaintiff does not allege or claim that he ever offered to perform the contract on his part, and without such an allegation this complaint fails to state a cause of suit against the defendant for a rescission of the contract, nor is he, under such a complaint, entitled to a decree for specific performance. It was insisted on the argument that defendant had, by his conduct in relation to the 160 acres of supposed

mortgagee to take his option and give notice thereof before suit brought in order to recover the whole principal sum. *Basse v. Galleger*, 7 Wis. 447.

#### *Effect of possession by vendee.*

Equity follows the law in holding that time does not run against one who is in possession in the exercise or assertion of a right, and hence a vendee who enters upon land and holds the land with vendor's consent and acquiescence will not be barred by the mere lapse of time, nor until he is put in default by a notice to surrender the premises or pay the price. *Abbott v. L'Honniedieu*, 10 W. Va. 712; *DuBois v. Baum*, 46 Pa. 537; *Williams v. Starke*, 2 B. Mon. 196; *Ely v. McKay*, 12 Allen, 323; *Schmidt v. Livingston*, 3 Edw. Ch. 213, 6 L. ed. 631.

So long as the purchaser of lands remains in possession under his deeds, he has no defense to an action for the purchase price. *Kirts v. Peck*, 118 N. Y. 231; *Thorpe v. Keokuk Coal Co.* 43 N. Y. 258; *McConihe v. Fales*, 10 Cent. Rep. 322, 108 N. Y. 404; *Ryerson v. Willis*, 31 N. Y. 277; *Parkinson v. Sherman*, 74 N. Y. 83.

A vendee remaining in possession under his purchase cannot set up an outstanding title in a third person which he has purchased. *Greeno v. Munson*, 9 Vt. 37; *Larkin v. Montgomery Bank*, 9 Port. (Ala.) 434; *Bush v. Adams*, 22 Fla. 193.

If he buys in an outstanding incumbrance he will not be permitted to set up an adverse title under it against his vendor, but the purchase inures to the benefit of the vendor's title, and the vendee can only abate the unpaid purchase money, or, in case he has paid this, may recover the amount he has expended in the purchase of the incumbrance by action on the covenant broken, or in assumpsit. The vendee cannot use the title or incumbrance purchased to the annoyance of him under whose

title he entered. Equity will also lend aid for remuneration. *Delavernne v. Norris*, 7 Johns. 358; *Stanard v. Eldridge*, 16 Johns. 254; *Stewart v. Drake*, 9 N. J. L. 175; *Davenport v. Bartlett*, 9 Ala. 179; *Hardeman v. Cowan*, 10 Smedes & M. 436; *Champlin v. Dotson*, 13 Smedes & M. 553; *Meadows v. Hopkins*, Meigs, 181, 33 Am. Dec. 140; *Fowler v. Cravens*, 3 J. J. Marsh. 423; *Morgan v. Boone*, 4 T. B. Mon. 291; *Kirkpatrick v. Miller*, 50 Miss. 521, 522; *Dyer v. Britton*, 53 Miss. 270; *Prescott v. Trueman*, 4 Mass. 637; *Norton v. Babcock*, 3 Met. 510; *Bush v. Adams*, *supra*.

#### *Relations of parties.*

The vendor is regarded as trustee of the land for the purchaser, and the purchaser as the trustee of the purchase money. *Boetwick v. Beach*, 7 Cent. Rep. 637, 105 N. Y. 651; *Ware v. Lippincott*, (N. J.) 8 Cent. Rep. 573, citing *Haughwout v. Murphy*, 22 N. J. Eq. 544; *Waterman*, Spec. Perf. § 519.

Where an agreement is made to sell land, upon execution of notes for the price and the title bond, the vendor holds the legal title as trustee for the vendee, and the vendee is a trustee for the vendor as to the purchase money. *Lewis v. Hawkins*, 90 U. S. 23 Wall. 119, 23 L. ed. 113; *Boone v. Chiles*, 35 U. S. 10 Pet. 177, 9 L. ed. 338; *Jennison v. Leonard*, 33 U. S. 21 Wall. 302, 23 L. ed. 539, citing *Swartwout v. Burr*, 1 Barb. 469; *Champion v. Brown*, 6 Johns. Ch. 402, 2 L. ed. 164; 1 Story, Eq. § 739; 2 Story, Eq. § 1212; 1 Sugd. Vend. 175.

Execution of a contract for sale of real estate, with part payment thereon, is a transfer in equity of the title; the vendor has simply the naked title as trustee for the vendee, to be conveyed on his performance. *Bissell v. Heyward*, 93 U. S. 580, 24 L. ed. 673.

On sale of real estate by contract, the title remains in the vendor, and the possession passes to

railroad land, rendered it impossible for plaintiff to obtain a title thereto, so that he could comply with his contract; and therefore was excused from tendering a deed to the land agreed to be conveyed, before bringing suit to rescind the contract. The complaint does perhaps show a sufficient excuse for not tendering a deed for the 160 acres. If plaintiff was prevented from complying with his contract by the wrongful acts of defendant, as far as this portion of the land is concerned, the defendant cannot be heard to say that no tender of deed in fee had been made; but there remain 200 acres to which plaintiff has a title, and he should have tendered a deed for that portion of the land he agreed to convey, and given defendant an opportunity to pay the purchase money before attempting to rescind the contract. The defendant may have been perfectly willing to have accepted a deed in fee for the 200 acres, and a release as to the remaining 160 acres, and to have paid the purchase money he agreed to pay; at least he should have been given an opportunity to do so, before bringing this suit. Plaintiff was bound to comply with the contract on his part by performing, or offering to perform, according to his engagements, except in so far as he was excused by reason of defendant's conduct or acts.

the vendee, and an equitable interest vests in the vendee to the extent of the payments made by him. *Jennison v. Leonard, supra.*

The vendee put into possession will not be permitted to buy in incumbrances, and set up an adverse title under them against his vendor. *Champlin v. Dotson, 18 Smedes & M. 553, 58 Am. Dec. 104; Harper v. Reno, Freem. Ch. 323; Hardeman v. Cowan, 10 Smedes & M. 436.*

But a vendee is not the trustee as to the possession of the property sold. He claims and holds it in his own right. *Boone v. Chiles, 35 U. S. 10 Pet. 177, 9 L. ed. 383. See Blight v. Rochester, 20 U. S. 7 Wheat. 535, 5 L. ed. 515.*

Whatever puts an end to the equitable interest of the vendee—as notice, an agreement of the parties, a surrender, an abandonment—places the vendor where he was before the contract was made. *Jennison v. Leonard, supra.*

It does not alter the effect in such a case that the contract contains no clause of re-entry, or that the vendor has sought to enforce payment of the amounts which became due to him, before the surrender and abandonment. *Ibid.*

If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee, and cannot dispute the title of the vendor. *Burnett v. Caldwell, 16 U. S. 9 Wall. 290, 19 L. ed. 712; Galloway v. Finley, 37 U. S. 12 Pet. 264, 9 L. ed. 1079; Bush v. Marshall, 47 U. S. 6 How. 234, 12 L. ed. 440; Peters v. Bowman, 98 U. S. 56, 25 L. ed. 91, citing *Mumford v. Whitney, 15 Wend. 380; Dolittle v. Eddy, 7 Barb. 73; Watkins v. Holman, 41 U. S. 16 Pet. 54, 10 L. ed. 385; Blight v. Rochester, 20 U. S. 7 Wheat. 535, 5 L. ed. 515; Whiteide v. Jackson, 1 Wend. 418; Jackson v. Moncrief, 5 Wend. 26; Jackson v. Stewart, 6 Johns. 84; Hamilton v. Taylor, Litt. Sel. Cas. 444; Co. Litt. 82b.**

If vendee has no right to take possession, but enters, he holds as a licensee or tenant at will, and cannot dispute the vendor's title. *Lewis v. Hawkins, 90 U. S. 23 Wall. 119, 23 L. ed. 118; Sufferin v. Townsend, 9 Johns. 35; Dolittle v. Eddy, 7 Barb. 75.*

Where a vendee has bought up a better title than that of the vendor, equity treats him, in reforming the contract, as a trustee for the vendor. *Galloway 12 L. R. A.*

There is yet another reason why plaintiff cannot have this contract rescinded. It appears from the complaint that soon after making the contract defendant paid \$340 of the purchase price. Before plaintiff can abandon the contract, and treat it at an end, he must refund or offer to refund the money paid in part performance of it, with legal accrued interest. It is a general rule that in order to disaffirm a contract and entitle a party to the right resulting therefrom, the rescinding party must put the other *in statu quo*. He must account to the other for any money paid in part performance of the contract. *Knott v. Stephens, 5 Or. 235; Johnson v. Jackson, 27 Miss. 493; 2 Warvelle, Vend. and P. 381; Thomas v. Beaton, 25 Tex. Supp. 318.*

Plaintiff does not offer to account for the money paid him by defendant in part performance of this contract, but seeks not only to rescind the contract and retain this money, but to charge defendant with the rents and profits of the land, during the time he has been in possession thereof, in addition. It would certainly be unjust to permit plaintiff, after having received a part of the purchase money, to put an end to the contract, upon the failure of defendant to pay the remainder, without offering to account to him for the money already paid.

*v. Finley, supra, citing Searcy v. Kirkpatrick, Cooke, 211; Mitchell v. Barry, 4 Hayw. 138; Willison v. Watkins, 26 U. S. 8 Pet. 43, 7 L. ed. 593; Connolly v. Chiles, 3 A. K. Marsh. 242; Wilson v. Smith, 5 Yerg. 393.*

#### *Rights and remedies of parties must be mutual.*

It is a general principle of equity to grant a decree of specific performance only where there is a mutuality of obligation, and when the remedy is mutual. *United States v. Noe, 64 U. S. 23 How. 312, 16 L. ed. 403; Brashier v. Gratz, 19 U. S. 6 Wheat. 523, 5 L. ed. 322; Dorsey v. Packwood, 53 U. S. 12 How. 123, 13 L. ed. 321; Bronson v. Cahill, 4 McLean, 21; German v. Machin, 6 Paige, 233, 5 L. ed. 900; Justice v. Lang, 43 N. Y. 509.*

The remedial right which gives jurisdiction over suit for a specific performance, if it exists at all, must be mutual, and each party must be able to enforce the remedy against the other. *Old Colony B. Corp. v. Evans, 6 Gray, 35; Benedict v. Lynch, 1 Johns. Ch. 370, 1 L. ed. 175; Schroepfel v. Hopper, 40 Barb. 423; Jones v. Newhall, 115 Mass. 244; German v. Machin, supra.*

When a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other. *Rutland Marble Co. v. Ripley, 77 U. S. 10 Wall. 339, 19 L. ed. 955; Butman v. Porter, 100 Mass. 397; Sullings v. Sullings, 9 Allen, 234; DeCordova v. Smith, 9 Tex. 144, 58 Am. Dec. 139.*

The remedial right must be mutual; each party must be able to enforce the remedy against the other. *Rindge v. Baker, 37 N. Y. 319, 15 Am. Rep. 433; Adderley v. Dixon, 1 Sim. & Stu. 607, 610; Old Colony B. Corp. v. Evans and Schroepfel v. Hopper, supra; Hopper v. Hopper, 16 N. J. Eq. 147; Jones v. Newhall, 115 Mass. 244; 3 Pom. Eq. Jur. 441; Loeoe v. Morey, 57 Barb. 566.*

Mutuality in the contract is essential to a decree for a specific execution of the contract. *Bronson v. Cahill, 4 McLean, 21; 3 Pom. Eq. Jur. 443; Benedict v. Lynch, 1 Johns. Ch. 370, 1 L. ed. 175; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 233, 1 L. ed. 141.*

A contract, to be enforceable in equity, must, in general, be mutual in its obligations and its remedy. *(Duvall v. Myers, 3 Md. Ch. 401; Beard v.*

He who seeks the aid of a court of equity must himself do equity. If plaintiff had tendered a deed such as the contract required, he should, in addition, have returned the notes given by defendant, for the purchase money, and the amount paid him by defendant, with legal interest, or at least have offered to return them, before he could be permitted to rescind. This seems to be the universal rule. The party against whom its rescission is sought must be placed *in statu quo*. *Murphy v. Lockwood*, 21 Ill. 611.

In a case of this kind where the vendee has been allowed to enter into possession of the land, and receive the rents and profits, the vendor would probably be entitled to have the reasonable value thereof deducted from any money paid on the contract by defendant, and would only be required to refund to defendant the balance, if any, remaining after deducting such rental value. What has already been said is sufficient to show that plaintiff does not allege facts sufficient to entitle him to maintain a suit to rescind the contract of sale to the defendant; but it is insisted that under the allegations of the complaint the defendant should be enjoined from selling the 160 acres, for which he holds a certificate for a patent from the United States.

The controversy between plaintiff and defendant concerning the legal title to this land is still pending before the land department of the United States, and therefore this court cannot now undertake to inquire into the question as to who has the better right to this land under the provisions of the Land Laws of the government. The land department having acquired jurisdiction, it must first be allowed to proceed to final determination of the case. *Moore v. Fields*, 1 Or. 818.

But defendant having entered into the possession of this land under a contract of purchase, will not be permitted to obtain an outstanding title and assert it against the plaintiff. It was expressly understood at the time the contract for the sale of this land was made that the title was unsettled, and that plaintiff would take such steps as might be necessary, in order to perfect the same, so as to comply with his agreement with defendant. With this understanding, defendant was allowed to go into possession of the land, and having done so, neither equity nor good conscience will permit him, by taking advantage of such possession, to obtain the title from the general government in his own name for his own use and benefit. So that, if it should finally be determined by the land department that the land is not within

*Lanthicum*, 1 Md. Ch. 345; *Reese v. Reese*, 41 Md. 554; *Meason v. Kaine*, 68 Pa. 335; *Moore v. Fitz Randolph*, 6 Leigh, 175; *Blanchard v. Detroit*, L. & L. M. R. Co. 31 Mich. 48; *Maynard v. Brown*, 41 Mich. 298; *Hopkins v. Roberts*, 54 Md. 312; but this rule is far from universal. *Green v. Richards*, 23 N. J. Eq. 35.

There is no absolute equity to enforce a contract not mutually complete. *Hall v. Loomis*, 6 West. Rep. 617, 63 Mich. 709.

Yet a promise void for want of mutuality, but fully performed by one party, may be enforced. *Henry v. Gilliland*, 1 West. Rep. 230, 108 Ind. 177; *Willets v. Sun Mut. Ins. Co.* 45 N. Y. 45.

Where the legal title cannot be conveyed to the vendee by the vendor, and the vendee must resort to a court of equity to establish his title, notwithstanding a conveyance of all the rights of the vendor to him, the court will not compel him to pay the purchase money. *Bank of Columbia v. Hagner*, 26 U. S. 1 Pet. 455, 7 L. ed. 219; *Hepburn v. Auld*, 9 U. S. 5 Cranch, 232, 3 L. ed. 96.

#### *Rights and remedies of vendor.*

Ordinarily, a vendor, in the recovery of pecuniary damages, has an adequate remedy at law; but he has a choice of remedies. He may resort either to a court of law or a court of equity. *Crory v. Smith*, 2 N. Y. 62; *Pincke v. Curteis*, 4 Bro. Ch. 339.

The real test in an equitable action is this: If it be brought for damages for breach of contract, it is a case at law; if it be brought for money, by way of performance of the contract, it is a case in equity. *Rindge v. Baker*, 57 N. Y. 219.

If the seller is able to make a good title he is required to make a conveyance to entitle him to sue for the consideration. See *note to Townshend v. Goodfellow* (Minn.) 3 L. R. A. 739.

But it is sufficient if he can make the title at the time of this decree. *Id.* 740.

If a contract fixes the time for payment agreed upon, but fixes no time for doing that which is the condition of the payment, performance of the condition is not a condition precedent to an action. See *Donovan v. Judson*, 6 L. R. A. 591, 81 Cal. 334.

Whether in such action a tender of the deed is a prerequisite of the right to sue, see *note to Donovan v. Judson*, *supra*.  
12 L. R. A.

The legal effect of a covenant to sell is that the land shall be conveyed by a deed from one who has a good title, or full power to convey a good title. This is a condition precedent, without the literal performance of which the purchasers are not bound to pay their money. *Turner v. Ogden*, 66 U. S. 1 Black, 450, 17 L. ed. 303.

At law, to entitle the vendor to recover the purchase money, he must, in his declaration, aver performance of the contract on his part, or an offer to perform, at the day specified for the performance. *Bank of Columbia v. Hagner*, 26 U. S. 1 Pet. 455, 7 L. ed. 219. See *Davis v. Hone*, 2 Sch. & Lef. 347; *Lennon v. Napper*, 2 Sch. & Lef. 684.

An innocent grantor induced to convey in aid of the fraud of a third person is entitled to reconveyance. *Bugbee's App.* (Pa.) 1 Cent. Rep. 113.

#### *Rights and remedies of vendee.*

When the contract price is fully paid, the entire title is equitably vested in the vendee, and he may compel a conveyance of the legal title by the vendor, his heirs or assigns. *Jennison v. Leonard*, 28 U. S. 21 Wall. 302, 22 L. ed. 539.

Where time is not of the essence of the contract the purchaser is not entitled to a rescission of the contract for inability of vendor to make a good title, the vendor's title being subsequently perfected. *Smith v. Canaler*, 33 Ky. 367.

Nor will the contract be rescinded where it is obvious that the parties cannot be restored to the status occupied at its execution, in consequence of disposition since made of the property. *Stanton v. Hughes*, 97 N. C. 318, citing *McDowell v. Simms*, *Bush. Eq.* (N. C.) 130; *Pettijohn v. Williams*, 2 Jones, Eq. 302.

Nor is the purchaser entitled to a rescission and recovery of the purchase money, if the vendor is ready to perform. *Hathaway v. Hoge* (Pa.) 1 Cent. Rep. 339. See *note to Tarkington v. Purvis* (Ind.) 9 L. R. A. 607.

It would not prevent him from afterward rescinding the contract, on discovery of the fraud practiced on him by vendor in executing a void deed. *Nothe v. Nomer*, 3 New Eng. Rep. 656, 54 Conn. 323.

A purchaser in possession under a deed with

the grant to the Oregon & California Railroad Company, and a patent issued to defendant, the title will inure to the benefit of plaintiff, and the defendant would only be entitled to deduct from the purchase money the actual cost of obtaining such title from the government. It is an established rule of equity "that if a vendee buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title. Equity treats the purchaser as a trustee for his vendor, because he holds under him, and acts done to perfect the title of the former when in possession of the land inure to the benefit of him under whom the possession was obtained, and through whom a knowledge of a defect of title was obtained. The vendor and vendee stand in the relation of landlord and tenant. The vendee cannot disavow the vendor's title." *Bush v. Marshall*, 47 U. S. 6 How. 284, 12 L. ed. 440; *Galloway v. Finley*, 37 U. S. 12 Pet. 294, 9 L. ed. 1091.

At the time of the contract for the sale of this land by plaintiff to defendant, plaintiff was in the possession thereof under a contract

of purchase from the Oregon & California Railroad Company, and, acting in good faith, had made valuable and permanent improvements thereon to the amount and value as alleged in the complaint of the sum of \$1,800. Relying on defendant's agreement to purchase the same, he surrendered the possession to him, and now he, having so obtained the possession, seeks, contrary to good faith and fair dealing, to obtain the title in his own name, and thereby to overreach his vendor, who was using every endeavor to secure the title for the use and benefit of defendant in fulfillment of his own contract to convey. This a court of equity will not permit him to do, but whatever title he may obtain will inure to the benefit of plaintiff. But, while such is the law applicable to the facts of this case, plaintiff has failed to allege in his complaint, as we have already shown, sufficient to entitle him to a decree for a specific performance of his contract with defendant, or for a cancellation of the same, and, until he does so, the court is powerless to aid him, and the decrees of the court below is affirmed.

covenants, in case of a defective title, cannot be relieved against payment of the purchase money; his remedy is on the covenants in his deed. *Patton v. Taylor*, 48 U. S. 7 How. 122, 12 L. ed. 637; *Noonan v. Braley*, 67 U. S. 2 Black, 499, 17 L. ed. 278; *Engle v. Thomason*, 28 Ky. 280, citing *Miller v. Long*, 3 A. K. Marsh. 1173; *Gale v. Com.* 8 J. J. Marsh. 583; *Campbell v. Whittingham*, 5 J. J. Marsh. 96; *Simpson v. Hawkins*, 1 Dana, 308; *Taylor v. Lyon*, 2 Dana, 276; *Duval v. Parker*, 2 Duval, 182; *Trumbo v. Lockridge*, 4 Bush, 415; *Upshaw v. Debow*, 7 Bush, 442; *Murtfeldt v. New York, W. & B. R. Co.* 5 Cent. Rep. 418, 102 N. Y. 708.

Where title fails the remedy is on covenants in the deed. See *notes to Kansas City Land Co. v. Hill* (Tenn.) 5 L. R. A. 47; *Moore v. Williams* (N. Y.) 5 L. R. A. 654.

But if he has been evicted by paramount title, if the vendor was guilty of fraud or knew he had no title, damages may be measured by the ordinary rule of compensation for the injury suffered, and include reimbursement for improvements by the vendee. *Erickson v. Bennet*, 30 Minn. 323.

See, as to ordinary rule of compensation applied in cases of breach of contract and of fraud, *Bush v. Cole*, 28 N. Y. 231; *Pumpelly v. Phelps*, 40 N. Y. 59; *Burr v. Todd*, 41 Pa. 206; *Hammond v. Hannin*, 21 Mich. 374; *Dustin v. Newcomer*, 8 Ohio, 49; *Drake v. Baker*, 34 N. J. L. 368; *Martin v. Wright*, 21 Ga. 504; *Kirkpatrick v. Downing*, 58 Mo. 32; *Lewis v. Lee*, 15 Ind. 490; *Morgan v. Stearns*, 40 Cal. 484; *Tracy v. Gunn*, 29 Kan. 508; *Sweem v. Steele*, 5 Iowa, 352; *Gerault v. Anderson*, 2 Bibb, 543; *Engel v. Pitch*, 1 L. R. Q. B. 314; *Hopkins v. Grazebrook*, 6 Barn. & C. 31; *Plumer v. Simonton*, 18 U. C. Q. B. 220.

Upon an oral agreement to sell land where money was paid, and it was agreed that the purchaser should make a mortgage for the balance, which subsequently the vendor refused to accept, the contract was void under the Statute of Frauds, and the purchaser was entitled to recover the money paid. *Welch v. Darling*, 3 New Eng. Rep. 468, 60 Vt. 128.

But where a parol contract for the sale of land 12 L. R. A.

upon which money has been paid is repudiated, the vendor is required to return the money, for he will not be allowed to retain both the money and the land. *Cade v. Davis*, 96 N. C. 120.

Where the contract provides for the vendee taking possession, his remedy, in case the title of the vendor fails, or he is unable to make a conveyance as stipulated in the contract, is to rescind, or offer to rescind, the contract, to restore the possession, and recover back the money paid. *Gates v. McLean*, 70 Cal. 43.

If the vendee elects to retain the property, and not to rescind, he can do so only on condition that he pay the purchase money and interest, according to the contract, and receive such title as the vendor is able to give. *Ibid.*, citing *Taft v. Kessel*, 16 Wis. 273; *McIndoe v. Morman*, 26 Wis. 586.

Taking possession of property before conveyance does not deprive vendee of the right to relinquish the property, if the vendor could not make a title or neglected to do so. *Bank of Columbia v. Hagner*, 28 U. S. 1 Pet. 455, 7 L. ed. 219.

Where the vendor had put it out of his power, by deeding away the land to another, to perform on his part, the vendee may treat the contract as broken and recover back the money paid by him. *Weaver v. Acheson*, 3 West. Rep. 764, 65 Mich. 235.

If a vendee purchases a better title, there being no fraud, he can compel the vendor to refund only the amount paid for the better title. *Bush v. Marshall*, 47 U. S. 6 How. 284, 12 L. ed. 440.

A vendee in possession under a contract of purchase or a deed with covenants cannot reclaim the purchase money already paid, to be held as security for the completion or protection of his title. *Refeld v. Woodfolk*, 68 U. S. 23 How. 318, 16 L. ed. 370.

A purchaser of real property has no remedy on the ground of failure of title if he has taken no covenants to secure the title. See *notes to Kansas City Land Co. v. Hill* (Tenn.) 5 L. R. A. 45.

Relief is obtainable only in cases of fraud. *Refeld v. Woodfolk*, 68 U. S. 23 How. 318, 16 L. ed. 370. See *Patton v. Taylor*, 48 U. S. 7 How. 122, 12 L. ed. 637.

## ILLINOIS SUPREME COURT.

CONSOLIDATED COAL CO. of St. Louis,

Appt.,

v.

James D. BAKER, Treasurer of St. Clair  
County.

(.....Ill.....)

1. The one objecting to a tax has the burden of showing facts which will avoid it, or which will establish its illegality, if it has been returned in conformity to the statutory requirements. The collecting officers cannot be compelled, in the first instance, to furnish evidence of its validity.
2. The right to coal and minerals in their natural state can be severed from the ownership of the land by a contract so as to subject to taxation the property thereby acquired.
3. The separation for purposes of taxation of coal or other minerals from the ownership of the land is not prohibited by Rev. Stat., chap. 120, requiring real property containing minerals to be valued at the price for which it would sell including the minerals.

(January 24, 1891.)

**A**PPEAL by defendant from a judgment of the County Court for St. Clair County in favor of plaintiff in a proceeding to collect certain taxes alleged to be delinquent. *Affirmed.*

The facts are stated in the opinion.

Mr. Charles W. Thomas for appellant.

Mr. M. W. Schaefer for appellee.

Shope, J., delivered the opinion of the court:

This was an application to the County Court of St. Clair County by the County Treasurer of that county for judgment for delinquent taxes for the year 1889. The assessor of the township in which the property was situate and assessable had returned his assessment, conformably to law, of five tracts of land, assessing one of said tracts in the name of Louis Fuchs; one in the name of Francois Louis; one in the names of F. Schmissarun and L. De Kum; one in the name of Casper Bertelsman; and one in the name of Marsh Ward; and had also returned an assessment in the name of appellant "for the coal under" the same lands,—upon which several assessments taxes had been extended by the proper officer. It appears that the taxes extended upon the assessment of the lands had been paid, but the taxes upon the assessment of the coal underlying the same had become delinquent, and judgment was asked for in this proceeding. Appellant appeared in the county court, and filed the following objections to the rendition of judgment, to wit: "(1) The coal is not assessable separately from the land in which it lies; and (2) the taxes have been paid on the land in which the coal lies, and that the land was assessed without excepting the coal." The court, upon consideration of the evidence, overruled the objections, and rendered judgment for said taxes, and the Consolidated Coal Company of St. Louis prosecutes this appeal.

13 L. R. A.

It is insisted (1) that the burden was upon the collector to show that the owners of the land had in some way sold and conveyed the coal underlying their lands respectively, and, having failed to do so, the objections should have been sustained. We are unable to concur in this view. The assessment was introduced in evidence, and the assessor called as a witness, who testified that, in making the assessment, he decreased the value placed upon the land by the amount he placed upon the coal, and that "the superintendent of objector's mines, on the premises in which the coal is situated, told me the number of acres in each tract yet unmined, and I followed his statement" in making the assessment. The collector's return of the delinquent list, with statutory notice and proof of publication, prima facie entitles the collector to judgment for the tax returned as delinquent. The presumption is that the assessor, and other officers charged with the levy and collection of taxes, have done their duty, and have not made an illegal assessment or returned an illegal tax delinquent. We have repeatedly held that the burden of showing such matters as would avoid the tax or establish its illegality is upon the person objecting thereto. *Moore v. People*, 123 Ill. 645, 12 West. Rep. 769; *Durham v. People*, 97 Ill. 414; *Pike v. People*, 84 Ill. 80; *Mia v. People*, 81 Ill. 118; *Chiniquy v. People*, 78 Ill. 570; *Brackett v. People*, 115 Ill. 29, 1 West. Rep. 616.

When the return of the collector is in conformity with the Statute, the presumption of the regularity of the assessment and the validity of the tax is indulged until facts are shown that impeach its legality. Here the tax was returned delinquent against the coal underlying the several tracts named, and the presumption must obtain that it was properly so assessed and returned until the contrary is made to appear. It was peculiarly within the power of the objector to show the fact; and if, for any reason not appearing on the face of the return of the collector, the tax was improperly assessed, or was invalid, the burden was upon the objector to establish it.

It is insisted, however, that under the Revenue Laws of this State, coal and other substances which, in their natural state and *situs* are part of the realty, cannot be so severed from the ownership of the land, or the land itself, as to become separately taxable, and that therefore the assessment made upon the coal underlying these lands is void; that the land having been assessed to the several owners thereof, and the taxes thereon duly paid, there was no further liability because of any substance upon or forming part of the land. The 4th section of the Revenue Act (chap. 120, Rev. Stat.) provides: "Real property shall be valued as follows: *First.* Each tract or lot of real property shall be valued at its fair cash value, estimated at the price it would bring at a fair, voluntary sale. *Second.* Taxable leasehold estates shall be valued at such a price as they would bring at a fair, voluntary sale for cash. *Fourth.* In valuing any real property on which there is coal or other mine, or



stone or other quarry, the same shall be valued at such a price as such property, including the mine or quarry, would sell at a fair, voluntary sale for cash." And it is insisted that therefore, for the purposes of taxation, there can be no severance of the mine from the land, but, as before said, the value of the mine must be included in the valuation of the land, however separated by contract, or severally held and owned. Section 1 of article 9 of the Constitution of this State provides "that the General Assembly shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property." Construing the provisions of the Revenue Law quoted, and in the light of this provision of the Constitution, it would seem that the question was whether appellant had, or could have held, by deed of conveyance or lease, such an interest in the coal underlying these lands as would be property and assessable as land. By the Statute of New York the term "land," as used in the law relating to property liable to taxation, etc., is, by statute, to be construed "to include the land itself, including land and water; all buildings and other articles erected upon or affixed to the same; all trees and underwood growing thereon; and all mines, minerals, quarries and fossils in and under the same."

In *Smyth v. Mayor*, 68 N. Y. 552, it was held that, under the definition of land thus given, "one may be taxed as owner of the fee of the land, and another for the trees, buildings and other structures thereon, and the minerals and quarries therein." And it was there held that a pier built upon the land of the city by the appellant, Smith, was real estate, within the meaning of the statute, and taxable as such, although built upon the land of another.

So, in *People v. Cassity*, 46 N. Y. 46, when the question was as to the right to tax the track of a street railway, placed in the streets of a city, as land, it was held to be land, within the Statute. The ground was then taken that it was not real estate, but the court, by Folger, J., said: "The Statute means, for its purpose, to make two general divisions of property—one all lands, another all personal property; and then, to be more definite, it declares that by 'land' is meant the 'earth' itself, and also all buildings and other articles erected upon or affixed to the same. We do not think that, when buildings or other articles are erected upon or affixed to the earth, they are not, in the view of the Statute, land, unless held and owned in connection with the ownership of the fee in the soil. We are of opinion that the Statute means that such an interest in real estate as will protect the erection or affixing thereon, and the possession of the fixtures, will bring such building and fixtures within the term 'lands,' and hold them to assessment as the land of whomsoever has that interest in the real estate, and owns and possesses the buildings and fixtures." See also *People v. Taxes & Assessments Commrs.* 10 Hun, 207; *People v. Brooklyn Board of Assessors*, 98 N. Y. 308. In the latter case it was expressly ruled that it was competent for the parties by contract to regulate their several interests in the real estate, so that one might own the buildings

and the other the fee, and holding that the buildings, in such case, were properly assessed as land. We do not deem it necessary to extend this opinion by citation from other courts. Our Statute provides that in valuing lands on which there is coal or other mine, or stone or other quarry, the price and value of such mine or quarry shall be included. This necessarily means a valuation of the mine or quarry, and, if there is no division of ownership, it will all properly be assessed with the fee. It is, however, a matter of common knowledge, that the coal underlying lands are conveyed by deed or other instrument so as to vest the coal, with right of mining the same, in another than the owner of the fee. Ordinarily, perhaps, there is an absolute conveyance of the coal or other mineral, with a lease of sufficient of the surface for shafts, etc., at which to deliver the coal from the mine, or it may be mined by entries from other adjacent lands without entering upon the surface of the particular tract of land upon which the coal is situated. The grant is more than a mere license to enter and mine the coal. It is a conveyance of the coal itself as it lies impacted between the strata of stone, slate or clay, in a state of nature. The title passes to it as property. It is true its value must be added to the valuation of the land, but it by no means follows that it must be assessed with it. The parties have created two distinct properties in the same land, one holding one property right in the land, and the other a distinctively separate property interest therein. The Statute, as before said, when read in view of the constitutional provision quoted, would regard the assessment to be made in the name of the persons or corporations holding such property interests in the land. True, the total assessment must equal the value of the land augmented by the value of the coal or mine, but the assessment of each should be made separately, according to the several holdings, to the end that each "shall pay a tax in proportion to the value of his, her or its property." The coal thus conveyed or reserved by the grantors of the land is not personal property, and cannot be until it is severed. By the conveyance of it, an interest in the land itself passes to the grantee the ownership of portions of the constituents of the land, and falls within the designation of real estate for the purposes of taxation. This question was before us in *Major v. Parvey* (Ill.) 84 N. E. Rep. 973, and we there held that where the grantor had reserved from the conveyance the coal, etc., underlying the land conveyed, it was properly assessed for taxation separately. This holding is criticized by counsel, and we have been thereby led into the foregoing discussion. In that case, after quoting the provision of the Constitution hereinbefore quoted, we said: "We think it clear that the mining right to the coal and minerals reserved in the deeds and contracts must be regarded as property, within the meaning of the foregoing provision." That case is, as we have seen, supported by abundant authority, and, upon careful reconsideration of the question, we are fully satisfied with the principle then announced.

*The judgment of the County Court in this case was fully warranted, and must be affirmed.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

William J. HAYES

v.

TOWN OF HYDE PARK.

(.....Mass.....)

1. A telegraph wire across a highway, hanging so low as to cause an injury to a traveler, is a defect for which the town is liable if it had or ought to have had notice thereof.
2. The co-operation of the act of a traveler, who is not guilty of negligence or any wrongful act, with a defect in a highway in causing an injury to another traveler, will not relieve the town from liability.

(May 18, 1891.)

**EXCEPTIONS** by plaintiff to rulings of the Superior Court for Norfolk County (Lathrop, J.) made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligently permitting a defect to remain in a public highway, in which a verdict was directed to be returned in favor of defendant. *Sustained.*

The facts sufficiently appear in the opinion. *Meers, Elisha Greenhood and F. W. Murphy*, for plaintiff:

That the condition of things immediately created by the falling wires, and to which immediate condition plaintiff's accident was attributable, was due to the careless indifference of the town officers, could be fairly inferred from the evidence.

*Day v. Milford*, 5 Allen, 96; *Drake v. Lowell*, 18 Met. 292; *West v. Lynn*, 110 Mass. 514.

The wires were a defect in or upon the highway from the time that they were liable to fall by the ordinary action of the elements.

*Day v. Milford, supra; Hewison v. New Haven*, 84 Conn. 142.

The bare fact that the street was wide and smooth enough for travel does not satisfy the Statute.

*Munson v. Derby*, 87 Conn. 298.

Anything in the condition of a highway which renders it unsafe or inconvenient or is a menace to ordinary travel is a defect.

*Barber v. Roxbury*, 11 Allen, 818, 820.

The Town was bound to see that the highway was safe and convenient for travel thereon, in the light of such conditions as are natural and likely to occur.

*Lindsey v. Danville*, 45 Vt. 72.

A town has the power and it is its duty to see that there shall be no structure or physical thing upon or over the highway, and that no object which is not an incident of a building, shall be in, upon, near or over the traveled part of the highway, which obstructs or hinders one in the use of the highway, or which from its position or character or lack of support is likely to become such an obstruction, hindrance or nuisance to travel; and any such structure or object causing damage may be a defect.

**NOTE.**—Contributory negligence; effect of co-operating causes of injury to the person. See *Smithwick v. Hall*, post, —, 12 L. R. A.

*Day v. Milford, supra; Post v. Boston*, 1 New Eng. Rep. 549, 141 Mass. 189; *Hewison v. New Haven and Drake v. Lowell, supra; Talbot v. Taunton*, 1 New Eng. Rep. 615, 140 Mass. 552; *Jones v. New Haven*, 84 Conn. 10; *West v. Lynn, supra.*

It is of no consequence that the immediate physical condition arose from natural and general causes over which the Town had no control, such as storms, accident or gradual change, if the Town was already chargeable with permitting to exist such a previous condition as, with the aid of such causes, would be likely to produce such immediate condition.

*Billings v. Worcester*, 102 Mass. 829, 833; *Day v. Milford, supra; Gregory v. Adams*, 14 Gray, 242; *Lindsey v. Danville*, 45 Vt. 72; *Oheney v. Ryegate*, 55 Vt. 499.

The innocent shifting of the position of the wires by Rogers was no more the cause or one of the efficient causes of the accident, than would have been the force of gravitation or the force of the elements working horizontally or perpendicularly.

*Salisbury v. Herchenroder*, 106 Mass. 458; *Day v. Milford*, 5 Allen, 98; *Drake v. Lowell*, 18 Met. 292; *Dickinson v. Boyle*, 17 Pick. 78; *Woodward v. Aborn*, 85 Me. 271; *Barnard v. Poor*, 21 Pick. 378; *Pittsburgh v. Grier*, 23 Pa. 54; *Scott v. Hunter*, Id. 192; *Polack v. Pioche*, 85 Cal. 416, 428.

The fact that an accident such as is natural, and reasonably to be anticipated and guarded against by the Town, in some way contributed to the injury, is no defense to the Town, and does not, as a matter of law, prove that the defect was not the direct, sufficient and sole cause of the injury.

*Maccarty v. Brookline*, 114 Mass. 527; *Oushing v. Bedford*, 125 Mass. 526, 529; *Palmer v. Andover*, 2 Cush. 600; *Stone v. Hubbardston*, 100 Mass. 49; *Bemis v. Arlington*, 114 Mass. 507.

The negligence of the Town was the proximate cause of the plaintiff's accident.

*Flagg v. Hudson*, 2 New Eng. Rep. 652, 142 Mass. 280; *Stickney v. Maidstone*, 80 Vt. 738.

Assuming that Rogers' act had something to do with the accident, and that it was competent for the jury to find that it was an unintentional act, not attributable to his carelessness, it was an accident which was not an efficient, independent cause, conspiring with the defect, but, on the contrary, was a natural and ordinary incident of the defect itself, behind which the Town cannot shield itself.

*Alger v. Lowell*, 8 Allen, 402; *Maccarty v. Brookline, supra; Marble v. Worcester*, 4 Gray, 895, 400; *Hunt v. Potomac*, 9 Vt. 411; *Fletcher v. Barnet*, 43 Vt. 192; *Hodge v. Bennington*, 48 Vt. 450; *Kelsey v. Glover*, 15 Vt. 708. See *Flagg v. Hudson, supra; Lund v. Tyngsboro*, 11 Cush. 568; *Sears v. Dennis*, 105 Mass. 810; *Stickney v. Maidstone*, 80 Vt. 738; *Emporia v. Schmidling*, 88 Kan. 485; *Chicago v. Schmidt*, 107 Ill. 189.

*Meers, James E. Cotter and Charles F. Jenney*, for defendant:

The evidence did not show a defect within the meaning of Pub. Stat., chap. 52, § 18.

*Keith v. Easton*, 2 Allen, 552; *Barber v. Rox-*

bury, 11 Allen, 318; *Pratt v. Weymouth*, 6 New Eng. Rep. 671, 147 Mass. 245.

A defect, or a want of repair, is either inert matter in incumbering the highway upon or over it, or structural defect endangering public travel.

*Davis v. Bangor*, 43 Me. 523.

Such a state of repair in a road as would free a town from exposure to indictment and conviction would protect it also against a claim for damages for an injury sustained by an individual while traveling thereon.

*Merrill v. Hampden*, 26 Me. 284; *Howard v. North Bridgewater*, 16 Pick. 189; *Hizon v. Lowell*, 18 Gray, 59.

A plaintiff cannot recover unless the defect is the sole cause of the injury. Where this follows from a defect united with some distinct, efficient, concurring cause, without which it would not have happened, unless as suggested by Chief Justice Shaw in *Marble v. Worcester*, 4 Gray, 395, such concurring cause is pure accident, the plaintiff cannot recover.

*Roswell v. Lowell*, 7 Gray, 100; *Kidder v. Dunstable*, Id. 104; *Lyons v. Brookline*, 119 Mass. 491.

Holmes, J., delivered the opinion of the court:

This is an action to recover damages for personal injuries alleged to have been caused by a defect in the highway. The alleged defect was a telegraph wire which sloped down from a house to which it was fastened and lay across the highway. Whether the wire was broken before the time of the accident, or whether it still was attached on the other side of the way to another house five or six hundred feet away from the one first mentioned, is not very clear and is not material. The only support which there had been between these two points was a bracket on a pole (in the road as we understand) and this had been gone for about a week. There was evidence that the wire was down within a foot of the ground the night before. The wire was caught in the wheels of a wagon which was coming toward the plaintiff and he was hurt in bending back in his seat in order to get under the wire as it reached him. He saw the wire approaching when it was fifty feet ahead and called to the other driver, but the other driver paid no attention and might have been found not to have heard the plaintiff. In view of the possible expectations of the plaintiff that the other man was to stop, and his testimony as to the shortness of the time, the speed, his inability to turn out or to change his seat, etc., we cannot say that the jury might not have been warranted in finding that he used due care.

It is argued that the wire was not a defect. But it was fixed at one end, at least, and the jury might have found that it came down to the road in such a way as permanently to obstruct travel so that it resembled "a barrier fixed or stretched across the way" which was admitted to be a defect, rather than the rope of a derrick being moved by third persons, for which the city was held not to be liable in *Barber v. Roxbury*, 11 Allen, 318, 320; *French v. Brunswick*, 21 Me. 29. The jury might have inferred from the length of time that the

wire had been down that the Town had or ought to have had notice of the defect.

The main argument for the defendant is that whether the wire was a defect or not it was not the sole cause of the injury, but that the conduct of the driver of the other wagon concurred in bringing about the plaintiff's hurt. If in the opinion of the jury the other driver was negligent as towards the plaintiff, and thus had a hand in causing the injury, no doubt the plaintiff cannot recover. *Kidder v. Dunstable*, 7 Gray, 104; *Pratt v. Weymouth*, 147 Mass. 245, 252, 6 New Eng. Rep. 671. But the jury might have found that the other driver was not negligent, and indeed that until it was too late he was wholly unaware of his entanglement, or that there was a wire in the road at all. If so his co-operation stood on no different footing from the force of gravitation.

A town is not exonerated because other causes co-operate with the defect; if it were it never would be liable. Human causes stand no differently from any others merely as such. The limit of the statutory liability of towns is only the strictest form of the limit of the liability of wrong-doers, to an extent not yet, perhaps, exactly determined. Wrong-doers are presumed not to contemplate wrong-doing by others unless they are shown in fact and actually to have contemplated it. Therefore generally they are not liable if another wrong-doer intervenes between their act and the result. *Tasker v. Stanley* (Mass.) Jan. 12, 1891. But the mere fact that another human being intervenes is not enough. *Elmer v. Fessenden*, 151 Mass. 359, 362, 363, 5 L. R. A. 724; *Corney v. Shanty*, 107 Mass. 568, 581; *Carter v. Towne*, 98 Mass. 567; *McDonald v. Snelling*, 14 Allen, 290, 296. His intervention is important, not *qua* cause, but *qua* wrong-doer. In the case of towns sued for a defect in the highway the wrongful acts of the third person need not intervene subsequently. It is enough that it co-operates with the defect at the moment; but the principle is the same. It is because the act is wrongful (including under this head negligence), not because it is a concurring cause, that the defendant escapes. If the act which concurs with the defect in producing the result complained of is innocent and is of a kind which the defendant is bound to expect and to provide for, such, for instance, as another man's driving upon the road, the jury may find against the town as well as when a particular state of the weather is a concurrent cause. *Flagg v. Hudson*, 142 Mass. 280, 2 New Eng. Rep. 652. It can make no difference whether the defect brings the plaintiff into contact with the innocent vehicle, as in *Flagg v. Hudson*, or the innocent vehicle brings the plaintiff into contact with the defect, as the jury might find to have been the fact here. The act of the third party is equally necessary to the result, and is equally innocent in the two cases. We will add that there is no question before us of remoteness in the sense discussed in *Marble v. Worcester*, 4 Gray, 395, and *McDonald v. Snelling*, 14 Allen, 290, 292.

The other objection urged to the plaintiff's right to go the jury was that it did not appear that notice was given to the Town, as required by statute, within thirty days of the accident.

Pub. Stat. chap. 52, § 19; Stat. 1883, chap. 36; Stat. 1888, chap. 114. By the plaintiff's testimony the accident happened on February 7, 1889. The notice gave the same date. The town clerk produced the notice and testified solely, as he said, from inspection of a memorandum upon it, that it was received on February 6, 1889. Another witness testified that he heard of the accident through the notice during the last month of his official

year, which ended on March 4, 1889. If the jury believed that the accident happened on the seventh, they necessarily would have found that the indorsement of the sixth, as the day when the notice was received, was a mistake, but that the notice was received before March 4.

We are of opinion that the learned judge erred in directing a verdict for the defendant.  
*Exceptions sustained.*

## NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*  
WESTERN UNION TELEGRAPH  
COMPANY, *App't.*,

*v.*

Edward DOLAN *et al.*, Assessors, etc.,  
*Resp'ts.*

SAME, *App't.*,

*v.*

Michael A. TIERNEY *et al.*, Assessors, etc.,  
*Resp'ts.*

SAME *v.* SAME.

(....N. Y.....)

In assessing that part of a telegraph "line" in any town for taxes under Laws 1883, chap. 653, providing for its assessment in the same manner as lands of residents, its value as part of a telegraph line in operation is not to be considered, especially since a tax on the business and franchises of the company is provided for by another statute, but the property actually in the town, such as the wires, poles and interest and easement in the land occupied, is to be assessed at its full value.

(April 14, 1891.)

APPEALS by relator from orders of the General Term of the Supreme Court, Third Department, affirming orders of the Special Term for Rensselaer County quashing three separate writs of certiorari by which relator sought to review the assessment of its property for taxation by the Assessor of the City of Troy for the years 1885, 1886 and 1887. *Reversed as to assessment for 1886. Affirmed as to the others.*

The facts are stated in the opinion.

Messrs. Wager Swayne, Willard Brown, Charles W. Wells and Edwin A. King for appellant.

Mr. William J. Roche for respondents.

Peckham, J., delivered the opinion of the court:

We have lately held in *People v. Adams* (N. Y.), 96 N. E. Rep. 746, that a person under the circumstances in which this relator stood, failing to appear before the board of assessors on what is known as "grievance day," is guilty of such laches as to warrant the court in refusing to grant him any relief in the premises. It sufficiently appears in this proceeding that the relator did thus fail to appear in the years 1885

and 1887. This leaves only the assessment of 1886 open for inspection and review. In the affidavit made on the part of the relator to procure the certiorari to review the assessment for that year it is alleged that the assessment is erroneous and illegal by reason of overvaluation, and is unequal, because made at a higher proportionate valuation than other real property on the roll. It is also alleged that the actual value of the property of the relator within the limits of the City of Troy, and all fixtures connected therewith, does not exceed \$4,000. The writ of certiorari was duly issued, and the defendants made return thereto, and the issues were referred to a referee to take testimony, after which the matter came on for a hearing before the court at special term, which made various findings of fact, and upon the merits quashed the writ. Upon appeal to the general term that court affirmed the order of the special term, and from the affirmance the relator has appealed here. The court at special term found the value of the taxable property of the defendant listed on the assessment roll of Troy for the year 1886 was at least \$12,000. If there be any evidence to support the finding, this court is concluded. But if it appear that in coming to that conclusion the courts below have included improper and illegal elements as a basis for valuation, then an error of law has been made which is reviewable here. Upon the hearing before the referee to take testimony, the counsel for the defendants, under the objection of the relator's counsel, proved that the receipts of the relator's Troy office were about \$30,000. At another time, before the court, the counsel for the defendants objected to proof as to the cost of setting the ordinary sized pole in Troy, because, as counsel said, the property of the Company was real estate, and must be valued as a whole. He also objected to evidence of the cost of freight in transporting relator's poles to Troy, because it was not competent to reduce the value of the real estate in such manner. He made the same objection to proof of the wages of employes engaged in setting the poles. The eleventh finding of fact by the court is that, "except as appears from the assessment rolls in said city for the year 1886, there is no sufficient proof of the actual value of the relator's telegraph property as it was then established and in operation in the City of Troy as part of an extensive system for transmitting information and news by telegraph." In his opinion at special term the learned judge said: "In ascertaining the value of the real estate in ques-

tion it must be regarded as a part of a whole, of a complete telegraph line in operation. Its value, not as poles and wire simply, but for telegraph purposes, and its position, with its connections and its productive capacity, are important, if not controlling, considerations." At the general term, in the opinion delivered, the learned judge says upon this point: "The cost of construction was by no means controlling as to the value of the relator's property in Troy. That was only an integral part of a great system which extended over the entire State, and by itself might be of little value, as compared with its value as a part of the entire system." And in his brief before this court the learned counsel for the defendants, in justifying the valuation placed upon the relator's property by the Assessors and the court at special term, uses this language: "In ascertaining the actual value of such property, the Assessors had the right, and it was their duty, to look beyond the cost of specific material at wholesale prices, and the cost of the labor, and to estimate such property, not as an isolated piece of land, but in connection with its position, its incidents and the business and profits to be derived therefrom." It is thus seen that it has been assumed as a fact by the courts below, and it is conceded by counsel, that the defendants pursued the method above mentioned of determining the value of the property of the relator in the City of Troy for purposes of local taxation. The question now to be decided is whether this method or system is valid.

For the purpose of fixing the manner of assessing what the Legislature denominated "certain real estate of telegraph companies" it passed in the year 1881 an Act (chap. 597 of the Laws of that year), by which it was provided that telegraph companies in the State should on a certain day in each year make a sworn statement showing the total length of their lines in each county, with the cost of construction and equipment thereof, and the assessors within each county were to assess for purposes of taxation such proportion of the cost of construction as the length of the lines in the district of the assessors bore to the total length of the lines in the county. The Legislature at the same session passed the Act (chap. 861) taxing the corporations therein named in the manner stated. Among such corporations are telegraph companies. The tax is declared to be one upon the corporate franchise or business of the corporation, is payable annually, and is computed upon the par value of the capital stock, the percentage of tax depending upon the amount of dividends paid by the company, or, if no dividends, or a less amount than 6 per cent is paid, then the tax is to be at the rate named in the Statute upon a certain valuation of the capital stock. In addition to this tax and by the same Act, the companies named therein are to pay to the state treasurer, as a further tax on their corporate franchises or business in the State, a certain tax upon the gross earnings in the State for the business therein. These two Acts of the Legislature should be construed together as *in pari materia*, and in them is provided a system for the taxation of the property of telegraph companies, their franchises and business

(exclusive of real estate, in the ordinary acceptation of that term, which might be owned by them). This system continued until 1886, when the Legislature passed the Act providing for the assessment of telegraph, telephone and electric-light lines, and known as chapter 659 of the Laws of that year. (This Act should also be construed in connection with the Act of 1881, chap. 861.) The important sections are 1 and 2, and they read as follows: "Section 1. The portion of any telegraph, telephone or electric-light line in any town or ward in this State shall be assessed in such town or ward to the owner or person or corporation or association in control thereof, in the manner provided by law for the assessment of lands of resident owners; and the same proceedings may be had upon such assessment, and for the collection of any tax levied thereon. Sec. 2. The word 'lines' shall include the interest in the land on which the poles stand, the right or license to erect such poles on land, all poles, arms, insulators, wires and apparatus, instruments, or other thing connected with or used as a part of such line in such town or ward, and belonging either to the owner of such line or the person, corporation or association in control thereof." This Act superseded that of 1881, chap. 597. Of course the land—that is, a house and lot, or a vacant lot of ground owned by a telegraph company—is assessed to it in the same way it would be to any other owner. The Act of 1886 does not allude to real estate or land strictly so called. It refers to the telegraph "line" in the town or ward, and it is to be assessed in the manner provided by law for the assessment of lands of resident owners. It being thus necessary to assess the lines as land, in the manner provided by law for the assessment of lands of resident owners, and the Statute providing that the word "lines" must include among other items of value the interest in the land on which the poles stand, and the right or license to erect such poles on land, it becomes necessary to inquire, What is the manner provided by law for the assessment of the lands of resident owners? The Revised Statutes provide the manner. 1 Rev. Stat. 889, title 2, art. 1. The resident is to be assessed in the town or ward of his residence when the assessment is made for the lands owned by him within such town or ward, and the full value of such land is to be set down by the assessors in a separate column in their assessment roll. The assessors are to estimate and assess the land at its full and true value as they would appraise the same in payment of a just debt due from a solvent debtor. This is the manner provided by law for the assessment of lands of a resident owner.

What is the full and true value of this property of a telegraph company, and how is it to be arrived at? To enact that certain things shall be regarded as and included in the term "land" or "real estate," does not in the least alter the essential nature or characteristics of the things which are to be thus called. To say that the word "land," when used in the law with reference to taxation, shall include not only the land itself, but all telegraph lines, wires, poles, arms, insulators, apparatus and instruments, does not change their essential nature. They remain articles which are manu-

factured, and which can be duplicated and supplied to any required extent at a certain known cost of production. The company may be able to procure the instruments, poles or wires at a less cost than others, owing to their special advantages; but anyone can procure such articles in all the quantities desired. The supply has always kept pace with the demand. The value of the poles, arms, insulators, apparatus, instruments and wires would therefore consist of the cost of production, meaning by that term to include the value of the labor necessary to set them up and place them ready for use. If any of these articles were patented, and the company did not own the patent, the price paid therefor would be their value, where they could be furnished indefinitely as desired. To call these things "land" does not make them land in their nature. As they are capable of indefinite reproduction at a known cost, that cost must, in the nature of the subject, be their value for the purpose of the Statute. And when that cost is shown by evidence which is uncontradicted, and in no way doubtful, or in fact doubted, then such cost must be deemed the value of those separate articles. But this is not all that shall be taxed under the provisions of the Statute. The interest in the land on which the poles stand, and the right or license to erect such poles on land, are also to be included in the assessment of the property of the company. What is the nature of the interest in the land on which the poles stand? We have held in *American Rapid Tele. Co. v. Hess* (N. Y.), 36 N. E. Rep. 919 (lately decided), that a telegraph company organized under the Act of 1848, and obtaining from it the right to construct its lines of telegraph upon the public streets or highways, acquired no absolute interest in the highway or the land, and that it was subject to the police power of the State, wielded through its municipal agencies, which could direct the lines to be taken down and placed in subways provided for them. This interest in the land in a street is in reality nothing more than a license granted by the State. In the language of the Act, it is an authority to construct lines along and upon the public roads and highways. This license may also be revoked by legislative enactment. It was so stated in the case heretofore cited (*American Rapid Tele. Co. v. Hess*), and we feel strengthened in our views in that case by further reflection. Therefore the value of the interest in the land in which a pole is placed in a public street by a telegraph company must be arrived at in consideration of the important fact that such interest is a mere license, and revocable at the pleasure of the Legislature. It must also be observed that any other telegraph company organized under the general law may avail itself of the same license to enter upon the public streets. So there is really no title whatever in the Company to the land thus used, and its only interest is subject to extinguishment by the Legislature at any time. The cost which the Company incurred in obtaining the interest in the land in a public street would in this case, taking into consideration all the Acts providing for the taxation of the Company, be a correct criterion by which to judge of its value. As to the value of the right or license to erect the poles on land, also spoken of in the Act, much

the same reasoning is to be adopted. This right or license is one which any company may avail itself of if incorporated under the general Act, and it costs nothing. If the company, in placing its poles on the land of any individual, shall have paid anything to the owner of the land for such use, or incurred any contractual liability to him, the amount paid, or the amount included in such liability, would be good evidence of the value of the right. There might be other elements entering into that question, but in this case all the poles seem to have been placed exclusively in the public streets. If the Company should pay an abutting owner on a public street or highway for the use of the interest, or any part of it, which the owner may have in such street or highway, such payment would be part of the cost of obtaining the interest in the land, and the right to therein erect the poles. Taking the cost of the production of those articles, which are in their nature personal property, and capable of infinite production, as above described, and adding to that cost the value of the interest in the land on which the poles stand and the value of the right to erect such poles on the land, upon the principles above indicated, and we have the total elements entering into the full and true value of the property of the Company subject to taxation under the Act of 1886 above cited. In the assessment for taxation under that Act the property is not to be regarded as a part of a whole, nor as a complete telegraph line in operation. Its value for telegraph purposes, and its position, with its connections, and its productive capacity, are not considerations entering into the value of the property under the Act last named. These considerations are foreign to its purpose. They largely enter into the question of the value of the business and the franchises of the Company; and the value of such business and franchises is to be assessed under the Act of 1881, already quoted. If it were not for that Act and its provisions for assessing the value of the business and franchises of telegraph companies for the purpose of taxation, it may be that courts would strive to give a wider meaning, if possible, to the language of the Act of 1886, for the purpose of reaching these subjects of taxation. But when they are already taxed under a separate Act it cannot be supposed that the Legislature intended to tax them again proportionately in every tax locality in the State.

It is obvious that the learned courts below, in arriving at their conclusions as to the proper facts to consider in deciding the question of the value of the property of the relator, viewed it as if such property were real estate in the narrow acceptance of the term, such as a piece of ground on which a house was erected on rails laid, and which was owned by the relator in fee. The authorities cited in support of their proposition relate to railroads or bridges forming part of real estate owned in fee by the companies. In such cases it is held that in determining the value of such real estate its earning capacity is a most important feature, and that in assessing the real estate of a railroad it is to be assessed, not as an isolated piece of property, but in connection with its position, its incidents and the business and profits to be derived therefrom. Its productive capacity

and its earnings are all to be considered, and the cost of the whole road is to be taken into account. *People v. Barker*, 48 N.Y. 77; *People v. Hicks*, 40 Hun, 600; *People v. Weaver*, 84 Hun, 822.

In this case, under the Statute of 1886, as to telegraph companies, different language is used, and a different kind of property is intended to be reached for assessment. The poles, wires, instruments, arms, insulators and apparatus are included in the word "lines" in the Statute, and they are to be assessed in the manner provided by law for assessing the lands of residents. The Statute points out how that is to be done, and the property is to be assessed at its full value, together with the interest in the land on which the poles stand, and the right to erect such poles on the land. This interest and this right differ wholly in character and nature from the real estate owned in fee by the railroad or bridge company, and the rules for the valuation of that species of property are by no means appropriate for the purpose of arriving at the full value of the property of the Telegraph Company, as enumerated in the Statute of 1886. Most of this property, it is seen, is personal property, and it is called "land," although the poles are placed in streets which do not belong to the Company, and in which the Company has, as we have seen, no interest of a strictly legal nature. The railroad or the bridge company, on the contrary, does own the fee of the real estate upon which it places its superstructure of rails or bridge, and the question arises, What is the value of this real estate owned by the Company upon which this superstructure has been placed, and which is used for railroad or bridge purposes? That question involves almost necessarily the inquiry as to the profitableness of the superstructure which has been placed thereon, and which forms part and parcel of the real estate upon which it is laid; and this can only be answered by regarding the real estate as part of a whole portion of real estate devoted to the railroad or bridge purpose. The land—the por-

tion of the earth on which the rails rest—is owned by the Company, and the Company to that extent has a monopoly. This land cannot be increased or reproduced. The structure, having been placed on it, becomes a part of it, and it must all be appraised at its full value as an integral part of a whole or completed instrument created for the purpose of realizing pecuniary profit. The cost of each particular portion of real estate, while one element to be considered for the purpose of determining the question of profits, cannot, in the nature of the property, be regarded as the one important consideration for the purpose of arriving at its full value for taxation. Without continuing the comparison further, it seems to me there is a clear, radical and important difference in the very nature of the properties to be taxed, and which should lead to a different rule in the assessment of what is in fact real estate or earth in the one case and personal property in the other, although called "land."

A question as to the appealability of this order as not involving \$500 has been made by counsel for defendants. The counsel calls it a "judgment of the general term." It is in truth an order, and it has been so held to be by us. *People v. Asten*, 100 N.Y. 600, 1 Cent. Rep. 770. We think the appeal is provided for by the Act which gives the remedy by certiorari, and hence the point made by the counsel for the defendants is not well taken.

*The orders of the General and Special Terms, so far as they relate to the assessment of 1886, should be reversed, and that assessment should be set aside, with directions to the assessors to reassess the property of the corporation for the year 1886, in conformity with the principles laid down in this opinion; and the orders of the general term, so far as they relate to the assessments of 1886 and 1887, should be affirmed; no costs to either party on any appeal.*

All concur, except Finch and Gray, JJ., absent.

## MISSOURI SUPREME COURT.

John B. HUNDLEY, *Appt.*,

v.

John C. FARRIS, Admr., etc., of Madison S. Farris, Deceased, *Resp't.*

(...Mo....)

**Individual creditors of one partner have after his death the exclusive right to the satisfaction of their debts out of his separate property in the same way that partnership creditors have the right to payment from the firm property, and until such primary claims are satisfied in either case neither class of creditors is entitled to any share of the fund thus primarily devoted to the other class of debts.**

NOTE.—For authorities upon the equitable rule as to the payment of the individual and social debts of partners, see notes to *Valentine v. Wysesor* (Ind.) 7 L. R. A. 791; *Darby v. Gilligan* (W. Va.) 6 L. R. A. 740; *Patton v. Leftwich* (Va.) 6 L. R. A. 570. 12 L. R. A.

And this rule is not changed by statutes classifying demands against the estate of a deceased partner and requiring joint contracts to be construed as joint and several.

(Barclay, J., dissents.)

(February 2, 1891.)\*

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Buchanan County disallowing his claim against the estate of Madison S. Farris, deceased. *Affirmed.*

Statement by Sherwood, J.:

Mo. Rev. Stat. 1889, § 2384, provides that

\*An opinion was handed down in this case on March 22, 1890, leading to a reversal of the judgment below. A rehearing was subsequently granted and the court finally reached the conclusion announced in the opinion given herewith. [Rep.]



all contracts, which by common law are joint only, shall be construed to be joint and several; and sections 188, 209, that all demands against the estate of any deceased person shall be classified and paid as follows: " (5) all demands legally exhibited within one year; (6) all demands thus exhibited after the end of one year, and within two years."

This cause originated in the Probate Court of Buchanan County, from whose judgment plaintiff appealed to the circuit court, where the cause was tried on the following agreed statement of facts: "That during the whole of the year 1882, and thereafter, up to the time of the death of Madison S. Farris, the said Madison S. Farris and Michael Farris were partners, doing business in the City of Saint Joseph and Platte County, Mo., under the firm name of M. S. Farris & Co. That during the time they were so in partnership, to wit, on the 1st day of February, 1884, said firm borrowed from plaintiff, for use in their business as such partners, the sum of \$10,000 and gave their note in their firm name therefor, payable to plaintiff one day after date, which note is on file with the transcript from the Probate Court of Buchanan County, sent up in this case. That on said note there was paid, September 4, 1884, \$3,075.88, and on July 1, 1885, \$1,284.70, which said payments were made by Michael Farris, as administrator of the estate of M. S. Farris & Co., and as dividends on claims allowed by the probate court. Said Michael Farris, as surviving partner of said firm, was appointed and qualified as administrator of said partnership estate within one year before January 30, 1884, and the balance due on said note, no payments having been then made, was duly presented and allowed by the Probate Court of Buchanan County, Mo., against said partnership estate. That John Farris was duly appointed and qualified as administrator of the individual estate of Madison S. Farris by said probate court, and within one year after the grant of letters of administration on said individual estate this said note was presented for allowance against said individual estate, subject to the dividend so paid. That said John Farris has already paid, of individual claims allowed against said individual estate, within said first year of his administration, other than the one in controversy, nearly all the money realized from the assets of said estate, and there is not sufficient of said assets to pay, in addition, on the claim in contest, a per cent thereof equal to the per cent already paid on said other individual claims so allowed. That the individual estate is not sufficient to pay more than fifty cents on the dollar of the individual claims allowed within the first year against said individual estate, exclusive of the note or claim in contest in this suit. That the partnership assets have been about exhausted, and will not pay more than fifty per cent on partnership demands. The partnership estate of said M. S. Farris & Co. is not sufficient to pay more than fifty per cent of the claims allowed against said partnership estate. That this claimant has received his full *pro rata* of the assets of said partnership estate, the assets of said partnership estate being fully exhausted. That said Madison S. Farris died on the—— day of——, 1884."

12 L. R. A.

This was all the evidence introduced or offered in the case on either side. The note mentioned in the agreed statement of facts was not read in evidence, nor is a copy of it preserved in the bill of exceptions. There were no instructions or declarations of law asked or given. The court, on the agreed statement of facts, allowed plaintiff's claim against the individual estate of Madison S. Farris, deceased, but, finding it to be a partnership debt of M. S. Farris & Co., allowed it subject to the payment in full, first, of the individual debts theretofore allowed and proved in the probate court against the individual estate of said deceased, and rendered its judgment accordingly. The case was tried at the January Term, 1886, of the circuit court, and at that term motions for a new trial and in arrest were filed by the plaintiff, overruled by the court and the case appealed to this court.

*Messrs. James W. Boyd and A. D. Kirk* for appellant.

*Mr. B. R. Vineyard*, for respondent:

The estate of a partnership must be settled, in case of dissolution by death, entirely on equitable principles, and they would require that the claims of the several creditors and those of the joint creditors should be kept entirely distinct, each having its separate fund, and passing over to the other only in case of a surplus. Upon such dissolution, the assets are placed in the custody of the law for distribution.

Parsons, Partn. 2d ed. \*447, 448; 2 Bates, Partn. (1888) §§ 825, 828; 2 Lindley, Partn. Ewell's ed. pp. 1054, 1055; Story, Partn. 4th ed. § 868; Collyer, Partn. Perkin's ed. § 920; 8 Kent, Com. 12th ed. 65; *Level v. Farris*, 24 Mo. App. 445; *Union Nat. Bank v. Bank of Commerce*, 94 Ill. 278; *Ratney v. Nance*, 54 Ill. 85; *Black's App.* 44 Pa. 508; *Wilder v. Keeler*, 3 Paige, 171-174, 8 L. ed. 108, 104; *Murrill v. Neill*, 49 U. S. 8 How. 426, 12 L. ed. 1140; *Bond v. Nave*, 62 Ind. 505; *Weyer v. Thornburgh*, 15 Ind. 124; *Gray v. Chiswell*, 9 Ves. Jr. 118; *Jarris v. Brooks*, 28 N. H. 136; *Crockett v. Orain*, 38 N. H. 542; *Holton v. Holton*, 40 N. H. 77; *Moody v. Downs*, 63 N. H. 50; *Bagwell v. Bagwell*, 72 Ga. 92; *Irby v. Graham*, 46 Miss. 425; *McOuloh v. Dashiell*, 1 Harr. & G. 96; 3 Redf. Wills, 2d ed. p. 257, § 9; *Phelps v. McNeely*, 66 Mo. 558; *Cowan v. Gill*, 11 Lea, 674; *Davis v. Howell*, 38 N. J. Eq. 72; *Toombs v. Hill*, 28 Ga. 371; *Smith v. Mallory*, 24 Ala. 628; *Rodgers v. Meranda*, 7 Ohio St. 179.

The Statute of this State (§ 658) requiring all joint contracts to be construed as joint and several, and making provision (§ 8467) for a suit against anyone liable, or his administrator, without the necessity of uniting with him as defendants the other joint contractors, was intended only to affect the mode of procedure, "and does not affect the law of contracts as it existed prior to its enactment."

*Clark v. Cable*, 21 Mo. 225; *Ryan v. Riddle*, 78 Mo. 522; *Level v. Farris*, 24 Mo. App. 460.

Statutes making partnership debts joint and several were not intended to affect the distribution of funds, and do not give the joint creditors a right to participate *pari passu* with the separate creditors after exhausting the joint estate.

2 Bates, Partn. (1888) 828; *Level v. Farris*, 24 Mo. App. 445; *Irby v. Graham*, 46 Miss. 425; *Smith v. Mallory*, 24 Ala. 628.

The Statutes of this State, providing for the classification of demands against the estate of deceased persons and for the payment thereof, were not intended to disturb the prior rights of creditors already existing.

*Rodgers v. Meranda*, 7 Ohio St. 192; *Irby v. Graham*, 46 Miss. 431, 432; *Level v. Farris*, 24 Mo. App. 461, 463; *Smith v. Mallory*, *supra*; *Black's App.* 44 Pa. 508.

**Sherwood, J.**, delivered the opinion of the court:

Touching the principle involved in this litigation, *Chancellor Kent* remarks: "The joint creditors have the primary claim upon the joint fund, in the distribution of the assets of bankrupt or insolvent partners, and the partnership debts are to be settled before any division of the funds takes place. So far as the partnership property has been acquired by means of partnership debts, those debts have, in equity, a priority of claim to be discharged; and the separate creditors are only entitled in equity to seek payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the partnership estate, they cannot, in equity, resort to the private and separate estate, until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property until all the partnership creditors are satisfied. The basis of the general rule is that the funds are to be liable on which the credit was given."

3 Kent, Com. pp. 64, 65. *Judge Story* announces the same rule. *Story*, Partn. Bennett's ed. §§ 363, 365, 366, 377, 382. It is well-settled law, as shown by the text-writers already mentioned, and others cited by counsel for defendant, that partnership creditors have a primary and exclusive claim upon the partnership assets of bankrupt or insolvent partners, when the same are administered and distributed. From this admitted right sprang the corresponding exclusive right of individual creditors to the satisfaction of their debts out of the separate property of the individual partners, and, until such satisfaction of such primary claim in either case, neither class of creditors is entitled to any share of the fund thus primarily devoted to the satisfaction of its own special indebtedness, the rule being, and the plain equity being, that each estate must pay its own creditors. The great current of authority follows in this direction, and is recognized by the Supreme Court of the United States, (*Murrill v. Neill*, 49 U. S. 8 How. 414, 12 L. ed. 1135), and in a large majority of our sister States, as well as by the text-writers. They

are collated in the brief of defendant's counsel. A different rule was announced in England during *Lord Thurlow's* time, but afterwards the ancient rule was restored, as declared by his successor, *Lord Loughborough*, in *Ex parte Elton*, 8 Ves. Jr. 239. This is the generally prevalent rule in this country, as already stated. This rule is distinctly and with emphasis recognized and asserted by this court in *Phelps v. McNeely*, 66 Mo. 554, where the contest was between a creditor of the firm and an individual creditor as to which one was entitled to primary satisfaction of his indebtedness out of the partnership fund; and it was held that the partnership creditor was thus entitled, that his preference was not impaired by the dissolution of the partnership, nor by the fact that a deed of trust on the firm assets had been given by the purchasing partners to secure his indebtedness to his individual creditor, and that, as against the rights of the firm creditor, such deed was a nullity. This ruling, though standing alone, would be decisive of this cause; for the priority of a firm creditor to be satisfied out of the firm property would not be lost by reason of the dissolution of the partnership, or perish by reason of the death of one member of the firm. Our statutes looking to the classification of demands against the estate of a deceased member of a partnership, and the distribution of his estate, have no effect whatever on such priority. They were not intended to have any such effect. The well-settled equities in such cases are not to be thwarted or overthrown by mere methods of procedure such as those statutes authorize. This point has frequently been thus ruled in States possessed of statutes similar to our own. *Rodgers v. Meranda*, 7 Ohio St. loc. cit. 192; *Irby v. Graham*, 46 Miss. 425; *Smith v. Mallory*, 24 Ala. 628. A different rule was at first announced in Pennsylvania by a divided court in *Bell v. Newman*, 5 Serg. & R. 91; but the views of *Judge Gibson*, as expressed in that case, finally prevailed. *Black's App.* 44 Pa. 503. See also *Level v. Farris*, 24 Mo. App. 461, where the subject is exhaustively discussed by *Phillips, J.*, and the authorities ably reviewed.

Nor is the position here taken in any manner affected by our Statute requiring all joint contracts to be construed as joint and several, and making provision for suit against any one or more of those liable. This was the equity rule upon the occurrence of the death of a partner long before the enactment of the Statute. 3 Kent, Com. 64.

Statutes of that nature confer no additional rights on the creditors of a partnership, nor upon individual creditors. Nor do they affect or vary the equitable priorities of the partnership creditors. 2 Bates, Partn. 828, and cases cited. Indeed, they contain not the slightest tendency or intimation that way.

The case of *Shackelford v. Clark*, 78 Mo. 491, is not opposed to the views here announced, when rightly understood. *Martin, C.*, says expressly: "No principle in the law of partnership is better settled than that the creditors of a partnership have priority over the creditors of an individual member thereof in respect to the funds of the partnership." But that was a case where there were no partnership assets at all, and no dissolution of the partnership in

consequence of the death of one of the partners. The parties to the contract were all alive, and parties to that suit. Besides, there was but one fund in that case, and no occasion arose to discuss the priorities of different persons to different funds, as in the case at bar. Such a right as is now being considered did not and could not arise in that case, and all remarks concerning it are but *obiter*. It is only where the dissolution of the partnership occurs by reason of the death of a partner or the bankruptcy of the firm that the lien of the partnership creditors can arise. Story says: "The joint creditors of the partnership, while all the partners are living and solvent, can enforce no claim against the joint effects or the separate effects of the partners, except by a common action at law. It is only in cases where there is a dissolution by the death or bankruptcy of

one partner that the right of the joint creditors can attach, as a quasi lien upon the partnership effects, as a derivative subordinate right, under and through the lien and equity of the partners." Story, Partn. § 861. When there is no joint fund and no solvent partner, this makes an exception to the rule just mentioned. *Id.* § 878; 24 Ala. *supra*, *loc. cit.* 686, and cases cited. These considerations mark the wide difference between the present case and the one in 78 Mo., on which the plaintiff so confidently relies. The case of *Eaton v. Walsh*, 42 Mo. 272, has no bearing whatever on this case.

*This reasoning and these authorities result in an affirmance of the judgment, and it is so ordered.*

All concur, but *Barclay, J.*, who dissents.

### MINNESOTA SUPREME COURT.

William SCHUMAKER, *Resp't.*,

v.

St. PAUL & DULUTH R. CO., *Appt.*

(....Minn....)

1. The general rule in actions in tort is that the damages recoverable are those resulting directly from the wrongful act, whether they could or could not have been foreseen or contemplated by the wrong-doer as the probable result of the act done.
2. The direct or proximate consequences of a wrongful act are those which occur without any intervening cause; and where an efficient adequate cause for the injuries has been found, it must be considered as the true cause, unless another, not incident to it, but independent of it, is shown to have intervened.
3. The question as to what is the direct or proximate cause of an injury is ordinarily, not one of science or of legal knowledge, but of fact, for a jury to determine, in view of the accompanying circumstances.
4. Where the injuries complained of were caused immediately by the act of the servant in walking from the point to which he had been transported and put at work by the master, to a place where he could obtain necessary and proper shelter and protection from the elements, the master cannot be relieved from liability, in case it appears that the servant's act in so walking was apparently rendered necessary by the master's negligent act, and was not, in itself, negligent.

(April 8, 1891.)

**A**PPEAL by defendant from an order of the District Court for Ramsey County overruling a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

\*Head notes by COLLINS, J.

The facts sufficiently appear in the opinion. *Mr William H. Bliss* for appellant.

*Messrs. Erwin & Wellington*, for respondent:

The contract on the part of the master is, among other things, to provide those appliances that will enable the servant to perform his duty without exposure to dangers that do not come within the obvious scope of his employment.

*Coombs v. New Bedford Cordage Co.* 102 Mass. 572; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492; *Columbus & I. O. R. Co. v. Arnold*, 31 Ind. 175; *Keegan v. Kavanaugh*, 62 Mo. 280.

Where the servant is employed in a service from the performance of which danger may arise, it is the duty of the master to use all reasonable means and precautions to prevent the happening of anything from which increased and unnecessary danger may occur.

*Clarke v. Holmes*, 7 Hurlst. & N. 987; *Hayden v. Smithville Mfg. Co.* 29 Conn. 548.

Where the peril grows out of extrinsic causes, or circumstances which are not discoverable by the use of ordinary precaution and prudence, the employer is liable if the loss or injury is caused by his neglect or want of care.

*Perry v. Marsh*, 25 Ala. 659; *Baxter v. Roberts*, 44 Cal. 187; *Gibson v. Pacific R. Co.* 46 Mo. 168.

A servant has a right to repose confidence in the prudence and caution of his employer, and to rely upon his not putting him in a position of peril or risk, that a prudent man would not assume.

*Le Clair v. First Div. St. Paul & P. R. Co.* 20 Minn. 9. See *Clifford v. Denver, S. P. & P. R. Co.* 9 Colo. 383, where the facts are similar to those in the case at bar.

The neglect of the defendant was the proximate cause of the injury suffered.

See *Houye v. Fulton*, 29 Wis. 296.

NOTE.—Proximate and remote cause of injury discussed in *Smithwick v. Hall* (Conn.) *post*. — See notes to *Spicer v. Chesapeake & O. R. Co.* (W. Va.) 11 L. R. A. 389; *Smith v. Kanawha County Ct.* (W. Va.) 12 L. R. A.

Va.) 8 L. R. A. 82; *Read v. Nichols* (N. Y.) 7 L. R. A. 123; *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. 194; *Smethurst v. Proprietors of Ind. Cong. Church* (Mass.) 2 L. R. A. 695.

**Collins, J.**, delivered the opinion of the court:

To plaintiff's complaint herein the defendant corporation interposed a demurrer, upon the ground that it failed to state facts sufficient to constitute a cause of action. Upon the argument of this appeal defendant contended that its negligence in the premises was insufficiently pleaded; that the injury complained of, provided the same could be said to have been the result of defendant's act, was not proximate, but was too remote a consequence to be chargeable to it; and, further, that from the allegations of the complaint it was manifest that plaintiff himself was guilty of contributory negligence. Very little need be said on any of these points, for none are well taken. The complaint contains much that is superfluous, but in respect to negligence it avers the defendant's duty to have been to furnish transportation to plaintiff, a car-repairer in its employ, from the wrecked caboose, which he had been sent out to repair by the foreman, back to St. Paul, when he had completed his work, and that it wrongfully, unlawfully and negligently failed and omitted so to do, or to furnish plaintiff with transportation to any other place where shelter or food could be obtained, and that by reason of such negligent failure and omission plaintiff was compelled to and did walk to the Village of White Bear, a distance of nine miles, in the night-time, in extremely cold and dangerous weather, that being the nearest point at which the necessary shelter and food could be had; that placing reliance upon defendant's performance of its duty towards plaintiff when he had completed his work, by furnishing transportation back to St. Paul from the place on its line of road where he had been taken to repair the caboose, plaintiff was wholly unprepared with means for properly sheltering or clothing himself. It was also averred that the facts and circumstances with reference to the location of the caboose, the inclemency of the weather, the distance to shelter or food, and that plaintiff, by reason of his reliance upon being transported back to St. Paul when through with his work, had not provided himself with proper clothing for such weather, were then well known to the defendant. The negligence of the defendant might have been specified with greater certainty, but from an inspection of the pleading it appears that defendant is charged with having unnecessarily and unreasonably placed its servant, the plaintiff, in serious danger, from which injury resulted, by carelessly and negligently omitting to perform a duty immediately connected with his work, on the performance of which he had a right to and did rely. With full knowledge of the situation as to weather and the locality, consequently of the danger to be apprehended, it neglected and abandoned the plaintiff under circumstances which he alleges resulted in personal injury to him. It had no more right to unnecessarily and unreasonably leave him in a dangerous place, to expose him to an unnecessary and unreasonable risk from the elements, by failing to furnish transportation from the place where he had been put at work, when that work was completed, it being its duty so to do, according to the complaint, than it had to un-

necessarily and unreasonably expose him to risks and dangers while he was at work,—such risks and dangers as were discoverable by the use of ordinary precaution and diligence. The defendant should have been reasonably diligent, and could not, without incurring liability, desert the plaintiff in the manner and under the circumstances set forth in the complaint.

The important question in this case, however, is whether, from the complaint, it appears that defendant is liable for the injuries which resulted from plaintiff's efforts to obtain shelter and food on the occasion referred to; the former, as before stated, arguing that, as alleged, they are too remote, and are not the proximate results of its act. It is averred that, by reason of the unavoidable exposure of the plaintiff, he was made sick, contracted rheumatism, has ever since suffered great pain and agony, and has been permanently injured. It must not be forgotten that the gravamen of the action is the negligence and carelessness of the defendant in leaving plaintiff at a place where he could not procure either shelter or food. It is an action in tort, and not for a breach of contract. It is the negligence of the defendant which is complained of, and not the breach of a contract to return the plaintiff to St. Paul when he had performed his labor. It was, of course, essential that the plaintiff's relation with the defendant be made to appear, for, unless he was a servant to whom the defendant owed a duty, there could arise no liability by reason of its neglect to perform that duty. The relation of master and servant first having been shown to exist, the law fixes the duty of the former towards the latter, and a violation of this duty is a wrong, not a breach of the contract. This, then, is an action in which the wrong-doer is liable for the natural and probable consequences of its negligent act or omission; the general rules which limit the damages in actions of tort being, in many respects, different from those in actions on contracts. The injury must be the direct result of the misconduct attributed, and the general rule in respect to damages is that whoever commits a trespass or other wrongful act is liable for all the direct injury resulting therefrom, although such resulting injury could not have been contemplated as a probable result of the act done. 1 Sedgw. Dam. 180, *note*, and cases cited; *Clifford v. Denver, S. P. & P. R. Co.* 9 Colo. 393.

He who commits a trespass must be held to contemplate all the damages which may legitimately flow from his illegal act, whether he may have foreseen them or not; and, so far as it is plainly traceable, he must make compensation for the wrong. The damages cannot be considered too remote if, according to the usual experience of mankind, injurious results ought to have been apprehended. It is not necessary that the injury in the precise form in which it, in fact, resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. *Hill v. Winor*, 118 Mass. 251. The question is whether the negligent act complained of—leaving the plaintiff in the open country in the night-time, in extremely cold and dangerous weather, a long distance from shelter or food—was the direct cause of the injuries men-

tioned in the complaint, or whether it was a remote cause, for which an action will not lie, and it must be taken for granted that the walk of nine miles and incident exposure brought about the alleged sickness, pain and disability. There was no intervening independent cause of the injury, for all of the acts done by the plaintiff, his effort to seek protection from the inclement and dangerous weather, were legitimate, and compelled by defendant's failure to reconvey him to the city. Had he remained at the caboose, and lost his hands, or his feet, or perhaps his life, by freezing, no doubt could exist of the defendant's liability. It must not be permitted to escape the consequences of its wrong because the injuries were received in an effort to avoid the threatened danger, or because they differ in form or seriousness from those which might have resulted had the plaintiff made no such effort. An efficient, adequate cause being found for the injuries received by plaintiff, it must be considered as the true cause, unless another, not incident to it, but independent of it, is shown to have intervened between it and the result. This is the substance of very clear statements of the law found in *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 228, and in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 489, 24 L. ed. 256.

And upon the point now under consideration we fail to distinguish between the case at bar and *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 842, an action brought to recover for like damages said to have been caused by directing passengers to alight from a train at a place

about three miles distant from their destination. At all events, the question as to what was the proximate cause of a plaintiff's injuries is usually one to be determined by a jury. As was said in *Milwaukee & St. P. R. Co. v. Kellogg*, *supra*, the true rule is that what is the proximate cause of an injury is ordinarily for a jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances attending it.

Finally, the defendant insists that plaintiff was guilty of contributory negligence, because, from the complaint, it appears that he was wholly unprepared with clothing sufficient for the occasion, and because he left the shelter of the caboose when he undertook his journey upon foot to the Village of White Bear. The plaintiff, undoubtedly, went prepared with such clothing as he would ordinarily and naturally need for the occasion, had the defendant performed its alleged duty, and this was all that was required of him. He was not obliged to anticipate the defendant's negligence or omission, and prepare for it, nor does it follow that, because there was a caboose at the place where he worked, it afforded him adequate and proper shelter for the night. If this was the fact, it can quite properly be shown as a defense upon the trial of the case. But the complaint negatives such a conclusion.

*Order affirmed.*

*Mitchell, J.*, did not participate in the making and filing of this decision.

## INDIANA SUPREME COURT,

Martha O. LOSTUTTER, *Appt.*,

v.

CITY OF AURORA *et al.*

(....Ind....)

1. A public pump in a city street is not a nuisance to an abutting lotowner when maintained by the city authorities.
2. A well in a city street abandoned by a former owner of the land may be fitted up and maintained for public use by the municipal authorities without the consent of the abutting owner.

(January 8, 1891.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Dearborn County in favor of defendants in an action brought to enjoin the maintenance of a pump in the street in front of plaintiff's property. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. McMullen & Johnson* for appellant.

*Messrs. William S. Holman and William S. Holman, Jr.*, for appellees:

It is not every little annoyance, not every in-

convenience, and not even every violation of the rights of another, which will authorize the interposition of a court by means of an injunction. It must be a case of strong and imperative necessity.

Hilliard, *Injunctions*, 8d ed. p. 828, par. 2.

The rights of the public in a city street, and the control of the city over her streets, is not different in principle, whether the fee of the street is in the adjacent owners or in the city.

*Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224, 228.

It is too late to contend that a public street in a populous city may be used for no other purpose than a mere passageway for foot passengers and vehicles, without compensation to the abutting owners.

2 Dillon, *Mun. Corp.* 2d ed. p. 545.

Although an easement only be acquired by the public, the municipal or local authorities may build a reservoir or cistern in a street to retain water with which to sprinkle streets or extinguish fires without the consent of the owners of the fee.

2 Dillon, *Mun. Corp.* 2d ed. par. 545, par. 690 in 8d ed.; *Crooke v. Flatbush Water-Works*

**NOTE.**—For authorities as to the rights of an abutting property owner in a highway, see notes to *Iron Mountain R. Co. v. Bingham* (Tenn.) 4 L. R. A. 622; *Pearson v. Eaton County* *Supra* (Mich.) 4 L. R. A. 198; *Moose v. Carson* (N. C.) 7 L. R. A. 548; 13 L. R. A.

*Charlotte v. Pembroke Iron Works* (Me.) 8 L. R. A. 828; *East End St. R. Co. v. Doyle* (Tenn.) 9 L. R. A. 100; *Dill v. Board of Education of Camden* (N. J.) 10 L. R. A. 278.

*Co. 20 Hun, 245; Angel, Highways, 3d ed. par. 91, p. 98, par. 312; Wait, Act, and Def. par. 12, art. 3, p. 616; Gross v. Ft. Wayne, 45 Ind. 429, 437.*

An ornamental structure proper in itself, placed in a public street by the proper authorities, for public use or enjoyment, although it extends upward instead of downward, and although it may not leave the entire street open to the public, if there is ample room left for public travel and convenience, will not be declared a nuisance on the application of the abutting owner of the fee, nor will the said owner be entitled to compensation as for a new and additional servitude.

*Tompkins v. Hodgson, 2 Hun, 146, 4 Thomp. & C. 485.*

The streets of a populous city or village may be appropriated to other purposes than a mere place of passage; they may be used and appropriated for any public use which is consistent and in harmony with their use as a public highway.

*People v. Kerr, 27 N. Y. 188, 218; Chapman v. Albany & S. R. Co. 10 Barb. 360; Boone, Corp. par. 293, p. 456, par. 294, p. 459; Dillon, Mun. Corp. 3d ed. par. 558; Horr & Bemis, Mun. Pol. Ord. par. 243; Pierce v. Drew, 136 Mass. 75.*

It is not essential that the act be specially authorized; it is sufficient if it be within the general scope of the powers conferred upon the municipality.

*3 Dillon, Mun. Corp. 3d ed. par. 971.*

**Elliott, J.**, delivered the opinion of the court:

The appellant owns a lot abutting upon a public street in the City of Aurora, on which she erected a dwelling-house, in which she and her husband, with their family, reside. The street has been improved, and has long been in general use. Years ago the owner of the lot now owned by the appellant dug and walled a well in the street in front of the lot, and this he did for his private benefit. The City had no interest and took no part in the work. In time the old well was abandoned, but another was dug by an owner of the lot for his own convenience. In April, 1887, the City of Aurora, without any legal proceedings and without the consent of the appellant, who had then become the owner of the lot, caused a platform to be constructed around the mouth of the well, and a pump to be placed in it. The appellant now asserts that the well constitutes a nuisance; that the City has no right to maintain a well in the street; that in doing so it has invaded her rights as an abutting owner; and she seeks an injunction prohibiting the City from maintaining the well.

It is undoubtedly the law that the abutter has a private property right in the street distinct from that of the public, of which he cannot be deprived without compensation. *Common Council of Indianapolis v. Croas, 7 Ind. 9; Haynes v. Thomas, Id. 88; State v. Berdette, 78 Ind. 185, and cases cited; Rensselaer v. Leopold, 106 Ind. 29, 3 West. Rep. 874; Terre Haute & L. R. Co. v. Bissell, 108 Ind. 113, 6 West. Rep. 253; Lafayette v. Nagle, 113 Ind. 425, 12 West. Rep. 637; Kincaid v. Indianapolis Nat. Gas Co. 124 Ind. 578, 8 L. R. A. 602; 12 L. R. A.*

*Porter v. Midland R. Co. 125 Ind. 476. See also authorities collected in note, Elliott, Roads and Streets, p. 528.*

This established principle leads to the doctrine that the street cannot be diverted from the use to which it was dedicated, and that an additional burden cannot be laid upon the property, without lawful authority, and after compensation has been paid or tendered. This much is clear. But an urban servitude is very comprehensive. It is always much more comprehensive than a suburban one. *Kincaid v. Indianapolis Nat. Gas Co. supra.*

The immediate question which arises is whether the urban servitude is broad enough to vest in the municipality the right to maintain a well in the street. The rights of a municipality, vested in it as the owner of an urban servitude, authorize it to use a street for many other purposes than that of travel. It is true that its primary character is that of a thoroughfare upon which citizens have a free right to pass and repass, and it is also true that its character as a street cannot be entirely destroyed without compensation to those injured by its destruction. See authorities cited in notes, pages 662, 663, Elliott, Roads and Streets. But, while this is true, it is also true that the use of streets is not confined to that of travel. Pipes for water and for gas may be laid in them, drinking fountains and hydrants may be placed in them, and cisterns may be dug in them. *West v. Bancroft, 33 Vt. 367; Barter v. Com. 8 Feur. & W. 259; Branson v. Philadelphia, 47 Pa. 329; Cincinnati v. Penny, 21 Ohio St. 499; 2 Dillon, Mun. Corp. 4th ed. § 690. See authorities collected in notes, Elliott, Roads and Streets, pp. 305, 306.*

We can see no reason why a well originally dug by a lotowner may not become a public convenience for citizens and travelers, and as such maintained by a municipal corporation. The principle asserted by the authorities to which we have referred clearly authorizes the conclusion that a well originally dug in a street by a lotowner may be taken charge of by the corporate authorities, and made fit for convenient public use. Town pumps have long been in existence—long before Hawthorne's historical pump poured forth its rill—and it cannot be justly said that a municipal corporation is guilty of maintaining a nuisance where it does no more than maintain a pump in one of its streets. It is immaterial whether a well, hydrant, fountain or the like was dug or erected by a municipal corporation as a part of a general plan of improvement, for a thing of that kind, promotive, as it presumptively is, of public convenience, may be adopted by a municipality and maintained for public use. Kindred cases prove that the general principle here involved has long been recognized. *King v. West Riding of Yorkshire, 2 East, 342; Board of Comrs. v. Washington Twp. 121 Ind. 379; Indianapolis v. Lawyer, 88 Ind. 348. See also authorities in notes, Elliott, Roads and Streets, pp. 22, 34, 85.*

We cannot presume that a wrong was committed by the officers of a public corporation. On the contrary, we must presume that they rightfully performed their duty. We must therefore presume that the officers of the City were not guilty of an actionable wrong in do-

ing what they did in order to put the well in a suitable condition for convenient public use. The burden is on the appellant to rebut this presumption by bringing forward countervailing acts, not by pleading bare conclusions or

recitals. Facts are requisite to constitute a cause of action, and they are wanting in this instance.

*Judgment affirmed.*

## NORTH CAROLINA SUPREME COURT.

WALLER  
v.  
BOWLING, *Appt.*

(....N.C....)

1. A tenant in common may be liable for conversion in wrenching and carrying away machinery from a mill against his co-tenant's protest.
2. After suit is brought for conversion plaintiff cannot be compelled to take back the property.
3. No demand is necessary before suit for conversion of property carried away in the face of plaintiff's protest.

(March 10, 1891.)

**A**PPREAL by defendant from a judgment of the Superior Court for Granville County in favor of plaintiff in an action brought to recover damages for the alleged wrongful conversion of certain machinery by defendant to his own use. *Affirmed.*

Statement by Avery, J.:

This was a civil action tried at the April Term, 1890, of the Superior Court of Granville County, before Womack, *Judge*. The action was brought to recover damages for unlawfully removing and converting to the defendant's own use certain machinery that had been placed in a mill run by water. On the 28d of August, 1890, and for some years prior to that time, the plaintiff and defendant were owners in fee and tenants in common of the

**NOTE.**—*Liability of tenant in common to action of trover.*

The law undoubtedly was formerly that one tenant in common of chattels had no right of action against his co-tenant if he was deprived by the latter of the enjoyment of the common property; and so it is laid down by Littleton, §22, that "if two be possessed of chattels personal in common, if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done him the wrong to occupy in common when he can see his time," and the earliest cases are to the same effect. And it may be said to be a general rule at the present time that trover will not lie between tenants in common. See Webb v. Danforth, 1 Day, 301.

Exceptions were soon made to the rule, however, some of which have become as firmly established and are as widely recognised as the rule itself, while others have received only partial recognition.

### *Exclusive possession of property by one tenant.*

The result of the common ownership is that each tenant has a right to the possession of the property, and consequently he can be guilty of no wrong in obtaining and retaining such possession, even though the result is to exclude his co-tenant from the beneficial enjoyment of the property. In such case the rule is uniformly applied, and the only remedy of the excluded tenant appears to be to await an opportunity to obtain the possession and enjoyment of the property or to file a bill in equity for a sale of the property and a division of the proceeds. Cheek v. Wheatley, 3 Sneed, 484; Tyler v. Taylor, 8 Barb. 587; Farr v. Smith, 9 Wend. 340; Given v. Kelly, 85 Pa. 309; Shamburg v. Moorehead, 4 Brewst. 32; Southworth v. Smith, 37 Conn. 355; Bertrand v. Taylor, 18 Ark. 470; Heller v. Hufsmith, 102 Pa. 586; Campbell v. Campbell, 3 Murphy, 66; Hinds v. Terry, Walker (Miss.) 80; Leonard v. Scarborough, 2 Ga. 73; Weld v. Oliver, 21 Pick. 523; Cole v. Terry, 3 Dev. & B. Eq. 25.

The reason assigned for this is because the possession of one is the possession of both. Brown v. Hedges, 1 Salk. 390; Fox v. Hanbury, 3 Cowp. 445; Holford v. Camsell, 1 T. R. 633; Smith v. Stokes, 1 East, 303.

19 L. R. A.

The rule is applied to crops. Keisel v. Earnest, 21 Pa. 90; Ballou v. Hale, 47 N. H. 347.

And it makes no difference that the tenant in possession uses the property as though it was his own exclusively. Fightmaster v. Beasley, 7 J. J. Marsh. 410.

Trover will not lie against the vendee of the original co-tenant while he remains in possession of the property although claiming it as sole owner. Kilgore v. Wood, 56 Me. 154.

Trover will not lie by one tenant in common of real estate against his co-tenant for the conversion of the title deeds because each has an equal right to the possession of them. Daniels v. Daniels, 7 Mass. 137.

One case has recognized a distinction where the property is of such a nature as to be necessarily destroyed by use, holding that in such case trover lies for the appropriation of the property by one of the parties to his exclusive use. Lowe v. Miller, 8 Gratt. 213.

In Illinois the statute has provided for an action in case one tenant assumes exclusive control (Benjamin v. Strempfle, 18 Ill. 463; Boyle v. Levings, 28 Ill. 314); but even in that State there is no liability unless one tenant assumes and exercises exclusive ownership repudiating the rights of the others. Swartwout v. Evans, 37 Ill. 445.

### *Destruction of property.*

The first exception made to the rule was that if one tenant in common gets possession of the common property and destroys it his co-tenant will have an action against him for the wrong. This exception appears in Coke's comments on Littleton, 200 a, b (see also Bacon, Abr. Trover, c), and runs through the books to the present time. In fact it became the basis for all the other apparent exceptions to the rule which now exist, the latter being scarcely more than an application of the original exception to acts which in the judgment of the various courts amount to a destruction.

Trover will lie for a destruction of the property. Tubbs v. Richardson, 6 Vt. 442.

If one tenant in common destroy the common property the other tenant may bring trover against him; but if the common property is not destroyed



tract of land on which the mill was situate, each holding one undivided half. On said 28d of August the defendant executed a contract under seal to convey to one John T. McDonough, on the payment of a note of the same date for the sum of \$300 by said McDonough and wife. McDonough and his wife, on the same day, also joined in executing a mortgage deed upon his interest in said land to secure the payment of said notes. The said John T. McDonough borrowed of the plaintiff the sum of \$200, and executed his note, bearing date March 20, 1888, for said sum, with interest at 8 per cent. The said McDonough purchased with said borrowed money the turbine wheel, shafts, pulleys, level, cog-wheel, etc., which are the subject of this action, and executed, his wife joining, a mortgage, conveying said machinery, to secure said note due plaintiff, the

said machinery not then being in said mill. On default in the payment of the \$300 note for purchase money of the land, the defendant, on the 17th of January, brought suit against McDonough to subject his interest in the land, and at April Term, 1888, of the Superior Court of Granville obtained a decree of foreclosure, under the terms of which the interest of said McDonough in said land was sold by a commissioner for the sum of \$50, the defendant being the purchaser, and said sale was confirmed at the September Term, 1888, of said court. The wheel and some other parts of the machinery were placed in the mill after being conveyed, on the 20th of March, 1885, by mortgage deed, to secure said note for \$200, due to plaintiff, but before the said foreclosure sale. The plaintiff alleges that none of the machinery sued for had been placed in position

but only taken out of the possession of the other tenants and carried away, the action will not lie. *Barnardiston v. Chapman*, cited in *Heath v. Hubbard*, 4 East, 110.

Destruction of the common property or rendering it useless by use will warrant the action. *Guyther v. Pettijohn*, 6 Fred. L. 888.

Where one tenant in common of a printing press removed certain essential parts of it and carried away several fonts of type so as to render the press incapable of use by himself or his co-tenant, he has so far destroyed the press that his co-tenant may maintain trover against him. *Needham v. Hill*, 127 Mass. 186.

Rendering the property wholly unfit for the use and purpose for which it was made is destruction. So held where a joint owner of an oil-well, and machinery used for working the same, tore up and removed from the well all the machinery, sold part of the tubing and caused the remainder of the machinery to be taken to another county, and applied the same to his own private use, and sold part of it for old iron. *Given v. Kelly*, 86 Pa. 308.

Turning hogs which one co-tenant is keeping to fatten out into the street without further account of them is *prima facie* evidence of destruction which will entitle his co-tenant to maintain trover. *Sheldon v. Skinner*, 4 Wend. 530.

The destruction of common property which will render one co-tenant liable to the other in trover means such dealing with it that it is no longer the thing held in common, but something else that cannot be used or possessed by the parties as before. Anything equivalent to destruction is sufficient as well as such a change that it is no longer the same thing, or a removal of it and placing it in such a condition that the co-owner cannot avail himself of his right, because the property is out of his reach. *Strickland v. Parker*, 54 Me. 209.

One tenant in common cannot maintain an action against his companion unless there has been a destruction of the particular chattel or something equivalent to it. *Morgan v. Marquis*, 9 Exch. 145; *Roston v. Morris*, 26 N. J. L. 176.

If one tenant in common of a note surrenders it to the maker trover will lie. *Winner v. Penniman*, 85 Md. 165.

#### *Loss of property.*

Loss of property will warrant the action. *Hyde v. Stone*, 7 Wend. 387; *Hall v. Page*, 4 Ga. 436; *Starnes v. Quinn*, 6 Ga. 87.

A destruction takes place whenever the plaintiff's right of recaption has been entirely put an end to by the act of defendant. So, where a vessel was sent on a voyage and lost the action lies. *Knight v. Coates*, 1 Ir. L. R. 59. See also *Barnardiston v. Chapman*, cited in *Heath v. Hubbard*, 4 East, 110. 12 L. R. A.

#### *Conversion of property.*

It is evident that the possession or use of the common property by one tenant may become so exclusive as to amount practically to a destruction of the interest of the other. When such is the fact there is no doubt that the excluded tenant may maintain trover for the wrong. *Bell v. Laymar*, 1 T. B. Mon. 40; *Newby v. Harrell*, 20 N. C. 154.

The difficulty arises in determining when the facts show a destruction of the interest of the complaining party. It has been stated that if the property is not capable of division and is still in the possession of the defendant there can be no action. *Balch v. Jones*, 61 Cal. 225.

But that is stronger than other courts state the rule. Thus, in *Roddy v. Cox*, 20 Ga. 309, the action is held to be maintainable as soon as the party in possession sets up an exclusive claim to the property denying any interest in the co-tenant.

And the latter rule appears in the decisions of other States; thus, in *Grove v. Wise*, 20 Mich. 162, the court held that trover can be maintained by one tenant in common against his co-tenant after demand made that he be admitted to his rights as co-tenant and a refusal to recognise such rights, coupled with a distinct claim of entire ownership. So where one co-owner of a buggy rakes got possession of the same, and when his co-tenant demanded possession refused it stating that he held and owned the rake in entirety as against his co-tenant, there is such a conversion as will entitle the other to maintain trover. *Bray v. Bray*, 30 Mich. 480.

The latter rule is a decided innovation on the main rule that trover will not lie between tenants in common and is in advance of the general doctrine on the subject, which is that the refusal to acknowledge the co-tenant's rights upon demand will not justify an action of trover. *Balch v. Jones*, 61 Cal. 225.

That one tenant in common has obtained the exclusive possession of the chattel (a horse) and claims to be the sole owner, refusing to deliver it up to his co-tenant or permit him to share in the possession, will not sustain an action in trover; a loss, destruction or sale must be shown. *Gilbert v. Dickerson*, 7 Wend. 450.

With regard to machinery one tenant in common has no right to demand a delivery of the whole or his share of the property and maintain an action for a refusal on the part of his co-tenant to deliver the same. *Koningsburg v. Launitz*, 1 R.D.Smith, 217.

Even where one tenant in common of machines had the interest of his co-tenant sold under execution and purchased the same himself, taking and claiming exclusive possession, there was no such conversion as would warrant trover. *St. John v. Standing*, 2 Johns. 463.

in the mill until after the mortgage to him was executed. The issues submitted were as follows: "(1) Did the defendant unlawfully convert the property described in the complaint? Yes. (2) If so, what damage has the plaintiff sustained thereby? Two hundred and fifteen dollars and interest from 18th day of April, 1889, to date, at 6 per cent."

First exception: In addition to the issues agreed upon the defendant tendered the following issue, which the court declined to submit to the jury, and the defendant excepted: "Are the plaintiff and defendant tenants in common of the property alleged to have been converted?" The plaintiff introduced a mortgage executed by John T. McDonough and wife to the plaintiff for the machinery described in the complaint, and also the note secured thereby, for \$200, \$100 of which was due

March 20, 1888, and \$100 of which was due March 20, 1887, and indorsed thereon was a credit of \$17 November 23, 1887.

Second exception: The plaintiff was examined in his own behalf, and testified: "I loaned McDonough money. He said he wanted to buy machinery. (Objection by defendant. Objection overruled, and exception by defendant.) The machinery he gave the mortgage on was bought with this borrowed money. It consisted of a turbine wheel, cog-wheel, shaftings, pulleys, etc., necessary to run the mill, and was worth at the time of the conversion \$215. It was put in the mill. The defendant tore it up. I saw him do it, and forbid him. He said he was responsible, and would carry it away. He took it away April 18, 1889. The mortgage was made on the machinery before it was put in the mill." Cross-

But where one tenant in common of machinery in the form of personal property removes the same to his own buildings and attaches it in such a way as to make it real estate, there is such a conversion of the property as will maintain trover. *Benedict v. Howard*, 81 Barb. 571.

So where a tenant in common of a marine railway consisting of iron and wooden rails and sleepers, endless chain, gears and sheep cradle removed the same from the place where they were situated and placed them upon land of his own, claiming the entire right and ownership of the same and denying any right in the co-tenant, it amounts to a conversion for which trover will lie. *Strickland v. Parker*, 54 Me. 208.

Following are some illustrations of the application of the doctrine:

To maintain the action plaintiff must prove that the conversion went to the destruction of the chattel or to the exclusion of his right. *Allen v. Harper*, 26 Ala. 689.

Trover for the conversion of one co-tenant's share in crops by the other cannot be maintained unless there is such destruction, sale or disposition of the crops by the one that the other party is precluded by that act from any further enjoyment of it. *Warner v. Abbey*, 113 Mass. 380.

One tenant in common of a chattel (corn) may maintain an action of trover against his co-tenant who has converted the chattel to his own use, and such a conversion may be proved by the destruction of the chattel, by sale or by such an act of appropriation as will of its nature finally preclude the other party from any future enjoyment of it. *Delaney v. Root*, 99 Mass. 547.

One tenant's using up the common property, as for instance hay, is a conversion. *Lewis v. Clark*, 59 Vt. 263.

Any disposition of the property by the defendant for his own use which puts it out of his power to deliver it on demand is a conversion. *Webb v. Mann*, 3 Mich. 143.

A tenant in common cannot maintain trover to recover possession of a machine from his co-tenant although the latter has leased it to a third person. *Poster v. Magee*, 2 Lans. 184.

One tenant in common of a chattel cannot sue another for a conversion unless the common property is destroyed, carried beyond the limits of the State, or, when perishable, so disposed of as to prevent the other from recovering it. *Grim v. Wickes*, 80 N. C. 243.

If one tenant in possession gets possession of the common property, which is perishable, and sends it off to a place unknown to his co-tenant, so that it is wholly lost to the latter, trover will lie. *Lucas v. Hardin*, 3 Dev. L. 298.

12 L. R. A.

Where a landlord leased property on shares and the tenant put in crops, after which the landlord moved upon the premises and harvested the crops and refused to recognize tenant's rights, it was held to be a conversion. *McClure v. Thorpe*, 13 West. Rep. 430, 66 Mich. 33.

Where a co-tenant is bound by contract to divide the joint property at a certain place and appropriates it altogether to his own exclusive use under a claim of exclusive right and under circumstances which render a division and delivery in the manner agreed upon practically impossible, there is such a conversion as will sustain an action of trover. *Ripley v. Davis*, 15 Mich. 79.

A complaint stating that, plaintiff being tenant in common with defendant of certain hay, defendant claiming to be the absolute owner thereof wholly converted the same to his own use to plaintiff's damage, states a good cause of action although plaintiff may be compelled to prove that defendant lost, sold or destroyed the entire hay to make out his cause of action. *Thayer v. Gile*, 43 Hun, 268.

The conversion of a chattel by a tenant in common to its general and profitable application, though it change the form of the substance, is not such a destruction of the subject matter as to prevent the plaintiff from taking and using it in its altered state; therefore there is no ground for trover. So held in regard to the extracting of oil from the whale. *Fennings v. Grenville*, 1 Taunt. 241.

*Refusal to permit a division or severance of the common interest.*

A tendency to extend the exception to embrace a refusal to permit a division of the common property, where such division was possible, appears in the modern cases, the extent of which will appear from the following cases:

The doctrine that the refusal of one tenant in common to relinquish possession is no conversion applies to things in their nature so far indivisible that the share of one cannot be distinguished from that of another; it can have no reasonable application to such commodities as are readily divisible by tale or measure into portions absolutely alike. In such case a refusal to permit a division when demanded is a conversion which will warrant trover. *Fiquet v. Allison*, 12 Mich. 332.

A tenant in common of oats has a right to sever and take his share of the common bulk, and a refusal on the part of his co-tenant to permit such action will amount to a conversion, for which trover will lie. *Channon v. Lusk*, 2 Lans. 214.

As to property separable in respect to quantity or quality, by weight or measure, each tenant in common may demand of his co-tenant, having pos-

examined, he testified: "The mill seat was jointly owned by defendant and myself. We had first a twelve-foot wheel. The mill hadn't been in operation for two years. A portion of it was rotten. I objected to his carrying it off that day. He said he was going to carry it off if he could. It was some months after the machinery was bought before it was put in the mill. My mortgage was registered first. The turbine is there now, but not by my consent. I did not receive it. I don't know who brought it there." John McDonough, a witness for the plaintiff, testified: "All property taken was worth \$340. The property sued for was worth \$215. It was taken by the defendant April 18, 1889. The plaintiff did not give permission. I saw it on the defendant's wagon. The defendant's team brought the wheel back seven months afterwards. I executed the mortgage

before the property was put in the mill." Cross-examined, he testified: "When the mortgage was executed the turbine alone had not been placed in position. The other property, not sued for, had been." There was other evidence for the plaintiff tending to show the manner of the removal of the property by the defendant, and that it was worth \$215. The defendant, being examined in his own behalf, testified: "I moved the machinery sued for from the mill, but did not injure it. I afterwards carried it back to the mill. I got the mud off it, and put three quarts of oil on it. No part of it is missing."

Third exception: The defendant proposed to show by the witness and by the records in the case of *Bowling v. McDonough*, lately pending in the Granville Superior Court, that the interest of McDonough (one half) in the mill-site

session of the whole, his share, and upon refusal, or a conversion by such co-tenant, may sue in his own name, without joining all the other co-tenants. *Stall v. Wilbur*, 77 N. Y. 168.

Where one tenant in common of tobacco locked it up in his barn and refused to let his co-tenant have any part of it, stating that the latter had no tobacco there, he is liable to trover. *Burns v. Winchell*, 44 Hun, 268.

Where one tenant in common of cattle drove them away from the farm where they were kept to another place, and after repeated demands by his co-tenant for a division, or an accounting, refused and denied all his co-tenant's right, interest or share in the cattle, and locked it up in his barn, thereby converting it to his sole use, benefit and purposes, in denial of all the right, title and interest of his co-tenant, he is liable to an action of trover. *Potter v. Neal*, 62 How. Pr. 180.

With respect to grain, one tenant has the right to make a division and take away his share without the consent of his co-tenant, and if he is prevented by the co-tenant from doing so, by the latter's locking up the property and showing a clear intention to appropriate the whole to his own use, he may maintain trover for its conversion, after a proper demand made and failure to obtain a delivery. *Lobdell v. Stowell*, 37 How. Pr. 88.

Where tenants in common of corn and oats mutually agree how they shall be divided, and the one in possession locks them up in his barn, and when his co-tenant demands his share states that he cannot have it, there is such a conversion as will warrant an action of trover. *Lobdell v. Stowell*, 51 N. Y. 74.

Some courts, however, have refused to extend the doctrine to this class of cases.

One tenant in common cannot maintain trover against his co-tenant for crops in which they have a joint interest until a separation or severance by the parties, or until such a conversion shall exist as goes to the destruction of the crop or the entire exclusion of the co-tenant from the enjoyment of his right and interest therein. *Carr v. Dodge*, 40 N. H. 408.

One tenant in common cannot maintain trover against his co-tenant for a conversion of turpentine before a division; he must show a destruction, or some act tantamount thereto. *Books v. Moore*, 1 Busb. L. 1.

One tenant in common of corn and fodder cannot maintain trover upon the co-tenant's refusal to deliver him his share from the undivided mass. *Powell v. Hill*, 64 N. C. 171. See also *Hill v. Robison*, 3 Jones, L. 601; *Shearin v. Riggsbee*, 97 N. C. 220.

#### *Sale of property.*

The question whether or not an exception to the 12 L. R. A.

rule shall be made in case one tenant in common sells the whole of the common property is by no means settled in the affirmative, although the great weight of the modern authority is in favor of extending the exception to such cases. Of course no action will lie in case one tenant sells simply his individual interest, since under those circumstances the purchaser becomes a tenant in common with the owner of the other interest, and some of the courts have reasoned that since one tenant in common cannot give a valid title to his co-tenant's interest, an attempted sale by him has no other effect than simply to make the purchaser a tenant in common with the owner of the other interest, and that there is no ground for an action. Other courts have, however, held that an attempt by one tenant to sell the whole of the property for his own exclusive benefit is such an unwarranted interference by him with his co-tenant's rights as to amount to a practical destruction of them, and to warrant trover. As above stated, the latter doctrine is supported by a majority of the modern cases.

The question which rule should be followed can perhaps be better settled by an examination of the development of the respective rules in the jurisdictions where they have received the most attention.

#### *The rule in New York.*

The exception in the case of sales of the property first received recognition in this country, and the New York courts appear to have been the ones to first extend the exception to such cases.

In *Selden v. Hickcock*, 2 Cal. 187, *Spencer, J.*, states that "one tenant in common cannot maintain trover against another unless the other has destroyed the subject matter of the tenancy," but in that case there had been such a sale by one tenant of his share as severed the tenancy, and the action was held maintainable in that case; so the remark was *obiter*.

Soon afterwards the question came squarely before the court in a case where one tenant in common of property consisting of rum and scale beams sold the same, and the court held trover would lie. *Wilson v. Reed*, 8 Johns. 179. This doctrine was again recognized in *Hyde v. Stone*, 9 Cow. 231.

A general bill of sale by one tenant in common of a ship of the whole of it, followed by an exclusive claim and dominion in the purchaser, is evidence of a conversion which will sustain trover. *White v. Osborn*, 21 Wend. 75.

Where parties mix their wheat by putting the same into a common bin, if one afterwards sells the whole an action of trover will lie against him. *Nowlen v. Coit*, 6 Hill, 422.

Where one tenant in common of a ship sold it as

was sold by order of court in said case, and purchased by the defendant. Offered: *first*, in mitigation of damages; and, *second*, to show bona fides. Objection by the plaintiff, for the reason that the record does not show that the property sued for was the subject of said action, and because the plaintiff was not a party to said action. Objection sustained, and exception by the defendant. Cross-examined, the defendant testified: "The plaintiff forbade my taking the property. I took it up by force. It was not nailed down. The shafting was let into a box of casting. That was let in a sill on the ground. The box was either set on the sill or mortised in it." William Harris, Bernard Bowling and John Davis, witnesses for the defendant, testified that they helped the defendant carry away and bring back the machinery; that it was not injured; and that all

of it was brought back. Jerome Bowling, a witness for the defendant, testified: "I have had experience in mills. The 'ink' which holds the shafting is let into a square mortise in the sill, which sets on the ground."

Fourth exception: The defendant asked the following instructions: (1) If the jury believe that the plaintiff and defendant are tenants in common of the property in dispute the plaintiff cannot recover. (2) In this case, the plaintiff, having made no demand on the defendant for the property in dispute, cannot recover at all in this action. (3) At most, the damages done the plaintiff in this action, according to his own evidence, cannot exceed the actual damage done the property by the defendant or his agents while the property was in the possession of said defendant. (4) There is no evidence in this case that the defendant has damaged the

his exclusive property, ignoring the rights of his co-tenant, there was such a conversion as would warrant an action of trover. *Dyckman v. Valiente*, 48 N. Y. 560.

If one tenant sells the whole property for his exclusive benefit the action will lie. *Le Barron v. Babcock*, 9 L. R. A. 625, 122 N. Y. 153. See also *Tyler v. Taylor*, 8 Barb. 597; *Small v. Robinson*, 9 Hun, 420.

Where plaintiff and defendant entered upon a joint venture for the curing and sale of skins, a sale by one of the parties is not in itself a conversion; but if he denies his co-tenant's interest in the skins and refuses to account for the proceeds, but appropriates them to his own use, there will be a conversion for which trover will lie. *Green v. Edick*, 66 Barb. 567.

#### *The rule in Vermont.*

In Vermont there have been a number of decisions, and from the earlier ones it would be very difficult to tell just what rule upon the subject the court would ultimately adopt. Thus in *Vickery v. Taft*, 1 D. Chip. 241, the judge states a case of property kept by tenants in common for profit or use only in which he says the sale of the property by one of the tenants in common might be treated by the others as a tort. He distinguishes the case in hand from the one cited, however, by showing that, it being one where logs were left to be sawed into lumber upon shares and the one doing the work sold all the lumber when finished, the parties could not be considered joint owners, but, the lumber being capable of a fair division the defendant should have selected his share and sold that only, and by attempting to sell the share of the other rendered himself liable for the tort: and in *Tubbs v. Richardson*, 6 Vt. 443, in which one of the tenants in common of sixty-eight pounds of wool sold twenty-eight pounds and carried the balance to his own house, refusing to deliver any to his co-tenant, the court says that if this was a case of a sale of the whole of an indivisible piece of property they should probably yield to the late authorities on the point, which held that for such sale trover would lie; it further says that upon principle it would seem to depend upon the kind of property, and the use the party intended to make of it, whether a sale of the whole would be lawful or not, but that in the case before them there was a sale of less than half, and that since the cases went upon the ground of a sale of the whole this case was distinguishable from them, and that the action was not maintainable.

Again in *Welch v. Clark*, 12 Vt. 681, the court made an examination of the authorities upon the subject, although it was not necessary in the case before them, it being one for trespass, and although 12 L. R. A.

holding that it was not necessary to decide the question, the impression is that there is a disinclination to follow the authorities in favor of the maintenance of the action.

The next case in which the subject appears to have come up is *Hurd v. Darling*, 14 Vt. 221, in which the court states that nothing short of destroying plaintiff's interest will amount to a conversion of the chattel as against him, and states that in the case before it it is not pretended that such was done, for "he did not even sell it, which, as it would seem, does not amount to a conversion,"—citing *Tubbs v. Richardson*, *supra*. In this state of the law the question came squarely before the court in *Sanborn v. Morrill*, 15 Vt. 700, and the court decided that the action could not be maintained and this has been since adhered to. *Barton v. Burton*, 27 Vt. 93; *Lewis v. Clark*, 59 Vt. 363.

#### *The rule in England.*

There is a dictum in *Parton v. Williams*, 3 Barn. & Ald. 385, to the effect that if one tenant in common without authority, either express or implied, sells the common property, he would be a wrongdoer and the act would be a conversion. See also *Stancliffe v. Hardwick*, 2 Crompt. M. & R. 11.

In *Farrar v. Beswick*, 1 Mees. & W. 637, Park, B., stated: "I have always understood until the doubt was raised in *Parton v. Williams*, *supra*, that one joint tenant or tenant in common of a chattel could not be guilty of a conversion by a sale of the chattel unless it was sold in such a manner as to deprive his partner of his interest in it. A sale in market overt would have that effect."

One of two tenants in common of a chattel is not liable in trover at the suit of his co-tenant for the mere sale of the chattel, though he may be for such a disposition as amounts to a destruction of it. *Mayhew v. Herriock*, 7 C. B. 220.

The secret removal of entire chattels by one tenant in common without the consent or knowledge of his co-tenant for the purpose of selling them and applying the proceeds to his own use does not amount to a conversion, even although the removal has created a lien on the chattels in favor of a third person. *Jones v. Brown*, 38 Eng. L. & Eq. 304, 25 L. J. Exch. 345.

In *Rathwell v. Rathwell*, 26 U. C. Q. B. 179, the court makes quite a full investigation of the English authorities and decides that one tenant in common of chattels may maintain trover against the other for the sale of property where such sale is plainly intended, not for the objects of the joint owners, but in order to deprive the other owner of all interest in the property or proceeds; and in *Brady v. Arnold*, 19 U. C. C. P. 46, a later case, the court sums up the law as follows: "That if the sale

said property at all. (5) The jury can act only on the evidence in this case, and in no aspect can the jury find a verdict for the actual value of the property. (6) There has been no unlawful conversion of the property by the defendant under the evidence. (7) McDonough having made a payment of \$17 on the mortgage, Bowling was an equitable tenant in common with Waller to the amount of the excess over and above the mortgage of said Waller in the mill property and in the property removed. All of the above instructions were refused, and the defendant excepted.

Fifth exception: The court charged the jury that if the jury believe that the defendant took the personal property sued for into his pos-

session, the plaintiff being present, forbidding, and carried the same away, exercising a dominion over the same in denial of and inconsistent with the rights of the plaintiff, it being the property of the plaintiff, as further charged the jury will answer the first issue "Yes," and this notwithstanding the fact that there may have been the equitable tenancy in common contended for by defendant; to which charge the defendant excepted.

There was a verdict and judgment for the plaintiff, and defendant appealed.

**Messrs. Graham & Winston** for appellant.  
**Messrs. L. C. Edwards and Bachelor & Devereux** for appellee.

is in market overt so as to change the property, or if the subject of the joint ownership is sold to a number of purchasers who carry away the articles, or if the consequences attending the sale are such as to put it out of the power of the plaintiff to take the property or to pursue his remedy against the parties who have gotten possession of it, trover will lie.

*The rule as generally followed in this country:*

So far as the authorities have come to our attention the exception in favor of a sale has been followed or recognized without material qualification in the following States:

Alabama: *Permynter v. Kelly*, 18 Ala. 718; *Smyth v. Tankersley*, 20 Ala. 216; *Cowles v. Garrett*, 30 Ala. 360; *Sullivan v. Lawler*, 72 Ala. 76; and in that State the action may be maintained although the sale is of an interest in remainder. *Arthur v. Gayle*, 38 Ala. 265.

Where crops produced on land are to be divided between landlord and tenant the parties are tenants in common and a sale of the entire property by one is a conversion for which the other may maintain trover. *Neilson v. Slade*, 49 Ala. 253.

California: *Williams v. Chadbourne*, 6 Cal. 561.

Georgia: *Hall v. Page*, 4 Ga. 435; *Starnes v. Quin*, 6 Ga. 87.

Indiana: The point does not appear to have been decided in this State; but see *Collins v. Ayres*, 67 Ind. 239.

Maine: *Dain v. Cowing*, 22 Me. 349; *Wheeler v. Wheeler*, 33 Me. 349.

Maryland: *Winner v. Penniman*, 35 Md. 165.

Massachusetts: *Weld v. Oliver*, 21 Pick. 562; *Burbank v. Crooker*, 73 Mass. 158. See also *Goell v. Morse*, 126 Mass. 430.

Minnesota: *Person v. Wilson*, 25 Minn. 189; *Shepard v. Pettit*, 30 Minn. 121.

Nebraska: *Perry v. Granger*, 21 Neb. 579.

New Hampshire: *White v. Brooks*, 48 N. H. 402.

North Carolina: If one co-tenant takes the common property out of the State to parts unknown and sells it, the co-tenant may treat it as a destruction of the property; but a sale within the State is not sufficient. *Pitt v. Petway*, 12 Ired. L. 73.

Oregon: *Yamhill Bridge Co. v. Newby*, 1 Or. 173.

Pennsylvania: If one tenant in common of a chattel sells it it is an ouster and conversion and his co-tenant may hold the wrong-doer responsible in damages to the full extent of the value of his interest in the chattel of which he has been deprived. *Coursin's App.* 79 Pa. 229.

Trover cannot be sustained against the vendor for the mere sale of a chattel in which he was a joint owner, for such a sale passes to the vendee the individual interest only of the vendor. This rule, however, should be restricted to cases in which the property remains *in specie*. *Given v. Kelly*, 85 Pa. 300.

12 L. R. A.

Tennessee: *Cowan v. Buyers*, 1 Cooke, 50; *Bains v. McNairy*, 4 Humph. 359; *Cunningham v. Wood*, Id. 417.

Wisconsin: *Warren v. Aller*, 1 Pinn. 433.

The only cases in this country, outside of Vermont, which have utterly refused to recognize this exception so far as we have seen, are *Oviatt v. Sage*, 7 Conn. 90, and *Bell v. Layman*, 1 T. B. Mon. 40.

If a co-tenant sells the whole of the common property to a third person trover cannot be maintained against the latter so long as he retains possession of it, since he merely becomes by his purchase a tenant in common with the original tenant. *Dain v. Cowing*, 22 Me. 349.

Tenant in common cannot maintain action against purchaser of common property from his co-tenant in the absence of any conversion of the property or proof of its destruction. *Soudder v. Calais Steamboat Co.* 1 Cliff. 883.

*Misuse of property.*

Where one misuses the joint property by appropriating it to uses for which it was not designed, and refuses to apply it to the purposes for which it was held by both, the action may be maintained. *Agnew v. Johnson*, 17 Pa. 378.

If one of the joint owners delivers the property wrongfully to a stranger for purposes inconsistent with the uses for which it was designed, and such stranger denies the title of the other and claims exclusive possession and ownership, trover may be maintained. *Ibid.*

*Permanently changing form of property.*

Where one tenant in common of shot iron took possession of it and mixed it with other iron and manufactured the whole into various kinds of ware, which he sold and disposed of, there has been such a conversion of the property as will warrant trover. *Redington v. Chase*, 44 N. H. 38.

So of incorporating common materials into bridge. *Yamhill Bridge Co. v. Newby*, 1 Or. 174.

*General rules as to when action is maintainable.*

The cases in which trover will lie against a tenant in common are reducible to this. They are cases in which something has been done which has destroyed the common property, or where there has been a direct and positive exclusion of the co-tenant in common from the common property. *Jacobs v. Seward*, L. R. 5 H. L. 474.

The action will not lie unless the property has been actually converted or destroyed. *Strong v. Colter*, 13 Minn. 84.

In order to maintain the action it must be shown that the common property has been destroyed, sold or otherwise disposed of. *Williams v. Nolen*, 34 Ala. 168; *Farr v. Smith*, 9 Wend. 340; *Mumford v. McKay*, 8 Wend. 444.

Avery, J., delivered the opinion of the court:

The rule laid down by this court in *Emery v. Raleigh & G. R. Co.* 103 N. C. 209, has been repeatedly approved since. *Lineberger v. Tidwell*, 104 N. C. 510; *Brown v. Mitchell*, 102 N. C. 387; *McAdoo v. Richmond & D. R. Co.* 105 N. C. 151.

The defendant, in order to sustain his assignment of error, must show that the court has erred in refusing or failing at his request to present to the jury, through the medium of some issue submitted, a pertinent view of the law applicable to the testimony, whereby the jury may have been misled. *Bonds v. Smith*, 106 N. C. 584.

A tenant in common of a chattel cannot maintain an action of, or in the nature of, trover against his co-tenant upon the ground merely that his demand for possession of the common property has been refused by the latter, unless he can show that the co-tenant had subsequently consumed it or placed it beyond recovery by means of legal process. *Newby v. Harrell*, 99 N. C. 149; *Pitt v. Petway*, 12 Ired. L. 69; *Lucas v. Hardin*, 3 Dev. L. 398; *Cooley, Torts*, p. 455; *Ripley v. Davis*, 15 Mich. 75. But where the tenant in possession of personal chattels withholds the common property from his co-tenant, or wrests it from him, and exercises a dominion over it either in direct denial of or inconsistent with the rights of the latter, an action will lie for conversion. *Shearin v. Riggsbee*, 97 N. C. 221; 2 Greenl. Ev. § 642; *Trustees of the University of N. C. v. State Nat. Bank*, 96 N. C. 284; *Cooley, Torts, supra*; 2 Greenl. Ev. § 686, *note a*; *Grove v. Wise*, 39 Mich. 161.

There is some conflict among the authorities, and it is difficult to draw or trace the shadowy line that marks the limit to which a tenant in common may go in the exercise of control over the common property without subjecting himself to liability for conversion. But Schouler, in his work on Personal Property (vol. 1, p. 200), after taking the extreme ground that at common law nothing short of the destruction of a chattel or the conversion of the whole to his own use, or something equivalent, will render the owner in possession liable to his co-owners, says that mere dispossession of a co-tenant might, "if accompanied with other acts showing a hostile intent," amount to a conversion. It would seem that the violent wrenching of the machinery from the mill, when the plaintiff was present, forbidding, was the strongest evidence of such intent. In the case of *Strickland v. Parker*, 54 Me. 283, the facts were that the purchaser at execution sale of an undivided interest in a tract of land removed the superstructure of a marine railway located on the land, consisting of iron and wooden rails and sleepers, etc., and placed it upon another tract of land. The court held that the property removed constituted a part of the land, and passed with it; but that the co-tenant of the purchaser might maintain trover against him for removing it. The Supreme Court of Michigan, in the case of *Grove v. Wise, supra*, held that even before condition broken any person wrongfully interfering with a mortgagee's possession of a chattel under his mortgage deed would subject himself to lia-

bility to damage in an action for trover brought against him by such mortgagee. The facts in that case were that an undivided half interest in a steam-engine, boiler, and some planing-mill machinery had been mortgaged to the plaintiffs, and the defendant, Wise, having previously owned the other half interest, had subsequent to the date of the mortgage bought, at bankrupt sale, the land on which the building containing the engine, boiler and machinery stood. The case is cited with approval both by Cooley and in the *notes to Greenleaf's Evidence*. It seems to be settled that where personal property, after being subjected to the lien of a mortgage, is attached to mortgaged land, it will be held to have passed to the mortgagee in the chattel mortgage as against the assignee or holder of the real-estate mortgage, who had notice of the first mortgage when it was attached. *Herm. Chat. Mortg.* § 188; *Sheldon v. Edwards*, 35 N. Y. 279; *Smith v. Benson*, 1 Hill, 176. Where a steam-mill was mortgaged, not including the land on which it stood, it was held by the Supreme Court of Iowa that subsequent purchasers of the mill and premises on which it stood, who had notice of the chattel mortgage, took title to the mill subject to it. *Greither v. Alexander*, 15 Iowa, 470; *Herm. Chat. Mortg.* § 188. The general principle that exclusive possession of personal property by one tenant in common, and denial of the rights of his co-tenant, is a conversion for which trover will lie, is supported by numerous adjudications in the courts of other States. *Fiquet v. Allison*, 13 Mich. 328; *Weld v. Oliver*, 21 Pick. 563; *Winner v. Penniman*, 35 Md. 163; *Person v. Wilson*, 25 Minn. 189.

In *Stephens v. Koonce*, 103 N. C. 266, the defendant tendered to the plaintiff a judgment for the possession of a steam-engine, boiler, saw-mill, grist-mill, etc., removed from his land, and the costs of the action. The court held that the defendant was not only liable for costs, notwithstanding such offer, but for the full value of the property converted, and interest allowed by the jury, and could not be compelled to take the property back. The general rule is that where one of the owners of an undivided interest in a chattel exercises such dominion over the common property as is inconsistent with the rights of his co-owner, the latter may bring claim and delivery, if the property can be found, and recover the specific property with damage for deterioration as well as detention, or he may elect to sue for damages for the wrongful conversion, and recover the value of the property at the time of the taking and costs. *Stephens v. Koonce, supra*; *Ripley v. Davis*, 15 Mich. 75; *Hall v. Younts*, 87 N. C. 285.

After suit has been brought for the conversion, the owner cannot be compelled to take the property back, but when he does allow it to be returned in a damaged condition its diminished value can be considered in mitigation of damages. 3 Sutherland, Dam. 530.

The rule as to the measure of damages would be different where fixtures, such as gas-piping, are torn from a building, and the building is thereby rendered unfit for occupation and use. There the measure of damages is the cost of restoring the building to its original state and

the loss in its rental value while it was uninhabitable. *Willis v. Branch*, 94 N. C. 142.

It was not necessary that the plaintiff should make a formal demand for possession of the property before bringing the action, if, as both plaintiff and defendant testified, he was present, forbidding, when it was removed from the land. The law did not require him to act on the assumption that one who took it away in the face of his protest would return it at his

request, or to accept it in full satisfaction of his damages if there was a voluntary offer to return it. The exceptions insisted on in this court were the first four, and fifth. For the reasons given, we do not think that the judge erred in refusing the instruction asked or substituting that given, or in the rulings excepted to.

*There is no error.*

## PENNSYLVANIA SUPREME COURT.

Henry C. BUNTING

v.

Robert HOGSETT.

(....Pa....)

1. The question of proximate cause is ordinarily for the jury, but it is for the court where the facts are not in dispute.
2. Negligence of the engineer of a donkey-engine operated on a circular track, used in connection with a furnace and twice crossing a railroad track, which caused a collision with a railroad train at one of the crossings, is the proximate cause of injuries to a passenger on the train received in a collision at the second crossing, where the rear coach of the train was derailed in the first collision and the train came to a full stop on the second crossing and was there struck by the donkey-engine, from which, after reversing it and shutting off the steam, the engineer and fireman had jumped before the first collision, but which started again at once, the throttle being reopened by the jar of the collision or otherwise and ran into the train on the second crossing.
3. The negligence of a common carrier cannot be imputed to a passenger so as to defeat his right to recover against a third person for negligence.
4. An instruction that there is proof that plaintiff was suffering from Bright's disease and that it was a dangerous disease and should be taken into consideration in determining his expectation of life and loss of earning power, in a suit for personal injuries, is proper where there is testimony of medical experts that he is suffering from that disease with little if any evidence to the contrary.

(January 5, 1891.)

**CROSS-APPEALS** from a judgment of the Court of Common Pleas, No. 1, of Allegheny County rendered in an action brought to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servants, defendant assigning as error rulings which permitted a recovery, and plaintiff assigning as error rulings which permitted the consideration of evidence in reduction of the amount of damages allowed. *Affirmed.*

The facts sufficiently appear in the opinion.

**NOTE.**—The doctrine of imputed negligence discussed in notes to *Casey v. Smith* (Mass.) 9 L. R. A. 259; *Chicago City E. Co. v. Robinson* (Ill.) 4 L. R. A. 126, and cases referred to.

As to proximate cause of injury, see note to *Smithwick v. Hall* (Conn.) post, —.

12 L. R. A.

*Meers, Edward Campbell and Thomas Patterson*, for plaintiff:

A defendant is responsible for the results which actually follow his negligent act. He is not to be relieved because the consequences of his negligence assume a novel or peculiar aspect.

*Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 356; *Oil City Gas Co. v. Robinson*, 99 Pa. 6; *West Mahanoy Twp. v. Watson*, 8 Cent. Rep. 548, 116 Pa. 844.

The rule of *Thorogood v. Bryan*, 8 C. B. 115, is no longer the rule in Pennsylvania.

*Dean v. Pennsylvania R. Co.* 6 L. R. A. 148, 120 Pa. 514.

*Meers, A. D. Boyd and Lasear & Orr*, for defendant:

If the collision at the second crossing would not have happened if defendant's engineer had remained on the locomotive or donkey on which he was employed, instead of jumping off at the time he did, still defendant would not be answerable for the accident if the circumstances were such as to produce a reasonable apprehension in the mind of the engineer that it was necessary to jump off the locomotive in order to prevent great bodily harm or loss of life to himself.

4 Bl. Com. p. 146; *Logus v. Com.* 88 Pa. 265; *Murray v. Com.* 79 Pa. 818.

The defendant is not liable for injuries resulting from the collision at the second crossing if the second collision could not have been foreseen by the engineer as the natural and probable consequence of his conduct.

The injury must be the natural and probable consequence of the negligence—such a consequence as might and ought to have been foreseen by the wrong-doer as likely to flow from his act.

*Pennsylvania R. Co. v. Kerr*, 62 Pa. 353; *Pennsylvania R. Co. v. Hope*, 80 Pa. 578; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 298; *Hawerly v. State Line & S. R. Co.* 135 Pa. 50; *Fairbanks v. Kerr*, 70 Pa. 86; *Allegheny v. Zimmerman*, 95 Pa. 287; *Morrison v. Davis*, 20 Pa. 174; *McGrew v. Stone*, 53 Pa. 436; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 316; *West Mahanoy Twp. v. Watson*, 8 Cent. Rep. 243, 113 Pa. 574, 8 Cent. Rep. 548, 116 Pa. 844; *South Side Pass. R. Co. v. Trich*, 10 Cent. Rep. 367, 117 Pa. 890.

If the trainmen were guilty of such negligence which directly contributed to the accident resulting in plaintiffs' injuries, and defendant's employes were also guilty of negligence which also contributed to the accident, then



there was such a case of mutual or concurrent negligence as exempts the defendant from liability to the plaintiffs.

*Lockhart v. Lichtenthaler*, 46 Pa. 151; *Locksylvania & B. R. Co. v. Chenevith*, 52 Pa. 887; *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. 192; *Mann v. Weiland*, 81\* Pa. 256; *Philadelphia & B. R. Co. v. Boyer*, 97 Pa. 100; *Carlisle v. Brisbane*, 4 Cent. Rep. 508, 118 Pa. 544.

Clark, J., delivered the opinion of the court:

*Hosgett's Appeal.*

The defendant, Robert Hosgett, is the owner of the Lemont furnace, on the line of the South-West Pennsylvania Railroad, and the plaintiff, who, on the 18th of October, 1883, was a passenger upon one of the railroad trains, brings this suit to recover damages for a personal injury, received through the alleged negligence of the defendant's employé. It appears that a railroad track was used in connection with the furnace, and that what is called a "donkey-engine" was operated thereon, in furnishing supplies of stock, ore and coke to the furnace. The furnace track, in running out from the furnace to the coke ovens, forms, as it were, the arc of a circle, and the railroad track, crossing the furnace track twice, subtends the arc as a chord. The collision which occurred at the first crossing was caused by the culpable negligence of the defendant's engineer. This fact is conclusively established by the verdict of the jury, and, in the determination of the questions of law raised upon the assignments of error, this fact must necessarily be assumed. It is unnecessary, therefore, to refer to the evidence bearing upon the question. The appellant's contention is, however, that, as the plaintiff's injuries were not received in that collision, but in the collision which subsequently occurred at the other extremity of the chord, the negligence of the engineer, under the circumstances, cannot be regarded as the proximate, but as the remote, cause of the injury. Ordinarily, the question of proximate cause is for the jury, but, where the facts are not in dispute, the determination of that question is for the court. *West Mahanoy Twp. v. Watson*, 112 Pa. 574, 8 Cent. Rep. 248, 116 Pa. 844, 8 Cent. Rep. 548.

Some reference to the undisputed facts, therefore, is necessary to the complete understanding of the question thus raised.

It is conceded that in the first collision, although no one was injured, the rear truck of the rear coach of the passenger train was derailed. The brakeman pulled the automatic cord which operates the air-brakes. The engineer put on the air from the engine, and, the truck having regained the track, the train, which consisted of three cars, came to a full stop, with the middle car standing upon the second crossing. The engineer of the donkey says that, about the time of, or immediately before, the collision, he reversed his engine, shut off the steam, and, fearing that they would be crushed, both the engineer and the fireman jumped from it to the ground. By some means, however, presumably by the jar of the collision, the throttle was reopened, and the donkey at once started with some speed around the arc to the second crossing, where it came in collision with the

middle coach, in which the plaintiff was riding. The injuries complained of were received in this second collision. The appellant's contention is that the throttle having been closed before Lehan, the engineer, left the donkey, the second collision, under all circumstances, could not have been foreseen by him, as the natural and probable consequences of his conduct, and that, being in fear of his life, he had a right to quit the engine for a place of safety. It may be, perhaps, that the engineer and fireman, being under actual apprehension of great bodily harm, were, in any criminal aspect of the case, justified in leaping from the engine to save themselves, even if, in so doing, they should put in jeopardy the lives of others. But, assuming this to be so, it must be remembered that it was their own negligence which put them in fear of their lives, and constrained them to leap from the engine, and submit it, without control, to the consequences of the collision. They will be justified, perhaps, as we have said, in saving themselves, but it does not follow that either they, or their employer, would not be held for the negligent act which not only put them in peril, but resulted in personal injury to the plaintiff.

It is true, as the appellant contends, that the injury must be the natural and proximate consequence of the negligence,—a consequence likely to flow from the negligent act. The engineer would be held to have foreseen whatever consequences might ensue from his negligence, without the intervention of some other independent agency, and both his employer and himself would be held for what might, in the nature of things, occur in consequence of that negligence, although, in advance, the actual result might have seemed improbable. *Oil City Gas Co. v. Robinson*, 99 Pa. 6. We do not know that the throttle was opened by the jar of the collision, only from the fact that it was liable to be so, and the engineer will be presumed to have foreseen what was liable to occur. The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256. But no intermediate cause, disconnected with the primary fault, and self-operating, existed in this case to affect the question of the defendant's liability; it was the engineer's negligence that caused the first collision, and what occurred in consequence of this collision was not broken by the intervention of any independent agent, whatever. The first collision derailed the truck, and at the same instant opened the throttle, and turned loose the destructive agency which inflicted the injuries complained of. The negligence of the defendant's engineer was the natural, primary and proximate cause of the entire occurrence.

The appellant's further contention, however, is that, as plaintiff was a passenger on the South-West Pennsylvania Railroad, it was a proper and legal defense for him to show that the negligence of the railroad company contributed to the injury; that in such case the negligence of the company, which was a common carrier, must be imputed to the plaintiff as a passenger in the carrier vehicle. *Lockhart v. Lichtenthaler*, 46 Pa. 151, and *Philadelphia*

& *R. R. Co. v. Boyer*, 97 Pa. 91, are cited in support of this doctrine. In *Lockhart v. Lichtenthaler*, it was held that where a passenger in a carrier vehicle is injured by a collision, resulting from the negligence of those in charge of it, and those in charge of another vehicle, the carrier only is answerable for the injury; and this case was followed by *Philadelphia & R. R. Co. v. Boyer*, where the same rule was applied. The decision in *Lockhart v. Lichtenthaler*, as we said in *Dean v. Pennsylvania R. Co.*, 129 Pa. 520, 6 L. R. A. 143, was made by adopting the conclusion of the English courts in *Bridge v. Grand Junction R. Co.*, 3 Mees. & W. 247 (1888), in the exchequer; *Thorogood v. Bryan*, 8 C. B. 115, and *Catlin v. Hills*, Id. 128 (1849), in the common bench. These cases were followed in the exchequer in *Armstrong v. Lancashire & Y. R. Co.*, 44 L. J. Exch. 89 (1875), L. R. 10 Exch. 47. But *Thorogood v. Bryan*, *supra*, which is the leading case, has recently been overruled in the English court of appeal (*The Bernina* [Mills v. Armstrong], L. R. 12 Prob. Div. 58); and the doctrine, although formerly accepted in many of the States, is now generally disapproved. The authorities in England, and the great current of authorities in this country, are against it. The cases are collected in *Dean v. Pennsylvania R. Co.*, *supra*. They are numerous, and it is unnecessary to refer to them here. What was there said was given as an individual opinion merely, and was, to some extent, perhaps, *obiter dictum*; but we are now unanimously of opinion that the views there expressed, somewhat in advance, contain a proper exposition of the law. The identification of the passenger with the negligent driver, or the owner, or with the carrier, as the case may be, without his co-operation or encouragement, is a gratuitous assumption. As *Mr. Justice Field* said, in *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652: "There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver, or the person managing it, is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." The rationale of the rule of *Thorogood v. Bryan* is expressly disavowed in our own case of *Lockhart v. Lichtenthaler*, and it is now rejected as untenable, and wholly indefensible. Nor is there any rule or principle of public policy which will support such a doctrine. If

a person is injured by the concurrent and contributory negligence of two persons, one of them being at the time the common carrier of his person, there is no reason founded in public policy, or otherwise, which should release one of them, and hold the other. It is true, the carrier may be subjected to a higher degree of care than his co-tortfeasor, but this affords no reason why either or both of them should not be held to that degree of care, respectively, which the law imposes upon them, and to be answerable in damages accordingly. The general rule undoubtedly is, if a person suffers injury from the joint negligence of two parties, and both are negligent in a manner which contributes to the injury, they are liable jointly and severally, and it would seem in principle to be a matter of no consequence that one of them is a common carrier. Neither the comparative degrees of care required, nor the comparative degrees of culpability established, can affect the liability of either. The whole subject is fully discussed in *Dean v. Pennsylvania R. Co.*, and we do not desire to repeat what was there said.

We think the law was correctly stated in the charge, and in the answers to the points submitted by the defendant's counsel, and *the judgment is affirmed*.

#### *Bunting's Appeal.*

There was evidence in this case that the plaintiff, Henry C. Bunting, at the time of the trial, was suffering from what is known as "Bright's disease of the kidneys." Upon a chemical analysis, albumen was found in his urine. He suffered from dizziness, failure of sight and double vision. He was feeble, had shortness of breath and a staggering gait, and exhibited other symptoms of this malady. The testimony of some of the medical experts was that they believed him to be suffering from Bright's disease, and there was little, if any, evidence to the contrary. The court very properly, therefore, instructed the jury that there was proof of this fact in the case; that it was a dangerous disease; and that they should take this into consideration in determining Mr. Bunting's expectancy of life and the loss of his earning power. Nor was there any evidence to justify the jury in finding that this disease was caused by the personal injuries received in the collision. *The judgment is therefore affirmed.*

### CONNECTICUT SUPREME COURT OF ERRORS.

Charlotte S. LEMMON *et al.*, Admsrs, etc.,  
of D. S. Lemmon, Deceased.

Willis A. STRONG, *Appd.*

(69 Conn. 448.)

**An assignment of a note** on which is indorsed a guaranty not referred to in the assignment, but

**NOTE.**—Assignment of commercial paper transfers guaranty.

An assignment of negotiable paper by indorsing it payable to the order of another, adding a guar-

which is all that gives the note any value, assigns the guaranty also.

(September 12, 1890.)

**A PPEAL** by defendant from a judgment of the Court of Common Pleas for Litchfield County in favor of plaintiffs in an action upon the guaranty of a promissory note. *Affirmed.*

anty of payment, transfers also the indorsed contract of guaranty. *Harbord v. Cooper*, 43 Minn. 463, citing *Stillman v. Northrup*, 13 Cent. Rep. 681, 109 N. Y. 473; *Claffin v. Ostrom*, 54 N. Y. 581; *Craig v.*

The facts are stated in the opinion.

*Messrs. Huntington & Warner*, for appellant:

The contract of guaranty was non-negotiable, and made in connection with a non-negotiable note, and the plaintiffs could acquire no rights to either except by an assignment.

The assignment is of the note. This is not enough to transfer the guaranty.

Gen. Stat. § 981; *Bissell v. Gowdy*, 81 Conn. 47-50; *Wadhams v. Vanderwerken*, 1 Root, 385, 386; *Lamourieuz v. Hewitt*, 5 Wend. 307; *Edwards, Bills and Notes*, p. 219; *Beach v. Fairbanks*, 52 Conn. 167-174.

The contract of guaranty was a personal contract and made with Sherman, and not assigned by him, and he was the first holder for value.

*Huntington v. Harvey*, 4 Conn. 124-129; *Bissell v. Gowdy*, *supra*; *Taylor v. Binney*, 7 Mass. 479; *Trus v. Fuller*, 21 Pick. 140; *Baldwin v. Dow*, 180 Mass. 416-418; *Jones v. Boston & M. V. R. Co.* 2 New Eng. Rep. 693, 142 Mass. 189, 140, and cases cited; *Turley v. Hodge*, 8 Humph. 78; *Smith v. Dickinson*, 6 Humph. 261; *Barlow v. Myers*, 64 N. Y. 41-45; *Springer v. Hutchinson*, 19 Me. 859; *MoDoal v. Yeomans*, 8 Watts, 861; *Story*, Prom. Notes, § 484, and notes; 2 Dan. Neg. Inst. §§ 1774-1780.

The contract of guaranty was a collateral undertaking and not a security.

*Anderson*, Law Dict. title *Guaranty*; *Dole v. Young*, 24 Pick. 250-252; *Parker v. Oulvertson*, 1 Wall. Jr. 160; *Hill v. Smith*, 62 U. S. 21 How. 286, 16 L. ed. 118.

There is a broad distinction between the rule relating to guarantors of negotiable and non-negotiable notes.

*Backus v. Danforth*, 10 Conn. 297-306; 1 Swift, Dig. S. P. 485; *Pool v. Anderson*, 1 L. R. A. 712, 116 Ind. 88; *Abacom Bldg. & Loan Soc. v. Leeds*, 50 N. J. L. 899.

*Mr. W. Cothren* for appellees.

*Torrance, J.*, delivered the opinion of the court:

The facts found by the court below, so far as a statement of them is necessary for the decision of the case, may be briefly stated as follows: In April, 1877, one Karrman borrowed of one Sherman \$400, and at the same time, and in consideration of the loan, made and delivered to Sherman a promissory note, of which the following is a copy:

"Woodbury, April 26, 1877.

"On demand, for value received, I promise to pay B. A. Sherman \$400 (four hundred dollars), with interest annually.

"H. S. Karrman."

When so delivered the note had the follow-

ing indorsement upon it, made and signed, in consideration of the loan, by the defendant Strong:

"I hereby warrant the within note good and collectible until paid. W. W. Strong."

At this time Karrman had but little property and it is found that the loan was made and the note accepted "upon the individual financial responsibility of the defendant Strong, and upon his guaranty."

Karrman regularly paid the annual interest upon the note to Sherman up to April, 1888. In January, 1884, Sherman demanded of him payment of the note, which being refused, he brought suit against him in February, 1884. While that suit was pending, Sherman, for the sum of \$300, paid to him by Daniel S. Lemmon, the plaintiffs' intestate, sold and assigned the note to Lemmon by a written indorsement, directly under the guaranty and signature of Strong, of which the following is a copy:

"February 12, 1884.

"For value received I hereby sell and assign this note to D. S. Lemmon.

"B. A. Sherman."

Thereupon Sherman withdrew from the suit. Lemmon was by order of court substituted as plaintiff, and he prosecuted the suit to final judgment, and took out execution against Karrman. Only a small sum, however, was realized upon the execution, and the present suit is brought to recover from the defendant the balance due upon the note.

In the court below, after the plaintiffs had rested their case, the defendant moved for a nonsuit, "on the ground that the plaintiffs had failed to prove that the contract of guaranty of the defendant Strong, upon said note, had been assigned to the plaintiffs' intestate."

The court below, upon the point involved in this claim, in addition to the facts already stated, finds as follows: "The evidence bearing upon this point and the intention of the parties was the written assignment that appeared upon the note itself signed by the said Sherman as aforesaid, the fact that the said Lemmon at the time the note was purchased by him made an examination of the same, and the fact that the note was not good and collectible as against Karrman, while the defendant Strong was a man of property and in good financial standing. There was nothing said between the said Sherman and the said Lemmon, at the time of the assignment of the note as aforesaid, about the defendant Strong."

The court below came to the conclusion, upon the facts found, that, in making the assignment to Lemmon, Sherman, under the circumstances, had assigned both the contract of

*Parkia*, 40 N. Y. 181; *McLaren v. Watson*, 26 Wend. 425; *Ketchell v. Burns*, 24 Wend. 456; *Waldron v. Harring*, 26 Mich. 488; *Reed v. Garvin*, 12 Serg. & R. 100.

An indorsement on the back of a note of the words, "I guarantee payment of such note when due," does not show title in him, even if the words themselves are sufficient to transfer title, when an identical indorsement by him to another person follows it, with nothing to show that he had acquired title. *Brotherton v. Street*, 124 Ind. 690.

12 L. R. A.

A signature at the foot of a promissory note, following those of the makers, must be intended to be a signature as guarantor. *Parks v. Brinkerhoff*, 7 Hill, 668; *Jones v. Dow*, 187 Mass. 119.

On a guaranty of bills of exchange which are protested for nonpayment, the payee who has trusted to the guaranty may recover of the guarantor the commissions, disbursements and other charges. *Lanusee v. Barker*, 18 U. S. 8 Wheat. 101, 4 L. ed. 243. See note to *Barnes v. Boardman* (Mass.) 8 L. R. A. 738.

Kartman and the contract of the defendant, and thereupon overruled the motion for a nonsuit, and rendered judgment for the plaintiffs. Whether the court erred in its conclusion is the principal question in the case.

The defendant argues that the contract of the defendant was a collateral undertaking and not a security; that it was made with Sherman alone, as the first holder of the note for value, was not negotiable, and was attached to a non-negotiable note, and therefore that it did not pass to Lemmon unless it was specially assigned to him by Sherman, and that the transaction between Sherman and Lemmon, resulting in the delivery of the note to Lemmon, did not amount to such an assignment of the defendant's contract.

If we assume, for the sake of the argument, that the guaranty was a collateral undertaking, made with Sherman as the first holder for value, we still think the plaintiffs are entitled to recover upon the facts found.

It is not claimed by the defendant that the contract of guaranty could not under any circumstances be either legally or equitably assigned by Sherman to Lemmon. The claim is that, as matter of law on the facts found, the guaranty was not assigned legally or equitably, under and by virtue of what took place between Sherman and Lemmon relating to the assignment of the note.

The consideration of this claim involves two questions, namely: Did Sherman and Lemmon intend, by what took place between them relative to the sale and purchase of the note, the assignment legally and equitably of the guaranty as well as that of the note? and Did they carry that intent into effect? Let us consider these questions in the order stated.

At the time of the transaction in question the guaranty was practically the only thing that gave the note any value in Sherman's hands. The maker was insolvent and could not pay it. The defendant was abundantly able to pay it. These facts were known to both parties at the time, and in view of this knowledge the transaction took place. Separated from the guaranty the note had little pecuniary value, and apart from the ownership of the note the guaranty had but little meaning or value. They belonged together, on the same paper, and were treated by all concerned as forming one instrument for the recovery of the amount due on the note. The parties each knew that if Sherman assigned the note alone it would be worthless in Lemmon's hands, and that the retention of his rights under the guaranty could in that event do Sherman no good. Under these circumstances Lemmon offers to purchase and Sherman agrees to sell the instrument in question for \$300, being nearly the full amount due on the note. The money is paid, the indorsement is made and the instrument is delivered to Lemmon. We think there can be no doubt about Lemmon's intention. He certainly supposed he was getting all the rights which Sherman had under both contracts or he never would have paid his money. And as to Sherman's intention there can be just as little doubt. He was acting in good faith as the court finds. He must have known what Lemmon expected, and, if he did not intend to give him the benefit of the guaranty, should have

made such intention manifest. If Sherman intended to limit the operation of the transaction to the assignment of the note proper, he could easily have done so by appropriate words. The defendant says that Sherman in his assignment uses the words "this note," and that these words "seem to restrict the transfer to the note and exclude the guaranty." Read in the light of all the surrounding circumstances this is not of much significance. These parties undoubtedly regarded the paper containing both contracts as one instrument, and probably used the word "note" as descriptive of the paper and all that was written upon it. To suppose that under the circumstances they intended the effect which the defendant claims resulted from this transaction, is to suppose that Sherman was a knave and Lemmon a fool, and for neither of these suppositions does the record afford the slightest ground. We feel bound to hold, therefore, that these parties, as honest men of average intelligence, intended the assignment of the guaranty as well as the assignment of the note.

The next question is, whether in doing what they did they carried out this intent.

The defendant says that no special assignment of the guaranty is claimed by the plaintiffs or found by the court, and if by this is meant that the contract of guaranty is not specifically mentioned or described in Sherman's indorsement, this is true.

Is such a specific assignment necessary under the circumstances? We know of no law which prescribes the form in which the intention of the parties in such cases shall be embodied, and where the law prescribes no form, it will, to accomplish rather than defeat their intent, give effect to such form as they choose to adopt.

Now, in the case at bar, Sherman takes the paper containing both contracts, and writes an assignment upon it, and delivers it to Lemmon, intending thereby to transfer to him, as we have seen, all the beneficial interest in both contracts which Sherman himself then possessed. Why is not this effectual to pass such interest, at least in equity?

Sherman fully intended and Lemmon fully expected such a result; and independently of Sherman's intent, his language and acts should be interpreted in the sense in which he had reason to suppose Lemmon understood them.

The contract and acts of Sherman in this matter should be construed with reference to all the surrounding circumstances, the controlling consideration being to discover and give effect to the mutual intention of the parties.

Such an equitable assignment could certainly be made by a transaction of this kind if so intended. "In any case of the guaranty of a bill or note, the party to whom the guaranty is originally made may in equity assign his right to the holder at the time he transfers the bill or note, and thereby vest in him the equitable, although not the legal, title thereto." 2 Dan. Neg. Inst. § 1774.

Indeed it is unnecessary to cite authorities upon such a point. No special form of words and no prescribed acts are necessary to constitute an equitable assignment. The delivery of a negotiable note without indorsement may operate as an assignment of it in equity. *Jones v. Witter*, 13 Mass. 804.

The transfer of a debt or obligation usually carries with it as an incident all the securities for its payment, although such securities are not in terms transferred with the principal obligations. *Craig v. Parkie*, 40 N. Y. 181.

In a Virginia case the court uses the following language: "If the contract of guaranty is not negotiable at law, along with the bond and coupons, it is assignable in equity, and an interest in it passes in equity to each successive holder of the bond or coupon. . . . In order to give effect to the manifest intention of the parties the right to enforce the guaranty, unless lost by laches or otherwise, must be held co-extensive with the right to enforce a bond or coupon. The guaranty as an accessory to the bond or coupon follows it and adheres to it in equity, and the right to enforce the guaranty must be determined by the right to demand payment of the bond or coupon." *Arents v. Com.*, 18 Gratt. 768.

We think this language is quite applicable to the case at bar. We hold, therefore, that Sherman assigned in equity to Lemmon all the beneficial interest which the latter had in the contract of guaranty, and so Lemmon became the equitable and bona fide holder thereof, and as such was entitled to sue in his own name under our statutes. The defendant has cited no case which is inconsistent with this conclusion.

*There is no error in the judgment of the court below.*

In this opinion the other Judges concurred.

Henry C. BUTLER, *Appt.*,

v.

Wallace BARNES.

(....Conn.....)

**1. A mutual mistake of grantor and grantee in supposing that land staked and pointed out to**

**NOTE.—Equity jurisdiction to correct mistakes in contracts.**

The correction of mistakes in written instruments occurring by accident, fraud or otherwise has been one of the acknowledged branches of equity jurisdiction from the earliest history of the court. *Andrews v. Gillespie*, 47 N. Y. 491.

It is among the first principles of a court of equity to correct mistakes, and prevent parties from being injured in their property, and especially their freeholds, by any misapprehension or concealment of the true state of facts. *Read v. Cramer*, 2 N. J. Eq. 277, 34 Am. Dec. 208; *Bingham v. Bingham*, 1 Ves. Sr. 128; *Gee v. Spencer*, 1 Vern. 58; *Evans v. Llewellyn*, 2 Bro. Ch. 151; 1 Story, Eq. 156, 160. See *note* to *Page v. Higgins* (Mass.) 5 L. R. A. 152.

It is not material whether the instrument is an executory or an executed agreement, nor is it material whether the proceeding is directly by bill to correct the mistake or the mistake is set up in the answer by way of defense. *Leitensdorfer v. Delphy*, 15 Mo. 167, 55 Am. Dec. 140; 3 Pom. Eq. Jur. 384; *Wadsworth v. Wendell*, 5 Johns. Ch. 224, 1 L. ed. 1064; *Higinbotham v. Burnet*, 5 Johns. Ch. 184, 1 L. ed. 1060; *Chamberlain v. Thompson*, 10 Conn. 244; *Wiser v. Blachly*, 1 Johns. Ch. 607, 1 L. ed. 268; *White v. Wilson*, 6 Blackf. 448; *Newsom v. Buffertow*, 1 Dev. Eq. 879; *Ketselbrack v. Livingston*, 4 Johns. Ch. 144, 1 L. ed. 706; *Phyfe v. Wardell*, 2 Edw. 12 L. R. A.

the grantee all belonged to the grantor while in fact it included a strip belonging to an adjoining owner, whose land was made a boundary by the description of the premises in the deed, entitles the grantee to have the deed reformed, so as to include such strip, and then to damages for breach of the covenants of warranty and for quiet enjoyment by reason of the failure of title to such strip.

**2. A claim for the reformation of a deed and one for damages for breach of covenants of the deed as amended may be joined in the same action, under Gen. Stat., § 877, providing that legal and equitable remedies may be enforced in one action.**

**3. An action for reformation of a deed as to the description of the property as well as for damages for breach of covenant of warranty may be brought against a remote grantor who conveyed to plaintiff's grantor with covenants sufficient to support the action, and which were the same that were contained in plaintiff's deed.**

(*Carpenter J., dissents.*)

(March 3, 1891.)

**A PPEAL** by plaintiff from a judgment of the Court of Common Pleas for Hartford County in favor of defendant in an action brought to obtain the reformation of a deed and to recover damages for a breach of the covenants contained in it as reformed. *Reversed.*

The facts are stated in the opinion.

*Messrs. Noble E. Pierce and Epaphroditus Peck*, for appellant:

The power and duty of equity to grant reformation of deeds and other writings upon parol evidence of the real intention of the parties, and of the mutual mistake by which they have failed to carry out that intention, is constantly stated in more and more unqualified language.

See *Broadway v. Buxton*, 43 Conn. 282; 2 Pom. Eq. Jur. § 866; *Story*, Eq. Jur. § 152; *Johnson v. Taber*, 10 N. Y. 819; *Bush v. Hicks*,

Ch. 47, 6 L. ed. 804; *Coles v. Bowne*, 10 Paige, 523, 535, 4 L. ed. 1078, 1080; *Hendrickson v. Ivins*, 1 N. J. Eq. 562; *Workman v. Guthrie*, 20 Pa. 495; *Raffensberger v. Cullison*, 28 Pa. 426; *Tyson v. Passmore*, 3 Pa. 122; *Glass v. Hulbert*, 103 Mass. 85, 3 Am. Rep. 427; *Worley v. Turgie*, 4 Bush, 194; *Canedy v. Marcy*, 18 Gray, 378; *Gillespie v. Moon*, 3 Johns. Ch. 585, 1 L. ed. 500.

The mistake must be material and free from culpable negligence on the part of the party seeking the equitable relief to warrant the exercise of the equitable jurisdiction. *Iverson v. Wilburn*, 65 Ga. 108; *Penny v. Martin*, 4 Johns. Ch. 506, 1 L. ed. 938; *Segur v. Tingley*, 11 Conn. 124; *Weaver v. Carter*, 10 Leigh, 37; *Trigg v. Bead*, 5 Humph. 522; *M'Ferran v. Taylor*, 7 U. S. 3 Cranoh, 270, 2 L. ed. 486; *Henderson v. Dickey*, 35 Mo. 120; *Paulison v. Van Iderstine*, 28 N. J. Eq. 308; *Dambmann v. Schulting*, 75 N. Y. 63; *Stettheimer v. Killip*, Id. 282.

Whether error in the written contract is the result of intentional or unintentional misstatement of the defendant is immaterial, for equity has power to correct it as well in the former as in the latter case. *Smith v. Jordon*, 13 Minn. 270; *Botsford v. McLean*, 45 Barb. 473.

A court of equity will not interfere to reform a contract, on the ground of a mistake, unless it is mutual. But mistake on the one side and fraud on the other will authorize a reformation. *Welles v.*

60 N. Y. 298; *Tabor v. Olley*, 58 Vt. 487; *May v. Adams*, 2 New Eng. Rep. 203, 58 Vt. 74; *Chamberlain v. Thompson*, 10 Conn. 248; *Stedwell v. Anderson*, 21 Conn. 189; *Bunnell v. Read*, Id. 586; *Knapp v. White*, 28 Conn. 548; *Blakeman v. Blakeman*, 89 Conn. 320; *Cake v. Peet*, 49 Conn. 501; *Palmer v. Hartford F. Ins. Co.* 54 Conn. 488.

A deed can be reformed and enforced in the same action.

*Thompsonville Seals Mfg. Co. v. Osgood*, 26 Conn. 16. See Story, Eq. Jur. § 161; Pom. Eq. Jur. §§ 861, 862, 866.

An action for reformation may be brought, not only by the original parties, but by their privies in title.

Story, Eq. Jur. § 165; *Bunnell v. Read*, *supra*.

*Mr. John J. Jennings*, for appellee:

No contract relation exists between the plaintiff and defendant. Barnes has given Butler no deed, has entered into no contract with him. Barnes is privy to no contract with Butler. Butler is a naked assignee of Riggs and Riggs had nothing to assign. Said assignment is void, or at least an assignee thereunder gains no right to bring or maintain a suit.

*Prosser v. Edmonds*, 1 Younge & C. 481; 2 Story, Eq. Jur. § 1040 *h*, note; *Hill v. Boyle*, L. R. 4 Eq. 260.

An action for the reformation of a deed is not sustainable by one who does not, as a matter of fact, connect himself with the arrangement, bargain or contract under which the deed was made; and the mere fact that one is a grantee of the party to whom the deed was made does not so connect him.

*Willis v. Sanders*, 19 Jones & S. 891; 8 Pom. Eq. Jur. § 1276; *Milwaukee & M. R. Co. v. Milwaukee & W. R. Co.* 20 Wis. 175; *Jones v. Babcock*, 15 Mo. App. 149; *Brush v. Sweet*, 88 Mich. 574; 2 Spence, Eq. Jur. 868, 869, 872.

*Yates*, 44 N. Y. 529; *Wiest v. Garman*, 4 Houst. 186; *Waldron v. Stevens*, 12 Wend. 100; *Hill v. Gray*, 1 Stark. 484. See note to *Rosenbaum v. Council Bluffs Ins. Co.* (Iowa), 3 L. R. A. 189; *Rosell v. Roszell*, 7 West. Rep. 910, 109 Ind. 354; 1 Story, Eq. Jur. §§ 158-159; *Gouverneur v. Titus*, 6 Paige, 347, 3 L. ed. 1015; *Penwick v. Bruff*, 1 McArth. 107; *Pierce v. Brown*, 74 U. S. 7 Wall. 217, 19 L. ed. 138.

Such power in courts of equity is too well settled to admit of question, but it should be exercised only when the proof is entirely satisfactory. *Cummins v. Bulgin*, 87 N. J. Eq. 476; *Hamlon v. Sullivan*, 11 Ill. App. 423; *Reese v. Wyman*, 9 Ga. 430; *Beard v. Hubble*, 9 Gill, 420; *Edmond's App.* 59 Pa. 220; *Fowler v. Fowler*, 4 De G. & J. 265; *Cleary v. Babcock*, 41 Ill. 271; *Leitensdorfer v. Delphy*, 15 Mo. 160; *Preston v. Whitcomb*, 17 Vt. 183.

Yet the court will receive any evidence which will tend to prove the mistake. *Elliott v. Sackett*, 106 U. S. 132, 27 L. ed. 678; *Popplein v. Foley*, 61 Md. 361; *Jones v. Sweet*, 77 Ind. 187; *Morris v. Stern*, 80 Ind. 227.

#### Sealed instruments.

The equitable rule permitting a sealed agreement to be modified or replaced by subsequent parol contract is generally adopted by the law courts, except in cases where the Statute of Frauds prevents its operation. 1 Pom. Eq. Jur. 61; *Rees v. Berrington*, 2 Ves. Jr. 540, 2 Eq. Lead. Cas. 4th Am. ed. 1867, 1298; *Hurlbut v. Phelps*, 30 Conn. 42; *Headley v. Goundry*, 41 Barb. 279; *Clark v. Partridge*, 2 12 L. R. A.

A mere right to file a bill in equity is not assignable.

*Marshall v. Means*, 12 Ga. 63; *Norton v. Tuttle*, 60 Ill. 180; *Mitchell v. Winslow*, 2 Story, C. C. 680; *Kendall v. United States*, 74 U. S. 7 Wall. 113, 19 L. ed. 85.

Where the language of a conveyance is unambiguous, no parol evidence to vary or control its import is admissible.

*Stone v. Clark*, 1 Met. 381; *Osborn v. Phelps*, 19 Conn. 70.

The plaintiff in no wise brings himself within the rules permitting a reformation of the deed.

*Palmer v. Hartford F. Ins. Co.* 54 Conn. 501.

A written instrument will not be reformed by a court of equity until a mistake is made out to appear beyond reasonable controversy.

*Hinton v. Citizen's Mut. Ins. Co.* 63 Ala. 498; *Remillard v. Prescott*, 8 Or. 37; *McCoy v. Bayley*, Id. 196; *Rowley v. Flannelly*, 30 N. J. Eq. 612; *McDonnell v. Milholland*, 48 Md. 540; *Yocum v. Foreman*, 14 Bush, 494; *Tufts v. Larned*, 27 Iowa, 330; *Hamlon v. Sullivan*, 11 Ill. App. 423; *Grievold v. Hazard*, 26 Fed. Rep. 135; *Brahammer v. Hoss*, 17 Mo. App. 1; *Cox v. Woods*, 67 Cal. 817; *Stiles v. Willis*, 66 Md. 352; *Poulsen v. Van Iderstine*, 28 N. J. Eq. 310; *Ramsey v. Smith*, 32 N. J. Eq. 31; *Starkie*, Ev. 676, 677.

Equity will not relieve against mistakes due to plaintiff's want of reasonable care and diligence in the absence of fraud.

*Pearce v. Suggs*, 85 Tenn. 724; *Lewis v. Lewis*, 5 Or. 169; *Brown v. Fagan*, 71 Mo. 563; *Torson v. Wilburn*, 65 Ga. 103.

A mistake to be the ground of reformation of a written agreement should be proved as much to the satisfaction of the court as if admitted.

*Ford v. Joyce*, 78 N. Y. 618; *Turner v. Shaw*, 96 Mo. 22; *Jarrell v. Jarrell*, 27 W. Va.

Pa. 18; *Partridge v. Clarke*, 4 Pa. 166; *Kidder v. Kidder*, 23 Pa. 263.

Relief can be had against any deed or contract in writing founded on mistake or fraud. *Rosevelt v. Fulton*, 2 Cow. 138; *Walden v. Skinner*, 101 U. S. 565, 25 L. ed. 908; *Snell v. Atlantic F. & M. Ins. Co.* 96 U. S. 89, 25 L. ed. 54; *Elder v. Elder*, 10 Ma. 83, 25 Am. Dec. 208; *Champlin v. Laytin*, 18 Wend. 407, 31 Am. Dec. 398; *Welles v. Yates*, 44 N. Y. 529; *Hutchison v. Johnson*, 38 Barb. 398; *Bishop v. Clay F. & M. Ins. Co.* 49 Conn. 176; *Alden v. Pryal*, 60 Cal. 222; *Faure v. Martin*, 7 N. Y. 213; *Wood v. Hubbell*, 10 N. Y. 497; *Funch v. Abenheim*, 30 Hun, 6; *Kent v. Manchester*, 29 Barb. 598; *Huss v. Morris*, 63 Pa. 372; *Fishell v. Bell*, 1 Clarke, Ch. 33, 7 L. ed. 45; *Phoenix F. Ins. Co. v. Hoffheimer*, 43 Mies. 658; *Reading v. Weston*, 8 Conn. 122, 20 Am. Dec. 99; *Firmstone v. De Camp*, 17 N. J. Eq. 315.

#### Reformation of deed.

When reformation is sought of a deed which, through fraud or mistake, conveyed less land than was orally bought and paid for, the case does not stand as if there were no deed; and the error may be corrected without proof of such part performance as is necessary for a decree of specific performance compelling a conveyance of the whole land when no part of it has been conveyed. *Hitchins v. Pettingill*, 58 N. H. 389; *Doe v. Doe*, 37 N. H. 268, 266; *Herbert v. Odlin*, 40 N. H. 267; *Brown v. Glines*, 42 N. H. 160; *Kennard v. George*, 44 N. H. 440; *Leach v. Noyes*, 45 N. H. 364; *Tucker v. Madden*,

743; *Toope v. Snyder*, 70 Ind. 554; *Petesach v. Hambach*, 48 Wis. 443; *St. Anthony Falls W. P. Co. v. Merriman*, 35 Minn. 42; *Barnes v. Bartlett*, 47 Ind. 98; *Casady v. Woodbury*, 13 Iowa, 113.

A contract must have been made and by a mutual mistake of the parties incorrectly reduced to writing.

*Latier v. Wyman*, 5 Robt. 147; *Sutherland v. Sutherland*, 69 Ill. 481; *Hearts v. Steger*, 5 Or. 147.

The power of a chancellor over instruments is limited, and he cannot make a contract for the parties or vary that which they have executed.

*Nepeau v. Dos*, 2 Mees. & W. 894, 2 Smith, Lead. Cas. 474; *Thompsonville Seals Mfg. Co. v. Osgood*, 26 Conn. 19; *Osborn v. Phelps*, 19 Conn. 70.

The description by boundaries is conclusive. It is the duty of the plaintiff to measure his land and ascertain the facts according to the boundaries. If he desires to limit the defendant, he should ask to have express covenants inserted.

*Powell v. Clark*, 5 Mass. 356; 3 Washb. Real Prop. 864; *Frost v. Spaulding*, 19 Pick. 445, 448; *Osld v. Wells*, 18 Pick. 121; *Pride v. Lunt*, 19 Me. 115; *McCoy v. Galloway*, 8 Ohio, 253; *Emertek v. Kohler*, 29 Barb. 169; *Parker v. Kane*, 68 U. S. 22 How. 1, 16 L. ed. 286; *Clark v. Baird*, 9 N. Y. 188; *Dodge v. Nichols*, 5 Allen, 548; *Spiller v. Scribner*, 86 Vt. 247; *Gilman v. Smith*, 12 Vt. 150; *Peaslee v. Ges*, 19 N. H. 278; *Terry v. Chandler*, 16 N. Y. 858; *Dean v. Brakine*, 18 N. H. 88; *Roberti v. Atwater*, 42 Conn. 269; *Snow v. Chapman*, 1 Root, 529; *Rawle, Covenants*, 528.

**Seymour, J.**, delivered the opinion of the court:

In this case the appellee claims at the outset,

and as conclusive of the question before us, that the court below has decided as a question of fact that no mistake occurred between the parties to the original deed, which the plaintiff seeks to have reformed, but that it accurately expresses the contract which was made and correctly describes the land which was sold. Is this claim well founded? The finding states that in 1872 the defendant sold to one Riggs a piece of land, which he described and bounded in the deed as follows: "Northerly, on land of the heirs of Mrs. Ann O'Connor, one hundred feet; easterly, on highway called 'North Main Street,' thirty-three feet; southerly, on grantor, one hundred and sixteen feet and ten inches; westerly, on grantor, thirty feet two and a quarter inches;" and the deed contained the usual covenants of warranty and seisin. At the time of the purchase both Barnes and Riggs went upon the land, and Barnes then pointed out four stakes which he had previously placed at the corners, one at each corner, as designating the boundaries of the lot. Both supposed that the lot described in the deed and the lot staked out were identical, and that the lines indicated by the stakes correctly designated the boundaries of the piece of land purchased. There were no buildings on the land, and no fence marked any of the boundaries. Barnes and Riggs, and Butler, the plaintiff, who afterwards purchased the land of Riggs, all supposed that the lot staked out correctly designated the land described in the deeds from Barnes to Riggs and from Riggs to Butler, and that the northerly line of the lot indicated by the stakes correctly marked the boundary line on the land of the heirs of Mrs. O'Connor. The court finds "that the land actually sold and conveyed by Barnes to Riggs, and by Riggs sold and conveyed to the plaintiff, was the piece as described in their deeds; and that all three supposed the land described

44 Me. 204; *Adams v. Stevens*, 49 Me. 362; *Burr v. Hutchinson*, 61 Me. 514; *Blodgett v. Hobart*, 18 Vt. 414; *Brown v. Lamphear*, 35 Vt. 362; *Shattuck v. Gay*, 45 Vt. 87; *Blakeman v. Blakeman*, 39 Conn. 320; *Wiswall v. Hall*, 3 Paige, 513, 3 L. ed. 166; *Ehleringer v. Moriarty*, 10 Iowa, 78; *Barber v. Lyon*, 15 Iowa, 37.

If the doctrine can be thus applied to deeds which have actually conveyed the title, then it may be applied to mere executory contracts which do not disturb the legal title. 3 Pom. Eq. Jur. §866; *Monro v. Taylor*, 3 Macon. & G. 718; *Lenty v. Hillas*, 3 DeG. & J. 110, 120; *Craig v. Kittredge*, 23 N. H. 231; *Smith v. Greeley*, 14 N. H. 578; *Tilton v. Tilton*, 9 N. H. 385; *Chamberlain v. Thompson*, 10 Conn. 248; *Gouverneur v. Titus*, 1 Edw. Ch. 477, 6 L. ed. 217.

A vendee in a contract for the sale of land is not bound to know what land is contained in the description in his contract or deed, and fraud may be predicated upon representations that the description covers lands not actually included therein. *Beardsley v. Duntley*, 69 N. Y. 584; *Keisselbrack v. Livingston*, 4 Johns. Ch. 144, 1 L. ed. 795.

A court of equity has power to correct the mistake upon a bill filed by the purchaser for that purpose, and such correction should be made. *Bradshaw v. Atkins*, 110 Ill. 323; *Bartlett v. Judd*, 23 Barb. 222.

#### *Mistake in description, boundaries, etc.*

A mistake in drawing an instrument is ground for equitable relief. *Newcomer v. Kline*, 11 Gill & 12 L. R. A.

*J. 487*; *Wood v. Hubbell*, 10 N. Y. 487; *Cries v. Withers*, 26 Md. 509; *Chamberlain v. Thompson*, 10 Conn. 248; *Clark v. Munyan*, 22 Pick. 410; *Avery v. Lewis*, 10 Vt. 332; *Pillsbury v. Dugan*, 9 Ohio, 117; *Willis v. Henderson*, 5 Ill. 13; *McNaughten v. Partridge*, 11 Ohio, 223; *Keisselbrack v. Livingston*, 4 Johns. Ch. 144, 1 L. ed. 795; *Gillespie v. Moon*, 2 Johns. Ch. 565, 1 L. ed. 500.

Where it is apparent, both from the evidence and the location of the land, that the insertion in the deed of a certain corner was made by the mistake of the draftsman, the deed will be reformed. *Mage v. Lane* (Ky.) 11 Ky. L. Rep. 293.

Deeds may be reformed not only in cases where the mistake consists in the omission or insertion of words or clauses contrary to the intention of the parties, but in cases where the parties understood what language was contained in the deed if they believed the description corresponded with the actual boundaries intended, and were mistaken therein. *Johnson v. Taber*, 10 N. Y. 319; *DeRiemer v. Cantillon*, 4 Johns. Ch. 85, 1 L. ed. 772; *Bush v. Hicks*, 60 N. Y. 228; *Bailey v. Woodbury*, 50 Vt. 166; *Tabor v. Cilley*, 53 Vt. 457.

Where there was a mutual mistake in a deed of partition, which consisted in that the words and figures "north 45 degrees 30 minutes west" did not correctly describe the line agreed upon, the mistake was remediable in equity. *May v. Adams*, 3 New Eng. Rep. 203, 53 Vt. 74; *Freeman's Bank v. Vose*, 23 Me. 93; *Adams v. Stevens*, 49 Me. 362.



in their deeds was identical with the lot staked out by Barnes. But Barnes did not undertake to sell and convey to Riggs any other land than a piece bounded northerly on the land of the heirs of Mrs. Ann O'Connor, and extending southerly on North Main Street, from the line of the land of Mrs. O'Connor, thirty-three feet; and Riggs sold to the plaintiff the same land, having the same northerly line and the same frontage on North Main Street. Barnes had attempted to locate such a piece by placing stakes at its corners, but he had mistaken the correct northerly line. Butler had occupied the lot staked out, supposing it to be the land described in his deed. The decision of the court had ejected him from a portion of the land he was occupying, but not from any part of the land described in his deed. He has lost no land which he actually bought of Riggs. The substance of the whole matter is that Barnes, Riggs and Butler all were mistaken as to the correct location of the northerly line of the piece of land bought and sold by them." From this finding it is evident that the court did not decide, as matter either of law or of fact, that no mistake occurred between the parties to the original deed. A mistake is clearly stated, namely: "that both parties supposed that the lot described in the deed and the lot staked out were identical, and that the lines indicated by the stakes correctly designated the boundaries of the piece of land purchased;" that is to say, both parties supposed that the deed accurately described the lot which was staked out, and which the defendant pointed out as the subject of the sale. This supposition was incorrect. The deed did not accurately describe the northern boundary of the lot so designated and pointed out by the grantor. Here the mistake arose. This was the mistake. The reasoning of the court in coming to its conclusion seems to have been substantially this: The line pointed out as the correct line for the northern boundary, when the sale was made, was indicated by two stakes. The parties supposed that the line so indicated was identical with the O'Connor line, and would be correctly described by bounding the lot sold northerly on land of the heirs of Mrs. O'Connor. The deed did bound the lot northerly on the land of said heirs. Therefore I find that the lot actually sold was the piece described in the deed, and not the piece pointed out and contained within the four stakes, and that the defendant did not undertake to sell and convey to Riggs any other land than a piece bounded northerly on the land of the heirs of Mrs. O'Connor. The conclusion is manifestly a conclusion of law, based upon the idea that the description of the boundaries in the deed must prevail over the boundaries actually pointed out upon the premises, and that the parties must be taken to have intended to contract according to the boundaries named in the deed, although they were mutually mistaken in supposing these were identical with the boundaries pointed out as above stated. The claim which the court overruled, as stated in the finding, was the claim of the plaintiff "that, as matter of law, the pointing out by the defendant to his grantee, while the negotiations were in progress, of a lot exactly located and staked, which lot all the parties supposed to be the lot

which was to be sold and conveyed, and the mutual mistake between them by which they gave and received the deeds as correctly describing the staked lot, entitled the plaintiff to a reformation of the deed so as to make it describe the staked lot, and to damages upon the covenants as reformed." In overruling this claim the court manifestly decided that, upon the facts stated, the law was that the plaintiff was not entitled to the relief sought. Was this decision correct? That is the question now presented. As between the original parties, would the grantee have been entitled to a reformation of his deed?

The mistake which the parties made was, as we have seen, that both supposed that the lot described in the deed and the lot staked out were identical. Both supposed that the description in the deed covered the land which was staked off and had been pointed out by the defendant as the lot sold. Notwithstanding this, the court held that the land actually sold and conveyed by the terms of the deed is self evident. That it was the piece sold, is the conclusion upon which the court bases its refusal to reform the deed so as to embrace the lot contained between the lines staked. Notwithstanding, also, the mistake set forth, the court further finds that the defendant did not undertake to sell and convey to Riggs any other land than a piece bounded northerly on the land of the heirs of Mrs. O'Connor. If by the word "undertake" the court means that, taking all the facts together, it must be held that the defendant only agreed to sell what the deed specifies, which is the natural meaning of the word as here used, then the issue is plainly before us. It is clear that, while on the premises, the defendant undertook, both in the sense of offered and agreed, to sell the lot he pointed out. The deed, through the mistake of the parties, did not express that undertaking. What would have prevented the grantee from having it so corrected that it should express the undertaking? It may be suggested that it is evident that the defendant did not intend to sell any land which he did not own, and therefore it was no mistake on his part to bound the land in the deed as he did. But the suggestion is specious. It has reference to the general intent which every honest man has within himself not to sell what is not his own. And yet he may fully intend, as between himself and another, to sell what he mistakenly supposes to be his own. It may no doubt be truly said, in one sense, that the grantor in this case did not intend to sell, nor the grantee to buy, land belonging to the O'Connor heirs. At the same time it is true that the grantor intended to sell and the grantee to buy exactly the lot which was pointed out as for sale between the lines indicated by the stakes. The mistake was in supposing that the line between the north stakes was identical with the O'Connor line. If the grantor had known where that line was, he would have made his stakes conform to it. The bargain was made before the deed was executed. There was no misunderstanding as to the shape or dimensions of the land which was the actual subject of the sale. If the parties had united in fencing it, after the execution and delivery of the deed, they would have built the fence from stake to stake. The

true statement of the case would be that the defendant had no intention of encroaching on the O'Connor land when he marked out for sale, and sold, a lot which in fact so encroached, though described in the deed, in accordance with the parties' belief, as bounded north on the O'Connor heirs' land. If the court had found that, though the lot was pointed out, yet the parties intended to bound it north on the O'Connor land, whether the stakes correctly indicated that line or not, such finding would present a very different case and would have been conclusive. If, also, the question had arisen in a court of law as to what land the defendant had sold, then the deed, upon well-known principles, would have been held to express the contract and to exclude parol testimony to vary or contradict its terms. The very reason for coming into a court of chancery is to avoid the application of those principles, and, in a proceeding brought for that purpose, to make the deed conform to the contract of which it purports to be the evidence. It seems to a majority of us that here was a mistake of such a nature as would have entitled the original grantee to have the deed reformed.

*Broadway v. Buxton*, 48 Conn. 392, was an action upon the covenants of warranty and seisin. Buxton gave a deed of certain land to Broadway, which bounded it west by land of Calvin Hoyt, John L. C. Hoyt, Alva June, and land of Ida Scofield. It appeared, therefore, from the deed that the lands of the four proprietors named extended along the entire length of the western boundary. Such, however, was not the case. One G. W. Young also owned land abutting for several rods on the west. After the execution of the deed, the true divisional line between said Young's land and the land conveyed to Broadway was judicially ascertained and determined. Broadway claimed that by such line he was dispossessed and evicted of a strip of land which was covered by the deed of Buxton to him, and that, therefore, Buxton was liable on the covenants in his deed. To support this claim he offered parol evidence that prior to completing the contract for purchasing the land, and prior to the giving of the deed, the parties went upon the premises, and Buxton pointed out a line of fence constructed partly of stone and partly of brush, running generally in a northerly and southerly direction, as being the western boundary line of the land proposed to be conveyed. This line was in fact one or two rods westerly of the line established as the true divisional line between Young's land and the plaintiff's land. It was for the loss of that strip of land consequent upon establishing the boundary line further east than Broadway anticipated, that the action was brought. This court said: "As this is an action at law on a sealed instrument, the intent of the parties must be gathered from the instrument itself, not from any parol evidence. . . . The western boundary of the land conveyed is the eastern line of the adjacent proprietors, those lands, by the express terms of the deed, being made the plaintiff's western boundary. No line of fence, no visible monuments, are referred to as boundaries, and to interpolate them as such by parol would clearly affect and vary the meaning of that instrument. Such a course is clearly inadmissible. If the

plaintiff has been led into error, if he has been deceived or imposed upon by the representations of the defendant as to the western boundary of the land contracted for, and that it extended to a line of fence pointed out, which would give him more land than his deed covers, an action on the covenants can afford no remedy. Resort must be had to a court of equity to correct the deed and make it conform to the intent and agreement of the parties."

In *May v. Adams*, 58 Vt. 74, 2 New Eng. Rep. 208, two tenants in common divided their land by deed of partition. There was a mutual mistake in the deed, in that the words and figures, "north 45 degrees 30 minutes west" did not correctly describe the line agreed on. The agreed line was recognized and understood by them to be the one described in the deed so long as they were the owners; and the parties to the suit purchased with a like understanding, and also recognized it for several years. When the mistake was discovered, a bill in chancery was brought by May for the reformation of the deeds so as to make them describe accurately the line originally agreed on. It was held that the mistake was remediable in equity, both as between the original owners and their grantees. The court says: "With the deeds reformed, making the division line to follow the old fence, etc., the defendant is secured in his title to all the land that he understood his deed included at the time of his purchase, and the orator is entitled to have the deeds of partition reformed as against the defendant so as to conform to the practical location of the division line as made by the Doanes [the original owners], and understood by the orator and defendant at the times of their respective purchases." See also *Bush v. Hicks*, 60 N. Y. 298; *Beardsley v. Knight*, 10 Vt. 185; *Taber v. O'Leary*, 53 Vt. 487; *Wilcox v. Lucas*, 121 Mass. 25; *Allen v. McGaughey*, 81 Ark. 252; *Calverley v. Williams*, 1 Ves. Jr. 210; Fry. Spec. Perf. § 501; 2 Pom. Eq. Jur. § 866.

For the purpose, then, of putting the original grantee, Riggs, in a position to recover for a breach of the covenants in the defendant's deed, it is clear, both upon principle and authority, that his deed might have been reformed, and made in terms and description to cover the land pointed out and lying withing the lines which connected the corner stakes. Making the deed describe the line pointed out as the boundary could only result in exact justice between the parties to it.

In *Johnson v. Taber*, 10 N. Y. 319, it was held that where the boundaries of lands are pointed out by the vendor to the purchaser, but in the written contract of sale and in the deed executed in pursuance of it the description is made, by mistake, to include lands not within such boundaries, the deed will be corrected, on the application of the vendor, so as to correspond with the boundaries thus pointed out; and that it is no answer to such application that the description in the contract and deed was made in accordance with the instructions of the vendor, where it appears that both he and the vendee believed the description to correspond with the boundaries.

There being, then, a mutual mistake in the deed, which would have entitled the original grantee to have it reformed, the purchaser from

him brings this complaint. Is he entitled to the relief which he demands? And first, irrespective of the facts in this case, can the claims therein made be properly joined in a single complaint? The plaintiff asks for the reformation of the deed, to make it state the true contract between the parties, and then, not a specific performance of the contract thus truly stated, but damages for the breach of covenants which the contract, as amended, will show that he is entitled to upon the facts of the case. Under the Practice Act (Gen. Stat. § 877) all courts which are vested with jurisdiction both at law and in equity may hereafter to the full extent of their respective jurisdictions administer legal and equitable remedies in favor of either party in one and the same suit, so that legal and equitable rights of the parties may be enforced and protected in one action. The rules under said Act (chap. 2, § 11) refer to "a complaint demanding specific equitable relief, and also damages, as equitable relief, incident thereto (as for the reformation of a policy of insurance and the payment of a loss under the same as reformed)."

Pomeroy, in his book on Remedies and Remedial Rights, § 78, treats of the provisions in the several Codes and Practice Acts combining legal and equitable actions and defenses in the same suit. He says: "When a plaintiff is clothed with primary rights, both legal and equitable, growing out of the same cause of action or the same transaction, and is entitled to an equitable remedy and also to a further legal remedy based upon the supposition that the equitable relief is granted, and he sets forth in his complaint the facts which support each class of rights, and which show that he is entitled to each kind of remedy, and demands a judgment awarding both species of relief, the action will be sustained to its full extent in the form adopted." This rule, he says, has been firmly established by the court of last resort in New York, and is adopted in all the States, with one or two exceptions. He states several cases where it has been applied, among them, an action by the holder of the legal title to correct his title-deed, to recover possession of the land according to the correction thus made and to recover damages for withholding such possession, and an action by the grantor of land to correct his deed by the insertion of the exception of the growing timber, and to recover damages for trees, embraced in the exception, wrongfully cut by the grantee. The author further says: "The court, instead of formally conferring the special equitable remedy, and then proceeding to grant the ultimate legal remedy, may treat the former as though accomplished, and render a simple common-law judgment embracing the final legal relief which was the real object of the action." See section 90. It was a maxim of equity jurisprudence before the statutory joinder of legal and equitable actions that when the chancellor had once obtained jurisdiction he would do complete justice; but the limit of his power in that direction was not well defined. Certainly the spirit of our Practice Act, and of Acts of a similar character, would enlarge such jurisdiction, rather than restrict it. The application now is to a single court having both legal and equita-

ble jurisdiction, and the intention of the law is to give the suitor full and complete relief within certain well defined rules as to joinder of actions and parties in a single action. If it be suggested that, inasmuch as the defendant does not own the strip of land in question, a complaint for the reformation of the deed and a specific performance of the reformed contract would not lie, and therefore the court will refuse to reform the deed, we reply that for that very reason—because he cannot obtain a specific performance—the plaintiff is entitled to the relief he is seeking. There is no other way to compel the defendant to pay for what, not owning, he sold. An action of covenant broken will not lie, because, unreformed, the deed does not cover the land. If it cannot be corrected so as to include the land sold, then the grantee is remediless, and the protection expected from the covenant of warranty breaks down just where it is needed.

As to the facts on this point, the finding shows that in 1873 Riggs, the original grantee, sold the land in question to the plaintiff, and conveyed it by deed containing the usual covenants of warranty and seisin, in which it was bounded and described to all intents and purposes precisely as in the original deed. The stakes placed at the corners by the defendant were still standing, and both Riggs and the plaintiff supposed the land described in the deed was the lot designated by the stakes. About the time of the purchase the plaintiff employed a surveyor to locate the boundaries of the described land, who reported that they were correctly designated by the stakes. In 1874 Butler erected a barn on the lot within the boundary line as indicated by the stakes. In 1886 Catherine R. Root, who had become the owner of the land described in the deeds as belonging to the heirs of Mrs. Ann O'Connor, brought an action against the plaintiff, claiming that his barn encroached upon her land. The court found upon the trial of the action the barn to be an encroachment, and also established the boundary line between the lands of said Root and the plaintiff, and it is found by the court below, in accordance with that decision, that the northerly line, as indicated by the stakes, had included in the plaintiff's lot a triangular piece of land belonging to said Root, six and one half inches wide at the front and running out to a point at the rear of the lot. By this decision the plaintiff was ejected from such triangular piece. The title of the plaintiff to the triangular piece, and his right of occupancy, had never been disputed until about the time the action of *Root v. Butler* was commenced, and the plaintiff did not learn, until final judgment was rendered in that action, that the line of the land of Mrs. O'Connor's heirs and the northerly line of the lot staked out by the defendant were not identical. Riggs executed and delivered to the plaintiff an assignment of all his claim, right and cause of action against the defendant arising out of said conveyance, etc., and authorizing him to bring suit in his own name.

These facts present the case of a grantee in a deed containing the usual covenants of warranty and seisin, who has been evicted from a portion of the granted premises, seeking *first*,

to reform the deed, and *second*, to recover damages, not against his immediate grantor, but against a remote grantor, who conveyed the premises to his grantor with the same covenants. It is familiar law that the covenants of seisin, and of a right to convey, and against incumbrances, are personal covenants, not running with the land or passing to the assignee; for, if false, there is a breach of them as soon as the deed is executed and they become choses in action, which are not assignable at common law. But the covenants of warranty and the covenant for quiet enjoyment are prospective, and an eviction is necessary to constitute a breach of them. They are therefore, in their nature, real covenants. They run with the land conveyed, and descend to heirs, and vest in assignees. So long as the grantor has not a good title, there is a continuing breach. In respect of them this court held in *Booth v. Starr*, 1 Conn. 248, that "every assignee may maintain an action against all or any of the prior warrantors till he has obtained satisfaction. This results from the nature of the covenant, for each covenantor covenants with the covenantee and his assigns, and, as the lands are transferable, it is reasonable that covenants annexed to them should be transferred;" and (page 249) "that the nature of the engagement of the first covenantor is to indemnify all the subsequent covenantees from all damages arising from a breach of the covenant." The plaintiff, as assignee of the real covenants of the deed, has also a right of action against the defendant for the reformation of the deed, for the purpose of enabling him to take advantage of the breach of such covenants. An action for reformation may be brought, not only by the original parties, but by their privies in title. *Story, Eq. Jur. § 165*. This court held in *Bunnell v. Reed*, 21 Conn. 586, than an execution creditor, to whom land had been set off, could sustain an action against his debtor's grantor for the correction of the deed conveying such land to the debtor, so that it might be made to include the land levied upon, as was intended by the parties thereto, but which by mistake it failed to do.

We have thus disposed of all the questions which it is necessary to consider in order to decide the case before us. There is nothing in the record which shows any such laches on the part of the plaintiff in pursuing his remedies, after his eviction, as would defeat his right to invoke the assistance of a court of equity, and the majority of the court think there is error in the judgment appealed from, and that a new trial should be granted, at which the court of common pleas may reform the deed as herein indicated, and thereupon render judgment for damages for the breach of the covenants not in said deed contained.

*There is error, and a new trial is granted.*

**Andrews, Ch. J.**, and **Loomis and Torrance, JJ.**, concur; **Carpenter, J.**, dissents.

Petition for rehearing overruled.  
12 L. R. A.

Edward SMITHWICK

v.

HALL & UPSON CO.

(39 Conn. 261.)

1. A negligent act or omission to constitute contributory negligence must operate as a proximate cause of the injury or one of the proximate causes, and not merely as a condition.
2. An act or omission that merely increases or adds to the extent of the loss or injury occasioned by another's negligence will not have the effect of contributory negligence to defeat a recovery, though it may affect the amount of damages to be recovered.
3. An employe struck by brick from a falling wall while standing on a platform helping to put ice in a brick building, in consequence of which he was knocked or fell to the ground, is not guilty of contributory negligence.

*NOTE.*—Action for damages for personal injuries caused by negligence.

Two things must concur to support an action for damages for negligence: the fault of the defendant, and ordinary care on the part of the plaintiff. *Butterfield v. Forrester*, 11 East, 60.

To enable a plaintiff to recover in an action for negligence, he must show that the defendant was guilty of negligence in the respects charged in the petition, that the negligence charged was the proximate cause of the injury, and that he was free from contributory negligence. *Rebelaky v. Chicago & N. W. R. Co.* 79 Iowa, 55.

#### *Contributory negligence as a defense.*

Freedom from negligence is not one of the essentials of the defense of contributory negligence. There must be negligence in the defendant before plaintiff can contribute to its injurious results. *Louisville & N. R. Co. v. Hall*, 4 L. R. A. 710, 87 Ala. 708; *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376.

A plaintiff suing for negligence cannot recover where his own testimony, even by giving it the most favorable construction, shows that he could have avoided the injury by the exercise of ordinary care. *Atlanta & W. P. R. Co. v. Loftin* (Ga.) Oct. 13, 1890.

A person who is shown by the evidence to have been guilty of contributory negligence cannot recover damages for injury. *Dandle v. Southern Pac. R. Co.* 42 La. Ann. 683, citing *Schwartz v. Crescent City R. Co.* 30 La. Ann. 15; *Childs v. New Orleans City R. Co.* 33 La. Ann. 154; *Delkman v. Morgan's Louisiana T. R. & S. S. Co.* 40 La. Ann. 790.

To justify a nonsuit, the contributory negligence must appear so clearly that no construction of the evidence, or inference drawn from the facts, would have warranted a contrary conclusion, and that a verdict of the jury the other way would have been set aside as against evidence. *Stackus v. New York Cent. & H. R. R. Co.* 79 N. Y. 466; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 660, 42 L. ed. 745; *Green v. Erie R. Co.* 11 Hun, 383, 336; *Green v. Erie R. Co.* 4 N. Y. Week. Dig. 596.

It may be that, if the injury was solely occasioned

which will defeat a recovery for his injuries by the fact that in violation of his orders he had left the part of the platform which had a railing and gone to a part which had none and on which he had been warned not to stand on account of the danger of falling, where he had no warning of any danger from the wall, and his injuries, though chiefly caused by his fall, would have been greater if he had not fallen out of the way of the brick.

(July 10, 1890.)

**P**RESERVATION by the Superior Court for New Haven County for the opinion of the Supreme Court of Errors of a case appealed from the District Court of Waterbury and brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. The question reserved was as to the amount of damages,—if plaintiff was free from contributory negligence the damages to be \$1,000, otherwise nominal. *Judgment for \$1,000.*

The facts are stated in the opinion.

*Messrs. J. O'Neill and G. H. Cowell, for plaintiff:*

Though the plaintiff was in a measure negligent, yet if his negligence was not the proximate cause of his injury he is not barred.

*Isbell v. New York & N. H. R. Co.* 27 Conn. 392.

by the willfulness of the plaintiff, after warning, that may be a ground of defense by plea in confession or avoidance. *Popplewell v. Pierce*, 10 Cush. 509; *Woolf v. Chalker*, 31 Conn. 130. See *Jackson v. Smithson*, 15 Mees. & W. 568; *Card v. Case*, 5 C. B. 622.

If, in an action under the Kentucky Statute for willful neglect, willful neglect is proved, contributory negligence is not a defense. *Louisville & N. R. Co. v. Brice*, 84 Ky. 298.

*The contributory negligence must be the proximate cause of the injury.*

The contributory negligence must not only contribute to the injury but it must be the proximate cause of the injury, in order to defeat a recovery. *Carter v. Chambers*, 79 Ala. 233; *Irwin v. Sprigg*, 6 Gill. 200; *Meeks v. Southern Pac. R. Co.* 59 Cal. 513; *Fernandes v. Sacramento City R. Co.* 53 Cal. 45; *Kline v. Central Pac. R. Co.* 37 Cal. 400; *Isbell v. New York & N. H. R. Co.* 27 Conn. 392; *Weymire v. Wolfe*, 53 Iowa, 533; *Frick v. St. Louis, K. C. & N. R. Co.* 5 Mo. App. 435; *Walsh v. Mississippi Valley Transp. Co.* 53 Mo. 434; *State v. Manchester & L. R. Co.* 53 N. H. 533; *Palys v. Erie R. Co.* 30 N. J. Eq. 304; *Dudley v. Camden & P. Ferry Co.* 45 N. J. L. 333; *Matthiason v. Mayer*, 7 West. Rep. 740, 90 Mo. 566; *Harvey v. New York Cent. & H. R. Co.* 19 Hun. 556; *Mark v. Hudson River Bridge Co.* 56 How. Pr. 103; *Gunter v. Wicker*, 85 N. C. 310; *Kerwhacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 173; *Thirteenth & F. St. Pass. R. Co. v. Boudrou*, 92 Pa. 475; *Fowler v. Baltimore & O. R. Co.* 18 W. Va. 379; *Pittsburgh, C. & St. L. R. Co. v. Conn.* 1 West. Rep. 301, 104 Ind. 64; *West Mahanoy Twp. v. Watson*, 8 Cent. Rep. 543, 116 Pa. 344.

If the defect in a sidewalk was the remote and not the proximate cause of injury to a person traveling thereon, such person is not entitled to recover. *Childrey v. Huntington (W. Va.)* 11 L. R. A. 813. See notes to *Goshen v. England (Ind.)* 5 L. R. A. 253; *Choze v. Eureka (Cal.)* 4 L. R. A. 335; *Lincoln v. Boston (Mass.)* 3 L. R. A. 267.

The fall of ice and snow from a building, causing 12 L. R. A.

He must by his own act have brought the injury upon himself.

*Wood, Mast. and S.* § 638.

If the act of the defendant was the proximate cause, and was such as a man of ordinary prudence would not have anticipated, the plaintiff cannot be charged with that degree of contributory negligence which excuses the negligence of the defendant, even though the plaintiff's act in view of the circumstances was in a measure negligent.

*Ibid.* See also *Fraser v. Sears Union Water Co.* 13 Cal. 555; *McKeon v. Citizens R. Co.* 43 Mo. 79; *Macon & W. R. Co. v. Winn*, 26 Ga. 250; *Carroll v. New York & N. H. R. Co.* 1 Duer, 571.

Because the plaintiff is willing to take some risks, this will not necessarily excuse the defendant's negligence.

*Harris v. Clinton Twp.* 7 West. Rep. 666, 64 Mich. 447.

*Messrs. Terry & Bronson, for defendants:* Plaintiff's injury was the direct result of his own negligence in assuming a risk not required of him by the defendant, and he was therefore guilty of such negligence as materially contributed to his injury.

*Whart. Neg.* § 215; *Otis v. Janesville*, 47 Wis. 422; *Lookwood v. Chicago & N. W. R. Co.* 55 Wis. 50; *Sprong v. Boston & A. R. Co.* 60 Barb. 80; *Daniels v. Saybrook*, 84 Conn. 377.

a horse to start and run, is the proximate cause of injury to the driver thrown from the wagon. *Smethurst v. Proprietors of Ind. Cong. Church*, 2 L. R. A. 695, 143 Mass. 251; *Lee v. Union R. Co.* 12 R. L. 388.

For other instances of frightening horses, see *Read v. Nichols*, 7 L. R. A. 133, note, 118 N. Y. 234.

Fire negligently set out is the proximate cause, though other agencies concur. See note to *Read v. Nichols, supra*.

The proximate cause of an injury is that cause which immediately precedes and directly produces the injury, without which an injury would not have occurred. *Lindvall v. Woods*, 44 Fed. Rep. 355.

In ascertaining what constitutes proximate cause, the inquiry is as to whether the injury is the natural and proximate consequence of the negligence, such as under the circumstances ought to have been foreseen. *Maak v. Lombard & S. Streets P. R. W. Co. (Pa.)* 18 Wash. L. Rep. 84.

Although contributory neglect by the deceased will not relieve from responsibility a party by whose willful neglect the life of deceased has been destroyed, yet, if the injury received by the deceased was caused wholly by his own negligence, no action can be maintained. *Jones v. Louisville & N. R. Co.* 32 Ky. 610.

Defendant would be answerable for the injury to deceased, although it was brought about by his own act, if that act had been the necessary, legal or natural consequence of the original wrongful act. *Ibid.*

*Contributory negligence of party injured defeats a recovery.*

Contributory negligence of party injured defeats a recovery. See notes to *Erickson v. St. Paul & D. R. Co. (Minn.)* 5 L. R. A. 786; *Evans v. Adams Exp. Co. (Ind.)* 7 L. R. A. 678.

But the fact that one injured by another's negligence did all he could to avoid the injury absolves him from the charge of contributory negligence. *Louisville, N. A. & C. R. Co. v. Lucas*, 6 L. R. A. 133, 119 Ind. 533.

The plaintiff had voluntarily placed himself in a spot where, if anything occurred, he would be unable to avail himself of the safeguards specially provided by the defendant, and on which the foreman intended to have him rely in stationing him as he did.

See *Goldstein v. Chicago, M. & St. P. R. Co.* 46 Wis. 404.

He had no right to leave the post of duty assigned him, for his own comfort or convenience, except at his own risk.

*Sprong v. Boston & A. R. Co. supra.*

An employé cannot recover against an employer for injuries caused by the negligence of the employer, if the injuries which result would have been avoided had he been free from negligence on his own part. The plaintiff's injuries resulted from the fall; had he remained where he was employed and directed to stand, he could not have fallen.

*Baltimore & P. R. Co. v. Jones*, 95 U. S. 442, 24 L. ed. 507, and cases cited on p. 443; *Rains v. St. Louis, I. M. & S. R. Co.* 71 Mo. 164, and cases cited.

It is true that the defendant did not contemplate the falling of the gable of the building when the warning was given to the plaintiff not to go upon the end of the platform, but the danger there was manifest to an ordinarily prudent man, and in cases of mutual negligence the plaintiff cannot recover.

For instances of contributory negligence which will defeat a recovery, see *Evans v. Adams Exp. Co.* 7 L. R. A. 978, and *note*, 123 Ind. 382.

#### Other instances:

Driving at an unlawful speed on a street, if it contributes to an injury received in a collision with another team, is a bar to a recovery for the negligence of the other party. *Broschart v. Tuttle*, 11 L. R. A. 38, and *note*, 59 Conn. 1.

A person unacquainted with the place, walking on a dark night with a companion carrying a lantern, parted with him near the approach to a bridge, and was precipitated through an unguarded opening. He was held chargeable with such contributory negligence as prevented recovery of damages from the municipality. *Cummings v. Syracuse*, 1 Cent. Rep. 710, 100 N. Y. 637.

A man who fell into a hatchway which had a coaming of about twelve inches, and was lighted by a lamp hanging from a mast at one end of the hatchway, while the deck was well lighted with electric lights near by, while he was attempting to pass across the deck, having a clear passageway of five feet, is guilty of negligence which will prevent his recovery. *Anderson v. The E. B. Ward, Jr.* 38 Fed. Rep. 44.

One who, in going out of a public hall or building, instead of going out by a lighted hall and stairway of which he had knowledge, leaves the hall by a side door, stepping into the dark upon a platform, under the mistaken belief that it is protected by a railing, and falls and is injured, is guilty of such contributory negligence as will prevent his recovering for injuries against the owner of the hall. *Johnson v. Wilcox*, 135 Pa. 217.

#### When contributory negligence will not bar a recovery.

Where the negligence of the defendant is so gross as to amount to wanton and willful negligence, the want of ordinary care on the part of the party injured, to avoid the consequences of defendant's negligence, will not bar a recovery. *Central R. & Bkg. Co. v. Denson*, 84 Ga. 774. 12 L. R. A.

*Parker v. Adams*, 53 Mass. 420; *Gonzales v. New York & H. R. R. Co.* 38 N. Y. 442; *Park v. O'Brien*, 23 Conn. 389; *Neal v. Gillett*, Id. 436; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 443, 24 L. ed. 507; *Smith v. Smith*, 19 Mass. 631; *Fallon v. Boston*, 85 Mass. 38.

**Torrance, J.**, delivered the opinion of the court:

The general question reserved for our advice in this case is, whether the plaintiff upon the facts found is entitled to the substantial damages or only to the nominal damages found by the court below.

Inasmuch as that court has expressly found that the negligence of the defendant caused or contributed to the injury for which the plaintiff seeks to recover, the decision of the above general question depends upon this single point, namely, whether the acts and conduct of the plaintiff as set forth upon the record constitute or amount to such contributory negligence on his part as will bar his right to substantial damages. The facts found, so far as they bear upon the question for decision, are in substance the following:

The plaintiff was a workman in the service of the defendant, and at the time of the injury complained of was engaged in helping to store ice for the defendant in a certain brick building. In doing this work the plaintiff stood

If the injury was willfully inflicted, plaintiff may recover, although guilty himself of negligence. *Ivens v. Cincinnati, W. & M. R. Co.* 1 West. Rep. 122, 103 Ind. 27; *Terre Haute & I. R. R. Co. v. Graham*, 95 Ind. 238.

Contributory negligence will not bar a recovery where the injury complained of is in terms or substance willfully committed, or so gross as to lead to the conclusion that it is willful and culpable. *Central R. & Bkg. Co. v. Denson, supra.*

#### Contributory negligence; instances.

One traveling by night along a country road in a wagon driven by a man known by him to be drunk is guilty of contributory negligence. *Hershey v. Mill Creek Twp. Road Comrs. (Pa.)* 8 Cent. Rep. 222.

The intoxication of the plaintiff at the time of the accident is a circumstance to go to the jury upon the question of his contributory negligence; but it is not conclusive upon the question. *Seymer v. Lake*, 66 Wis. 651.

It is not contributory negligence not to look out for danger when there is no reason to apprehend any. *Engel v. Smith (Mich.)* July 2, 1890.

It cannot be laid down as a universal rule that it is negligence for a blind man to walk the streets of Boston unattended. *Smith v. Wildes*, 3 New Eng. Rep. 744, 143 Mass. 556.

He is bound to use only ordinary care to avoid accidents; but in determining what is ordinary care the jury must consider his blindness and other infirmities, and all the circumstances which bear upon the question.—What care is reasonably necessary to insure his safety? *Neff v. Wellesley*, 3 L. R. A. 500, 148 Mass. 497.

A person who has ample time to get across a street, although a vehicle may be approaching, is not guilty of contributory negligence in attempting to do so. *Fenton v. Second Ave. R. Co.* 56 Hun. 99.

Where one on foot comes into collision with another in a sleigh, and is injured, the fact that the foot traveler did not step out of the beaten track to allow the other to pass is not conclusive evidence of contributory negligence; but that ques-

upon a platform about five feet wide and seventeen feet long, raised fifteen feet above the ground, and extending from the west side of the building easterly to a point about two feet east of the door or aperture through which the ice was taken in the building. A stout plank of suitable height and strength extended along the outer side of the platform as far as the west side of the door and served as a protective railing or guard to that portion of the platform. In front of the door and east of it the platform was without guard or railing of any kind. A short time prior to the injury the foreman of the defendant stationed the plaintiff on the platform just west of the door and inside the railing, and showed him what his duties were there, and told him "not to go upon the east end of the platform east of the slide and door, as it was not safe to stand there." He did not tell the plaintiff why it was not safe, but the danger which he had in mind was the narrowness and unrailed condition of the platform and the liability by inadvertence to misstep or fall or slip off, the latter being aggravated by the liability of the platform to become slippery from broken ice. These dangers were all manifest. The peril resulting from the accident which happened to the building was not in contemplation.

After the foreman went away the plaintiff, in spite of the orders so given to him, and for

reasons of his own apparently, went over to the east end of the platform and worked there. It is found that there was no sufficient reason or excuse for the change of position. One of his fellow workmen, seeing the plaintiff in that place, told him that "it was not safe, and to stand on the other side," but the plaintiff, notwithstanding such warning, remained at work there.

While so at work the brick wall of the building above the platform, in consequence of the negligence of the defendant, gave way, the brick falling upon the platform and thence to the ground. The plaintiff was struck by portions of the descending mass and fell to the earth. He was either knocked off, or his fall, in the condition in which he stood, was inevitable; indeed, had he not fallen when he did, his injuries, which were very serious, would have been worse. Most of the injuries which he actually sustained were occasioned by the fall.

The plaintiff had no knowledge that the wall would be likely to fall or was in any way unsafe, and it is found that "no fault or negligence can be imputed to him in this regard."

In contemplation of the peril from the falling wall, it is found that "the spot where the plaintiff stood could not have been considered more dangerous than the place where he was directed to stand, though in fact most of the

tion is one for the jury under all the evidence in the case. *Kendall v. Kendall*, 147 Mass. 432.

The contributory negligence of a carrier is no bar to the right of a passenger to recover from another party for injuries received in consequence of the latter's negligence. *New York, P. & N. R. Co. v. Cooper*, 85 Va. 939.

Rule applied to the negligence of the driver of a hack or stagecoach. *Becker v. Missouri Pac. R. Co.* (Mo.) 9 L. R. A. 187.

Contributory negligence is chargeable to an oil miner who is killed by an explosion occasioned by his lantern, in passing near an oil well from which he could smell and hear gas escaping. There can be no recovery from the owners of the well, although they had not exercised usual care. *McClafferty v. Fisher* (Pa.) 1 Cent. Rep. 871.

Where penitentiary lessees working the convicts in a coal mine promulgate an order that convicts, on discovering a loose or dangerous roof in the mine, shall immediately stop work and report to the mining boss, their neglect to do so, and continuing work, will bar recovery for injuries received thereby. *Knoxville Iron Co. v. Smith*, 86 Tenn. 45. See *East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 73.

#### *Voluntary assumption of peril.*

If the danger is known and can be avoided, a peril voluntarily and unnecessarily assumed may constitute such contributory negligence as would preclude a recovery. *Harris v. Clinton*, 7 West. Rep. 669, 64 Mich. 447, citing *Erie v. Magill*, 101 Pa. 616; *Schaeffer v. Sandusky*, 33 Ohio St. 243; *Wilson v. Charlestown*, 8 Allen, 187; *Centralia v. Krouse*, 64 Ill. 19; *Parkhill v. Brighton*, 61 Iowa, 103; *Cook v. Johnston*, 58 Mich. 437.

It is not contributory negligence in a person to risk his life, or place himself in a position of great danger, in an effort to save the life of another, or to rescue another from a sudden peril or great bodily harm, unless under circumstances which would constitute rashness in the judgment of prudent 12 L. R. A.

persons. *Peyton v. Texas & P. R. Co.* 41 La. Ann. 861, citing *Eckert v. Long Island R. Co.* 43 N. Y. 503; *Beach, Contrib. Neg.* 45; 2 *Thomp. Neg.* 1174; *Pierce, Railroads*, 323; *Rorer, Railroads*, 1029.

One by whose negligent act another is induced so to act as to sustain personal injuries is not excused from liability merely because the latter voluntarily incurred the danger. *Liming v. Illinois Cent. R. Co.* (Iowa) Oct. 23, 1890. See *Harris v. Clinton Twp.* 7 West. Rep. 663, 64 Mich. 447.

But one who walks blindly into danger without observing due care cannot claim to be free from negligence because he exercised due care after coming into the dangerous position. *Chicago, M. & St. P. R. Co. v. Halsey*, 123 Ill. 243; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 203.

One who places himself in a position of peril and is unavoidably injured by the act of another is the author of his own misfortune, his act being the proximate cause of the injury. *Stewart v. Newport News & M. V. R. Co.* 86 Va. 693. See *Dun v. Seaboard & R. R. Co.* 73 Va. 645.

#### *Concurrent or co-operating causes of injury.*

When two causes co-operate to produce the injury, the proximate cause is the originating and efficient cause which sets the other cause in motion. See notes to *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. 194; *Smith v. Kanawha County Ct.* (W. Va.) 8 L. R. A. 83; *Colorado Cent. R. Co. v. Holmes*, 5 Colo. 197; *Paduach & M. R. Co. v. Hoehi*, 12 Bush, 41; *Cornwall v. Charlotte, C. & A. R. Co.* 97 N. C. 11; *Murphy v. Deane*, 101 Mass. 455; *Richmond & D. R. Co. v. Morris*, 31 Gratt. 200; *Richmond & D. R. Co. v. Anderson*, Id. 312; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 430, 24 L. ed. 503.

Where a person was driving a team on a narrow road, and the horse was frightened by two calves yoked together and suddenly appearing, which caused the horse to back and topple the wagon and plaintiff over the bank to her serious injury, it was held she could not recover against the county. *Smith v. Kanawha County Ct.* 8 L. R. A. 83, 38 W. Va. 713.



brick fell upon the side where he stood, and the result demonstrated therefore that the other side would have been safer in the event which occurred."

Upon these facts the defendant contends that the plaintiff, in going to and remaining on the east end of the platform, contrary to the orders and in spite of the warning given him, and in view of the obvious and manifest danger in so doing, was guilty of such contributory negligence as bars him of his right to recover more than nominal damages.

If the plaintiff's injuries had resulted from any of the perils and dangers attendant upon the mere fact of his standing and working on the east end of the platform, which were obvious and manifest to anyone in his place, which were in the mind of the foreman when he told the plaintiff not to go there, and in view of which his fellow workmen warned him, then this claim of the defendant would be a valid one. But upon the facts found it is without foundation.

The injury to the plaintiff was not the result of any such dangers, but was caused through the negligence of the defendant by the falling walls. This was a source of danger of which he had no knowledge whatever. He was justified in supposing that the wall was safe and would not be likely to fall upon him, no matter where he stood on the platform. He had

no reason to anticipate even the slightest danger from that source before or after he changed his position. This being so, he could be guilty of no negligence with respect to this source of danger by changing his position contrary to orders; for negligence presupposes a duty of taking care, and this in turn presupposes knowledge or its legal equivalent.

With respect to that danger the plaintiff upon the facts found must be held to have acted as any reasonably careful man would have acted under the same circumstances. In changing his position contrary to orders he voluntarily took the risk of all perils and dangers which a man of ordinary care in his place ought to have known or could reasonably have anticipated; but as to dangers arising through the defendant's negligence from other sources—dangers which he was not bound to anticipate and of whose existence he had no knowledge,—he took no risk and assumed no duty of taking care. It was the duty of the defendant on the facts found to warn the plaintiff against the danger from the falling wall.

Now the act or omission of a party injured which amounts to what is called contributory negligence, must be a negligent act or omission, and in the production of the injury it must operate as a proximate cause, or one of the proximate causes, and not merely as a condition.

Contributory negligence need not be the sole cause of the injury, but it is sufficient, if it be one of two or more concurring efficient causes, to bar recovery. *North Birmingham Street R. Co. v. Calderwood* (Ala.) Jan. 31, 1890; *West. Railway of Ala. v. Sistrunk*, 85 Ala. 352.

The general rule is, that where two or more causes concur, and it cannot be determined which contributed most to the accident, or whether without their concurrence the accident would have happened a recovery cannot be had. See *note to Smith v. Proprietors of Ind. Cong. Church* (Mass.) 2 L. R. A. 695.

Where it can be shown that the accident would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained. *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147, 62 Am. Dec. 323; *Central R. Co. v. Letcher*, 60 Ala. 103, 44 Am. Rep. 505.

But it must be such negligence as contributes to the injury. *Kennard v. Burton*, 25 Mo. 39, 43 Am. Dec. 249.

One negligent person cannot escape liability because of the negligence of a third person which concurred in producing the injury. *Louisville, N. A. & C. R. Co. v. Lucas*, 6 L. R. A. 193, 119 Ind. 533.

#### *Intervening agency breaks causal connection.*

An intervening agency breaks the causal connection, so if an intervening cause is sufficient of itself to cause the misfortune the former must be considered too remote. *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 274.

Effect produced by an intervening cause. See *note to Smith v. Kanawha County Ct.* (W. Va.) 8 L. R. A. 84, examples on p. 85.

If, subsequent to the original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of a misfortune, the former must be considered as too remote. *Texas & P. R. Co. v. Doherty* (Tex.) Nov. 8, 1890; *Brandon v. Gulf City C. C. & Mfg. Co.* 51 Tex. 121; *Seale v. Gulf, C. & S. F. R. Co.* *supra*; 3 Civil Cas. Ct. App. 437.

12 L. R. A.

If an intervening cause and its probable consequences be such as could reasonably have been anticipated by the original wrong-doer, the connection between the original wrongful act and the resulting injury is not broken so as to relieve the wrong-doer from liability. *St. Louis, A. & T. R. Co. v. McKinney*, 78 Tex. 293. See *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 273.

Both causes necessarily contribute to a result which was the necessary and unavoidable effect of the first cause, but was hastened by the intervention of a new, independent force, of itself sufficient to produce the effect. *Thompson v. Louisville & N. R. Co.* (Ala.) 11 L. R. A. 146.

#### *Proximate cause of injury fixes the liability.*

The proximate and not the remote cause is to be regarded in considering the question of negligence and liability therefor. See *notes to Read v. Nichols* (N. Y.) 7 L. R. A. 181; *Smith v. Kanawha County Ct.* (W. Va.) 8 L. R. A. 82.

If the plaintiff's negligence is the proximate cause of the injury no recovery can be had. *Trow v. Vermont Cent. R. Co.* 24 Vt. 437.

A recovery by one who has been guilty of contributory negligence, from injuries which have resulted in part from the negligence of another, is permitted, where the defendant failed through his own negligence to discover plaintiff's peril and to use the means at his command to prevent the injury. *Kelley v. Missouri Pac. R. Co.* (Mo.) 8 L. R. A. 733, and *note* containing instances.

And if the plaintiff, by the exercise of ordinary care, could have avoided the injury, but failed to exercise such care, his own negligence will be held to be the proximate cause, and he cannot recover unless the remote cause, the negligence of the defendant, resulted from some wanton or willful act or omission of the defendant. *Macon & W. R. Co. v. Winn*, 19 Ga. 440; *Hoehl v. Muscatine*, 57 Iowa, 444; *Walsh v. Mississippi Valley Transp. Co.* 52 Mo. 454.

#### *Defendant's negligence as the proximate cause.*

Where the defendant's negligence is the proximate cause of the injury a recovery may be had.

In the case at bar the conduct of the plaintiff, as we have seen, was, with respect to the danger from the falling wall, not negligent for the want of knowledge or its equivalent on the part of the plaintiff.

Nor was his conduct, legally considered, a cause of the injury. It was a condition rather.

If he had not changed his position he might not have been hurt. And so, too, if he had never been born, or had remained at home on the day of the injury, it would not have happened; yet no one would claim that his birth or his not remaining at home that day can in any just or legal sense be deemed a cause of the injury.

The court below has found that the plaintiff's fall in the position in which he stood was due to the giving-way of the wall, and that most of his injuries were occasioned by the fall. His position there, upon the facts found, can no more be considered as a cause of the injury, than it could be in a case where the defendant, in doing some act near the platform without the plaintiff's knowledge, had negligently knocked him to the ground, or had negligently hit him with a stone. Had the injury been occasioned by a misstep or slip from the platform by the carelessness of the plaintiff, or for the want of a railing, the causal connection

between the change of position and the injury would, legally speaking, be quite obvious; but from a legal point of view no such connection exists between the change of position and the giving way of the wall.

The plaintiff had full knowledge of and was abundantly cautioned against certain particular sources of peril and danger, and he voluntarily neglected the warnings and took the risk of those perils and dangers. He was injured through the negligence of the defendant from an entirely different source of danger, of which he knew and could know nothing, and of whose existence it was the duty of the defendant to warn him.

Under these circumstances the failure or neglect to heed the warning does not constitute contributory negligence. *Gray v. Scott*, 66 Pa. 845.

In the case cited certain boys had been warned not to play at a certain point because of some particular and obvious dangers existing there. They failed to heed the warning, and one of them, playing at that place, was killed. His death was caused by the negligence of another and came from a source of danger not obvious and entirely different from any the boys had been warned against. In answering the argument that the boy's failure

*Pacific R. Co. v. Houts*, 12 Kan. 336; *Whalen v. St. Louis, K. C. & N. R. Co.* 60 Mo. 323; *Manly v. Wilmington & W. R. Co.* 74 N. C. 655.

If the negligence of a defendant, which contributed directly to the injury, occurred after the danger in which the party had placed himself, and defendant might have averted the accident, he is liable however gross may have been the negligence of the plaintiff placing himself in the position of danger. See note to *Erickson v. St. Paul & D. R. Co.* (Minn.) 5 L. R. A. 787.

Where plaintiff had negligently exposed himself or his property to injury, and the defendant, with knowledge of the risk the plaintiff had taken, by ordinary care might have avoided doing the injury, his failure to exercise such care would constitute the proximate cause and would render him liable. *Schierhold v. North Beach & M. R. Co.* 40 Cal. 447; *Pennsylvania R. Co. v. Sinclair*, 62 Ind. 301; *McKean v. Burlington, C. R. & N. R. Co.* 55 Iowa, 122; *Pacific R. Co. v. Houts*, *supra*; *O'Brien v. McGlinchy*, 68 Me. 532; *People's Pass. R. Co. v. Green*, 56 Md. 84; *Zimmerman v. Hannibal & St. J. R. Co.* 71 Mo. 476; *Bunting v. Central Pac. R. Co.* 16 Nev. 277; *Gunter v. Wicker*, 85 N. C. 310; *Nashville & C. R. Co. v. Carroll*, 6 Helsk. 347.

Where a passenger on a street-car was injured by a collision thereof with a railroad car left standing close to the street-car track, the negligence of the railroad company, if any, in leaving the car on the track, was only the remote cause of the accident, and such passenger cannot recover for it. *Texas & P. R. Co. v. Doherty* (Tex.) Nov. 8, 1890.

The cases are numerous which establish these principles of the law of negligence, and may be summarised, in addition to those already specifically noted, as follows: *Central R. & Bkg. Co. v. Letcher*, 69 Ala. 106, 44 Am. Rep. 506; *Little Rock & Ft. S. R. Co. v. Pankhurst*, 36 Ark. 371; *Birge v. Gardner*, 19 Conn. 507, 60 Am. Dec. 251; *Strong v. Sacramento & P. R. Co.* 61 Cal. 323; *Nehrbas v. Central Pac. R. Co.* 62 Cal. 320; *McCoy v. Philadelphia, W. & B. R. Co.* 5 Houst. 599; *Colorado Cent. R. Co. v. Holmes*, 5 Colo. 197; *Illinois Cent. R. Co. v. Hetherington*, 38 Ill. 510; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 232, 19 Cent. L. J. 360; *Jamison v. San José & S. C. R. Co.* 55 Cal. 593; *Harford County* 12 L. R. A.

*Comra. v. Hamilton*, 60 Md. 340; *Starry v. Dubuque & S. W. R. Co.* 51 Iowa, 419; *Louisville, N. A. & C. R. Co. v. Shanks*, 94 Ind. 593; *Salem v. Goller*, 75 Ind. 291; *Steele v. Central R. Co.* 43 Iowa, 109; *McKean v. Burlington, C. R. & N. R. Co.* 55 Iowa, 122; *Hoehl v. Muscatine*, 37 Iowa, 444; *Jeffrey v. Keokuk & D. M. R. Co.* 56 Iowa, 546; *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160, 43 Am. Rep. 206; *Kentucky Cent. R. Co. v. Lebus*, 14 Bush, 513; *Sullivan v. Louisville Bridge Co.* 9 Bush, 81; *Jacobs v. Louisville & N. R. Co.* 10 Bush, 233; *Louisville & N. R. Co. v. Collins*, 2 Duval, 114; *Louisville & N. R. Co. v. Robinson*, 4 Bush, 507; *Levy v. Carondelet Canal & Nav. Co.* 34 La. Ann. 130; *Fleytas v. Pontchartrain R. Co.* 13 La. 339, 33 Am. Dec. 659; *Murray v. Pontchartrain R. Co.* 31 La. Ann. 490; *Kennard v. Burton*, 23 Me. 39, 43 Am. Dec. 240; *Murphy v. Deane*, 101 Mass. 455, 3 Am. Rep. 309; *Peverly v. Boston*, 126 Mass. 369, 49 Am. Rep. 37; *Vicksburg & M. H. Co. v. Hart*, 61 Miss. 468; *Walsh v. Mississippi Transp. Co.* 52 Mo. 434; *Zimmerman v. Hannibal & St. J. R. Co.* 71 Mo. 476; *Palya v. Erie R. Co.* 30 N. J. Eq. 604; *Pennsylvania R. Co. v. Bightler*, 42 N. J. L. 130; *Dudley v. Camden & P. Ferry Co.* 45 N. J. L. 368; *Mullen v. Hainear*, Id. 530; *Munger v. Tonawanda R. Co.* 4 N. Y. 349, 53 Am. Dec. 334; *Milton v. Hudson River S. R. Co.* 37 N. Y. 212; *Rexter v. Starin*, 78 N. Y. 601; *Morrison v. Cornelius*, 63 N. C. 346; *Pennsylvania R. Co. v. Goodman*, 63 Pa. 339; *Simpson v. Hand*, 6 Whart. 311, 35 Am. Dec. 231; *Erie v. Magill*, 101 Pa. 616; *Freer v. Cameron*, 4 Rich. L. 223, 55 Am. Dec. 663, and note; *Renneker v. South Carolina R. Co.* 20 S. C. 219; *Houston & T. C. R. Co. v. Richards*, 50 Tex. 373; *Richmond & D. R. Co. v. Morris*, 31 Gratt. 200; *Bradley v. Andrews*, 51 Vt. 530; *Sheff v. Huntington*, 16 W. Va. 307; *Hoth v. Peters*, 55 Wis. 405; *Martin v. Bishop*, 59 Wis. 417; *Otis v. Janesville*, 47 Wis. 423; *Cronin v. Delavan*, 50 Wis. 375; and following *Butterfield v. Forrester*, 11 East, 60, the leading English case; *Bridge v. Grand Junction R. Co.* 3 Mees. & W. 244; *Tuff v. Warman*, 5 C. B. N. S. 573; *Witherley v. Regents Canal Co.* 12 C. B. N. S. 2, 3 Fost. & F. 61, 1 L. T. N. S. 255; *Dowell v. General Steam Nav. Co.* 5 El. & Bl. 195, cited in *Beach*, Contrib. Neg. 15. And see *Shearn & Redf. Neg. § 323*; *Thomp. Neg. § 1140*; *Whart. Neg. § 300*; *Saunders*, Neg. 55; *Field*, Dam. 153, 159, 173.

to heed the warnings was a cause of his death and contributory negligence, the court says: "But because he was under the tramway in the passage below it is thought he was guilty of contributory negligence. He could not be guilty of negligence as to the defendant without there was some reason to expect danger and a duty of care on his part in relation to it. There was ordinarily none. He had a right therefore to suppose everything secure and safely managed on the tramway, and because it was not he was killed. Precisely the same argument could have been used if the boy had been killed in that place by the negligent use of firearms discharged a hundred yards off."

The defendant seems to claim, however, that, although some of the plaintiff's injuries were caused by falling bricks, yet most of them were caused by his fall; and that as he probably would not have fallen had he remained behind the railing, he contributed to his injury by placing himself where in case of such accident there was nothing to prevent his fall.

Whether the claim that he would probably not have fallen had he remained where he was stationed be true or not, must forever remain matter of conjecture. But if its truth could be demonstrated it would not, as we have seen, change the relation of the plaintiff's act to the legal cause of his injury, or make that act, from a legal standpoint, a contributing cause when it was but a condition.

And if the claim means that the plaintiff by his act increased the injury merely, then if this were true it would not be such contributory negligence as would defeat the action. To have that effect it must be an act or omission which contributes to the happening of the act or event which caused the injury. An act or omission that merely increases or adds to the extent of the loss or injury will not have that effect, though of course it may affect the amount of damages recovered in a given case. *Gould v. McKenna*, 86 Pa. 297; *Stebbins v. Central Vermont R. Co.* 54 Vt. 464. This claim however, on the facts found, is wholly without foundation.

The plaintiff is entitled to judgment in his favor for \$1,000, and the Superior Court is so advised.

In this opinion the other Judges concurred.

BURTON MANSFIELD, Admr. *de Bonis non* of Dennis McLaughlin, Deceased,  
v.

Ann LYNCH, Impleaded, etc., Appt.

(59 Conn. 320.)

**An overpayment by an administrator to a creditor** in the mistaken belief that the estate is solvent where the mistake is one of either law or fact may be recovered back either by the administrator himself or his successor, the administrator *de bonis non*, although the creditor received it in good faith believing that he was justly entitled thereto; and the fact that the mistake arose through the negligence of the administrator is immaterial if it has caused the creditor no harm.

(Andrews, Ch. J., *dissentia*.)

12 L. R. A.

(July 10, 1890.)

**APPEAL** by defendant from a judgment of the City Court for the City of New Haven in favor of plaintiff in an action brought to recover back money overpaid to defendant as a creditor of the estate of Dennis McLaughlin, deceased. *Affirmed*.

The facts are stated in the opinion.

**Mr. Joseph B. Morse**, for appellant:

The mistake made by the administrator was not such as equity will relieve, and the plaintiff, his successor, as administrator, can have no stronger claim for relief. It is apparent that it was not a mistake of fact. The administrator knew every fact regarding the value of the estate and the number and amount of claims presented.

2 Pom. Eq. § 841; *Allen v. Galloway*, 30 Fed. Rep. 486; 2 Swift, Dig. 92.

Money paid under a mistake of law with respect to the liability to make payment, but with full knowledge or with means of obtaining knowledge of all the circumstances, cannot be recovered back.

2 Pom. Eq. § 851.

The mistake must be such as the exercise of ordinary diligence would not have prevented.

*Bonney v. Soughton*, 123 Ill. 536, 11 West. Rep. 708; *Staples v. Staples*, 85 Va. 76; *Clarke v. Dutcher*, 9 Cow. 674; *Mowatt v. Wright*, 1 Wend. 355; *Peterborough v. Lancaster*, 14 N. H. 382; *Evans v. Gale*, 17 N. H. 573; *Brainard v. Colchester*, 31 Conn. 411.

**Messrs. Samuel A. York and A. D. Penney**, for appellee:

The administrator Bradley was never under any legal, equitable or moral obligation to pay, nor was the defendant at any time legally, equitably or morally entitled to receive out of said estate upon her claim more than 81 1/2 per cent; and if more than that was paid her, by mistake of either law or fact, or both, the plaintiff is clearly entitled to recover it back.

*Northrop v. Graves*, 19 Conn. 555; *Camp v. Tompkins*, 9 Conn. 554; *Dutton v. Connecticut Bank*, 13 Conn. 496; *East Haddam Bank v. Scovil*, 12 Conn. 810; *Brainard v. Colchester* 31 Conn. 411; *Post v. Clark*, 35 Conn. 341; 4 Wait, Act. and Def. 483-487.

No privity of contract, in fact, is required in this cause between the parties.

*Eagle Bank v. Smith*, 5 Conn. 75; 1 Swift, Dig. p. 398; *Stevens v. Goodell*, 3 Met. 84; 2 Greenl. Ev. p. 105, *note*.

When Bradley died and the plaintiff had been appointed administrator, he succeeded to all the rights of the deceased administrator in this matter.

*Stevens v. Goodell*, *supra*.

If an executor pay a debt in full, supposing the estate solvent, which afterwards proves to be insolvent, he may recover back the excess of such payment over the creditor's proportion, in an action for money had and received.

*Walker v. Hill*, 17 Mass. 380; *Walker v. Bradley*, 8 Pick. 261; *Bliss v. Lee*, 17 Pick. 83; *Heard v. Drake*, 4 Gray, 514; 1 Wait. Act. and Def. 168, 169.

**Torrance, J.**, delivered the opinion of the court:

The record in this case discloses the following facts:

On the first of May, 1888, one McLaughlin died intestate, and in fact insolvent, owing the defendant, Ann Lynch, \$400 upon a promissory note. On May 14 of that year one Bradley was appointed administrator upon McLaughlin's estate. The court of probate limited a time for the presentation of claims, and within the time all the claims finally allowed against the estate, amounting to \$1,696.44, were presented to said Bradley.

Of the claims so presented Bradley allowed some and disallowed others. Among the claims of general creditors so allowed (amounting in all to \$705.14), was that of the defendant upon said note, amounting with interest to \$424.87. The claims disallowed, amounting to \$991.80, were in fact valid claims against the estate, but none of them were evidenced by any writing signed by the deceased, and Bradley believed they were not valid claims on that account. He also honestly but erroneously believed that he had been advised by the judge of probate to disallow all claims presented against the estate not evidenced by a writing signed by the deceased, and supposed that one of the claims was barred by the Statute of Limitations.

On these grounds he disallowed these claims and gave the parties notice of the disallowance. After the time limited for presenting claims had expired, Bradley, acting under the belief that the disallowed claims were no longer claims that could be collected out of the estate, and believing that, this being so, the estate was solvent, paid the defendant's claim in full, and took the note into his possession, on the 19th of December, 1888. In so believing and acting he was honestly mistaken, as the court finds, both as to the matters of fact and as to the matters of law.

Afterwards, in May, 1889, certain creditors whose claims had been so disallowed brought suit against Bradley, and thereupon, by the advice of counsel, he represented to the court of probate that the estate was insolvent, and asked that commissioners be appointed to receive and examine all the claims presented. Thereupon, in May, 1889, the court adjudged the estate to be insolvent and appointed commissioners, to whom Bradley in due time presented all the claims against the estate, including those allowed and paid as well as those disallowed by him; all of which the commissioners allowed, and reported their doings to the court on the 28th of July, 1889, which report was duly accepted, and no appeal has been taken therefrom. In the meantime, on July 1, 1889, Bradley died, and on August 2, 1889, the plaintiff was duly appointed and qualified as administrator *de bonis non* of the McLaughlin estate.

The estate could at no time in fact pay to the general creditors more than 81  $\frac{1}{4}$  per cent on the dollar, which was the percentage finally found due and ordered to be paid by the court.

Before the present suit was brought the plaintiff demanded of the defendant \$290.18, which was the amount paid to her by Bradley over and above the allowed percentage. This she refused to pay, and thereupon this suit was brought. The defendant received the amount paid to her by Bradley in good faith, believing the same to be justly due, and she had no

actual knowledge of the mistakes on the part of Bradley, or of any of the doings of the commissioners or of the court of probate, before the date of this suit, although public notice thereof was given according to law.

The money so paid to her was by her forthwith deposited in her own name in a savings bank, where it has ever since remained, and is a part of the money attached in this suit.

On these facts the court below rendered judgment that the plaintiff recover of the defendant the \$290.18, with interest from December 18, 1888, when it was paid to her. Whether, upon the facts found, the court erred in so deciding, is the general question presented for our consideration.

From the record it is evident that, in fact and in law, it was the duty of the administrator to pay, and the right of the defendant to receive, only \$184.69; that the administrator by mistake paid her \$290.18 more than she was entitled to receive; and that the loss, if the overpayment cannot be recovered from the defendant, must fall, either upon Bradley's estate or upon the creditors of the McLaughlin estate. Now, whatever view may be taken of Bradley's action in making the overpayment, it seems unjust that the loss should fall upon the creditors, and if Bradley acted in good faith in making it, and did it under a mistaken view of the law or of the facts, or both, it seems hard that the loss should fall on his estate or upon his bondsman.

On the other hand, if the defendant is compelled to repay this amount, she is no worse off than she would have been if no mistake had been made. She retains her *pro rata* share of the assets, and is not legally harmed, for she thus gets all the law would in any event allow her out of the then known assets of the McLaughlin estate, and she still holds a valid claim against the estate for the balance due her. Viewed in this light it would seem as if the general result arrived at in the judgment of the court below is fair and equitable, and ought not to be disturbed unless the attainment of such a result in a case like the present is forbidden by some stubborn rule or rules of law.

The defendant claims that the judgment below is erroneous on two grounds: first, because on the facts found Bradley himself in his lifetime had no cause of action against the defendant; and second, if he had, still the present plaintiff as administrator *de bonis non* cannot recover as he now seeks to do upon that cause of action. We will examine these points in their order.

It is claimed that Bradley had no cause of action because his mistake was one of law and not of fact, and because he was guilty of such negligence and laches towards the defendant that no court, either of law or of equity, would have aided them to recover the overpayment.

Bradley paid the defendant's claim in the honest belief that the estate was solvent. But for this belief he would not have paid it in full. It would seem from the finding that this belief arose partly from ignorance of law, and partly from what he mistakenly supposed to be the advice given him by the probate judge, as to the validity of certain claims presented against the estate. He also supposed that one of the

claims disallowed was barred by the Statute of Limitations. It is perhaps not clear from the finding whether the court below regarded the mistake which Bradley made in supposing the estate to be solvent as the result of a mistaken view of law or of fact, or of both combined, nor is the settlement of this question very material.

If we concede what the defendant claims, that the overpayment was the result of a mistake of law with full knowledge of all the facts, still we think, even then, that Bradley upon the facts found would, if living, have a right to recover the overpayment upon the principles settled by this court in the case of *Northrop v. Graves*, 19 Conn. 548. In that case the husband of a legatee, as the result of a mistaken view of the law as applied to the construction of a will by the executors, was paid a sum of money to which by law he was not entitled. In the case at bar the defendant, as the result of a mistaken view of the law as applied in the disallowance of claims against an estate by the administrator, has been paid a sum of money to which she was not by law entitled out of the known assets of McLaughlin's estate. It is true that in *Northrop v. Graves* the defendant, at the time the money was paid, knew it was not due under the will, and that this knowledge was an element that entered into the decision of that case, but it was by no means the controlling element.

The court in that case said: "We mean distinctly to assert that when money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back in an action of *indebitatus assumpsit*, whether the mistake be one of law or fact; and this we insist may be done both upon the principles of Christian morals and the common law."

Here are two, and only two, conditions laid down to entitle a plaintiff in such cases to recover. First, the money must be paid by one under a mistake of his rights and his duty, and be such as he is under no moral or legal obligation to pay. Second, the recipient of the money must have no "right in good conscience" to retain it.

In the case at bar we think the first condition is fulfilled. Bradley was not only under no moral or legal obligation to make the overpayment, but on the contrary it was clearly his duty to retain the money so overpaid and divide it among the other general creditors. This duty he in fact violated solely because of a mistake of law or fact or both, it matters not which.

It is said, however, that the second condition is not fulfilled in the case at bar, because as the estate did in fact owe the defendant the whole sum paid, she has "a right in good conscience" to retain it. In one sense it is true that the estate owed the defendant the amount overpaid, but it is not in any legal or moral sense true that it was the duty of the administrator to pay, or the right of the defendant to receive, her claim in full from the then known assets of the estate. Her right was only to receive her *pro rata* share with the other general creditors, and the unpaid balance still remained a claim in her favor against the estate. If she

gets more than this it must be at the expense of the other general creditors or of the administrator. She did in fact get more than she was entitled to solely in consequence of an honest mistake. It is true that when the overpayment was made she had no knowledge of the condition of the estate or of the mistakes of Bradley, but such knowledge on her part is not made one of the conditions of recovery in the case cited, and after she obtained such knowledge she still refused to make the repayment.

Can it then with reason be said she has "a right in good conscience" to retain money which rightfully belongs to the estate, to which she is neither morally nor legally entitled, and which she obtained solely in consequence of an honest mistake which wrought her no harm whatever? Whatever meaning may be given to the somewhat indefinite phrase, "right in good conscience," we think it clear that the defendant had no such right as against Bradley under the circumstances to retain the overpayment, and this fulfills the second condition.

We are aware that upon the general question whether, when all the facts are known, or may with ordinary diligence be known, money paid under a mistake of law may be recovered back, the authorities are in direct conflict, but since the decision of the case of *Northrop v. Graves*, *supra*, there can be no doubt as to the position of this court upon this question in a case like the present. It is unnecessary therefore to cite the decisions of other States upon the question, but if it were many such authorities might be found. Such, for instance, are the cases of *Culbreath v. Culbreath*, 7 Ga. 84; *Stevens v. Goodell*, 8 Met. 34; *Rogers v. Weaver*, 5 Ohio, 586; *Beatty v. Duffie*, 11 La. Ann. 74.

From the case of *Culbreath v. Culbreath*, here cited, which was decided in 1849, a month or two after our own case of *Northrop v. Graves*, we quote the following (p. 87): "The question is, Can a party recover back money paid with a knowledge of all the facts, through mistake of the law? We are fully aware that the authorities upon this question are in conflict, as well in England as in this country. Great names and courts of eminent authority are arrayed on either side. It is not one of those questions upon which the mind promptly and satisfactorily arrives at a conclusion. This is true in reference both to principle and authority. . . . I think, and I shall try to prove, that the weight of authority is with us. If it were not so—if authorities were balanced—we feel justified in kicking the beam and ruling according to that naked and changeless equity which forbids that one man should retain the money of his neighbor for which he paid nothing and for which his neighbor received nothing, an equity which is natural, which savages understand, which cultivated reason approves, and which Christianity not only sanctions but in a thousand forms has ordained."

In the case of *Rogers v. Weaver*, *supra*, the court says, p. 587: "It is an admitted rule that where money has been paid by mistake it may be recovered back in this action. It appears to us that the payment in this case was made under a mistaken understanding of the true situation of the estate. . . . We think it just and equitable, as well as lawful, to infer a prom-

ise to repay the sum received more than was due from the fact of its receipt through mistake." The same principle was acted upon in the case of *Bliss v. Lee*, 17 Pick. 88.

But it is further said that Bradley knew all the facts and was guilty of gross negligence and laches in this matter towards the defendant, and that on these grounds he had no cause of action. But it nowhere appears that the defendant has been in any way harmed or injured by the claimed negligence or laches of Bradley. She has not changed her position for the worse on that account. She has her *pro rata* share of the assets now in her hands, and still has a claim for the unpaid balance, even if she is compelled to repay the amount overpaid. If she has given up her note she can undoubtedly easily get it back, and she has in place of it the proved and allowed claim based upon it. We fail to see where she has been legally harmed by Bradley's negligence or laches.

Where money is paid under a mistake of fact, it is no defense to an action brought to recover it that the mistake arose through the plaintiff's negligence, if such negligence caused the defendant no harm. *Appleton Bank v. McGilveray*, 4 Gray, 518; *Kingston Bank v. Ellings*, 40 N. Y. 891.

We think the same principle should apply in a case like the present, even where the mistake is one of law.

We also think that if the law is as laid down in *Northrop v. Graves* as to payments of money made by mistake of law by a party acting in his own right, much more ought the law to be so held in a case where the party making the payment acts in some fiduciary capacity as the agent of others.

We hold, then, that Bradley, if living, would upon the facts found be entitled to recover from the defendant the amount overpaid. The next question is whether the present plaintiff is entitled to recover.

If we are right in our conclusion that Bradley, if living, might on the facts found recover from the defendant the overpayment, then upon principle we see no good reason why the plaintiff may not recover in this action.

It is true that the doctrine of the common law is, that between the administrator and the administrator *de bonis non* there is little or no privity, and that to the latter is committed only the administration of the goods, chattels and credits of the deceased which have not been administered. It may also be true, perhaps, that if Bradley's estate had made good the overpayment to the plaintiff, Bradley's rep-

resentatives alone would in that case have had the right to bring this suit; but, notwithstanding these and other reasons that might be urged, we think the plaintiff can maintain this action.

Bradley parted with certain assets of the estate to the defendant by an act which, under the facts found, gave the defendant no right to retain them as against Bradley acting as administrator. After the overpayment the money overpaid still remained assets of the estate, and it was Bradley's duty to recover it back for the benefit of the estate as soon as he knew that the estate was insolvent in fact. After Bradley's death the plaintiff became the sole representative of the estate, the trustee of all persons having an interest in it. *Wiggin v. Sweet*, 6 Met. 194. It was his duty to take charge of and administer all assets of the estate of the deceased in the hands of the administrator at his decease, or in the hands of third persons, not administered upon. Bradley was, as to the cause of action which he had against the defendant for the overpayment, a trustee for the estate and the other general creditors. Had he in his lifetime instituted a suit to recover the overpayment and then died, the plaintiff by our Statute (§ 569) might have entered and prosecuted such suit to final judgment. We think, in a case like the present, he can as well institute a suit himself as to prosecute one brought by his predecessor.

Whether the suit is brought by the administrator *de bonis non*, or by Bradley's representatives, can make little or no difference to the defendant. In the one case she pays back to the estate directly, and in the other indirectly, the amount overpaid. In either case she pays it back. That is the object to be accomplished by either method; and we think the present method is the simplest and cheapest for all concerned, and was properly adopted.

We know of no case, and have been referred to none, wherein it is decided that the administrator may not recover in a case like the present. On the other hand in *Stevens v. Goodell*, *supra*, the administrator *de bonis non* was allowed to recover in a case very similar to this. See also *Bliss v. Lee*, *supra*, where the executor was allowed to recover a payment made to a creditor beyond his *pro rata* share by an executor *de son tort*.

*There is no error in the judgment of the court below.*

In this opinion *Carpenter, Loomis and Seymour, JJ.*, concurred; *Andrews, Ch. J.*, dissented.

## MASSACHUSETTS SUPREME JUDICIAL COURT

William H. ZINN  
v.

Wilbur P. RICE.

(....Mass....)

### The rule that a malicious prosecution

must have terminated before a suit for damages can be based thereon does not apply to a just cause of action in respect to which the only grievance is that an excessive attachment of goods was made, not to secure the debt, but to injure the defendant.

(May 20, 1891.)

NOTE.—As to action to recover for malicious prosecution of action or malicious abuse of process, 12 L. R. A.

see notes to *Antoliff v. June* (Mich.) 10 L. R. A. 622; *Pope v. Pollock* (Ohio) 4 L. R. A. 354.

**EXCEPTIONS** by plaintiff to a ruling of the Superior Court for Suffolk County (Lathrop, J.) that an action to recover damages for alleged malicious acts done by defendant to plaintiff's injury was prematurely brought, and to an order of nonsuit and entry of the same. *Sustained.*

Rice instituted a suit against Zinn in which he sought to recover \$4,522.45. He laid his damage in his writ at \$40,000 and placed various attachments each in the sum of \$40,000 upon the real and personal property of Zinn.

At the trial of the present action Zinn offered to prove that the attachments in the prior action had been placed upon two separate pieces of real estate, one of which was worth \$15,000 above incumbrances, and also upon a stock of goods worth \$100,000; that at the time the suit was brought and the attachments made Zinn was absent from the Commonwealth for the benefit of his health; that Rice's counsel refused to reduce the damages as laid in the writ, but the court subsequently did reduce them to \$10,000. Zinn offered to prove actual as well as constructive malice on the part of Rice, and that Rice laid his damages and placed the attachments for the avowed purpose of injuring Zinn; he further offered to prove injury because of such acts. It appearing that the suit in which the attachments were made was still pending, the court ruled that this action was prematurely brought, and for that reason ordered a nonsuit to be entered, which entry was made.

**Mr. Benjamin L. M. Tower**, for plaintiff:

The sole reason of the rule, that in cases of malicious prosecution the original proceeding must be first determined, is that it may be ascertained whether it was instituted without reasonable or probable cause. In the case at bar that question does not arise.

If it be urged that this defendant may have made a mistake in stating his claim, the complete answer to such an improbable suggestion is, that an innocent mistake can and should be taken advantage of, by way of defense in this present action, whether it be a mistake in the amount of the claim, or in the amount for which the officer was instructed to attach.

*Savage v. Brewer*, 16 Pick. 453.

It is well settled that in an action for abuse of legal process, it is unnecessary to allege or prove that such process was sued out without probable cause, or that it has terminated.

*Page v. Ousking*, 38 Me. 523; *Gilding v. Eyre*, 10 C. B. N. S. 592, 604; *Grainger v. Hill*, 4 Bing. N. C. 212; *Steward v. Gromett*, 7 C. B. N. S. 191; *Tebbutt v. Holt*, 1 Car. & K. 280; *Melia v. Neate*, 8 Fost. & F. 757; *Haywood v. Collinge*, 9 Ad. & El. 268; *Austin v. Debnam*, 3 Barn. & C. 139, 144; *Bebinger v. Sweet*, 1 Abb. N. C. 263; *Sommer v. Witt*, 4 Serg. & R. 19; 3 Greenl. Ev. § 452.

Enforcing by arrest or otherwise an erroneous judgment or execution is none the less an abuse or misuse of legal process, that it is strictly within the scope of such process.

*Tebbutt v. Holt*, *Gilding v. Eyre* and *Steward v. Gromett*, *supra*.

In the case at bar the question whether the attachments were excessive is not an issue in the suit in which the attachments were made.

13 L. R. A.

And in *Wilkinson v. Howell*, Moody & M. 495, Lord Tenterden says: "The termination must be such as to furnish prima facie evidence that the action was without foundation."

The point here presented has not been decided in Massachusetts, but in *Savage v. Brewer*, *supra*, the court says: "It seems to be a well-established principle that if one causes another to be arrested and held to bail, for a debt not due, or for more than is due, and this is done knowingly, an action on the case lies for this abuse of legal process."

**Messrs. Robert M. Morse, Jr., Edward A. Upton and Charles E. Hellier**, for defendant:

The same principles of law apply to an action to recover damages for excessive attachment as apply to an action for malicious arrest.

See *Lindsay v. Larned*, 17 Mass. 190; *Savage v. Brewer*, 16 Pick. 453; *Cardinal v. Smith*, 109 Mass. 158; *Rossiter v. Minnesota B. S. Paper Co.* 37 Minn. 296; *Newark Coal Co. v. Upson*, 40 Ohio St. 17.

To recover in an action for malicious prosecution there must first have been a termination of the action sued upon.

*Ripley v. McBarron*, 125 Mass. 272; *Hamilburgh v. Sheppard*, 119 Mass. 30; *Cardinal v. Smith*, 109 Mass. 158; *O'Brien v. Barry*, 106 Mass. 300; *Bicknell v. Dorion*, 16 Pick. 478.

The action in the case at bar is not an action for abuse of legal process.

*Johnson v. Reed*, 136 Mass. 421.

**W. Allen, J.**, delivered the opinion of the court:

It is not contended that the facts alleged in the declaration and offered to be proved at the trial are not sufficient to sustain an action by the plaintiff against the defendant. The defendant's contention is that the action is prematurely brought; that it is an action for malicious prosecution and subject to the rule that a suit for malicious prosecution cannot be maintained until the prosecution has terminated in favor of the plaintiff. But the rule applies only to suits for maliciously instituting groundless prosecutions, and does not apply to the injurious and malicious use of process in proceedings which were commenced with probable cause. The latter being for the malicious use of legal process by acts authorized by its terms may be called actions for malicious prosecution to distinguish them from actions for the abuse of process by doing under color of legal process acts not authorized by it; but there is no rule of law that in such an action the termination of any former suit must be shown. The rule is founded on the necessity of proving that a prosecution which itself puts in issue the truth of the charge on which it is founded is without probable cause. A defendant in such an action cannot bring another action to try the issue tendered him in the first while that issue is pending. The rule is by its terms and nature limited to a prosecution to establish a charge or cause of action, and cannot include an *ex parte* use of process incidental and collateral to such a prosecution and in defense to which falsity of the charge cannot be shown. *Parker v. Langly*, 10 Mod. 209; *Fortman v. Rottier*, 8 Ohio St. 548; *Bump v.*



*Betts*, 19 Wend. 421; *Barnett v. Reed*, 51 Pa. 190; *Jenings v. Florence*, 2 O. B. N. S. 487; *Churchill v. Siggers*, 8 El. & Bl. 929; *Wentworth v. Bullen*, 9 Barn. & C. 840; *Wood v. Graves*, 144 Mass. 365; *Boerett v. Henderson*, 146 Mass. 89; *Savage v. Brewer*, 16 Pick. 458; *Bicknell v. Dorion*, 16 Pick. 478.

In the case at bar the grievance of the plaintiff is not that the defendant maliciously commenced a groundless suit. He admits that the plaintiff had a good cause of action, and that there is no defense to the suit, and that its termination cannot be in his favor. Nor is his grievance that the defendant abused the process in the former suit, and under color of it did things not authorized by its terms. His grievance is that the defendant, having a just cause of action and a legal suit against this plaintiff, made an excessive attachment of property which he knew was not needed for the security of his debt, not for the purpose of securing his debt, but for the purpose of injuring the plaintiff. If the plaintiff has any right of action, which is not controverted, it is idle to say that he must wait until the former action has terminated in his favor.

The defendant contends that the amount of the debt must be fixed by the determination of the former suit, and that it cannot be shown in this suit. We know of no authority or reason for this. The amount of the debt cannot exceed the amount declared for in the suit, and that is admitted to be due so far certainly as affects this suit. Beyond that there is no question in the former suit, and no issue, and the proceedings complained of were *ex parte*, and they were terminated by the reduction of the attachment. It is argued that the plaintiff in that suit may amend his declaration and introduce a new cause of action. That case as stated by the plaintiff himself does not present any issue involved in the case at bar, and the possibility that a new cause of action may be added, if it existed, would not be sufficient to show that the issues presented in this case are pending in that, or to bring it within the terms or reason of the rule that the liability of this plaintiff to such possible cause of action can be tried only in that action.

*Exceptions sustained.*

## PENNSYLVANIA SUPREME COURT.

James RAY

v.

WESTERN PENNSYLVANIA NATURAL  
GAS CO. of Pittsburgh, *Appt.*

(....Pa....)

**1. The election of a lessor who is in actual possession of the premises to forfeit an**

oil and gas lease for default of the lessee may be regarded as a constructive entry under his title.

**2. A lessee cannot set up his own default** as a defense to an action for money due by him under the lease on the ground that a forfeiture was created by such default.

**3. An innovation or change in the law** by a judicial decision does not impair the obligation of an existing contract where neither the

### NOTE.—Leases of oil lands.

A lease giving the exclusive privilege, for a certain term of years, of boring and digging for oil and other minerals, is a chattel. *Brown v. Beecher*, 120 Pa. 590. See *Duke v. Hagne*, 107 Pa. 57; *Titusville Novelty Iron Works' App.* 77 Pa. 103; *Kile v. Giebner*, 5 Cent. Rep. 304, 114 Pa. 831.

A lease of a tract of land for oil purposes, with the exclusive privilege of boring other wells to be drilled only in case the lessor determines to have more wells drilled, restricts the operations to the sites mentioned, and gives no present right of possession at any other place within the described territory. *Duffield v. Hue*, 129 Pa. 94.

A lease of oil lands expiring by its own terms if oil is not found by the lessee within two years is not extended by the finding of oil by others without the help and against the will of the lessee. *Thomas v. Hukill* (W. Va.) Dec. 3, 1890.

### Covenants in lease.

In an oil lease on royalty, a covenant to use due diligence in operating the premises and to prosecute the business to success or abandonment, and, if successful, to prosecute the same without interruption, for the common benefit of the parties, runs with the land. *Bradford Oil Co. v. Blair*, 4 Cent. Rep. 101, 113 Pa. 83.

The liability of the defendant under this covenant depends on the question whether or not the defendant violated the covenant to use due diligence, under the circumstances of the case. *Ibid.*

Where a lease for years for drilling for petroleum

oil and gas contains a provision that the parties covenant to commence operations within nine months or to thereafter pay \$1.33½ per month until work is commenced, and that a failure to comply with either condition shall work an absolute forfeiture of the lease, and there is no covenant for re-entry, if on failure to commence operations or to pay money in lieu thereof, the lessor leases to another person, the first lease is avoided and the second lease is good against it, as the execution thereof is a sufficient declaration of forfeiture without demand and re-entry. *Guffey v. Hukill* (W. Va.) 8 L. R. A. 759, and *note*.

Lessees authorized to drill for oil, but for no other purpose, who sink one well and obtain gas without obtaining any oil, and fail to put down a second well as required by the lease, whereby it becomes forfeited, have no equitable claim to be reimbursed, out of the fund arising from the gas produced from the well sunk by them, for the expenses of sinking it, on the ground that it has proved of value to the lessors. *Palmer v. Allen* (Pa.) 26 W. N. C. 514.

In leases providing for forfeiture on default of the lessee, before the lease can be regarded as at an end the lessor must in some unequivocal way manifest a purpose to treat the lease as forfeited. *Thomas v. Hukill* (W. Va.) Dec. 3, 1890.

Where a lease for years contains a clause of forfeiture for breach of its covenant to pay rent or other covenant, but no clause of re-entry for such forfeiture, demand and re-entry is not the only mode by which the landlord may enforce the forfeiture. *Guffey v. Hukill*, *supra*.

Constitution, a statute nor any enactment that has the force of the law is applied to affect the contract.

(January 5, 1891.)

**A** PPEAL by defendant from a judgment of the Court of Common Pleas for Washington County in favor of plaintiff in an action brought to recover the amount due plaintiff under an oil and gas lease because of defendant's failure to begin operations as provided by the lease. *Affirmed.*

The case sufficiently appears in the opinion.

*Messrs. D. T. Watson, David Sterrett and H. A. Miller* for appellant.

*Messrs. John L. Gow and Thomas McK. Hughes* for appellees.

**Clark, J.**, delivered the opinion of the court:

This appeal is taken from the judgment of the common pleas, entered for want of a sufficient affidavit of defense. The action is assumpsit to recover certain sums, stipulated in a gas or oil lease, for delay or default in operating the lease. The lease is dated 4th August, 1888, James Ray, the party of the first part, being the lessor, and the Western Pennsylvania Natural Gas Company, the party of the second part, the lessee. The lease provides that, in consideration of certain rents and royalties, the said Ray hath granted, demised and let unto the said Company, "for the sole and only purpose of drilling and operating for petroleum oil and gas, for the term of two years, or so long thereafter as oil or gas is found in paying quantities, a certain tract of land in Cross Creek Township;" etc.; the party of the second part agreeing, in consideration, "to give said first party one eighth ( $\frac{1}{8}$ ) of all the oil from wells producing less than fifty barrels per day, and one fourth ( $\frac{1}{4}$ ) of the oil from all wells producing more than fifty barrels per day;" and, further, "to give \$500 per annum for the gas from each and every well drilled," etc., in case the gas is conducted and used off the premises. The particular clause of the contract, upon which suit is brought, is as follows: "The party of the second part agrees to pay, within ten days from the execution of this lease, the sum of fifty-three dollars, and, if a well is not completed within six months from the execution of this lease, the said second party agrees to pay a further sum of fifty-three dollars, and so on continually every six months, during the continuance of the term herein specified. The said sum of \$600 gas rent shall be paid within one month from the time said well is completed on said premises, and to be paid annually, in advance, thereafter. It is further agreed by said second party that, if a well is not completed within fifteen months from the date of this lease, they are to pay a further sum of \$250, said sum to be a credit on well when drilled, and, in case of failure to complete one well within such time, the party of the second part hereby agrees to pay thereafter to party of the first part, for any future delay, the sum of one hundred and six dollars per annum, within one month after the time for completing such well, as above specified, payable, semi-annually, at the First National Bank of Washington, Pa.; and the party of the first part hereby agrees to

accept such sum as full consideration and payment for such yearly delay, until one well shall be completed. And a failure to complete one well, or to make any such payment within such time and such place, as above mentioned, shall render this lease null and void, and to remain without effect between the two parties." The plaintiff's statement averred that the defendant had never completed a well on the demised premises, and claimed to receive \$53, due January 7, 1889; \$53, due July 7, 1889; \$250, due October 7, 1889; and \$53, due January 7, 1890.

The affidavit of defense set forth, in substance, that, by the terms of the lease, the only right granted was the right to operate for gas or oil; that the defendant never entered into the possession for this purpose, while the plaintiff not only at the time of the lease, but when the several sums sued for became due, respectively, was and still is in possession of the land described in the lease, and that, under these circumstances, and according to the law as declared in the decisions of this court, the lease, by its terms, on the defendant's failure to put down one well, or to make any one of the payments specified, became *ipso facto* null and void, without re-entry; and that, therefore, there is now no liability upon part of the defendant either to pay or to perform.

The case is in all respects governed by our decision in *Wills v. Manufacturers Nat. Gas Co.*, 180 Pa. 222, 5 L. R. A. 603. It is true the lessor's possession was not alluded to in the discussion and decision of that case, nor do we regard the question whether or not he was in possession, subject to the lease, as a matter of any great significance. We agree with the appellant in its contention that, if in such a case as this, the lessor should choose to avail himself of the forfeiture clause in his contract, a formal re-entry, to take advantage of the breach, was not required. The authorities cited by the appellant are decisive of the question.

In *Hamilton v. Elliott*, 5 Serg. & R. 375, there was a conveyance of a freehold by A to B, upon certain conditions, which were not complied with, the grantor, in accordance with the terms of the grant, remaining in the possession from the time of the conveyance until after the forfeiture accrued; and it was held in a suit by the assignee of A, that, by reason of the breach of the condition, while A was in the actual possession, the estate reverted in A without a formal entry, to take advantage of the breach or notice of the non-performance of the condition. As the grantor was already in the possession, it was deemed unnecessary that he should go out in order that he might re-enter, or that the grantee should have formal notice of what he already knew, viz., that the condition was not performed. To the same effect are the other cases cited by the appellant: *Dickey v. McCollough*, 2 Watts & S. 99; *Feather v. Strohoecker*, 3 Penn. & W. 508, and *Bear v. Whistler*, 7 Watts, 149.

The same rule has been applied to leases for years. *Kenrich v. Smick*, 7 Watts & S. 41; *Sheaffer v. Sheaffer*, 87 Pa. 525; *Davis v. Moss*, 38 Pa. 346; *Brown v. Bennett*, 75 Pa. 420; *Brown v. Vandergrift*, 80 Pa. 142; *Munroe v. Armstrong*, 96 Pa. 307.

But as, by the terms of the lease, Ray, the appellee, was entitled to remain in possession of the land, subject to the right of the Company to drill and operate for oil and gas, his occupancy of the land at and after the time of the breach can be of little consequence, unless by some act in assertion of the forfeiture he gave it a greater effect. It was certainly not necessary that he should abandon the possession to which, by the very terms of his contract, he was entitled, in order that he might insist upon performance by the lessee. The lessor's election to forfeit, while he is in the actual possession, may be regarded as a constructive entry under his title.

But it is said that the doctrine declared in *Wills v. Manufacturers Nat. Gas Co.*, *supra*, is an innovation or change in the law; that the parties must be presumed to have contracted in view of the general law, as it was expounded when their engagements were formed, and to determine the legal effect of the contract otherwise is to impair its obligation, in contravention of the tenth section of the first article of the Federal Constitution. In *Kenrich v. Smick*, *supra*, and in *Sheaffer v. Sheaffer*, *supra*, although the condition, in each case, was inserted in the interest of the lessor, it was held that, upon breach of the conditions by the lessee, the lease was, *ipso facto*, absolutely void, without re-entry, and could not afterwards be affirmed or continued by any subsequent recognition of the tenancy on part of the lessor, or by any act of his, other than the making of a new lease. But, as we said in *Wills v. Manufacturers Nat. Gas Co.*, *supra*, the rigor of the rule was relaxed in *Davis v. Moss*, 88 Pa. 846, where the forfeiture was said to depend upon the terms of the instrument, "unless there be evidence to affect the landlord with a waiver of the breach, like the receipt of rent, or other equally unequivocal act," in which case the lease may be continued at the instance of the lessee. The ruling in *Davis v. Moss*, *supra*, was the first step in the transition from the doctrine of *Kenrich v. Smick* to the now well-settled rule laid down in *Galey v. Kellerman*, 128 Pa. 491, and *Wills v. Manufacturers Nat. Gas Co.*, *supra*, where the principle is established that, where the condition appears to have been inserted solely in the interest of the lessor, the lease is void upon the breach, if the lessor, by some positive act, elects to take advantage of it. The departure from *Davis v. Moss* is greater, perhaps, than the reasoning in the case last cited would seem to indicate, but it was taken on due deliberation and careful study of the principles involved, and we are not inclined to recede from the position assumed. It is a somewhat significant fact that in all the cases cited, including *Davis v. Moss*, the forfeiture was set up by the lessor, in whose interest the condition was inserted, upon the default of the lessee; in none of them, as in the case at bar, did the lessee set up his own default as a cause of forfeiture. No case has been brought to our notice in which the lessee was allowed to take advantage of his own wrong, or to set up his own default, to work a forfeiture of his own contract. It must be conceded, however, that, if the old rule is the right one, this anomalous result must ensue.

12 L. R. A.

Persons may perhaps contract expressly in this form, and to this effect. When they do, the transaction amounts to a mere option, and the lessee, in setting up his own default, simply avails himself of an elective right secured to him in his contract. We do not understand the contract in suit to be of this character. The clear purpose of the lessor was to have his land operated for oil or gas, and the condition was inserted for his benefit. While the obligation on part of the lessee to operate is not expressed in so many words, it arises by necessary implication. The lease was for the expressed purpose of drilling and boring for oil or gas, the lessor, in a certain event, to receive a share of the productions as a royalty, or rent; and, in another event, to be paid \$500 per annum for each gas-well, the product of which was conducted from the land for consumption. If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops, in the nature of rent, it would be absurd to say, because there was no express engagement to farm, that the lessee was under no obligation to cultivate the land. An engagement to farm in a proper manner, and to a reasonable extent, is necessarily implied. The clear purpose of the parties to this lease was to have the lands developed, and the half-yearly payments, and the other sums stipulated, were intended not only to spur the operator, but to compensate Ray for the operator's delay or default. The lessor's hands have been tied for two years. We do not know that he lost anything in royalties, or that he suffered by drainage, for the territory might have proved unproductive; but, as the transaction was founded in the hopes that either oil or gas, or both, might be found in paying quantities, it was competent for the parties to contract in advance for the amount of compensation to which, in the event of delay or default in development, the lessor would be entitled. The provision for forfeiture was doubtless inserted in anticipation that the lessee might make default, and become unable to pay, in which event he might put an end to the lessee's pretensions, and seek other means of development. This clause having been inserted as a protection to the lessor, he had the right either to declare the forfeiture or to affirm the continuance of the contract, and, if the lessor did not choose to avail himself of the forfeiture, the lessee cannot set it up as a defense to an action in affirmation of the contract. *Galey v. Kellerman* and *Wills v. Manufacturers Nat. Gas Co.*, *supra*.

The courts of highest authority in all of the States, and of the United States, are not infrequently constrained to change their rulings upon questions of the highest importance. In so doing the doctrine is, not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decision upon the subject. The members of the judiciary in no proper sense can be said to make or change the law. They simply expound and apply it to individual cases. To this general doctrine there is a well-established exception, as follows: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as

the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enactment." *Douglas v. Pike County*, 101 U. S. 677, 25 L. ed. 968. See also *Anderson v. Santa Anna Twp.* 116 U. S. 861, 29 L. ed. 684, and cases there cited; *Cooley*, Const. Lim. 474-477. To this effect and no more we understand to be the cases of *Ohio L. Ins. & T. Co. v. Debolt*, 57 U. S. 16 How. 433, 14 L. ed. 1008; *Gelpecke v. Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 530; *Havemeyer v. Iowa Co.*, 70 U. S. 8 Wall. 294, 18 L. ed. 33, and *Ocott v. Fond du Lac County Supra.*, 83 U. S. 16 Wall. 678, 21 L. ed. 382.

In *Ohio L. Ins. & T. Co. v. Debolt*, *supra*, the doctrine is thus stated: "The sound and true rule is that if a contract, when made, was valid by the laws of the State, as then expounded by all the departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent Act of the Legislature, or the decision of its courts altering the construction of the law." The ruling applies, it will be observed, not to the general law, common to all the States, but to the laws of the State "as" expounded by all the departments of its government; "and it is held that contracts valid by these laws may not be impaired, either by subsequent legislation or by the decisions of its courts altering their construction." The reference is, of course, to the statute law.

In *New Orleans Water Works Co. v. Louisiana S. R. Co.*, 125 U. S. 18, 31 L. ed. 607, the law on this subject is stated as follows: "In order to come within the provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards, or officers, or the doings of corporations or individuals. This court, therefore, has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some Legislative Act of the State has been upheld by the judgment sought to be reviewed." "We are not authorized by the Judiciary Act," says *Mr. Justice Miller* in *Knox v. Exchange Bank of Virginia*, 79 U. S. 12 Wall. 883, 20 L. ed. 414, "to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." To bring the case within this provision of the Federal Constitution, it must be the Constitution, or a statute, or some enactment that has the force of law, either of the State or of some municipality, exercising legislative power delegated by the State, which impairs the obligation of a contract. *Williams v. Druffy*, 96 U. S. 176-183, 24 L. ed. 716, 717; *United States v. New*

*Orleans*, 98 U. S. 381-392, 25 L. ed. 225, 226; *Murray v. Charleston*, 96 U. S. 432-440, 24 L. ed. 760, 761; *Moriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197.

In the very recent case of *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, *Mr. Justice Harlan* says: "The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold the contract void which in our opinion is valid; it may adjudge a contract to be valid which in our opinion is void, or its interpretation of the contract may in our opinion be radically wrong; but in neither of such cases would the judgment be reviewable by this court, under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms, or by its necessary operation, gives effect to some provision of the State Constitution, or some legislative enactment of the State, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question." The affidavit, in our opinion, is insufficient, and the judgment was rightly entered.

*Judgment affirmed.*

William S. GRAHAM and Wife  
v.

PENNSYLVANIA CO., *Appt.*

(...Pa....)

# 1. Opinions of witnesses, expert or other, are not admissible where the circum-

NOTE.—*Witnesses; opinion evidence, when not admissible.*

The general rule is that witnesses are to testify to facts and not to give their individual opinions. *Clifford v. Richardson*, 18 Vt. 623; *Lawson, Expert and Opin. Ev. Rule 24.*

When all the pertinent facts can be sufficiently detailed and described, and when the triers are supposed to be able to form correct conclusions without the aid of opinion or judgment from others, no exception to the rule is allowed. *Clifford v. Richardson, supra*; *Parkhurst v. Masteller*, 57 Iowa, 476; *Kent v. Miltenberger*, 15 Mo. App. 430; *Railroad Co. v. Schulta*, 43 Ohio St. 370.

In general, wherever the inference is one of skill and judgment, the opinion of experienced persons is admissible; for by such means only can the jury be enabled to form a correct conclusion. *Starkie, Ev. 153.*

The testimony of opinion may be given where, from the general and indefinite nature of the inquiry, it is not susceptible of direct proof. *Lester v. Pittsford*, 7 Vt. 161.

The opinions of witnesses, whether experts or not, will not, according to some authorities, be received on the question whether a certain place is dangerous or safe. *Chicago v. McGiven*, 73 Ill. 847; *Way v. Illinois Cent. R. Co.* 40 Iowa, 841; *Topeka v. Sherwood*, 39 Kan. 690; *Tolson v. Inland & Seaboard Coast. Co.* 8 Cent. Rep. 738, 6 Mackey, 30; *King v. Missouri Pac. R. Co.* 98 Mo. 225; *Couch v. Charlotte, C. & A. R. Co.* 22 S. C. 597; *Lawson v. Chicago, St. P. M. & O. R. Co.* 64 Wis. 447; *Baker v. Madison*, 63 Wis. 143; *Blodgett Paper Co. v. Farmer*, 41 N. H. 393.

stances can be fully and adequately described to the jury and are such that their bearing on the issue can be estimated by all men without special knowledge or training.

**2. Opinions of witnesses that a raised part of a depot platform or broad step four feet wide and nine inches high is a dangerous place are not admissible, as a brief statement would convey a perfect comprehension of the place and jurymen are capable of judging of the danger.**

**3. Ordinary care is required of a passenger in alighting from a train and leaving the platform, and in the absence of such care no recovery can be had for injuries sustained by falling over a raised portion of the platform.**

(January 5, 1891.)

**A** PPEAL by defendant from a judgment of the Court of Common Pleas, No. 1, of Allegheny County in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

On February 8, 1888, Mrs. Graham was a passenger on one of defendant's trains, which she desired to leave at the Federal Street Station in Allegheny City. The train reached that point after dark. She left the train and alighted upon a platform which consisted of two parts of different heights, one the platform proper leading to the exit, which was about nineteen feet wide and about as high as the top of the rails upon the track; the other was about four feet wide and extended along in front of the former between it and the cars. There was no space between the two but the latter was raised about nine inches above the former and was designed to be used as a step, and rendered access to the cars easier. Mrs. Graham started towards the exit without knowing of or observing this difference in the height of the different parts of the platform. When she stepped off from the raised portion she stumbled and fell, receiving the injuries complained of.

At the trial witnesses were permitted to give their opinions as to the safety of the platform as constructed and the admission of this evidence became the basis of the first and second assignments of error:

The 3d, 4th and 5th assignments of error called in question the answers of the court to the following requests for instructions:

"*Second.* The duty of the defendant Company is to use ordinary care in the construction of its platforms, and, if the jury believe that the platform on which the plaintiff fell was reasonably safe, and one which could be used without danger by a passenger exercising ordinary care, then their verdict should be for the defendant. *A.* This point is refused.

"*Third.* If the jury believe that the alleged defect in the platform was a patent one (that is, open and visible), and that there was sufficient light for a person using ordinary care to see and avoid the danger, then their verdict should be for the defendant. *A.* We cannot say that because the offset in the platform was open and visible, there being sufficient light to see it by a person exercising ordinary care, that the plaintiff cannot recover, without explaining to

the jury what constitutes ordinary care under the circumstances of this case. The question here is, Did the plaintiff use or exercise ordinary and proper care on the occasion in question? Here you will consider the facts in evidence. She says she did not know of the offset in the platform. The evidence shows such an offset is not usual in platforms used for the debarking of passengers from railway cars, but, on the contrary, indicates that the usual method was to have the platforms level after they were reached. Passengers are not bound to anticipate and look out for irregularities or offsets which might cause one to fall. Under ordinary circumstances, a passenger has a right to expect an ordinary and usually level and safe exit to the depot or station after he has left the cars, and has, therefore, a right to go along the platform, only exercising such care as would be reasonable and proper under circumstances he was bound to anticipate. With this explanation the point is affirmed.

"*Fourth.* If the jury believe from the evidence that the distance from the lowest step of a car to the ground is about seventeen inches, and that that distance is greater than children or women can with reasonable comfort and safety step, then it is the duty of the defendant to provide some intermediate step for them at stations; and if the jury believe that the narrow, raised platform or step from which Mrs. Graham fell was placed there for that purpose, and was such a device as could be used by a passenger exercising ordinary care, without injury, then their verdict should be for the defendant. *A.* This point is refused. We think the proposition is too broad. It means, if I understand it, that if one using ordinary care could use the platform without injury the plaintiff cannot recover. This would seem to say, if affirmed, that because one exercising due care was not hurt, therefore one who was hurt did not exercise due care,—proper care,—which we think does not follow, either as a matter of fact, or as a principle of law. I may be exercising due care, and may be getting along perfectly well, because I may see danger, and, if I see it, I am bound to expect it. If I do not, and fall down, I am not exercising due care, because I know it is there. You do not know it is there, and you fall down; it may be due care. The thing I do would be negligence in me and yet due care in you."

*Messrs. John H. Hampton, William Scott and George B. Gordon, for appellant:*

As a general rule, a witness is not allowed to give an opinion. The only exception to that rule is that with reference to matters which involve questions of science or peculiar skill to such a degree that when the facts in the case have been given in evidence it is impossible for a person of merely ordinary experience to draw the necessary inference from the facts to reach a conclusion in the case, persons having skill in that art or science may be called to say what would be the proper inference to be drawn from the facts proven.

Starkie, Ev. Sharswood's ed. pp. 96, 176; 1 Greenl. Ev. § 440, note 1; 1 Phillips, Ev. p. 778; *Franklin F. Ins. Co. v. Gruver*, 100 Pa. 273; *Hartman v. Keystone Ins. Co.* 81 Pa. 466;

*Ramadge v. Ryan*, 9 Bing. 333; *New England Glass Co. v. Lovell*, 7 Cush. 321; *White v. Bailou*, 8 Allen, 408; *Cannell v. Phiniz Ins. Co.* 59 Me. 582; *Gavisk v. Pacific R. Co.* 49 Mo. 374.

The degree of care imposed upon a railroad company with reference to its station platforms and approaches thereto is very different from the degree of care required in the appliances which relate to the actual carriage itself. As to its platforms, station houses and approaches thereto, it is only bound to exercise ordinary care.

Thomp. Carr. p. 104; *Moreland v. Boston & P. R. Corp.* 1 New Eng. Rep. 909, 141 Mass. 31; *Pennsylvania Co. v. Marion*, 2 West. Rep. 234, 104 Ind. 239, 27 Am. & Eng. R. R. Cas. 132; *St. Louis, I. M. & S. R. Co. v. Fairbairn*, 30 Am. & Eng. R. R. Cas. 166, 26 Am. & Eng. R. R. Cas. 283, note.

*Messrs. Petty & Friend and R. B. Petty*, for appellees:

Opinions of witnesses as to the safety of the platform were proper.

*Beatty v. Gilmore*, 16 Pa. 468; *American S. S. Co. v. Landreth*, 102 Pa. 185; *Altoona v. Lott*, 6 Cent. Rep. 135, 114 Pa. 245; *Nanticoke v. Warne*, 106 Pa. 874; *Minnequa Springs Imp. Co. v. Conn.* 10 W. N. C. 502; *Morse v. State*, 6 Conn. 9; *Potter v. Pequonnock Mfg. Co.* 17 Conn. 249; *Com. v. Sturdivant*, 117 Mass. 122; *Land v. Tyngsborough*, 9 Cush. 36; *Kelleher v. Keokuk*, 60 Iowa, 478; *Alexander v. Mt. Sterling*, 71 Ill. 366; *Spear v. Drainage Comrs.* 113 Ill. 632; *International & G. N. R. Co. v. Klaus*, 64 Tex. 298; *Missouri Pac. R. Co. v. Jarrard*, 65 Tex. 560; *Bridger v. Asheville & S. R. Co.* 25 S. C. 26; *Baltimore & L. Turnp. Co. v. Cassell*, 66 Md. 431.

A witness may state a conclusion of fact derived from observation and knowledge of the subject matter.

*Hanna v. Barker*, 6 Colo. 303; *Ardesco Oil Co. v. Gilson*, 63 Pa. 151.

The court could not say as matter of law that because others who exercised due care were not injured, therefore Mrs. Graham could not recover.

*Longmore v. Great Western R. Co.* 19 C. B. N. S. 163. See Thomp. Carr. p. 81.

It is a gross perversion of language to say that the court instructed the jury that the plaintiff had a right to go along the platform without taking the slightest care. On the contrary the court said that the plaintiff was bound to exercise such care as would be reasonable and proper under circumstances he was bound to anticipate. This was proper.

*Dickson v. Hollister*, 123 Pa. 421; *Philadelphia & T. R. Co. v. Hagan*, 47 Pa. 244; *Brassell v. New York Cent. & H. R. R. Co.* 84 N. Y. 241.

*Mitchell, J.*, delivered the opinion of the court:

That the opinions of witnesses are in some cases admissible as evidence, even when not coming properly under the head of "expert testimony," has long been established in practice. In several classes of questions the lines between the witness's judgment or opinion and his affirmation of a fact is so indistinct that it cannot be marked out in practice. Such are questions of identity of persons or things, of

the lapse of time, of comparative shape or color or sound, of expression, and, through it, of meaning, etc. In all of these, however positively the witness may affirm facts, what he says is after all only his opinion, but so blended with knowledge and recollection that the line where opinion ends and fact begins cannot be distinguished. Hence both must be admitted or both excluded, and to do the latter is often to shut out the only light the case admits of. In questions, therefore, of identity, of sanity, of handwriting, and some others of like nature, opinions of witnesses having sufficient knowledge of the particular circumstances to form the basis of a responsible judgment have been admitted without hesitation. Such is the elementary doctrine laid down in Greenleaf and other authoritative works, but the theory on which such evidence is admitted is very slightly developed. The cases, however, have extended far beyond the classes mentioned in the text-books, and may be said not only to have become legion, but legion against legion. An examination of a large number of them, while not enabling us to reconcile all the practical applications, does, we think, show that the ground on which such evidence must always rest, as expert testimony, strictly so called, does, is a clear necessity. One of the earliest and strongest cases, since constantly cited in favor of the admission of such testimony, is *Porter v. Pequonnock Mfg. Co.*, 17 Conn. 249 (1845), where the opinions of observers, not professional engineers or builders, were allowed to be given as to the sufficiency of a dam to stand the pressure of a flood, which it was contended ought to have been anticipated. The case is decided without any abstract discussion, but the germ, at least, of the principle may be found in the following language of Storrs, J.: "It is impossible for a person, however skillful or scientific, to give an intelligent opinion on facts testified to by another witness in the manner in which they are frequently related. Such witness may detail in the best manner he can the facts on the subject of which the opinion of a scientific person is sought; but it may be impossible to extract from his testimony the data for such an opinion with sufficient precision and certainty." In the following year (1846), the Supreme Court of Vermont, in *Clifford v. Richardson*, 18 Vt. 620, put the principle still more clearly, thus: "When all the pertinent facts can be sufficiently detailed and described, and when the triers are supposed to be able to form correct conclusions without the aid of opinion or judgment from others, no exception to the rule is allowed. But . . . the facts are sometimes incapable of being presented with their proper force and significance to any but the observer himself. . . . Under these circumstances, the opinions of witnesses must of necessity be received." This states very clearly and forcibly the principle and the limits of its application. In those matters where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in position to make the final decision of the fact. It is thus expressed in *Com. v. Sturdivant*, 117 Mass. 122, where a large number of illustrations are

given, some of which, I may say in passing, seem to us extremely questionable: "The exception . . . includes the evidence of common observers testifying to the results of their observation, made at the time, in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury."

But, as necessity is the ground of admissibility, the moment the necessity ceases the exception to the general rule that requires of a witness facts and not opinions ceases also. Hence, whenever the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible. This is well stated by Chief Justice Shaw, in *New England Glass Co. v. Lovell*, 7 Cush. 321: "The principle upon which this evidence is admissible is clear and entirely just. In applying evidence which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two duties to perform: First, . . . to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends on experience. . . . Now, when this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference." The law is thus summed up in the American & English Encyclopedia of Law, title *Expert and Opinion Evidence*, VI: "Opinions are never received if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable of comprehending and understanding. The ordinary affairs of life cannot be the subject of expert testimony." See vol. 7, p. 493, and cases there cited.

This examination of elementary principles and general authorities has seemed necessary because our own cases on the exact point are few, and supposed not to be in entire harmony. Passing by the cases where opinions not of experts have been received practically without challenge upon questions of sanity, identity, etc., the first case on the subject is *Beatty v. Gilmore*, 16 Pa. 468. Defendant was building a house on Market Street, Harrisburg, and had left an area-way from the street into the basement, without a guard or railing, and the plaintiff fell into it. Witnesses were allowed to state their opinion that it was dangerous. This was held to be proper, and the case has been accordingly cited as in favor of the general admissibility of such evidence; and Bell, J., does say that it is "a species of testimony always resorted to in cases like the present." But it appears from the report that there was a porch projecting beyond the area, and that, to fall, a person would have to turn aside from the direct way. It is not, therefore, clear that the mere description of the place would convey to the jury an adequate idea of it with reference to the danger, and this seems to have been in the mind of the court, from the language of the opinion, that testimony as to the dangerous character of the excavation "was,

in truth, rather the assertion of a fact dependent in some measure upon opinion than of an abstract opinion without more." That this was the *ratio decidendi* also appears probable from the cases cited in the opinion, which are clearly cases where the circumstances were incapable of adequate description. So understood, *Beatty v. Gilmore* is entirely in the line of the best authorities heretofore cited. If not to be so understood, then it must be considered as materially modified by the cases hereafter to be noticed. The next case, *Minnequa Springs Imp. Co. v. Coon*, 10 W. N. C. 502, was clearly in the same line. The opinions of witnesses as to the violence and unusual character of the storm were certainly necessary to supplement their descriptions, and, as to anything beyond that, this court said that if the witness "had any claims to the character of an expert" the court below would not be reversed on a matter so much within its discretion. The only other case is *Franklin F. Ins. Co. v. Gruver*, 100 Pa. 266, in which it was held that an insurance expert could not be permitted to give his opinion that the erection of a frame building next to the building insured increased the risk in fact. The basis of decision was indicated in the opinion of Gordon, J.: "How any person can be said to be an expert in that which must necessarily result from observation so general that it must be common to every person we cannot understand." In the same general line are *American S. S. Co. v. Landreth*, 102 Pa. 135, and *Lombard S. Street Pass. R. Co. v. Christian*, 124 Pa. 125, though in both of these the admissibility of the testimony was discussed rather as declarations of agents than as opinions necessary for the information of the jury. From this view it appears that our own cases are not really in conflict with each other, and that certainly the latest and most authoritative of them are in harmony with the best elementary doctrine. Some occasional difference in application may be unavoidable, because, as said by Chief Justice Shaw in *New England Glass Co. v. Lovell*, *supra*, there is extreme difficulty in laying down any rule precise enough for practical application, and the only proper course is to keep the principle steadily in view, and apply it according to the circumstances of each case. In the present case the alleged dangerous place was a raised part of the platform, or broad step, four feet wide and nine inches high. It came clearly within the range of ordinary experience. The briefest statement would convey a perfect comprehension of the place, and every jurymen who ever got in or out of a car, or went up or down a flight of steps, was as capable of judging of the alleged danger as the witnesses who gave their opinions. The first and second assignments of error must be sustained.

The third, fourth and fifth assignments must also be sustained. There is no situation in which ordinary care is not required of a plaintiff, and want of it a bar to recovery. *Delaware, L. & W. R. Co. v. Cadow*, 120 Pa. 559, 12 Cent. Rep. 725. It is unnecessary to discuss now whether the Railroad Company was bound in its platforms and approaches to use the very utmost degree of care, as it is to passengers during actual carriage. If the result in fact was a platform which could be used



without danger by a passenger exercising ordinary care, then the Company had done its duty so far as this plaintiff was concerned; and, as its points were based on the finding of this fact by the jury, they should have been affirmed. *Delaware, L. & W. R. Co. v. Napheys*, 90 Pa. 185.

In the *Napheys Case* the absence of a step or elevation in the platform was the only negligence alleged, and on it the jury found a verdict for the plaintiff. In the present case the presence of such an elevation seems to have

been sufficient for the jury to find negligence and a verdict for the plaintiff. Defendant's counsel, for reasons which are not apparent to us, omitted to ask for a nonsuit, or a peremptory direction in their favor. Notwithstanding the omission, however, it is clear that the admitted facts fail to establish any negligence of defendant, and that the plaintiff must, as a matter of law, always fail to recover. It would therefore be useless to send the case back for another trial.

*Judgment reversed.*

### WEST VIRGINIA SUPREME COURT OF APPEALS.

B. WILLIAMSON, Admr., etc., of J. F. Williamson, *Ptf in Err.*,

NEWPORT NEWS & MISSISSIPPI VALLEY CO

(...W. Va....)

**W. was employed as a brakeman on a freight train by the Chesapeake & Ohio Railway Company on the 4th day of April, 1888, and, when he applied for such service, stated that he had been employed for six months as brakeman on the same road in the year 1885. In July, 1888, the Newport News & Mississippi Valley Company took charge of said road as lessee. On the 12th day of August, 1888, while on duty on top of his train in daylight, said W. was killed by striking his head against a highway bridge which spanned said railroad track, which was not high enough for a man erect on the car top to pass under. While he was in the service of said Company on both occasions his run was between Huntington and Cannelton on a local freight train, and said bridge was between said points. When leaving Hurricane Station on the morning of the accident about ten minutes before reaching said bridge he was warned by the fireman to look out for the overhead bridge, and was found dead about fifteen feet from the rear end of the car. In a suit by W's administrator against the Newport News & Mississippi Valley Company, defendant demurred to the evidence. Held:**

(a) **That the demurrer was properly sustained.**

(b) **That, although the defendant may not have been free from blame on account of lowness of bridge, yet W's want of proper care contributed to the injury, and defendant is not liable.**

(c) **In entering the service of the defendant under the circumstances, W. was fully aware of the character of the bridge, and while in said service had ample opportunity to become familiar with it, and by continuing in the employment he assumed the risk of being injured by said bridge as incident to the employment.**

(January 31, 1891.)

**ERROR to the Circuit Court for Cabell County to review a judgment in favor of defendant in an action brought to recover damages.**  
\*Head note by ENGLISH, J.

ages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

*Messrs. L. N. Travenner, Vinson & McDonald and Gibson & Michie*, for plaintiff in error:

Shearman and Redfield say, in speaking of the decisions of the courts of Maryland, Missouri and Virginia, which hold that there is no liability of a railroad company for injuries caused to its servants by low bridges over the track: "Decisions more shocking to the moral sense are scarcely conceivable. If they are really law, then a railroad company may fire a cannon, at short intervals, all along its line, sending the balls within four feet of the roofs of its cars, may require its servants to stand on those roofs constantly, under fire, and yet be exempt from liability for the death of any of them who should forget to crouch down, when passing the cannon-stand, provided only that the act of murder goes on punctually, at the same time and place, every day."

Shearm. & Redf. Neg. 4th ed. § 198.

It is the duty of the railroad company when it becomes necessary to span a highway with a bridge, if reasonably practicable, to place the structure at such an elevation as that trains with their customary employes can pass under it unharmed, and mere knowledge, on the part of the deceased, of the danger, is not of itself contributory negligence.

*Louisville & N. R. Co. v. Hall*, 4 L. R. A. 710, 87 Ala. 708; *Beach Contrib. Neg.* 185; *Baltimore, O. & C. R. Co. v. Rowan*, 1 West. Rep. 914, 104 Ind. 88; *Chicago & A. R. Co. v. Johnson*, 2 West. Rep. 388, 116 Ill. 206; *St. Louis, Ft. S. & W. R. Co. v. Erwin*, 87 Kan. 701; *Louisville, N. A. & O. R. Co. v. Wright*, 18 West. Rep. 798, 115 Ind. 378.

*Messrs. Simms & Enslow*, for defendant in error:

A railroad cannot be held responsible in damages to an employe for its failure to maintain and keep bridges over its line at such a height from its track as to allow its employes to stand erect when passing under them.

*Patterson, Railway Acc. Law*, § 289, p. 807; *Clark v. Richmond & D. R. Co.* 78 Va. 709;

**NOTE.**—As to risks which servant assumes, see notes to *Taylor v. Evansville & T. H. R. Co.* (Ind.) 6 L. R. A. 584; *Hunter v. New York, O. & W. R. Co.* (N. Y.) 6 L. R. A. 246; *Howard v. Delaware & H.* 12 L. R. A.

*Canal Co. (Vt.)* 6 L. R. A. 78; *Foley v. Pettie Machine Works (Mass.)* 4 L. R. A. 51; *Pidcock v. Union Pac. R. Co. (Utah)* 1 L. R. A. 131.

*Well v. Burlington, C. R. & N. R. Co.* 56 Iowa, 520, 2 Am. & Eng. R. R. Cas. 243; *Clark v. St. Paul & S. U. R. Co.* 28 Minn. 123, 2 Am. & Eng. R. R. Cas. 240; *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. 276; *Owen v. New York Cent. R. Co.* 1 Lans. 108; *Devitt v. Pacific Railroad*, 50 Mo. 802; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291; *Rains v. St. Louis, I. M. & S. R. Co.* 71 Mo. 164, 36 Am. Rep. 459; *Gibson v. Erie R. Co.* 63 N. Y. 449, 20 Am. Rep. 552; *Lovejoy v. Boston & L. R. Co.* 125 Mass. 79, 28 Am. Rep. 206.

A servant by contracting for the performance of hazardous duties assumes such risks as are incident to their discharge, from causes open and obvious, the dangerous character of which he has the opportunity to ascertain.

*Wharton, Neg. par. 214; Broesman v. Lehigh Valley R. Co.* 4 Cent. Rep. 913, 118 Pa. 490.

A railroad employé knowing or having ample means of knowing, from long-continued employment, of the existence of certain defects or peculiarities in the road or its construction, and continuing in the employment without objection assumes all risks arising therefrom.

*St. Louis, Ft. S. & W. R. Co. v. Irwin*, 87 Kan. 701; *Patton v. Central Iowa R. Co.* 78 Iowa, 806; *Hewitt v. Flint & P. M. R. Co.* 67 Mich. 61; *Naylor v. Chicago & N. W. R. Co.* 58 Wis. 661.

No employer by an implied contract undertakes that his machinery and appliances are safe beyond a contingency, or that they are as safe as those of others using the same kind of machinery.

*Richards v. Rough*, 58 Mich. 212.

**English, J.**, delivered the opinion of the court:

This is a writ of error to a judgment of the Circuit Court of Cabell County, rendered on the 15th day of March, 1889, in an action of trespass on the case, in which B. Williamson, administrator of the estate of J. F. Williamson, deceased, was plaintiff, and the Newport News & Mississippi Valley Company, a corporation, was defendant. The plaintiff in said action sought to recover from the defendant Company damages to the amount of \$10,000 for causing the death of the plaintiff's intestate, J. F. Williamson, by the negligence of the said defendant, and, as the plaintiff alleges, without any negligence on the part of said J. F. Williamson. The case was decided upon a demurrer to the evidence in the court below, which evidence is set forth in the record under the rule of practice which prevails in such cases; and, in considering the propriety of the action of the court below in sustaining the demurrer to the evidence, the practice requires us "to consider the demurrant as admitting all that may be reasonably inferred by the jury from the evidence given by the other party, and as waiving all the evidence on his part which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it." *Muhleman v. National Ins. Co.* 6 W. Va. 508; *Lee v. Virginia & M. Bridge Co.* 18 W. Va. 299; *Allen v. Bartlett*, 20 W. Va. 46; *Garrett v. Ramsey*, 26 W. Va. 345.

12 L. R. A.

It appears from an examination of the evidence, under this rule, that the plaintiff's intestate was in the employ of the Chesapeake & Ohio Railway Company for about six months in the year 1885, and that he was in the employ of the same railway from the 4th day of April, 1886, until the 12th of August, 1886, each time acting as brakeman, and that while he was so employed in the year 1886 he was running on said freight trains between Huntington and Cannelton, W. Va.; that some time in July, 1886, said railway commenced doing business in the name of the "Newport News & Mississippi Valley Company," and was so operating said road at the time the plaintiff was injured. It also appears that at the time the plaintiff entered the service of the Chesapeake & Ohio Railway Company, on the 4th of April, 1886, he agreed to study the rules governing employes on said road carefully, to keep posted and obey them; and on examination at that time, when asked: "Do you know that bridges, including highway bridges and tunnels on this line, are too low to clear a man standing on a box-car?" answered "Yes." So far as the employes of said railroad were concerned, no changes appear to have been made in the rules, management and regulations. The name of the company managing the road was changed, and the vouchers were paid them after July, 1886, by the Newport News & Mississippi Valley Company.

How the plaintiff's intestate came to his death does not affirmatively appear, but circumstances would seem to indicate that his death ensued from coming in contact with a bridge which spans said railroad at a point between Hurricane and Milton Stations. This is the theory claimed by the plaintiff, and assuming it to be the correct one, it appears from the testimony of the engineer, Poindexter, who was introduced by the plaintiff, that he saw the plaintiff's intestate at Hurricane; that he got up on his engine, and set his lantern down, about 5 o'clock in the morning on the 12th day of August, by standard time, which is twenty-four minutes faster than sun time, and according to the evidence it would take about twelve minutes to run from Hurricane to the bridge. When the bridge was reached, then, it lacked twelve minutes by sun time of being 5 o'clock; and the court will take judicial cognizance of the fact that on the 12th of August, 1886, the sun arose at that place at seven minutes after 5 o'clock, so that it lacked about nineteen minutes of sunrise at the time said freight train passed under said bridge. He did not need his lantern, for the engineer, Poindexter, testifies that he left it sitting on the engine. He also states that it was a damp, cloudy morning; that the bridge was on a straight line, and, going west, it could be seen for half a mile. Mr. Keasel, who was a fireman on the train at the time, testifies that plaintiff's intestate said he was going on top of the car. That, as he went out, some cinders got in his eyes. He stopped and rubbed them; then came back down. Then he started back again. That nothing was said to him about going out, only he told him to look out for the overhead bridge. That he said something in reply, but witness did not know what it was. That he got up on the car, and stood for a minute in sight. Then he dis-

appeared. And that from his position he could see a man on the cars ten or fifteen feet. That deceased was found lying about fifteen feet from the other end of the car.

As this unfortunate accident occurred in the day-time, and not at night, I do not regard the question as to whether the guards or whipping strings were in proper order at the time the injury occurred as material, because the office of these guards is to give warning of the fact that a bridge is near, when it cannot be seen; but if the question was material, it is clearly shown by the evidence of the plaintiff's witness Nugent that the guards were in proper condition at the time of the accident. It also shows that said bridge, although not a county bridge, was used by the public, and that a county road passes over it. The greater portion of the rest of the evidence bears upon the question as to whether the plaintiff's intestate came to his death by coming in contact with said bridge, and, in my view of the case, must be regarded as immaterial. The plaintiff, in his declaration, avers that the fact that the bridge under and through which said train passed was low and unsafe was unknown to said J. F. Williamson, but he utterly fails to sustain said averment by proof; while, on the contrary, said Williamson acknowledged at the time he took service from said Company that he knew that bridges, including highway bridges and tunnels on this line, were too low to clear a man standing on box cars; and at the very time he was approaching the bridge where he lost his life the witness Keasel called his attention, and told him to look out for the low bridge. How this unfortunate accident occurred must, to some extent, always remain a subject of conjecture. The evidence discloses that, when he left the engine to go on top of the cars, some cinders got in his eyes. That he stopped and rubbed them; then came back down. Then he started back again. That he got on top of the car, and stood for a minute in sight. Then he disappeared. He may have gotten more cinders in his eyes. At any rate, he was delayed in returning to the engine, and rubbing his eyes, and standing again for a minute, after he reached the top of the cars again. And all this time the train was rushing on towards the bridge on a down grade, with no brakes applied; although Mr. Poindexter, when asked, "At what point was it the duty of the brakeman to put on the brakes?" replied, "Generally about a mile beyond the bridge;" meaning, as I suppose, east of the bridge, as he was testifying in Huntington. The train was running towards the bridge, and, as a matter of course, the smoke and cinders from the engine would be between said Williamson and the bridge; and, suffering from the cinders which had lodged in his eyes, it is but natural to suppose he would turn his side or his back to the smoke, and in this manner he failed to look out for the bridge, and was prostrated by it. Be this, however, as it may, the question presented for our consideration and determination is whether, under the circumstances detailed in the evidence, the court below acted properly in sustaining the demurrer to the evidence.

In the case of *Sheeler v. Chesapeake & O. R. Co.*, decided in 81 Va. 188, there was but one 12 L. R. A.

count in the declaration, the gravamen of which was that the deceased, a fireman in the employment of the defendant company, lost his life while in the discharge of his duty as such fireman by reason of the defendant's negligent and careless construction, at a point in the line of its road, of a bridge, the upright sides of which were not sufficiently distant from the engines and cars, when passing over the same, to allow and permit the plaintiff's intestate, as such fireman, to properly discharge his duties as fireman without incurring unreasonable risk and danger to his life and limbs; and also that by reason of the defendant's carelessness and negligence in not properly constructing said bridges, and the upright sides thereof, etc., the plaintiff's intestate, while in the faithful discharge of his duty to said defendant, was thrown against a certain bridge, and the upright sides thereof, etc., and was killed by means thereof; and it was also averred that he did not know, and had no means of knowing, of the defects and dangers of said bridge, although the same were well known to the defendant. It appears from the evidence in the case that Sheeler, without orders, and unnecessarily, got down on the side of the engine and tender, holding with his right hand a hand-holder on the engine, and holding in his left hand a small hose attached to a spigot on tender, swung his body out and forward in a stooping posture, and attempted to extinguish some greased woolen ravelings that were blazing in the box of the driving wheel, when he was struck by the side of the bridge and was killed. The court, in its opinion, says: "The settled doctrine is that 'in order to maintain an action against a railroad company for injuries received, etc., it must be proved that the injury was caused by the negligence of the defendant or its agents; and it must not appear from the evidence that want of ordinary care and prudence on the part of the person injured directly contributed to the injury.'"—referring to 17 Am. R. Rep. 253, and cases cited; also to *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 248. And the court arrived at the conclusion that said Sheeler's administrator was not entitled to recover.

In the case of *Clark v. Richmond & D. R. Co.*, reported in 78 Va. 709, the facts are very similar to the one under consideration. Clark was employed as a brakeman on a freight train; and while in the performance of his duty on top of a car, by moonlight, he was killed by striking a highway bridge, not high enough for a man standing erect on the car-top to pass under. When he was employed he had notice of highway bridges which were too low to pass under without stooping; and on that night, leaving the station next the bridge, he was warned to look out for the bridge. On nearing the bridge, a co-brakeman, seeing him standing erect on the car-top, shouted to him to stoop; but he did not stoop. In that case, as in this, there was a demurrer to the evidence; and the court sustained the demurrer, holding that, "though defendant may have been culpable for lowness of bridge, yet Clark's carelessness contributed to the injury, and defendant was not liable;" and also that "the risk of collision with such bridges was incident to the employment. Clark had opportunity to know of

their dangerous character, which must have been contemplated when he accepted employment."

In the case of *Owen v. New York Cent. R. Co.*, 1 Lans. 108, it was held that a brakeman in the employ of a railroad company, while discharging duties in the line of his employment, upon the roof of a freight car, who was carried against a highway bridge, and sustained injuries, for which he brought an action against his employer, the bridge being three and a half feet higher than the top of the highest freight-car in use by the company, and had so remained for many years, and since the construction of the railroad, the brakeman having entered into the employment of the company with knowledge of the position and height of the bridge, and having had opportunity of informing himself as to its continuance in the same position, he should have been consulted, the danger from the bridge being clearly incident to the labor he undertook to perform; and that, "in view of the brakeman's knowledge as to the bridge, his omission to avoid the accident by stooping was such want of ordinary care and caution as would have defeated his action, if otherwise maintainable."

In Wood's Railway Law (vol. 3, p. 1481), the author says: "But where the servant knows, or ought to know, of the obstruction, he cannot recover for an injury received therefrom, because, by reason of his failure to guard against it, and neglecting to do so, he is treated as guilty of contributory negligence,"—citing *Baylor v. Delaware, L. & W. R. Co.*, 40 N.J. L. 28. The author also says, on the same page: "Thus, in the case last cited, a brakeman, called upon suddenly to apply the brakes to a train, was hit by the roof of a bridge over the road, and injured. The bridge was not high enough to permit a person to stand upright on the cars in passing through it, and it appeared it was not usual or customary for railroad companies to build their bridges with an elevation sufficient to enable a person to stand upright on the top of the cars in passing through them; and the court held there could be no recovery for the injury, upon the ground that the plaintiff was chargeable with knowledge of the method of building such bridges, and assumed the risk incident thereto." See *Gibson v. Erie R. Co.*, 68 N. Y. 449, where it is held that, "where a servant enters upon employment from its nature necessarily hazardous, he assumes the usual risks and perils of the service, and also those risks which are apparent to ordinary observation. If he accepts service with knowledge of the character and position of structures from which employes might be liable to receive injury, he cannot call upon his master to make alterations to secure greater safety, or, in case of injury, hold him liable." See also the case of *Rains v. St. Louis, I. M. & S. R. Co.*, 71 Mo. 165, third section of syllabus, where it is held: "If a brakeman knows that a foot-bridge over the railroad upon which he is employed is too low to permit a man standing erect on the top of a freight-car to pass under in safety, and nevertheless remains in the service of the company, and, while passing under the bridge on the top of a freight-car stands erect, and is killed by coming in contact with the bridge,

the company is not liable." See also *Pittsburgh & O. R. Co. v. Sentmeyer*, 92 Pa. 276; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47.

That the plaintiff's intestate had ample opportunity to become acquainted with this portion of said railroad, and with this particular bridge, is clearly shown by the evidence. When he made application for service as freight brakeman, on the 4th of April, 1886, he was asked, "Were you ever employed by this road; where, and in what capacity?" and answered, "Yes, sir; in the year 1885, about six months as brakeman;" and P. O. Pine, a witness for plaintiff, when asked, "How long did Williamson run on this road?" answered, "I don't know; he was here twice;" and when asked, "Where did he run from?" answered, "From Huntington to Cannellton." The bridge at which it is claimed the injury was received is shown to be on the road between these two points; and Mr. Poindexter, a witness for the plaintiff, stated that he was running a freight train between Huntington and Cannellton, and, when asked how often he passed under said bridge, answered, "I couldn't say. I pass under it sometimes twice every twenty-four hours," clearly showing that employes on the freight trains between these points were not lacking in opportunity to become acquainted with this bridge. Counsel for the plaintiff in error rely upon the case of *Baltimore, O. & C. R. Co. v. Rowan*, 104 Ind. 88, 1 West. Rep. 914; but it is clearly apparent that that case is very different from the one at bar. The second section of the syllabus reads as follows: "Where a railroad company has constructed and maintains a bridge over its track with knowledge that it is of insufficient height, and dangerous to its employes in the discharge of their duties, it is liable to a brakeman, ignorant of the danger, who is injured while passing under such bridge in the performance of his duties." And so with the case of *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 89 L. ed. 389. The facts in that case are very different from the case under consideration. In that case a brakeman was injured by reason of a broken step to one of the cars, which caused him to fall from the train. The plaintiff ascertained the fact that the step was broken after the cars had started, and the conductor promised to drop the car out that had the broken step during the night, but failed to do so. The cars were similar, and the plaintiff was easily deceived as to the fact whether the car with the broken step had been dropped or not; and the court held it error, on account of the peculiar facts connected with the case, to strike out the testimony from the jury.

In the case of *Cooper v. Pittsburgh, O. & St. L. R. Co.*, 24 W. Va. 51, relied upon by counsel for plaintiff in error, while it holds that the master is bound to use ordinary care in supplying and maintaining suitable instrumentalities for the work required to be done, it also is held in that case that "the ordinary risks and perils incident to the employment, which the servant can foresee or shun or avoid or guard against by prudence, skill and forecast, are assumed by him, and they are supposed to enter into the consideration to be received by him for his services." And while it is true that in Illinois, and perhaps several other of the Western States,

it has been held that it is the duty of a railroad company to so construct overhead bridges as to prevent them from being dangerous to employes walking on the top of the cars in the performance of their duties, yet the great weight of authority in Virginia, New York, Iowa, Minnesota, Missouri, Maryland, Massachusetts and New Jersey hold in accordance with the passage above quoted from 24 W. Va., in regard to assuming the risks and perils incident to the employment; and we must hold that, by continuing in the employment of the defendant after he had every opportunity of becoming acquainted with its dangers, he assumed the risks incident thereto.

Looking, then, at the facts disclosed by the evidence in this case, and applying the rule which requires us to disregard the evidence of the defendant which is in conflict with that of the plaintiff, and admitting all that might be reasonably inferred by the jury from the evidence of the plaintiff, my conclusion is that the court below committed no error in sustaining the demurrer to the evidence, and the judgment complained of must be affirmed with costs to the defendant in error.

Brannon and Holt, JJ., concur. Lucas, P., absent.

## RHODE ISLAND SUPREME COURT

Hezekiah H. SMITH  
v.  
Hugh J. CARROLL *et al.*  
(....R. I....)

1. Money sued for is not in the custody of the law so as to be beyond the reach of garnishment where both suits are in the same jurisdiction.
2. A plea *pais darrein continuance* is sufficient to set up a defense that defendant has been garnished in another suit as trustee of the plaintiff.

(February 7, 1891.)

**A**CTION to recover money alleged to be due and unpaid. On demurrer to plea *pais darrein continuance* setting up that since the last continuance defendants had been garnished as trustees for plaintiff in respect to the debt sued for. *Overruled.*

The facts are stated in the opinion.

*Messrs. Claudius B. Farnsworth, Claude J. Farnsworth and Jacob W. Mathewson* for plaintiff in support of the demurrer.

*Messrs. William H. Clapp, Hugh J.*

*Carroll and Thomas J. McParlin*, for defendants, *contra*:

The pendency in the same court of an action against the garnishee will not preclude the garnishee's being charged.

Drake, *Attachm.* §§ 620, 621, citing *M'Carthy v. Emlen*, 2 U. S. 2 Dall. 277, 1 L. ed. 380; *Crabb v. Jones*, 2 Miles, 180; *Sweeney v. Allen*, 1 Pa. 380; *Penniman v. Smith*, 5 Lea, 180; *Thrasher v. Buckingham*, 40 Miss. 67; *Lieber v. St. Louis A. & M. Assn.* 36 Mo. 382; *Hitt v. Lacey*, 8 Ala. 104; *McDonald v. Carney*, 8 Kan. 20.

Mathewson's claim to the funds can be settled in the garnishee action in *Clapp v. Smith*. See Pub. Laws, Jan. 1884, chap. 483.

*Durfee, Ch. J.*, delivered the opinion of the court:

This is assumpsit to recover \$400 in money. The action was brought in this court at the October Term, A. D. 1888. February 17, A. D. 1890, one William H. Clapp brought an action of debt on judgment for \$122.74 debt and \$5.65 costs, against the plaintiff, in the court of common pleas, the writ wherein was served by garnishment on the defendants for the purpose of attaching in their hands the money sued for

**NOTE**—*Pleading; plea pais darrein continuance.*

Matters occurring after plea filed can only be pleaded *pais darrein continuance*. Mount v. Scholes, 8 West. Rep. 686, 120 Ill. 364.

Where matter of defense has arisen after the commencement of a suit, it cannot be pleaded in bar of the action generally, but must, when it has arisen after issue joined, be by plea *pais darrein continuance*. Yeaton v. Lynn, 30 U. S. 5 Pet. 224, 8 L. ed. 106; 1 Chitty, Pl. \*689, citing Rowell v. Hayden, 40 Me. 586; Semmes v. Naylor, 12 Gill & J. 361; Bank of United States v. Merchants Bank of Baltimore, 7 Gill, 415; Longworth v. Flagg, 10 Ohio, 300; Burns v. Hindman, 7 Ala. 531; Tuffs v. Gibbons, 19 Wend. 640; Morrow v. Morrow, 3 Brev. 394; Thomas v. Van Doren, 6 Mo. 201; Wyatt v. Richmond, 4 Humpb. 365.

A fact which has arisen since the return to a mandamus was made, as a matter of defense, whether in abatement or in bar, should be set up by a plea *pais darrein continuance*, or its equivalent. Thompson v. United States, 106 U. S. 480, 26 L. ed. 521, citing Jackson v. Rich, 7 Johns. 194; Jackson v. Ramsay, 8 Cow. 79.

13 L. R. A.

That a surety in a sheriff's bond had been compelled to pay the whole amount of his bond in other suits before judgment against him, but after the institution of the suit, is a good defense to the action if pleaded *pais darrein continuance*. Leggett v. Humphreys, 62 U. S. 21 How. 66, 16 L. ed. 50.

A plea *pais darrein continuance* is considered as a waiver of all previous pleas, and the cause of action is admitted to the same extent as if no other defense had been urged than that contained in the plea. Wallace v. McConnell, 38 U. S. 13 Pet. 138, 10 L. ed. 96; Yeaton v. Lynn, 30 U. S. 5 Pet. 224, 8 L. ed. 106.

If matter in abatement is pleaded *pais darrein continuance*, the judgment, if against the defendant, is peremptory as well on demurrer as on trial. Renner v. Marshall, 14 U. S. 1 Wheat. 215, 4 L. ed. 74.

A plea *pais darrein continuance* setting up a release made since the general issue was pleaded is defective where it does not state the time and place in which the release was made or delivered, or the day of the last continuance, or that there ever was a continuance. Field v. Cappers, 31 Me. 33.

In the case at bar. Said action was entered in the court of common pleas at the June Term, A. D. 1890, and appealed by the defendants to this court at its present term, so that both cases are now pending in this court. The defendants have set forth these facts on the record by plea *puis darrein continuance*, and the plaintiff has demurred. The plaintiff contends that, after the commencement of his action, the money sued for was in the custody of the law, and no longer subject to attachment; and, furthermore, that, even if it continued to be subject to attachment, the defendants' said plea is fatally defective in form and substance, and should be overruled.

We will consider the question first presented first, namely, whether such an attachment can be supported. According to what seems to be the prevailing consent of American decision, a debt is not necessarily put beyond the reach of garnishment by being put in suit, where both suits are in the same jurisdiction. *Drake, Attachment*, §§ 618-621; *McConn. Trustee Process*, §§ 818-820.

The law, as supported by American authority, is well stated in *Foster v. Dudley*, 30 N. H. 463, 465. In that case the court says: "If the trustee suit be commenced while the debtor trustee has yet an opportunity to ask for delay, and to plead a recovery against him, if one should be had, he may be charged as trustee, if no other objection appears." See also *McCarty v. Emlen*, 2 Yeates, 190; *Crabb v. Jones*, 2 Miles, 180; *Sweeney v. Allen*, 1 Pa. 880; *Thayer v. Pratt*, 47 N. H. 470; *Thrasher v. Buckingham*, 40 Miss. 67; *Lieber v. St. Louis Agr. & M. Assn.* 36 Mo. 382; *Smith v. Barker*, 10 Me. 458; *Thorndike v. De Wolf*, 6 Pick. 120; *Whipple v. Robbins*, 91 Mass. 107.

There are cases that hold or appear to hold that, for the garnishment to be effectual, the two suits must be in the same court, as well as in the same jurisdiction. *Hitt v. Lacey*, 8 Ala.

104; *McDonald v. Carney*, 8 Kan. 20; *Bingham v. Smith*, 5 Ala. 651. Under this rule the garnishment here is maintainable.

The next question is as to the plea *puis darrein*. The purpose of the plea is to protect the defendant from liability to double payment. The Supreme Court of Vermont in *Trombly v. Olark*, 18 Vt. 118, 123, has said: "If a suit is pending in the name of the principal debtor, against the trustee as defendant, and the latter is summoned as trustee, he may plead this temporary bar, and stay the proceedings until the suit of the creditor against him as trustee is determined." The same view has been taken by other courts. *Crawford v. Slade*, 9 Ala. 887; *McDonald v. Carney*, *supra*. The plea in this view has the effect simply of a motion for continuance or for a temporary stay of proceedings; and, where the two suits are depending in the same court, the record in each being thus readily accessible to inspection, we see no reason why the result intended to be accomplished by the plea cannot be as well, if not better, accomplished by motion. It seems to be the practice in some States to resort to a motion rather than a plea. *Winthrop v. Carlton*, 8 Mass. 456. And see *Spicer v. Spicer*, 23 Vt. 678. And in this view it seems to us that the matter, whether interfered by plea or motion, need not be very strictly regarded, if only it be made to appear that justice requires a stay. We are of opinion that the plea here is sufficient for the purposes intended. It is objected that the suit, though brought in the name of the plaintiff, is prosecuted, as appears by the declaration, for Jacob Mathewson as his assignee, and that the plea does not allege any invalidity in the assignment. We think, however, that the place to try whether the assignment is valid or not is in the garnishment suit, and that the allegation is therefore unnecessary.

*Demurrer overruled.*

## LOUISIANA SUPREME COURT.

F. R. BERNARD, Admr., etc., of M. S. Powell, Deceased,

v.

WHITNEY NATIONAL BANK.

Ora POWELL, Intervenor, *Appt.*

(...La....)

- \*1. The giving of a credit in payment, by a debtor, does not bind third persons, unless after notice of the transfer or assignment has been given to, or acknowledged by, the party owing the credit.
2. Delivery of title suffices between transferor and transferee; but, as against third persons, possession of the credit, which is acquired only by the given notice, is essential to bind them.
3. A check is a valid instrument for the assignment of the credit of the drawer against the bank; but it does not bind the creditors of the drawer, who are third persons, unless

the transfer was notified to the bank, before a change in the title to the credit has taken place.

4. At the death of an assignor, his property passes to his creditors and heirs, the rights of the former being then fixed, not susceptible of being changed afterwards, so that one may acquire any preference over another.
5. An assignment vests an inchoate title only, so far as third persons are concerned, and, until notice to the debtor of the credit assigned has been given, the assignor's interest may be seized by his creditors and devested.
6. The law considers as third persons all the creditors of the assignor, whose property is liable to them, unless a complete divestiture has taken place previous to any action by them against it.
7. At the death of an insolvent assignor, all his rights to property in his name, not completely and absolutely assigned so as to bind third persons, pass to his insolvent succession, as fully and effectually as if he had made a voluntary surrender, which had been duly accepted.
8. A notice of a transfer of credit made after a change in the title to the property of the

insolvent has thus occurred comes too late, and does not divest the rights acquired by the creditors.

9. In *dation en paiement*, delivery and possession are essential to operate a transfer, so as to exclude third persons. Everything doubtful or ambiguous must be interpreted against the transferee.

10. A change in the title before notice of the transfer or assignment forbids the payment by the bank to the transferee, and requires it to be made to the legal representative of the succession for distribution.

(December 15, 1890.)

**A**PPPEAL by the intervenor from a judgment of the Civil District Court for the Parish of Orleans disallowing her claim to a deposit made by M. S. Powell, deceased, with the defendant Bank, and which she alleged had been transferred to her. *Affirmed*.

The facts are stated in the opinion.

*Messrs. White & Saunders*, for appellant:

The ordinary relation existing between a bank and its customer, if not complicated by any further transaction than that of the depositing and withdrawing of moneys by the customer from time to time, is simply that of debtor and creditor at common law, whether the deposit is on demand or on time.

1 Morse, Banks and Banking, § 289; *Gordon v. Muchler*, 34 La. Ann. 607; *Mattheus v. Their Creditors*, 10 La. Ann. 842; *Re Louisiana Sav. Bank & S. D. Co.* 40 La. Ann. 515.

A bank is in no sense the agent of the depositor, nor is the depositor the principal of the bank.

*Foley v. Hill*, 2 H. L. Cas. 27; *Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 155, 19 L. ed. 899.

On its face a check is nothing more than a written order, signed by the depositor, addressed to the bank, and directing it to pay to a person therein named, or to his order, a certain sum of money.

A written order addressed by a creditor to his debtor, directing him to pay a third person, is in legal effect nothing more nor less than a transfer and assignment of the creditor's claim to such third person.

*Gray v. Trafton*, 12 Mart. 704.

This is true as well of checks on banks as of other orders.

Pom. Eq. Jur. § 1284; *Macomber v. Doane*, 2 Allen, 642; *Kingman v. Perkins*, 105 Mass. 112; Story, Eq. Jur. § 1044; Dan. Neg. Inst. § 21.

In Louisiana, whether a check is for the whole or for a part of a deposit, it amounts to an assignment.

*Gordon v. Muchler*, 34 La. Ann. 606; 2 Morse, Banks and Banking, § 496.

A transfer of an incorporeal right by a husband to his wife in satisfaction of his indebtedness to her is lawful.

Rev. Civ. Code, art. 2446; *Succession of Webre*, 35 La. Ann. 266.

The transfer by husband to wife authorized by art. 2446 is in reality a giving in payment.

Under art. 2656, a giving in payment "is made only by delivery."

In the transfer of credits, rights or claims to a third person, the delivery takes place between 13 L. R. A.

the transferor and the transferee by the giving of the title.

Art. 2642.

*Succession of Webre, supra*, decides that the delivery intended by the article consists in the execution and delivery of the act transferring the claim. The delivery consists in and is affected by what the parties do as between themselves at the time and in the act by which the transfer is made. Notice to the debtor is a subsequent and independent fact, not involved in the idea of delivery.

6 Marcadé, pp. 228, 224.

Assuming for the sake of the argument that the "delivery" required by art. 2656 embraces the notice to the debtor required by art. 2648, such notice is valid, if given after the transferor's death.

*Marshall v. Parish of Morehouse*, 14 La. Ann. 700; Laurent, §§ 492, 494; 4 Aubrey & R. p. 429; *De la Chaume v. Duguet*, Journal du Palais, p. 47, 10 Mai, 1845; 1 Morse, Banks and Banking, § 400.

A check is not a mandate. A mandate postulates the relation of principal to agent. The relation of principal and agent does not exist in any sense between bank and depositor.

The death of the drawer does not invalidate a check issued for value.

2 Dan. Neg. Inst. § 499; Edwards, Bills and Notes, 396; Byles, Bills, Notes and Checks, \*18; 2 Randolph, Com. Paper, 218; 1 Dan. Neg. Inst. § 368.

The death of a drawer of a bill of exchange works no revocation. Why should a different rule obtain as to checks?

1 Morse, Banks and Banking, § 400 (3). See *Jacquet v. His Creditors*, 38 La. Ann. 864; *Renshaw v. His Creditors*, 40 La. Ann. 37; *Campbell v. Sidell*, 5 La. Ann. 274; *Nicolopulo v. His Creditors*, 37 La. Ann. 474; *Garrison v. Creditors*, 7 La. 553; *Hall v. Mulholland*, 7 La. 889.

*Messrs. Farrar, Jonas & Kruttschnitt*, for appellee:

A husband's check given to his wife, in payment of her paraphernal claims, which is not presented for payment by the wife until after the husband's death, cannot be collected by the wife after the husband's death as against the administrator of his insolvent estate. The giving of such check was not a payment, because a check is a means or instrument by which payment is to be effected when the money is procured thereon. The holder in such case becomes the agent of the drawer to collect the money.

*Woodburn v. Woodburn*, 8 West. Rep. 85, 115 Ill. 427; *Brown v. Leckie*, 43 Ill. 497; 2 Parsons, Cont. 623; *Burke v. Bishop*, 27 La. Ann. 466; *Succession of De Pouilly*, 22 La. Ann. 97; Chitty, Bills and Notes, \*306; Parsons, Notes and Bills, p. 82; Bolles, Banks and Their Depositors, § 99.

A check being a mere vehicle of payment, the death of the maker of the check revokes the mandate of the drawer on the banker who holds the funds, and the vehicle is destroyed.

*Simmons v. Cincinnati Sav. Soc.* 31 Ohio St. 457; *Tate v. Hilbert*, 2 Vea. Jr. 112; Story, Prom. Notes, § 498; Byles, Bills, Notes and Checks, p. 25; Chitty, Bills and Notes, \*306; Parsons, Notes and Bills, p. 82; Bolles, Banks

and Their Depositors, § 99; Rev. Civ. Code, art. 8027.

**Bermudes, Ch. J.**, delivered the opinion of the court:

The plaintiff, as the administrator of the succession of M. S. Powell, brought this action to recover from the defendant the sum of \$3,400, standing on its books to his credit at the time of his death, on August 21, 1885. The Bank admitted the credit, but averred that claim was laid to it by the widow of the deceased. Mrs. Powell intervened in the suit, asserting rights to the credit, in consequence of a check of her husband in her favor, given her in payment of her claims against him; which check was drawn on the 20th of August previous and presented on the 27th following to, but not honored by, the Bank, on the ground of the death of the drawer some short time before presentment. From an adverse judgment the intervenor appeals. The facts disclosed by the record are the following: On July 31, 1885, M. S. Powell deposited \$3,400 with the defendant Bank, and was credited therefor. On August 20 following, being indebted to his wife in the sum of \$3,500, Powell gave her a check for the entire amount to his credit in bank. On August 21, the next day, Powell died. On the 27th of August the check was presented for payment, which was declined. On behalf of the intervenor, it is contended that the relation of principal and agent did not exist between Powell and the Bank; that the relation was that of creditor and debtor; that the check imported an assignment to the payee of the creditor's claim against the Bank; that this assignment was a valid *dation en paiement* under art. 2446, Rev. Civ. Code; that the delivery required by article 2656 was effected by the delivery to the assignee of the check, which is the act of transfer; that if notice was required, such was validly given, although after the transferor's death, and notwithstanding his insolvency. On the other hand, it is urged that in Louisiana all contracts between husband and wife are prohibited, except those which pertain to the restitution of her dotal or paraphernal property; that a husband's check to his wife, not presented by her until after his death, cannot be collected as against the administrator of his insolvent estate; that such a check was not a payment, a check being a means or instrument by which payment is to be effected when the money is procured thereon; that the holder, in such case, becomes the agent of the drawer to collect the money; that the death of the principal revokes the agency of both the Bank and the holder, the vehicle being destroyed; that delivery is of the essence of the giving in payment, and that there was none; that it is against public policy that an insolvent and defaulting public official should be allowed to make a preferred creditor of his wife, by transferring to her a large portion of his estate, she being aware at the time that he was a defaulter and an insolvent.

It would serve no useful purpose to undertake to discuss and determine all the complicated, broad and difficult issues thus presented by the litigants. Authorities are not wanting to sustain many of the conflicting positions by them respectively assumed. The question pre-

sented for solution is, after all, the following one only: Whether the drawing of a check by an insolvent, delivered by him to a creditor in payment of a claim, operates an assignment in his favor, such as entitles him to receive the amount as assignee, when claimed after the drawer's death, and without any previous presentment or certification. In other words, whether the condition of things existing during the drawer's life was or was not changed at his death, and, if it was, whether the change does or does not prevent the checkholder from recovering the amount of the check.

The contention of the intervenor, strictly, is that she was a creditor of Powell; that the check was given by him to her in payment; that this giving operated in her favor an assignment and transfer of the amount to his credit; that, by the title thus furnished to her, the credit was delivered to her, and that this delivery included the possession, if any be required by law; that this condition of things existed at his death, and that the fact of his dying insolvent in no way impaired her acquired rights. It is clear that, being at the time a creditor of her husband, she could receive payment from him of her claim against him, and that, when he issued and delivered to her the check in question, he intended to give her, and she consented to receive, in payment of what was due her the amount to his credit in the Bank. There was then an assignment made to her of his credit or right to that amount, and she held the check for a valid consideration. The "giving in payment" in Louisiana is an act by which a debtor gives a thing to the creditor, who is willing to receive it in payment of a sum which is due. Rev. Civ. Code, art. 2655. By the same law, that "giving of payment" is perfect only when followed by delivery. Rev. Civ. Code, art. 2656. In the transfer of credits, the delivery takes place between transferor and transferee by the giving of the title. Rev. Civ. Code, art. 2642. The transferee of a credit, says the Code, is only possessed, as regards third persons, after notice has been given to, or accepted by, the debtor, that the transfer had taken place. Rev. Civ. Code, art. 2643. The check given by Powell to his wife was not the thing given in payment. In itself it was a worthless piece of paper, unless filled, signed and honored according to the purpose in view by the parties concerned. That which was intended to be given in payment was not any money in bank of Powell, for he had none there, on special deposit, or separate and apart in his name, which he could order to be delivered in kind; but was his claim to the amount standing to his credit on the books of the Bank, and which the latter owed him for as much which he had deposited as a loan with it, subject to payment on call. It has therefore been frequently held that the giving of a check for an antecedent debt is not an absolute payment and extinguishment of the debt, in the absence of an express agreement giving it that effect. Ordinarily, it is only a means of payment, and the debt will not be extinguished unless and until the check is paid. 2 Dan. Neg. Inst. 688; 3 Am. & Eng. Encyclop. Law, *Checks*, 218. The evidence shows that it was some six or seven days after the death of Powell that the check was first



presented to the Bank, and payment asked, which was refused, on account of the death. It is certain that, before that event, the Bank had received or accepted no notice that the check had been drawn, or that the credit had been transferred either from Mr. or Mrs. Powell. Surely, had the check been presented before the death, it could and would have been paid; but the dominant question remains, whether, after that event, it should have been honored.

The able counsel for the intervenor, well aware of the tenderness and difficulty of the position here, says: "The sole test is whether any creditor of the assignor, or any other assignee, has acquired a right on the credit transferred." So that the contention is narrowed down to the solitary inquiry, whether or not, at the moment of the death, any creditor of the assignor, or any other assignee, has acquired a right on the credit. It is clear that had the check been presented before the death, but after the credit had been drawn against, or validly seized by judicial authority, in satisfaction of an undisputable claim, or had Powell become a judicially declared insolvent, to the Bank's knowledge, Mrs. Powell could not have been paid at all, because there would have then existed no claim which Powell could have enforced against the Bank, and because Mrs. Powell, transferee, could have had in the matter no greater right than he possessed. Now, it is well settled in the jurisprudence of this State that the rights of creditors are fixed at the debtor's death, and that no one can subsequently get any advantage over others. It is likewise well established that a debtor's property is the common pledge of his creditors. Under those just and equitable rules, all the titles which Powell had to any property, standing in his name, not divested so as to bind third parties, passed to his succession, represented by both his creditors and his heirs, if any of the latter, as effectually as if he had made a voluntary surrender, which had been accepted. Rev. Civ. Code, art. 871; Rev. Stat. § 1791. The intervenor nevertheless claims that under the settled jurisprudence of this State, as the sale of a movable or the transfer of a credit may be perfected as to creditors, after declared insolvency, it may be perfected after death, in case of actual insolvency of the succession, and the creditors and heirs are then as strictly bound by the obligations of the deceased after, as they were before, the death. In support of this bold proposition reference is made to three cases, viz.: *Campbell v. Slidell*, 5 La. Ann. 274; *Nicolopulo v. His Creditors*, 37 La. Ann. 474; *Hall v. Mulholland*, 7 La. 389.

It is perfectly true that, in those cases, the purchasers were recognized as owners of property sold before the cession or surrender, although in the first the act of sale of an interest in real estate had not been previously recorded, and in the others delivery or possession had not followed the sale of the movables before the declared insolvency. It must not be forgotten that we are not presently concerned with a sale, but with a "giving in payment," and that the principles which govern in one do not rule in the other. The Code distinctly declares (Rev. Civ. Code, art. 2656) "that giving in pay-

ment differs from the ordinary contract of sale, in this: that the latter is perfect by the mere consent of the parties, even before delivery, while the giving in payment is made only by delivery." It also says, on the subject of the assignment of credits, that although delivery takes place between transferrer and transferee by the giving of title (Rev. Civ. Code, art. 2642), the transferee is only possessed, as regards third persons, after notice has been given to the debtor of the transfer having taken place, or he has accepted the transfer by an authentic act. Rev. Civ. Code, art. 2643.

In the case of *Gordon v. Muchler*, 84 La. Ann. 604, in which a sum to the credit of the defendant was claimed by three parties,—(1) the bank in which the deposit had been made; (2) another bank which held a check against it, which had been presented but not paid; (3) a creditor who had attached after the presentment of the check,—this court held that the first claimant was not entitled to it, because it would not plead compensation against it; that the attaching creditor could not recover; because the seizure had been effected too late, *s. a.*, after the presentment; and the court allowed the amount to the bank which held the check, because the check had operated as an assignment, perfected by notice, in the form of the presentment of it. In thus holding, the court said: "Our law, differing therein from the common law, distinctly recognizes the assignability of that class of incorporeal rights known at common law as 'choses in action,' and provides for the perfectibility of such assignments by notice to the debtor, and entirely independent of his consent. . . ."

This clearly recognizes and establishes, in cases of checks drawn against a credit in bank, that, although the check may be an assignment by the drawer in favor of the drawee, that assignment is perfect and absolute as to third parties only when the check has been presented and payment asked, even independent of the consent of the bank on which drawn. It is the settled and unbending jurisprudence of this State that the assignment of an incorporeal right vests only an inchoate title, and that until notice to the debtor the assignor's interest may be seized by his creditors. 2 Hen. Dig. p. 1882, VIII. (b) 1. The law considers as third persons all the creditors of the assignor whose property is liable to them till a complete transfer and tradition to the assignee. *Oax v. White*, 2 La. 425. The transfer of a draft, in order to be binding on third persons, must be made by delivery of the draft to the transferee, and by notice to the debtor of the transfer. *Hill v. Hanney*, 15 La. Ann. 654; Louq. Dig. p. 641, (b) 1. Delivery is of the very essence of a *dation en paiement*, and, in such cases, everything doubtful or ambiguous must be interpreted against the creditor. *Groves v. Steel*, 3 La. Ann. 280. Until notice of the transfer of a claim has been given to the debtor, such claim, though transferred, is liable to attachment by the creditors of the transferrer. *Golsan v. Powell*, 83 La. Ann. 521; *Frolsen v. Witkowski*, 40 La. Ann. 273. When Powell died, all his rights and obligations were transmitted to his legal representatives, who were apparently his creditors (as he was thoroughly insolvent), and his heirs, if any. Rev. Civ.

Code, art. 871 *et seq.* Those representatives acquired by his death something besides rights which he could not have asserted had he not died, among which was that of undoing seasonably any illegal acts done by him, to their injury, even by resorting to parol proof, when he would have been estopped or required to produce only by written evidence; likewise that of resisting the effect of a mortgage consented to by him, but not recorded before his death or failure. Rev. Civ. Code, arts. 8362, 8363. It will not do, in order to avoid these propositions, to say that the property passed from the deceased to his legal representatives *cum onere*, because that is a begging of the question, for the reason that, in the instant case, under the special provisions of our law, the giving in payment was an absolute nullity, as regards third persons, inasmuch as the check had not been presented, or no notice of the transfer of credit had been given, before the death.

It was emphatically held in the celebrated case of *Tate v. Hilder*, 2 Ves. Jr. 112, in which the question presented related to the effect of the death of the drawer of a check presented after his demise, that, at the instant of the death, the title vested in his legal representatives, and his own order was no longer competent to withdraw any part of that which was no longer his property. The French authorities invoked by the intervenor are to the effect that the notice given after a judicially declared insolvency is of no avail; also that, in cases of sale, the contract may be perfected, even without previous delivery after surrender; also that notice may be given after death in cases of an acceptance by the heirs under benefit of inventory; but they do not establish authoritatively that, in cases of insolvent successions, the title of the deceased to credits given in payment does not vest in the creditors, as in cases of judicial surrenders. It is to be noted that, while Rev. Civ. Code, art. 2642 *et seq.*, were borrowed from the French Code, the subsequent article (Rev. Civ. Code, art. 2656) is not to be found in it, and was inserted in our legislation, obviously to differentiate, to some extent, between the two systems in this respect. The title which Mrs. Powell claims to hold to the credit may have been good evidence of the transfer, and binding, without notice to the Bank, on Powell and his heirs; delivery being sufficient, and possession not being essential as to them (*Hall v. Mulholland*, 7 La. 889; *Lee v. Cameron*, 14 La. Ann. 700; Rev. Civ. Code, art. 2642); but as to third persons, creditors being such, it surely was barren of all effect, for the reason that the transfer or assignment of the credit could not, under our law, which differs from the common law, have bound them, unless notice to the debtor, the Bank, had been duly and seasonably given, or he had acknowledged them before the death. Rev. Civ. Code, art. 2648. Delivery is one thing, and suffices in one instance. Possession is another, and is essentially required in another.

While ruling as we do, we are not to be understood as holding that the death of Powell revoked the check delivered by him to his wife, who is not a third person, for the assignment thereby made is binding between him and her, nor as holding that a third person

holding it would not be entitled to collect it. What we decide is simply that such assignment not having been notified before his death, he dying thoroughly insolvent, a change has taken place as to the title of the credit, which, at the moment of death, has passed to the mass of his creditors, who are third parties, not bound without notice of the assignment; consequently that, by such change, Powell was dispossessed for the benefit of his creditors, and that his order to pay, given before his death, cannot be executed as to them after that event has occurred. Had he died solvent, quite a different state of things would be presented, and this case would not have arisen; for it would have been immaterial to the heirs, as the debt existed, with what money it would have to be paid. It therefore follows that, as the check was not presented, paid or certified before the death, or that notice of the transfer of the credit has been given after that same event, a change in the title then occurred, and that the transfer is barren of effect as to the creditors of the insolvent assignor; that the credit belongs to his succession; and the amount which the Bank owes, as standing in Powell's name, must be paid, not to the intervenor, but to the administrator of his succession, for distribution according to law. The district court thought that the credit had not been transferred so as to prevent the legal representatives of Powell from acquiring title to it, and, in so finding, it has correctly applied the law to the facts.

*Judgment affirmed.*

**Fenner, J., dissenting:**

The value of legal principles consists in their practical application. We have held that a check operates as an assignment of the fund upon which it is drawn, perfect, as between the drawer and payee, from the moment of delivery, and binding on the bank as soon as it is notified thereof by the presentment of the check. *Gordon v. Muchler*, 84 La. Ann. 604; *Dan. Neg. Inst.* §§ 1638, 1643. This entirely removes the case from the application of those authorities which are based on the contrary principle, that a check is a mere mandate, revocable by the drawer, and not binding on the bank until accepted by the latter. All authorities, which hold the view taken by this court, agree, as a logical consequence, that the death of the drawer operates no change in the rights of the parties. Mr. Morse says: "It is perfectly clear that, where a check operates as an assignment, the death of the drawer will not revoke it. Whether it be with or without consideration, a right, once vested, cannot be divested by the death of the party from whom it was acquired." Morse, *Banks and Banking*, § 400. Mr. Daniel says: "The idea that the death of the drawer of a check, given to a payee for value, operates a revocation, is, as it seems to us, a total misconception of the law."

The drawer is deemed the principal debtor, and it is anomalous to hold that his death in any wise lessens his obligations, or the right of the bank to pay it, when given for value." *Dan. Neg. Inst.* § 1618, and *note*. Prof. Parsons takes the same view: "The right on the part of the drawee to complete the assignment would seem to be a privilege

of his own, and it is somewhat difficult to see how the death of the drawer can affect it." 2 Parsons, Notes and Bills, 287, *note*. In the case of *Gordon v. Muchler*, above cited, we assimilated a check to the transfer or assignment of an incorporeal right, saying: "It will not be disputed that a written order by a creditor, addressed to a debtor, directing him to pay to a third person a debt due to the former, accompanied by due notice to the debtor, would comply with all the requirements imposed by our Civil Code, arts. 2642-2654, for the valid giving of title, delivery and complete assignment of the credit or incorporeal right referred to in the order. The check, its presentation, protest and the written notice herein given, unequivocally fulfill all these requirements." If the death of the drawer of the check would operate to destroy the right of the payee to perfect his assignment by giving notice to the bank, the death of the assignor of any other incorporeal right would have a like effect. There is certainly no authority for such a proposition in our jurisprudence; and the French courts and commentators agree that the death of the assignor of an incorporeal right has no such effect, and that, notwithstanding the same, the assignee preserves intact his right to perfect his assign-

ment by giving notice to the debtor. *Journal du Palais*, 1837, 1, p. 431; *Id.* 1841, 2, p. 715; 24 Laurent, No. 494; 4 Aubry & R. p. 429. A reference to these authorities will show that all the reasons assigned in the majority opinion, touching the intervention of the rights of creditors as resulting from the death, etc., are considered and disposed of. They also refer to article 8363 of our Code (Code Nap. 2146), which refuses effect to mortgages inscribed after the death, as declaring an exceptional principle not to be extended beyond its terms, and hold that the failure to make such provision, with reference to notice of assignment of incorporeal rights, exempts the latter from a like regulation. I do not think the provisions of our law on the subject of giving in payment have any application. They apply to the giving in payment of things other than money. A check is an order for the payment of money, and is a mere vehicle or process for affecting a payment in money. Moreover, I think the delivery referred to in article 2656 is the delivery, as between the transferrer and transferee, which, under article 2642, takes place "by the giving of title." I dissent.

Petition for rehearing overruled.

### ALABAMA SUPREME COURT.

ELYTON LAND CO., *Appt.*,

v.

BIRMINGHAM WAREHOUSE & ELEVATOR CO. *et al.*

(.....Ala.....)

**Payment of stock subscriptions amounting to \$300,000 by a bond for title to land on which only \$5,000 had been paid, and which was worth no more than the subscribers had agreed to pay for it, the company assuming the purchase-money notes, leaves the subscribers liable to creditors of the corporation for the difference between the actual value of their interest in the land and the amount of their subscriptions where the State Constitution prohibits the issue of stock except for money or property actually received, and statutes require payments by property to be at its money value.**

(May 1, 1891.)

**A**PPREAL by complainant from a decree of the Chancery Court for Jefferson County sustaining demurrers to a bill filed to collect a corporation debt from stockholders whose stock subscriptions were alleged to remain unpaid. *Reversed.*

The facts are stated in the opinion.

*Mr. Alexander T. London*, for appellant:

Subscriptions to the capital stock of a corporation constitute a trust fund for the benefit of creditors, which neither the corporation,

nor its directors, can dispose of or waste to their prejudice, and any agreement to that effect is void against creditors.

*Smith v. Huckabee*, 58 Ala. 191; *Montgomery & W. P. R. Co. v. Branch*, 59 Ala. 189; *Sanger v. Upton*, 91 U. S. 60, 28 L. ed. 229; *Scott v. Thayer*, 105 U. S. 148, 26 L. ed. 968.

Creditors may enforce this liability.

*Taylor, Priv. Corp.* 660; *Cook, Stock and Stockholders*, § 42; *Smith v. Huckabee* and *Scott v. Thayer, supra*.

Where property is transferred in payment of subscriptions, it must be at its fair cash value.

1 *Morawetz, Priv. Corp.* §§ 425-428; 2 *Morawetz, Priv. Corp.* § 825, and cases cited; *Wetherbee v. Baker*, 85 N. J. Eq. 501, 518; *Taylor, Priv. Corp.* §§ 545, 701 *et seq.*; *Osgood v. King*, 42 Iowa, 478; *Jackson v. Traer*, 64 Iowa, 469, 477; *Bailey v. Pittsburg & O. G. O. & C. Co.* 69 Pa. 384; Code 1876, § 1805; *Cook, Stock and Stockholders*, §§ 44, 47, 48.

Where the over-valuation of land or property transferred in payment of stock subscriptions is so great as to bear evidence on its face that it was intentional and fraudulent, the court will hold, unless the transaction is reasonably explained, that there is no question of fact, but as a matter of law the over-valuation was fraudulent.

*Cook, Stock and Stockholders*, § 84, p. 81; *Boynston v. Hatch*, 47 N. Y. 225; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Brooklyn v. Ireland*, 61 How. Pr. 872; *Boynston v. Andrews*, 68 N. Y. 98.

**NOTE.**—That creditors may compel a stockholder to pay in the full value of his stock subscription, see *note* to *Minneapolis Threshing Mach. Co. v. Davis* (Minn.) 3 L. R. A. 796; *Boulton Carbon Co. v.* 12 L. R. A.

*Mills* (Iowa) 5 L. R. A. 651; *First Nat. Bank v. Gustin-Minerva Consol. Min. Co.* (Minn.) 6 L. R. A. 676; *Cartwright v. Dickinson* (Tenn.) 7 L. R. A. 708.

The rule by which it is to be determined whether the payment is fraudulent or not is the same as would apply in the purchase of property.

*Bump, Fraud. Conv. 44; Hoot v. Sorrell, 11 Ala. 886; Prosser v. Henderson, 11 Ala. 484; Gordon v. Tweedy, 71 Ala. 202-218.*

Stock issued must be based on a valuable consideration; that is, the stock should represent the fair value of assets received.

Const. art. 14, § 6; *Fitzpatrick v. Dispatch Pub. Co.* 88 Ala. 604; *Williams v. Evans*, 87 Ala. 725; *Ewing v. Oroville Min. Co.* 56 Cal. 649.

A subscription of "real property" is not "discharged by" the transfer to the corporation of the right to a conveyance of property upon payment of the purchase money.

*Goodlett v. Hansell*, 66 Ala. 151; 2 Addison, Cont. 8th ed. p. 390; *Bailey v. Pittsburg & C. G. & C. Co. supra*.

Where a stockholder fails to deliver property of the value of his subscription in discharge of it, he is liable for the subscription in money, and creditors may subject him to this liability.

*Boynton v. Hatch, supra; Schenck v. Andrews*, 57 N. Y. 188; *Boynton v. Andrews, supra; Douglass v. Ireland*, 75 N. Y. 100; *Endlich, Interpretation of Statutes; Bedsole v. Peters*, 79 Ala. 186.

As against creditors a corporation cannot release stockholders from any part of their subscriptions to capital stock, and an agreement to accept less than the full amount of the subscription in money or property, while binding on the corporation, is void so far as it injuriously affects creditors.

*Scott v. Thayer*, 105 U. S. 143, 154, 26 L. ed. 968, 973; *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 21 L. ed. 781; *Wood v. Dummer*, 8 Mason, 308.

*Messrs. Garrett & Underwood* for appellee.

**Walker, J.**, delivered the opinion of the court:

The bill was filed by the Elyton Land Company as a judgment creditor of the Birmingham Warehouse & Elevator Company, a corporation, and its purpose is to secure the payment of the judgment by the enforcement of the alleged unsatisfied liability of the individual defendants as original subscribers to the stock of the defendant corporation. It is averred that said individual defendants pretend that they have discharged and satisfied their liability as such subscribers, but it is alleged that the transaction whereby it was attempted to discharge that liability is merely colorable, and is void as against the creditors of said corporation, and that said subscribers are liable to pay in money the amount of their said subscriptions, or so much thereof as is necessary to satisfy said judgment. The following is the substance of the case stated by the bill:

On the 9th day of March, 1887, the Elyton Land Company executed and delivered to defendant J. A. Van Hoose, as trustee for the Birmingham Warehouse & Elevator Company, a corporation then in process of organization, its bond of title for two blocks of land near the City of Birmingham, to be paid for at the price of \$53,000. Said Van Hoose paid to the

Elyton Land Company \$5,000 on the execution and delivery of the bond for title, by the terms of which it was provided that he was to execute a transfer and conveyance of his rights and interests thereunder to the Birmingham Warehouse & Elevator Company, upon its organization, and that that Company should make its nine notes for the balance of the purchase money to the Elyton Land Company, said notes to be each for \$5,388.83, bearing interest from August 20, 1886, payable, respectively, at 1, 2, 3, 4, 5, 6, 7, 8 and 9 years from that date. On the 19th day of February, 1887, said Van Hoose and the other individual defendants, Johnston, Sage and McLester, filed their petition in the office of the probate judge of Jefferson County for the organization as a corporation of the Birmingham Warehouse & Elevator Company, the capital stock of which was to be fixed at \$250,000, to be divided into 2,500 shares of \$100 each. On the same day a commission was issued to said Van Hoose, Johnston, Sage and McLester, constituting them a board of corporators, and authorizing them to open books of subscription to the capital stock of the proposed corporation. On the 11th day of March, 1887, said board of corporators, over their signatures, reported and certified to said probate judge that on the 9th day of March, 1887, they had opened books of subscription to the stock of said proposed corporation, and that they had each subscribed for 500 shares, "subscribed through James A. Van Hoose, trustee for the subscribers, and payable in real property near the City of Birmingham,

of the money value stated in said subscription of \$250,183.83, subject to the unpaid purchase money due to the Elyton Land Company, amounting to \$50,183.83, the payment of which is to be assumed by said Company, said lands being fully described in the bond for titles of the Elyton Land Company to said James A. Van Hoose, trustee, dated March 9, 1887, which said trustee is to convey to said Company in payment of said two thousand shares of stock," and Van Hoose, Johnston and McLester each subscribed for one share, payable in money. Said corporators further reported that on the organization of said Company said Van Hoose, Johnston, Sage and McLester were present, and each represented in person 501 shares in stock; that each of said persons was elected a director of said corporation, and that the board of directors elected Van Hoose as president and McLester as treasurer and secretary of the corporation. It was further reported and certified by the corporators that on the 10th day of March, 1887, after the organization of said Company, all the capital stock thereof payable in money was paid to the treasurer, and all the property subscribed was delivered to him. The subscriptions were made as reported, and certified by the corporators. It was not true at the time of the filing of the bill, or when the subscriptions were made and reported, that said land was of the money value of \$200,000. The price named in said bond for title—\$53,000—was at the time of said subscription the full money value of said land when sold on long credit. Said Van Hoose, Johnston, Sage and McLester well knew that said land was not worth, nor was it of the money value of, \$200,000, or anything near that

sum. After said subscriptions were made, and after said Birmingham Warehouse & Elevator Company was organized, said Van Hoose indorsed to it said bond for title, and said Company executed its nine promissory notes, as by the terms of the bond for title it was provided it should do; and said Van Hoose, Johnston, Sage and McLester now claim that the assignment of said bond was a discharge and satisfaction of said subscription of \$200,000, which has not been otherwise paid. It is this transaction which the bill alleges is merely colorable and is void as against the creditors of said corporation. Only \$5,000 has been paid on account of said purchase money. The Elyton Land Company has recovered judgment against said Birmingham Warehouse & Elevator Company on two of said notes. That judgment remains unsatisfied, and said corporation has no property out of which it could be satisfied by execution.

Each of the individual defendants demurred to the bill upon the following, among other, grounds: (1) That the bill on its face shows that the complainant has no right to the relief therein prayed because it shows that this defendant owes nothing to the Birmingham Warehouse & Elevator Company, either in unpaid subscriptions for stock or otherwise; (2) because said bill alleges no facts which render this defendant liable personally in any way for the alleged debt mentioned therein as due from said Birmingham Warehouse & Elevator Company to the complainant; and (3) because said bill shows that this defendant subscribed for stock in said Birmingham Warehouse & Elevator Company, payable in property, at a valuation mentioned in said subscription, which property has been delivered and received in full payment for said stock; and said bill fails to show that said property was over-valued unreasonably, intentionally and fraudulently, or that the defendant has made a profit from the stock so subscribed and taken by him. A decree was rendered sustaining the demurrers as to the grounds here mentioned. The appeal is from that decree.

On the averments of the bill it is to be taken as true that the property which was received by the corporation as full payment of the stock subscription was worth only \$5,000, the amount which had been paid on the bond for title. It follows that the decree of the chancery court involves the assertion of the validity as against the creditors of the corporation of the payment of a stock subscription of \$200,000 by the transfer to the corporation of property worth only \$5,000. In reviewing this determination regard is to be had to certain constitutional and statutory provisions which are to be construed and applied in the light of settled principles governing the relations of stockholders to the corporation of which they are members, and to the creditors thereof. By the Constitution of 1875 it was provided that "no corporation shall issue stock or bonds, except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void;" and that "dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid

stock owned by him or her." Sections 6, 8, art. 14, of the Constitution. Prior to the adoption of the present Constitution each stockholder in any corporation was liable to the amount of stock held or owned by him, the law imposing a liability not only to the extent that the stock was unpaid, but for an additional sum equal to the amount of such stock. Section 8, art. 18, of the Constitution of 1868; section 1760, Rev. Code 1867; *McDonnell v. Alabama G. L. Ins. Co.* 85 Ala. 401.

Before the creation of this additional liability the stock and other property of a private corporation was regarded and treated in a court of equity as a trust fund for the payment of the debts of the corporation, and in the event of the insolvency of the corporation unpaid stock subscriptions could be condemned for the satisfaction of the creditors; and said additional liability was a mere increase of the security for the payment of the corporate debt. *Smith v. Huckabee*, 58 Ala. 191.

While corporate creditors were secured by this special liability existing in their favor there was no direct constitutional or general statutory prohibition against the abuse of corporate powers by the issue of stock not in good faith representing the value of money, service or property actually contributed to the corporate enterprise; and the general Incorporation Law then in force contained no requirements as to the mode of subscribing for stock, or as to how the subscription liability should be satisfied. Code 1867, chaps. 3, 4, title 2, pt. 2. The dangers to which corporate creditors were exposed by the absence of such regulations were obviated by the provisions for said additional liability. When those provisions were repealed by the Constitution of 1875 there was an obvious necessity of providing that the trust fund, the remaining security for corporate creditors, should exist as a thing of substance, and that the liability for unpaid stock should not be merely illusory. This necessity was not overlooked. The former legislative policy of securing corporate creditors by making the stockholders liable to them in amounts over and above what they could be called upon to pay on their stock subscriptions gave place to a new policy, the aim of which was to afford proper security to persons dealing with corporations by prohibiting the issue of stock except for value received by the corporation, and by providing definite regulations for the payment of stock subscriptions in money, or in labor or property at its money value. This new policy is evidenced generally by section 6, art. 14, of the Constitution, quoted above, and particularly as to manufacturing, mining, immigration and industrial business corporations, by section 1805 of the Code of 1876, which provides that "all subscriptions to the capital stock of any company organized or proposed to be organized under the provisions of this article shall be made payable in money, or in labor or property at its money value, to be named in the list of subscriptions; and in case of a failure to perform the labor, or deliver the property, according to the terms of the subscription, the money value thereof as named in the list of subscription shall be paid by the subscribers." These enactments are not for the benefit of corporate creditors

alone. The policy evidenced thereby bears upon the relations of corporations to the public and upon the relations of stockholders to each other, to the corporation and to its creditors.

This court has not heretofore had occasion to pass upon the question as to the effect of these provisions upon the rights of corporate creditors. The effective operation of the constitutional provision in other connections has been recognized in several cases.

In *Fitzpatrick v. Dispatch Pub. Co.*, 88 Ala. 604, it was held, at the instance of an objecting stockholder, that under the constitutional and statutory provisions a corporation with a paid-up capital of \$10,000 has no authority to double its capital stock and distribute the new stock among its stockholders as a stock dividend, on the mere statement that its capital stock "has been invested in property which has more than doubled in value, and is now worth \$20,000 over and above all liabilities;" and an injunction was issued to restrain and enjoin the corporation from carrying into effect a resolution which had been adopted by the stockholders for the issue and distribution of such new stock. In the course of the opinion it was said: "Let us not, by timid interpretation, impair the strength of this bulwark, erected by our constitution makers against the frauds which have become the reproach of the age we live in."

In *Williams v. Evans*, 87 Ala. 725, 6 L. R. A. 218, it was held that relief could not be granted on an executory contract to pay for the transfer of a subscriber's right under a stock subscription whereby it was provided that the corporation to be formed should issue "five dollars of stock for one dollar of subscription." The stock had not been issued when the contract in suit was made. The court said: "A contract which contemplates the violation of a statute or a constitution as a mode of executing such contract is illegal and void. . . . One of the purposes of this clause of the Constitution was to protect the public, as well as stockholders, against spurious and worthless stock by the process of watering; in other words, from fraudulently issuing and putting on the market fictitious corporate stock, which is based on nothing valuable as a consideration for its issue. It is greatly to the interest of the public that the policy of this provision should be enforced." In *Parson v. Joseph* (Ala.), decided during the present term, and reported in 8 So. Rep. 788, the bill, to which a demurrer was overruled, was filed by a stockholder to secure the cancellation of certain certificates of stock issued to another stockholder, on the ground that the stock so issued was fictitious, and that its issue was in violation of the Constitution and the statute law of the State. It was alleged that certain stock was paid for in full by conveying to the company thirty-nine acres of land at an agreed price and valuation of \$187 per acre, when the land was not worth more than \$25 per acre; that afterwards the capital stock of the company was doubled, and without further consideration than the thirty-nine acres of land the amount of stock issued therefor was doubled. The contention was in regard to this latter issue of stock. It was alleged that the excessive valuation of the land was made

knowingly, willfully and with the fraudulent intent of having the fictitious stock in question issued in violation of law. On these averments it was held that the stock in question was issued in violation of section 1663 of the Code of 1886, and of section 6, art 14, of the Constitution. It is to be observed that the respective requirements of section 1805 of the Code of 1876 and section 1662 of the Code of 1886, as to how stock subscriptions shall be payable, differ in this: that the former requires the subscriptions to be made payable in money, or in labor or property at its money value, to be named in the list of subscription; while the latter provides that all subscriptions must be payable in money; but the commissioners may receive subscriptions payable in money, the subscriber having the privilege of discharging the same by the rendition of stipulated necessary services, or the performance of stipulated necessary labor for the corporation, at the reasonable value of such services or labor, or in property at the reasonable value thereof. It does not seem, however, that the variations in the terms of these two Statutes are such that the fact that the stock subscription was made under the one or the other of them would make any substantial difference in the right of a stockholder to object to the issue of other stock representing property received by the corporation at an excessive and fraudulent overvaluation. In the case last cited it was suggested that stockholders who knowingly and intentionally have subscribed and paid for stock with property upon a fictitious valuation are liable to creditors as stockholders who have not paid up in full for their stock; but the question of such liability was not presented in that case.

In *Tutwiler v. Tuscaloosa O. I. & L. Co.*, 89 Ala. 391, several questions that might arise from the issue of stock for property taken at a palpably excessive valuation were stated, but not decided. It is plain from this review of the decisions that the constitutional and statutory provisions in question are treated as effectual to prevent the courts from lending their aid for the enforcement of any contract or obligation the execution of which involves a disregard of those regulations, and that, so far as they are appropriate for the protection of stockholders from improper discriminations in accepting payments for stock, those regulations are accorded such effect and operation as to fully accomplish this purpose of their enactment. It cannot be doubted that the protection of the interests of corporate creditors is as much within the aim and policy of those regulations as were the objects in behalf of which they have been successfully invoked in this court.

In considering the claim of corporate creditors to hold the stockholders of the corporation individually liable on the ground that an attempt by them to satisfy their stock subscriptions by the transfer to the corporation of property at a gross overvaluation was not such payment as the law requires, the fact is not to be lost sight of that the solution of the question is dependent in some measure at least upon the constitutional and statutory provisions which the court has already construed as amply effectual to secure the accomplishment

of other objects, also within the purview of the enactments; and it may be added that a like beneficial operation should be accorded to these provisions when invoked in furtherance of either of their manifest purposes. It is impossible to reconcile the decisions of the various courts upon the question of the liability to the creditors of the corporation of stockholders on stock issued for property taken at an overvaluation. We will briefly consider the cases principally relied on in support of the proposition that such liability cannot be maintained.

In *Cott v. North Carolina Gold Amalgamating Co.*, 119 U. S. 848, 80 L. ed. 420, the liability was claimed on the ground that the stock was paid for in property at a valuation illegally and fraudulently made at an amount far above its actual value. The court found that this claim was not sustained by the evidence. It was said in the opinion: "The incorporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item—the value of the charter privileges—which is at all liable to any legal objection. But if that were deducted the remaining amount would be so near the aggregate capital that no implication could be raised against the entire good faith of the parties in the transaction." It is plain that this case is not an authority against the existence of the liability contended for by appellant.

In *Brant v. Ehlen*, 59 Md. 1, there was no assertion of the absence of such liability. It was expressly stated in the opinion that the questions presented were dealt with upon the assumption that the sale and purchase of the land which was paid for in stock were made in good faith. Another case, decided subsequently, and reported in the same volume,—*Crawford v. Rohrer*, 59 Md. 599,—shows clearly the rule prevailing in that State on the subject under consideration. In that case it was decided that "any arrangement among stockholders, or those in charge of the affairs of the corporation, by which the stock is but nominally paid for, whether in money or property, the corporation not in fact getting the benefit of the price in good faith, will be regarded as a sham, and not as a valid payment, as against the creditors of the corporation, however it may be regarded as between the corporation and the subscriber."

In *Carr v. Le Fevre*, 27 Pa. 418, a stockholder was sought to be charged on stock which had been paid for in land. It was said in the opinion: "There is nothing in the special verdict tending to show that there was any fraud in this transaction;" and that "the parties took the precaution to have the lands valued and appraised. We are bound to presume that this was fairly done." The element of gross overvaluation was lacking in that case. In this particular it was like the Alabama case of *Davis v. Montgomery Furnace & Co.*, decided during the present term, and reported in 8 So. Rep. 486.

In *Van Cott v. Van Brunt*, 82 N. Y. 535, it appeared that stock and bonds of a railroad company were issued to a contractor for the building of the road, and that the work done under the contract was of less value than the par of the stock and bonds agreed to be paid

therefor. By this arrangement the stock was disposed of in good faith, and without fraud, though for less than its face value. It was held that the liability of the stockholder had been discharged. On page 542 of the opinion it is made to appear that the transaction was without the influence of statutes in that State somewhat similar to provisions prevailing here, as will be shown by references to be made to other New York decisions. This case has several times been made the subject of unfavorable comment. Taylor, Priv. Corp. 2d ed. § 545, note 5; 2 Morawetz, Priv. Corp. § 896; Cook, Stock and Stockholders, § 47, note 5; Jackson v. Traer, 64 Iowa, 488.

*Phelan v. Hazard*, 5 Dill. 45, was a suit by a creditor to charge a transferee of stock, who had purchased the same for value, and in good faith, as full-paid stock. It was said that a liability could not be established against the defendant by showing that the property conveyed to the corporation in payment for the stock was not worth the amount of the stock, or that it was not worth anything over and above the mortgages upon it at the time of the transfer. The court held that the agreement whereby property was received in payment for the stock was conclusive upon the company and its creditors, until by direct attack it has been impeached and rescinded for fraud; and it was said that "the courts, even where the rights of creditors are involved, will treat that as payment which the parties have agreed should be payment." This case was followed as authority in *Coffin v. Ransdell*, 110 Ind. 417, 9 West. Rep. 83.

The three cases last cited represent the weight of American authority opposed to the recognition of the liability asserted in the case at bar. It is to be marked that in neither of those cases were any statutory provisions mentioned as having any bearing upon the conclusions reached. It is also to be noted that in the latter two of the three cases English decisions were principally relied on as authority. The opinions in both those cases quote with approval from *Re Baglan Hall Colliery Co.*, L. R. 5 Ch. App. 346, where it was said, in reference to the right of a creditor to question the payment for stock by a transfer of property at an overvaluation, that "the test to be applied is this: Could the company by any proceeding have set aside the transaction?" The English rule seems to be that the creditor can have no other or greater rights in this regard than the corporation itself could assert. In this country, on the contrary, the best authorities maintain that arrangements to issue stock as full paid, though only partly paid for in fact, may be valid and binding between the company and its stockholders, and yet may be set aside at the instance of creditors, and full payment on the stock enforced for the satisfaction of the debts of the corporation. *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Curry v. Woodward*, 53 Ala. 371. This latter rule results from the doctrine, well established in America, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. *Wood v. Dummer*, 8 Mason, 308; *Montgomery & W. P. R. Co. v. Branch*, 59 Ala. 139; *Smith v. Huckabee*, 53 Ala. 191; *Paschall v. Whitsett*, 11 Ala. 472; *Allen v. Montgomery*

*R. Co. Id.* 487. This doctrine first distinctly enunciated in *Wood v. Dummer*, *supra*, does not prevail in England as in this country. Taylor, Priv. Corp. § 658, note 1; Cook, Stock and Stockholders, § 42. The absence of the recognition in English cases of this trust feature of a subscription to stock renders them unsafe guides in American courts when dealing with questions relating to the liability of stockholders in reference to the debts of the corporation.

Several cases are cited in support of the contention that the provision of section 6, art. 14, of the Constitution does not have such effect on the transaction in this case as to leave the stockholders who participated therein still liable for the debts of the corporation. In *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. ed. 595, it was held that a similar provision of the Constitution of Arkansas did not authorize a corporation itself to repudiate its liability on \$3,600,000 in bonds and \$1,800,000 in stock, both of which had been issued in payment for property worth only \$1,800,000. This case involves no question of the right of creditors to charge stockholders. As has been already shown, an arrangement which would preclude the corporation from demanding further payment upon stock issued by it would not prevent creditors from proceeding against the stockholders if the stock has not really been paid for. Nothing is said in that case to indicate that the transaction would have been sustained to the same extent as against the creditors of the corporation. The case is not an authority against the existence of the liability here asserted. The same thing may be said of the case of *Peoria & S. R. Co. v. Thompson*, 108 Ill. 187, which is cited in the opinion in the case just mentioned. In *Stein v. Howard*, 65 Cal. 616, it was held that an increase of capital stock, under a resolution authorizing the additional shares to be sold at 87½ cents on the dollar, was not such "a fictitious increase of the stock" as was prohibited by a constitutional provision similar to ours. Neither in this case nor in the two cases cited just before it is there anything in the report to indicate what, if any, statutory regulations prevailed in those States in reference to the mode in which subscriptions to stock in corporations should be made payable.

We will now turn to the principal cases which assert the invalidity as against creditors of attempts to satisfy the liability on stock subscriptions by the transfer of property at a gross overvaluation. In *Jackson v. Traer*, 64 Iowa, 469, the facts were that a railway company had been indebted to a construction company in the sum of \$70,000, which it was unable to pay; and in satisfaction of the debt it issued to the construction company certificates of stock of the face value of \$350,000, which shares were distributed among the members of the construction company. It was held that such members were to be treated as stockholders who had paid 20 per cent on their stock, the stock held by them being five times greater in amount than the debt for which it was issued, and that they were liable to a creditor of the corporation to the extent of the unpaid 80 per cent of the par value of the stock. To the same effect is *Osgood v. King*, 42 Iowa, 478. In neither of 12 L. R. A.

these cases does it appear that the statutes of Iowa require subscriptions to stock to be made payable in any particular mode. The existence of the liability was not made to depend upon a statutory requirement in this regard. By the New York Statute governing the organization of corporations for manufacturing purposes it is provided "that the trustees of such companies may in good faith purchase property necessary to their business, and issue stock to the amount of the value thereof in payment therefor, and the holders of such stock are exempt from liability for the debts of the corporation." In *Douglass v. Ireland*, 78 N. Y. 100, it appeared that the capital stock of the corporation organized under that Act to the amount of \$800,000 was issued in consideration of the assignment to the company of executory contracts for the purchase of property found by the jury to be of the value of \$68,000. The defendant acquired his stock with a full knowledge of the facts, having, as a trustee of the corporation, participated in the transaction. He was held liable as a stockholder who had not fully paid up. The court said: "A deliberate and advised overvaluation of property thus purchased and paid for is a fraud upon the law, and a violation of the condition upon which the exemption of stockholders from liability under the provisions of the statute is made to depend. It is in direct violation of the policy as well as the terms of the law which demands payment, either in money or property at its value, of all the capital stock of the company, as a condition of immunity to the stockholders from liability for debts of the corporation. The payment of an amount for property in excess of its value deprives creditors and the public of the security contemplated by the Statute, and thus a fraud is perpetrated as well upon the law as upon creditors. The fraud is consummated by the issue of stock as full paid under the Act of 1853, which has not been fully paid for in value by the property for which it is issued, and it does not depend upon any fraudulent intent other than that which is evidenced by the act of knowingly issuing stock for property to an amount in excess of its value. All that is necessary to establish the legal fraud and take the stock issued out of the immunity assured to stock honestly issued in pursuance of the Act of 1853 is to prove two facts: (1) that the stock issued exceeded in amount the value of the property in exchange for which it was issued; and (2) that the trustees deliberately and with knowledge of the real value of the property overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value." The rule laid down in this case is firmly established in New York. *Boynston v. Andrews*, 63 N. Y. 93; *Schenck v. Andrews*, 57 N. Y. 133; *Boynston v. Hatch*, 47 N. Y. 225; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87.

A New Jersey Statute authorized payment for capital stock to be made "either in money or in land; the land to be appraised by the board of directors, and taken at such value on such terms as may be agreed on." The capital stock of a corporation was fixed at \$100,000, all of which was subscribed for by five persons, who became the directors of the company. Certain lands were purchased for \$50,000, and



the deed thereto was made directly to the corporation, which gave its obligations for the whole of the purchase money. The directors then appraised the lands at \$100,000, and credited \$50,000 of that valuation as a payment of 50 per cent on their stock subscriptions. The lands were not worth more than the original purchase price. On this state of facts it was held, in *Wetherbee v. Baker*, 85 N. J. Eq. 501, that, as against creditors of the corporation, such allowance of credit on the subscriptions was invalid, and that the stockholders were liable for the whole amount of their subscriptions. In reference to the valuation of the land by the directors, as authorized by the Statute above quoted, the court says: "The directors, in making the appraisal and valuation and dealing with their stock subscriptions, act in a fiduciary capacity, and are bound to discharge the duties of the trust with fidelity. This appraisal, it is manifest, was illusory, and made only in the interest of the directors, who were to profit by it;" and that "in all such cases transactions under such powers have been upheld only where the contract for the rendition of services or the purchase of property payable in stock has been made in good faith, and the property taken in payment of stock subscriptions has been put in at a fair bona fide valuation; and the courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors only where payment has been made in money, or in what may fairly be considered as money's worth."

In *Bailey v. Pittsburg & O. G. O. & C. Co.*, 69 Pa. 334, the facts were that Bailey, with two other persons, on September 29th purchased certain land for \$125,000, and on October 1st following the corporation agreed to take the land at an advance of \$50,000, subject to the whole purchase money, so that the stock subscription of \$50,000 made by Bailey and the two others should be paid for in full by the agreed advance on the land. The Statute provided that "no share shall be issued for less than its par value." It was held that by such a transaction Bailey did not pay for his stock, and that he was still liable thereon. Rights of creditors were not involved in this case. The transaction was regarded as a fraud on the rights of other stockholders, and as involving a non-compliance with statutory safeguards intended for the protection of the public. The case is not unlike the Alabama case of *Parson v. Joseph*, *supra*.

The review of the authorities will not be further extended. Discussions of them may be found in Cook, *Stock and Stockholders*, §§ 83-47; 1 Morawetz, *Priv. Corp.* §§ 425-429; 2 Morawetz, *Priv. Corp.* § 825 *et seq.*; 2 Waterman, *Corp.* § 188; Taylor, *Priv. Corp.* §§ 545, 701 *et seq.* Our examination satisfies us that the weight of American authority does not support the statement made by Mr. Cook, in section 47 of his work on *Stock and Stockholders*, to the effect that the attempts which have been made, in cases where stock was issued for property taken at an overvaluation, to hold the party receiving such stock liable for its full par value, less the actual value of the property received from him, have been unsuc-

cessful; and that, if there has been an overvaluation, which is shown to have been fraudulent, then the contract is to be treated like other fraudulent contracts, and is to be adopted *in toto* or rescinded *in toto* and set aside. We have found no authority at all asserting the exemption of the stockholder from such liability where it appeared that the stock subscription was governed by a statutory regulation at all similar to section 1805 of the Code of 1876, or section 1662 of the Code of 1886. On the other hand, the New York, New Jersey, Maryland and Pennsylvania decisions which have been cited show that the courts in those States, in giving effect to statutory requirements, certainly no more stringent than ours, as to the mode in which stock subscriptions shall be made payable, do not allow attempted payments in property worth greatly less than the amount of the stock issued therefor to foreclose the just demand of corporate creditors to require that the stock subscriptions be made good in money, or in money's worth, as contemplated by the statutes. Those courts recognize in such provisions safeguards intended for the protection of persons dealing with corporations as well as for the corporations themselves and the persons associated together therein. Our general laws afford the amplest and freest facilities for persons desiring to engage in almost any kind of lawful venture to secure by corporate association the advantages of defined and limited responsibility, and at the same time the efficient execution of their purposes by means of an artificial being, changes in the membership of which cause no break in the continuity of its action, nor affect its capacity to act, within the scope of its powers, as a natural person. It is plain that such associations, endowed with such powers and privileges, would be a source of danger to persons dealing with them, unless the law required that in their formation suitable provisions be made for a substantial responsibility for such engagements as they may enter into. When legal provisions are found which are appropriately framed to secure the existence of such responsibility, it is not permissible so to construe them as to allow a mere formal and illusory compliance therewith to defeat the objects intended to be accomplished. No argument is needed to show that a requirement that the stock of a corporation shall be paid in money, or in labor or property at its money value, inures to the benefit of persons who may become creditors of the corporation, in that it requires the capital stock to be the representative of substantial values, and insures the existence of a fund which must be within reach for the satisfaction of debts if the affairs of the corporation are managed as contemplated by the law. It is equally clear that if a stock subscription which is required to be made payable in money, or in labor or property at its money value, and is in fact made payable in property at a designated money valuation, may be satisfied by the transfer of property the value of which is insignificant, or merely nominal, as compared with the valuation stated, then, so far as this provision of the law looks to the protection of creditors, it might as well have allowed the subscription to be made pay-

able in "chips and whetstones." Except section 6, art. 14, of the Constitution, and section 1905 of the Code of 1876, there were not, at the time of the formation of the appellee, in reference to the mode of satisfying stock subscriptions, adequate provisions for the protection of creditors of such corporations. Those enactments are appropriate for this purpose. The requirement of section 1905 of the Code of 1876, that "in case of a failure to perform the labor or deliver the property according to the terms of the subscription, the money value thereof, as named in the lists of subscription, shall be paid by the subscribers," cannot be regarded as providing for a penalty to compel the performance of the labor or the delivery of the property. The evident meaning is that, in the event of such failure, the corporation shall receive the equivalent, and no more nor less than the equivalent, in money, or the labor, or the property, as the case may be. This clause of the Statute is convincing that the statement of the money value of the property in which the subscription is made payable is a material feature of the contract, and that the property delivered must be of a value to correspond with that named in the subscription. As affecting the rights of creditors, the Statute is simply a definite requirement as to what shall constitute that trust fund to which persons dealing with the corporation have a right to look. The defendants in this case, in making and accepting payments on the stock subscriptions, were acting in a fiduciary capacity in reference to that fund. The performance of the contract of subscription, to be binding on creditors, should have been such as is required in the case of a contract between a trustee and one having knowledge of his trust obligation. In form the stock subscription was such as the Statute called for. Under section 2023 of the Code of 1876, and section 8, art. 14, of the Constitution the stockholders are liable only for the unpaid stock owned by them. But the creditors are entitled to demand that the payment on the stock shall be an actual and bona fide discharge of the liability imposed by the contract of subscription. The defendants, in making and accepting payment in property, were bound to exercise their judgment and discretion fairly and honestly directed to secure a substantial compliance with the terms of the contract. In the exercise of that judgment and discretion they are entitled to the benefit of whatever margin there may be for honest differences of opinion in the valuation of the property; but a deliberate and intentional overvaluation of the property is not permissible. The transfer of the property known to be worth only \$5,000 to pay a stock subscription of \$200,000 does not bear the semblance of a compliance with the contract of subscription as to one of the essential terms thereof. The taking of property at a valuation forty times greater than its actual worth, which was known to the parties, shows upon its face the absence of a bona fide exercise of judgment and discretion in making the valuation, and an intentional non-compliance with the requirement that the property shall be taken at its money value. The absence of the fraudulent motive on the part of a trustee does not give validity to a mere sim-

ulated execution of the trust; and an averment of fraud in reference thereto is unnecessary. The parties beneficially interested in the trust are entitled to a substantial compliance with its terms. They are not bound by an act of mere formal compliance, which really involves their practical exclusion from the benefits intended to be secured to them. The capital stock of a corporation constitutes the basis of its credit, and persons dealing with the corporation have a right to assume that the stock has been actually paid in, or that it may be reached. The transaction whereby payment was attempted to be made, as shown by the averments of the bill in this case, is not binding on creditors, because it did not constitute such a payment as was contemplated by the terms of the contract of subscription, and was in effect a palpable evasion of the requirements of the Statute. It is, however, contended in the argument for appellee that the appellant, through its officers, knew of the history of the organization of the appellee corporation, and of the mode in which the subscriptions to the stock were to be paid; that in fact it was an active promoter of the whole transaction in advance. It may be that such an unauthorized extinguishment of the subscription liability may not be impeached by one who was actively instrumental in securing the organization of a corporation with a view of making a sale of property to it, and did in fact accept benefit in dealing with the corporation with full knowledge of the arrangement by which the stock was proposed to be paid for. Disability to question a wrongful transaction usually attaches to a party who consented thereto or participated therein. *Deadwood First Nat. Bank v. Gustin-Minerva Con. Min. Co.* 43 Minn. 327, 6 L. R. A. 676; *Bank of Fort Madison v. Alden*, 129 U. S. 872, 32 L. ed. 725; *Parson v. Joseph*, *supra*; 2 Morawetz, Priv. Corp. § 829.

But the averments of the bill in this case do not show that the appellant participated in or knew of the mode in which the stock subscription was undertaken to be paid. In the absence of averments upon this subject, it is not to be taken for granted that the appellant, in making the agreement to convey the land to the corporation when formed, contemplated that the stock in the corporation should not be paid for as the law directed, or that, in accepting the notes of the corporation, it had such knowledge, and took such part in the furtherance of the acts connected with the transfer of the bond for title for the stock, that it is to be presumed to have dealt with the corporation on the basis of treating its capital stock as fully paid up. We find nothing in the averments of the bill to preclude appellant from asserting the right of a creditor of a corporation to hold stockholders liable for subscriptions to stock not really paid for. The statements of fact in the bill support the conclusions therein averred that the transaction by which payment for the stock was attempted to be made was merely colorable—in other words, that it was not really a payment—but had only the outward appearance, without the substance of payment. Such being the case, the individual defendants are still liable on their stock subscriptions to the extent that the attempted payment falls

short of a bona fide compliance with the terms of the contract, and the allegations as to excessive overvaluation of the property in question were sufficient under the rules above

stated. The chancery court erred in sustaining the demurrers.

*Reversed and remanded.*

## NORTH CAROLINA SUPREME COURT.

Andrew L. FOLLETT, *Appt.*,

v.

UNITED STATES MUTUAL ACCIDENT ASSOCIATION.

(107 N. C. 341.)

1. A claim that deafness is a bodily infirmity which is covered by a representation by an applicant for accident insurance that he is free from bodily infirmities is deemed to have been waived where the insurer's agent, by personal observation, knew or had abundant opportunity to know the extent of applicant's deafness before the application was signed, notwithstanding a provision in the policy that the company's agents should have no power to waive its conditions.

2. An insurance agent's knowledge of an applicant's deafness before the signing of the application may be shown by cross-examination of the company's witnesses in a suit on the policy.

(December 1, 1890.)

**A**PPPEAL by plaintiff from a judgment of nonsuit entered by the Superior Court for Durham County in an action upon a policy of accident insurance brought to recover for injuries caused by a gun-shot wound. *Reversed.*

### Statement by Avery, J.:

This was a civil action tried at the January Term, 1890, of the Superior Court of Durham County, before Armfield, J. The plaintiff gave evidence of his injury which was shown to be accidental, and to have happened as set out in the complaint, and that his hand was amputated above the wrist, in consequence of said injury. He testified that he was partially deaf; had been so for thirty years to the same extent. That he was in good health, and his deafness did not interfere with the pursuit of his business. That he did not use any mechanical applications to enable him to hear conversation, though a person speaking to him had to elevate his voice above the ordinary conversational tone to enable him to hear. That when he took out his insurance his deafness was just as it had been for years, and is now, and was at the time of his injury. In addressing the witness (plaintiff), judge and counsel had to raise their voices to a loud pitch to enable the witness to hear the questions. He could not hear questions asked in the tone used to other witnesses. That he was well acquainted with the local agent of defendant, who took his application and solicited his insurance, and had

often conversed with him. That the said agent had a chance to know the extent of his deafness when he applied for the policy. That no question was asked about deafness, and nothing said about it when he made his application or received his policy. That he did not think of his deafness as a bodily infirmity, and did not intend to suppress the fact of his deafness as aforesaid. Plaintiff introduced and read the following letter from the secretary and general manager of defendant's company, having explained that the said letter was a reply to one written on September 10th by himself, under the assumed name of Samuel C. Moore:

### "EXHIBIT A.

"The United States Mutual Accident Association, 820, 822 and 824 Broadway, New York.

"September 17, 1889. P. O. Box, 851.

"Samuel C. Moore, Esq., Asheville, N. C.

"Dear Sir: I have your favor of 10th instant, and in reply beg to say that, from the description you give of your deafness, we do not think that it will debar you from becoming a member of the Association. Fill out the inclosed application and forward it to us, together with your regular membership fee of \$5.00, and on receipt we shall be pleased to issue a policy to you in this Association.

"Truly yours,

"James R. Pitcher,

"Secretary and General Manager."

J. J. Mackey, local agent of defendant, testified that he took plaintiff's application for membership in defendant company, and delivered him the policy. Plaintiff proposed to ask the witness if he knew the extent of plaintiff's deafness at the time of the application and of delivery of certificate or policy. This question was, under objection of defendant, excluded, and plaintiff excepted. Exception 1. Plaintiff then asked said witness if he had frequently conversed with plaintiff prior to said application, and if any questions were asked plaintiff by him, at time of application, about deafness, or plaintiff's attention drawn to it in any way. This question was excluded, and plaintiff excepted. Exception 2. Plaintiff proved by his wife that one Frank, adjuster of defendant, who came to see plaintiff after his injury and the amputation of his hand, said that the company was satisfied that no fraud or concealment was intended by plaintiff in not stating in his application that he was deaf. Defendant introduced the certificate or policy, and the application. His honor stated that he would instruct the jury that plaintiff was not entitled to recover anything upon the ground that plaintiff's deafness was a "bodily infirmity" which he had not disclosed in his reply to the questions printed in the application, and that this was so, notwithstanding such suppression

NOTE.—As to how far company bound by acts and knowledge of agent, see notes to *Equitable L. Assur. Soc. v. Haslewood* (Tex.) 7 L. R. A. 217; *Davidson v. Old People's Mut. Ben. Soc.* (Minn.) 1 L. R. A. 432.

11 L. R. A.

was not fraudulent or intended, and though his deafness did not contribute to the injury. Exception 8. To this ruling and intimation plaintiff excepted, and, in deference thereto, submitted to a judgment of nonsuit and appealed to the supreme court.

The issues framed were as follows:

(1) Were the alleged receipt and acquittance obtained by the fraud or undue influence of plaintiff or its agent?

(2) Was the plaintiff, at the time of the execution of the alleged receipt and acquittance, incapable, by reason of his then mental condition, of understanding the meaning and effect of said paper writing?

(3) What is plaintiff entitled to recover from defendant on said policy?

Judgment: This cause coming on to be heard before me, in deference to the court, plaintiff submits to a judgment of nonsuit, and it is adjudged that the plaintiff take nothing by his suit, and the defendant go without day, etc.

Section 12 of the application was as follows: "(12) I have never had, or am I subject to, fits, disorders of the brain, rheumatism, or any bodily or mental infirmity, except as herein stated. Had an attack of rheumatism six years ago."

Two of the conditions of the policy were as follows: "(5) The application for membership, together with the classification risks indorsed thereon, are made a part of this certificate. Fraud or concealment in obtaining membership, or attempts by like means to obtain indemnity, shall make the membership and this insurance absolutely void. The Association may cancel this insurance and membership at any time by refunding the insured (member) herein named the membership fee, together with any balance to his credit deposited for assessments in advance. This membership and insurance, unless sooner terminated by forfeiture, cancellation or resignation, shall cease and determine when the insured (member) reaches the age of sixty-five years."

"(10) The provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this certificate and insurance, are conditions precedent to the issuing of this certificate and to its validity, and no waiver shall be claimed by reason of the act of any agent, unless such act or waiver shall be specially authorized in writing over the signature of the secretary of this Association."

**Messrs. W. W. Fuller, F. L. Fuller and R. B. Boone**, for appellant:

In making and forwarding application, the insurance company is held to do all that the agent does and to know all that he knows, and is estopped from availing itself, of the act or omission of its agent.

Bliss, L. Ins. § 290; Phillips, Ins. § 1876.

Just principles of public policy require that insurance companies should be held to a strict degree of responsibility for the acts of their agents.

Bliss, L. Ins. §§ 78-80.

As to agents' authority and power generally, as directly applicable in this case, see—

May, Ins. §§ 120, 181, 182, 140, 142, 143, 144; *Rowley v. Empire Ins. Co.* 86 N. Y. 550; *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 18 12 L. R. A.

Wall. 234, 20 L. ed. 623; *Woodbury Sav. Bank & B. Assn. v. Charter Oak F. & M. Ins. Co.* 81 Conn. 517; *Beebe v. Hartford County Mut. F. Ins. Co.* 25 Conn. 51.

Courts do not favor warranties by construction.

May, Ins. § 164.

When the language of the question in the application calls for an answer which to some extent may be a matter of opinion, so as to admit of different answer, if the insured answers in good faith, and when the application is unintentionally defective in a matter known to the insurer or its agent, the insured will be excused though he did not give the desired answer.

May, Ins. § 166, and the cases cited; *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 18 Wall. 223, 20 L. ed. 617; *Carpenter v. Washington Ins. Co.* 3 Am. Lead. Cas. 5th ed. p. 917; *Virginia F. & M. Ins. Co. v. Saunders*, 14 Va. L. J. 881.

**Messrs. J. S. Manning and J. W. Hinsdale**, for appellee:

In express words, the application is made a part of the policy, and becomes one of the paper writings containing the contract between plaintiff and defendant.

*Bobbitt v. Liverpool & L. & G. Ins. Co.* 66 N. C. 70.

A false statement in the application, when the application constitutes a part of the contract, will render the policy void.

*Bobbitt v. Liverpool & L. & G. Ins. Co. supra*; *Mace v. Provident L. Ins. Assn.* 101 N. C. 122; *Cuthbertson v. North Carolina Home Ins. Co.* 96 N. C. 480; *Sugg v. Hartford F. Ins. Co.* 93 N. C. 143; *Jeffries Economical Mut. L. Ins. Co.* 89 U. S. 23 Wall. 47, 22 L. ed. 888; *Knickerbocker L. Ins. Co. v. Trefz*, 104 U. S. 203, 26 L. ed. 710; *Eterna L. Ins. Co. v. France*, 91 U. S. 510, 23 L. ed. 401; *Moulou v. American L. Ins. Co.* 111 U. S. 846, 28 L. ed. 451.

It is no answer that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it.

*Jeffries v. Economical Mut. L. Ins. Co. supra*; May, Ins. §§ 179-181, 185; *Mace v. Provident Life Ins. Assn. supra*.

The statements made in the application are warranties, made so by express words of the application and policy, and must be strictly true.

May, Ins. §§ 179-181; Porter, Ins. pp. 145, 146, and cases cited *supra*.

Knowledge of the agent cannot help the plaintiff, and the evidence was properly excluded as immaterial.

Bliss, L. Ins. § 83, pp. 123, 123; *Chass v. Hamilton Ins. Co.* 20 N. Y. 53; *Lochner v. Home Mut. Ins. Co.* 17 Mo. 247.

The application contained these printed words: "The Association is not bound by statements made to agents or brokers not written in this application." This was notice to the plaintiff of the extent of the agent's authority.

*Biggs v. North Carolina Home Ins. Co.* 88 N. C. 141; Bigelow, Fraud, p. 235.

**Avery, J.**, delivered the opinion of the court:

It was competent to prove by the agent of

the defendant, on cross-examination, that he knew, or had had abundant opportunity and good reason to know, the extent of the plaintiff's deafness, when he solicited him to take out a policy or subsequently and before the application was signed. Actual knowledge of the plaintiff's defective hearing on the part of the agent was constructive notice of it to his principal, and hence the latter is deemed to have waived the objection that the deafness of the former was a bodily infirmity, notwithstanding the fact that it was provided in the policy that the agents of the company should have no power to waive its conditions. *Hornthal v. Western Ins. Co.* 88 N. C. 73; *Dupree v. Virginia Home Ins. Co.* 93 N. C. 240, 92 N. C. 422; *Collins v. Farmville Ins. & Bkg. Co.* 79 N. C. 284; *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 18 Wall. 222, 20 L. ed. 617; *Home Mut. F. Ins. Co. v. Garfield*, 60 Ill. 124; *Witherell v. Maine Ins. Co.* 49 Me. 200; *American Cent. L. Ins. Co. v. McOrea*, 8 Lea, 518; *Wood, Ins. § 496*; *Morrison v. Wisconsin O. F. M. L. Ins. Co.* 59 Wis. 162; *Shafer v. Brooklyn F. Ins. Co.* 53 Wis. 861; *Westchester F. Ins. Co. v. Earle*, 38 Mich. 148.

An application for insurance constitutes a part of the contract between the insurer and the insured, and the representations contained in it are presumptively inducements to the former to enter into it. But when it appears that an agent, through whom a corporation acts, himself examined and valued, or had opportunity to estimate by examination actually made by him, the value of property insured against fire, or frequently conversed with a man partially deaf, had opportunity to test the extent of his infirmity, and afterwards solicited or forwarded, with favorable recommendation, his application for insurance against accident, the insured will not be absolutely precluded from showing the facts, as evidence that the corporation assented to what subsequently appeared to be an overvaluation in the one case, or had knowledge of the defective hearing, and waived objection to the risk on account of it in the other. It was material that the jury, in passing upon and finding the facts upon which the liability of the defendant depended, should hear any testimony that would aid them in determining whether the defendant company was induced, or might reasonably have been induced, by the false representation contained in the application, to enter into the contract, when it would not have done so had its agents had full knowledge of the facts. The representation in the application must be, in contemplation of law, falsely and fraudulently made, in order to prevent a recovery in case of loss; but in the absence of any proof of knowledge of the misrepresentation complained of, or waiver of objection on account of it by the agents of the insured, a false statement constituting an apparent inducement to the contract will be deemed to have been made with fraudulent intent. *Mace v. Provident L. Ins. Assn.* 101 N. C. 183.

The courts of this country have differed widely as to the admissibility of testimony in cases like that before us. Some have held that parol testimony was not competent in a case to show a waiver of the requirements in the conditions of a policy or of the warranty arising

out of the application; while others have limited the power of agents to waive its requirements in the face of a prohibitory provision in the policy, to matters not constituting essential and material portions of the contract, such as the stipulations as to proof of loss. There is a very general concurrence of courses in the view that where the execution of a contract has been procured by the fraud of an agent of the insurer, it may be declared void upon showing the acts of the agent inducing its execution. This case is distinguishable from that of *Bobbit v. Liverpool & L. & G. Ins. Co.*, 66 N. C. 70, in that in the latter the plaintiff not only made a false statement, which was an apparent inducement to the defendant to issue the policy, but failed to rebut the presumption of fraudulent purpose by showing any actual knowledge of the true value of the property on the part of the corporation acting through its agent. In *Dupree v. Virginia Home Ins. Co.*, 93 N. C. 240, Chief Justice Smith, delivering the opinion of the court, said: "It was certainly competent to show this source of information possessed by the agency firm, in regard to the property included in both policies, when they issued the last, as tending to rebut the charge that it was solely brought about by the fraudulent statements contained in the plaintiff's application." The evidence referred to tended to show that a sub-agent of a general insurance agent had, the year before, inspected the same property for another company for which the general agent was acting, and had issued a policy upon the valuation then declared just by the sub-agent, and the general agent had the next year sent the insured the policy sued on, which was issued in the name of another company, upon the property destroyed by fire, but based upon the same valuation. Under the principle laid down, it was equally competent and material to show that Mackey, the agent of the defendant company, knew and could have informed his principal that the plaintiff was partially deaf, and, from the very nature of the case, could have communicated the extent of the infirmity. Being presumably in possession of the information acquired by its agent, the company is not deemed to have been induced to take the risk by the representation in the application that the plaintiff was not subject to any "bodily infirmity."

The principles announced by this court in the cases already cited are supported by reason and sustained by authority. *May, Ins. §§ 181, 182*; *1 Phillips, Ins. § 904*. In *Hornthal v. Western Ins. Co.*, *supra*, the court says that the policy "was issued and delivered to the plaintiff, with actual knowledge on the part of the agent, and constructive knowledge of his principal, and must be deemed to have been done with the full assent to the proposed increase." See also *Collins v. Farmville Ins. & Bkg. Co.* 79 N. C. 279; *Argall v. Old North State Ins. Co.* 84 N. C. 355; *Dupree v. Virginia Home Ins. Co.* 93 N. C. 422, 423. "The powers of the agent are prima facie co-extensive with the business intrusted to his care, and will not be narrowed by the limitations not communicated to the person with whom he deals." *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 18 Wall. 232, 20 L. ed. 617. So in the case of *Outhbertson*

v. *North Carolina Home Ins. Co.*, 96 N. C. 480 (cited by the defendant), the insured made a false representation as to the title of the property destroyed by fire, and offered no testimony to trace any actual knowledge of the facts to the defendant, or to rebut the presumption of a fraudulent intent by a waiver. *Justice Davis*, in *Mace v. Provident L. Ins. Assn.*, 101 N. C. 188, says: "A false statement made in the application, when the application constitutes a part of the contract, will render the policy

void, and so will any representation of a material fact by which the company is misled, if falsely and fraudulently made." But where there is a waiver, as in the cases of *Hornthal v. Western Ins. Co.* and *Dupree v. Virginia Home Ins. Co.*, *supra*, though the false statement be made in the application itself, it does not mislead, and cannot be considered an inducement to the contract.

There was error, for which a new trial must be granted.

## OREGON SUPREME COURT.

OAKES, *Resp.*,  
v.

NORTHERN PACIFIC R. CO., *Appt.*

(....Or....)

- \* 1. Carriers of passengers are responsible for the carriage and safe delivery of such baggage as by custom and usage is ordinarily carried by travelers; and the payment of the usual fare includes, in legal contemplation, a compensation for the conveyance of such baggage.
- 2. They are insurers of such baggage in the same manner and to the same extent as of goods or freight.
- 3. Baggage within the rule of such liability is confined to such articles as are usually carried as baggage for the personal use of the passenger or for his convenience, instruction or amusement on the journey, and does not include that which is carried for the purpose of business, such as merchandise or the like.
- 4. While the obligation of a carrier of passengers is limited to ordinary baggage, yet if the carrier knowingly permit a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly such, it will be liable for their loss or destruction, though without fault.

(March 23, 1891.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for the loss of certain of plaintiff's property while in defendant's possession for transportation. *Affirmed.*

Statement by Lord, J.:

This is an action brought by the plaintiff to recover from the defendant the sum of \$1,401.25 on account of the alleged failure of the defendant to deliver to the plaintiff certain personal property, specifically enumerated in the complaint, and constituting the contents of seven trunks. The complaint alleges that at the time therein mentioned the plaintiff, to-

gether with his wife and several other persons, naming them, constituted the Oakes Comedy Company, an organization giving theatrical entertainments in the villages and cities situated on the line of the Company's road, and that on said day, or the night thereof, the plaintiff, as proprietor of said theatrical organization, had engaged and advertised his company to give an entertainment at Thompeon's Fall, Mont., and had started with said company of people and baggage, by the defendant's line of road, to said place from Hope, in Idaho; that prior to starting he applied to defendant's ticket agent at said Hope for transportation for himself and other persons aforesaid, and their trunks and contents, and other movable property necessary and proper to be used by them in the business in which they were engaged, and necessary and proper as their wearing apparel; that he informed said ticket agent that he desired transportation for said persons and property, and said agent informed that it would be necessary for plaintiff to buy five first-class tickets for the sum therein specified to secure such transportation; and that thereupon plaintiff purchased said tickets, and secured said transportation and carriage, etc., and delivered said property to its agents and servants, which was accepted and taken in their charge and care, and for which he received checks in addition to his said tickets; that it refused and failed to deliver, etc.; and through its own negligence said train was wrecked, and a large part of the property was destroyed by fire, etc. The answer of the defendant put in issue all the allegations of the complaint, or that it had any knowledge or information as to the contents of such trunks, or the value thereof, etc. Upon the trial, the jury, at the request of the defendant, were required to find special answers to the following questions: "First. What do you find to be the value of the baggage belonging to the plaintiff and his company which was lost in the wreck of the defendant's cars March 25th last, aside from the stage properties, costumes, musical instruments and theatrical property of the comedy company? Answer, \$381.25. Second. What do you find to be the value of the stage properties, musical instruments, advertising matter, tickets, stage costumes, and stage paraphernalia destroyed in the wreck on the 25th of March last? Answer, \$754.75." At the same time the jury found a general verdict in favor of the plaintiff for \$1,186, being for the full value of all the

\* Head notes by LORD, J.

NOTE.—As to a carrier's liability for loss of baggage and as to what constitutes baggage, see notes to *Hartwell v. Northern Pac. Exp. Co.* (Dak.) 8 L. R. A. 845; *Metz v. California Southern R. Co.* (Cal.) 9 L. R. A. 481.  
12 L. R. A.

property belonging to the plaintiff and his company which was lost in the wreck. The counsel for the defendant moved to set aside the general verdict because the same was inconsistent with the special findings found by the jury, and moved the court to render a judgment upon such special findings in favor of the plaintiff and against the defendant for the sum of \$881.25, which the court refused to do, and rendered judgment for the plaintiff for the sum of \$1,186.

*Messrs. Dolph, Bellinger, Mallory & Simon* for appellant.

*Messrs. Jones & Stuart* for respondent.

Lord, J., delivered the opinion of the court:

The defendant does not deny liability for the loss or destruction of the personal baggage of the plaintiff and the members of his troupe, but it denies liability for property other than actual personal baggage. In determining the question presented by this record it is necessary to understand the nature and extent of the obligation which a carrier of passengers by rail assumes as respects the personal baggage of the passenger. That obligation requires it not only to carry the passenger, but also to carry a reasonable amount of his personal baggage. "The carriage of the baggage of the passenger," said Andrews, J., "under reasonable limitations as to amount, is the ordinary incident to the carriage of the passenger; and the duty arises on the part of the company to carry the baggage of the passenger as incident to the principal contract, without any specific agreement or separate compensation." *Isaacson v. New York Cent. & H. R. R. Co.* 94 N. Y. 278. As respects such baggage, a carrier of passengers is held to the same liability as a common carrier of goods. For its loss or destruction, save by the act of God or the public enemy, it must respond, though without fault on its part. To this extent it is an insurer, and is responsible for the carriage and safe delivery of such baggage, the same as goods intrusted to it as freight. But it is only to such articles as may be legally termed "baggage" that such liability attaches, no matter what may be the contents of the bag or trunk. As to what constitutes "baggage" in the legal sense, or "ordinary baggage," or "personal baggage," as commonly used in England, it has been found by the courts difficult, if not impossible, to define with accuracy within the meaning of the rule of the carrier's liability. "It is agreed on all hands," said Erle, Ch. J., "that it is impossible to draw any very well defined line as to what is and what is not necessary or ordinary baggage for a traveler. That which one traveler would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance." *Phelps v. London & N. W. R. Co.* 19 C. B. N. S. 321. In a general sense it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience and comfort, according to the habits and wants of the class to which they belong. In *Weeks v. New York, N. H. & H. R. Co.*, 9 Hun, 669, it is said that a passenger may carry with

him "such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and convenience, or protection." In *Jordan v. Fall River R. Co.*, 5 Cush. 69, the rule is stated to be "that baggage includes such articles as are of necessity or convenience for personal use, and such as is usual for persons traveling to take with them." In *Johnson v. Stone*, 11 Humph. 419, the court said: "It is not practical to state with precise accuracy what shall be included by the term 'baggage.' It certainly includes articles of necessity and personal convenience usually carried by passengers for their personal use; and what these may be will very much depend upon the habits, tastes and resources of the passenger." In *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 263, 20 L. ed. 428, Mr. Justice Field said that the contract "to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." In *Maerow v. Great Western R. Co.*, L. R. 6 Q. B. 612, Cockburn, Ch. J., said: "Whatever the passenger takes with him for his personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include," he continues, "not only articles of apparel, whether for use or ornament, . . . but also the gun-case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise and the like, or for larger and ulterior purposes, such as articles of furniture or household goods, would not come within the description of 'ordinary luggage' unless accepted as such by the carrier." See also 1 Am. & Eng. Encyclop. Law, *Baggage*, 1042; 9 Rorer, Railroads, 968; Hutch. Carr. §§ 677, 688, 689. So that it would seem that baggage, in the sense of the law, may consist of such articles of apparel as, through necessity, convenience, comfort or recreation, the passenger may take for his personal use, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey. The question what articles of property, as to quantity and value, contained in a trunk, may be deemed baggage within the rule, is to be determined by the jury according to the circumstances of the case, subject to the power of the court to correct any abuse. *New York Cent. & H. R. R. Co. v. Fratloff*, 100 U. S. 24, 25 L. ed. 581; *Bomar v. Maxwell*, 9 Humph. 622; *Brook v. Gale*, 14 Fla. 528; *Maurits v. New York, L. E. & W. R. Co.* 28 Fed. Rep. 765.

As the contract of the carrier of passengers

is to carry a reasonable amount of baggage for the accommodation of the passenger, it follows from the nature and object of the contract, as observed by Appleton, *Ch. J.*, "that the right of the passenger is limited to the baggage required for his pleasure, convenience and necessity during the journey." *Wilson v. Grand Trunk R. Co.* 56 Me. 62. Articles of whatever kind that do not properly come within the description of ordinary baggage are not included within the terms of such contract, nor is the carrier liable for their loss or destruction, in the absence of negligence. Stage properties, costumes, paraphernalia, advertising matter, etc., are not articles required for the pleasure or convenience or necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purposes of carrying on the theatrical business. They do not fall, therefore, under the denomination of "baggage," and, in the absence of negligence, no liability can arise against the carrier for their loss or destruction, unless accepted as baggage by the carrier. And so the special verdict of the jury found. They segregated the articles which might properly be termed "baggage" from those carried for the purposes of business, and found separately the value of each, but by their general verdict found the Company liable for the full value of the property upon the assumption that the trunks and their contents were received by the Company as baggage. The bill of exceptions discloses that the court charged the jury, among other things, as follows: "There is another phase of this question. If you find from all the evidence in the case that these trunks were brought to the agent of the Company, and their appearance indicated that they might not only contain the personal baggage, in the strict sense of the word, of the party, but that other things than baggage were received without objection, and no fraud or concealment was practiced by the plaintiff, if the trunks on their face advertised fully what their contents were, and their agents received them under these circumstances, and gave checks for them, and the Company, through these agents and employes, took them into its charge without making any objection, then the defendant is to be deemed to have taken these articles as baggage," etc. In substance, the complaint alleges that the defendant was fully informed of the contents of the trunks prior to their delivery, and that the defendant received and checked them as baggage, which is put in issue by the denials of the answer. Although the bill of exceptions contains no evidence, nor is any certified to us by this record, the issue permitted, and the instruction was designed to meet, the evidence upon this phase of the case. Under such circumstances, we are bound to assume that there was evidence tending to show that the defendant had notice of the nature of the property, and received it as baggage for transportation. In this view, the general verdict is not inconsistent with the special findings, for if the defendant knowingly permitted the plaintiff to take as baggage articles that would not come under that description, it is liable for their loss, though not arising from its negligence. While it is true that passenger carriers are not liable for merchandise and the like when packed up

with a traveler's baggage, if the baggage be lost, yet if the merchandise be so packed as to be obviously merchandise to the eye, and the carrier takes it without objection, he is liable for the loss. Story, *Bailm.* § 499. Thus, in the case of *Great Northern R. Co. v. Shepherd*, 8 Exch. 80, Parke, B., said: "If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss. So also upon any limit in point of weight, if the company chose to allow a passenger to carry more, they would be liable." And in *Macross v. Great Western R. Co.*, *supra*, Cockburn, *Ch. J.*, said: "If the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence." In *Sloman v. Great Western R. Co.*, 6 Hun, 546, Gilbert, *J.*, after stating and citing authorities to sustain the proposition that railroad companies are not liable for the loss of merchandise delivered to them under the guise of baggage for transportation along with a passenger, said: "They are liable, if they knowingly undertake to transport merchandise in trunks or boxes, which have been received by them for transportation, in passenger trains, unless the agent who receives the packages for that purpose violates a regulation of the company by so doing, and the passenger or owner of the goods has notice of such regulation,"—citing *Butler v. Hudson River R. Co.* 8 E. D. Smith, 571, and other cases. See also 2 Wait, *Act. and Def.* 82. "Doubtless," said Mitchell, *J.*, "if the carrier had actual notice of the nature of the property, and still received it as baggage, he would be liable." *Haines v. Chicago, St. P. M. & O. R. Co.* 29 Minn. 161. So in *Texas etc. R. Co. v. Cappe* (Tex.), 16 Am. & Eng. R. R. Cas. 118, it was held that where a railroad company, through its baggage or ticket agent, receives articles for transportation as baggage, knowing at the time that such articles are not properly baggage, the company will be responsible therefor as a common carrier, and will be estopped from denying that the same was baggage. *Chicago, R. I. & P. R. Co. v. Conklin*, 82 Kan. 55; *Minter v. Pacific R. Co.* 41 Mo. 508. Again, in *Hoeger v. Chicago, M. & St. P. R. Co.*, 63 Wis. 100, a traveling agent applied to a railroad company to transport his sample trunks as baggage, and the company, knowing their contents, received and checked them as baggage, and carried them as such on the passenger train on which he rode; and the court held that both parties were estopped to claim that such trunks were not baggage, and to be treated as such, and not as ordinary freight. So that, while the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly such, it will be liable for their loss or destruction,



though without fault. Now, the issue invites and the instruction indicates that there was evidence tending to prove that the contents of the trunks were fully advertised, and that the agent of the defendant knew that they contained, besides personal apparel, stage costumes and properties, and that they were received

and checked as baggage; and in such case the defendant is liable for their loss, though without fault, as the jury have found by their verdict, and the court affirmed by its judgment.

In this view there is no inconsistency in the general verdict with the special findings, and the judgment must be affirmed.

## PENNSYLVANIA SUPREME COURT.

John GLENNON

v.

LEBANON MANUFACTURING CO., App't.

(....Pa....)

**Loss caused by the unskillful work of a servant may be set off against his claim for wages and the set-off is not limited to his wages for the particular days during which the damage was done.**

(March 9, 1891.)

**A PPEAL** by defendant from a judgment of the Court of Common Pleas for Lebanon County in favor of plaintiff in an action brought to recover wages alleged to be due and unpaid. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Grant Weidman and Frank E. Mally*, for appellant:

The damages sustained by appellant was a good defense *pro tanto* to the claim of appellee.

The formal plea of set-off was not necessary in order to enable the appellant to prove the damages and the circumstances out of which they arose.

*Leech v. Baldwin*, 5 Watts, 449; *Heck v. Shener*, 4 Serg. & R. 249; *Pownall v. Bair*, 78 Pa. 403; *Blessing v. Miller*, 102 Pa. 45; *Gaw v. Wolcott*, 10 Pa. 43.

Damages resulting to a master from his servant's non-performance, or negligent or unfaithful performance, of the work for which he was hired are *ex contractu*, and may, if capable of liquidation by any recognized measure, be set off against the servant's claim for wages.

*Hunt v. Gilmore*, 59 Pa. 450; *Nickle v. Baldwin*, 4 Watts & S. 290; *Shoup v. Shoup*, 15 Pa. 361; *Wright v. Cumpsty*, 41 Pa. 102.

When one undertakes to perform work for another, the law implies a contract to do it with care and skill, and an action of assumpsit for a breach of such contract will lie.

*Conn v. Stumm*, 31 Pa. 14; *Reeside v. Reeside*, 49 Pa. 322.

*Mr. John Benson*, for appellee:

Damage done through carelessness and negligence is a wrong arising out of a tort, and cannot be set off in an action of assumpsit under our Defalcation Act.

*Gogel v. Jacoby*, 5 Serg. & R. 116; *Hunt v. Gilmore*, 59 Pa. 452.

When damage arises from a tort through the negligence or unskillful work of the plaintiff it cannot be set off in an action for assumpsit.

*Zell v. Arnold*, 2 Penr. & W. 292; *M' Cahan v. Hirst*, 7 Watts, 179.

Negligence in doing work may be proven in an action of assumpsit when directly connected with the cause of action, to prove failure of consideration of the promise to pay, but not as a set-off.

*Price v. Lewis*, 17 Pa. 51; *Leech v. Baldwin*, 5 Watts, 446; *Blessing v. Miller*, 102 Pa. 45.

**Paxson, Ch. J.**, delivered the opinion of the court:

This is a small case, yet it involves a question of some importance. It was not disputed that the plaintiff did certain work so unskillfully as to cause a loss to the defendant. The learned judge held that this loss could not be set off against the plaintiff's claim for wages, further than to the extent of the five or six days during which he was engaged upon the work which was so unskillfully done. It was contended by the learned counsel for the plaintiff that such set-off could not be allowed, because if the appellant (defendant) was injured by the imperfect work on the wheels, through the carelessness and negligence of the plaintiff, it is a wrong,—a tort; and redress cannot be obtained in this action of assumpsit by means of a set-off. We may concede that unliquidated damages arising from a tort growing out of a separate transaction cannot be set off in an

**NOTE.**—Set-off for damage by negligence and want of skill in performance of services.

In an action for services defendant is entitled to a counterclaim for loss resulting from the lack of skill and care on the part of the plaintiff. *Barretta, P. & H. Dyeing Estab. v. Wharton*, 2 Cent. Rep. 109, 101 N. Y. 681.

A recoupment may be allowed for loss sustained from plaintiff's negligence: but for this purpose a notice must be given to the plaintiff, and a definite statement of the claim filed. *Dermott v. Jones*, 64 U. S. 28 How. 220, 16 L. ed. 442. See *Green v. Biddle*, 21 U. S. 8 Wheat. 15 L. ed. 547.

A recoupment for defective workmanship in the construction of a brick store-building cannot be 12 L. R. A.

defeated by proof of changes in the contract, in no wise involved in the controversy. *Moellering v. Kayser*, 9 West. Rep. 374, 110 Ind. 533.

All damages directly arising from the inferior work upon it, or inferior materials, may be proved against a demand for its price. *Florida R. Co. v. Smith*, 38 U. S. 21 Wall. 255, 22 L. ed. 513; *Winder v. Caldwell*, 55 U. S. 14 How. 434, 14 L. ed. 437; *Dermott v. Jones*, 64 U. S. 23 How. 220, 16 L. ed. 442; *Ingle v. Jones*, 69 U. S. 2 Wall. 1, 17 L. ed. 762.

Evidence of delay contrary to the contract, and that the materials used and the workmanship were defective, is admissible. *Winder v. Caldwell*, *supra*. See notes to *Helwig v. Laschowaki* (Mich.) 10 L. R. A. 330; *Memphis & C. R. Co. v. Greer* (Tenn.) 4 L. R. A. 359.

action of *assumpsit*. This is not such a case. The plaintiff is a machinist, and was employed in defendant's machine-shop to do certain mechanical work for a compensation agreed upon. From this contract the law implies faithful service on the part of the employé, and an amount of care and skill proportioned to the character of the work which he has engaged to perform. If he performs it negligently and unskillfully it is a breach of contract, and when the employer is sued for wages earned under the contract he can defend by showing a failure on the part of the servant to properly perform his part, in consequence of which he has sustained damages. It is not a question of set-off or of tort; it is an equitable defense, growing out of the contract itself, and going directly to its consideration. *Leach v. Baldwin*, 5 Watts, 446, was an action by a common carrier against the consignee to recover the price of carrying, and it was held that the defendant might set up as a defense negligence or want of skill in the carrier, by which the goods were deteriorated in value. It was said by Justice Huston, in delivering the opinion of the court: "It is simply whether a person who has undertaken to perform a service for hire, and has performed it so negligently or dishonestly as to occasion loss to his employer, can recover full compensation, as though all had been done according to the contract. All our decisions say he cannot so recover. The defendant, if he can prove any facts which go to show that the plaintiff did not perform his part of the contract, or from negligence or want of skill performed it in such a manner as that the defendant suffered loss, may have the amount of that loss, as ascertained by the jury, deducted from the amount of the plaintiff's claim." The case of *Heck v. Shener*, 4 Serg. & R. 249, is even stronger. It was there held that in an action to recover compensation for services as a house-keeper, and for goods sold and delivered, evidence that the plaintiff was guilty of malfeasance in the execution of her trust, and embezzled the goods of the defendant, is not admissible by way of set-off; but it may be received under the plea of non-*assumpsit*, to defeat the action. To the same point are *Nickle v. Baldwin*, 4 Watts & S. 200; *Shoup v. Shoup*, 15 Pa. 361; *Wright v. Cumpsty*, 41 Pa. 102; *Hunt v. Gilmore*, 59 Pa. 450. This is not only good law, but it is good sense. Surely, if my servant sue me for wages, I may show as a defense to his claim that he has been unfaithful, negligent or dishonest, or that he wasted or embezzled my property. It was urged, however, that the defense was only available as to the portion of the claim for the particular days upon which the negligence and consequential injury occurred. This position cannot be sustained. The plaintiff was suing upon an entire contract. A separate suit could not be maintained for each day's work. *Logan v. Caffrey*, 80 Pa. 196. The authorities are clear that the defendant was entitled to make defense for his whole loss, and was not limited to defalcate it against the claim for the particular day's work when the loss occurred. *Prunall v. Bair*, 78 Pa. 403; *Blessing v. Miller*, 102 Pa. 45.

The judgment is reversed, and a *venire facias de novo* awarded.

12 L. R. A.

John G. CURTIN

v.

Philip H. SOMERSET, *App't*

(....Pa....)

**A contractor after the completion and delivery of possession of a building and its acceptance by the owner is not liable to a stranger to the contract for injuries resulting from defects in the construction of the building.**

(February 16, 1891.)

**A**PPREAL by defendant from a judgment of the Court of Common Pleas, No. 8, for Philadelphia County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

*Mr. E. Cooper Shapley*, for appellant:

If defendant had delivered possession of the hotel to its owner and the latter had accepted it, and if the accident happened while said owner, or its lessee, was in possession, then the plaintiff is not entitled to recover against the defendant.

Wharton, Neg. § 439 *et seq.*; *Collis v. Selden*, L. R. 8 C. P. 495; *Winterbottom v. Wright*, 10 Mees. & W. 115; *Blakemore v. Bristol & E. R. Co.* 8 El. & Bl. 1085; *Loop v. Litchfield*, 43 N. Y. 851; *Loose v. Clute*, 51 N. Y. 494; *Hydraulic Works Co. v. Orr*, 88 Pa. 535; *Boswell v. Laird*, 8 Cal. 469; *Francois v. Cockrell*, L. R. 5 Q. B. 501; *Heaven v. Pender*, L. R. 11 Q. B. Div. 508.

*Mr. Joseph S. Goodbread*, for appellee:

The appellant cannot cast the responsibility upon the hotel company for whom he erected the building.

*Mansfield Coal & Coke Co. v. McEnery*, 91 Pa. 185; *Meany v. Abbott*, 6 Phila. 266; *Walden v. Finch*, 70 Pa. 460.

The owner is not responsible for the acts of the architect or contractor.

*Willard v. Tatham*, 57 Pa. 874; *Meany v. Abbott*, *supra*; *Painter v. Pittsburgh*, 46 Pa. 222; *Blake v. Ferris*, 5 N. Y. 48; *Hilliard v.*

**NOTE.**—*Duty is an essential element of negligence.*

If there is no duty, there can be no negligence, as duty is an essential element, and such duty must be owed to the plaintiff, or an action will not lie. *Nickerson v. Bridgeport H. Co.* 46 Conn. 24; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Loose v. Clute*, 51 N. Y. 494; *Hofnagle v. New York Cent. & H. R. Co.* 65 N. Y. 608; *Housman v. Girard Mut. Bldg. & L. Asso.* 81 Pa. 256; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Heaven v. Pender*, L. R. 9 Q. B. Div. 302.

Negligence which consists merely in the breach of a contract will not afford ground for an action by anyone who is not a party to the contract, nor a person for whose benefit the contract was avowedly made. *Heaven v. Pender*, L. R. 11 Q. B. Div. 508.

Where one builds a mill-dam on a proper model, and the work is faithfully done, he is not liable to an action, though it breaks, and his neighbor's dam and mill below are thereby destroyed. *Livingston v. Adams*, 8 Cow. 175. See note to *Smethurst v. Proprietors of Ind. Cong. Church (Mass.)* 2 L. R. A. 605.

*Richardson*, 3 Gray, 349; *Chartiers Valley Gas Co. v. Lynch*, 10 Cent. Rep. 625, 118 Pa. 370; *Ardesco Oil Co. v. Gilson*, 68 Pa. 151; *Rapho v. Moore*, 68 Pa. 408; *Rigony v. Schuylkill County*, 108 Pa. 385.

Appellant knew that the building he was to erect was to be used as a hotel, and knew that persons without apprehending any danger would pass and repass and occupy the porch in great numbers. It was his duty to construct the porch in such a manner and with such materials, so that it would be held safe and secure, and suitable for the purposes for which it was intended. This duty the appellant owed to the public.

*Godley v. Hagerty*, 20 Pa. 387; *Carson v. Godley*, 26 Pa. 111.

If the appellant has committed only a breach of contract, he is liable to those only with whom he contracted; but, if he has committed a breach of duty, he is not protected by setting up a contract in respect of the same matter with another person.

*Smith*, Neg. p. 7; *Longmold v. Holliday*, 6 Eng. L. & Eq. 563; *McKain v. Blkin*, 27 Pittsb. L. J. 160; *Thomas v. Winchester*, 6 N. Y. 897.

*Paxson, Ch. J.*, delivered the opinion of the court:

The defendant, Philip H. Somerset, entered into a contract with the Sea Isle City Hotel Company for the erection of a hotel building, at Sea Isle City, according to certain plans and specifications. The building was completed, and accepted by the hotel company in the presence of their architect and the chairman of the building committee. Subsequently, at an entertainment given at the hotel by the proprietor or lessee, a crowd of persons, some twenty or more, having collected on the porch, a girder, which in part supported it, gave way, the porch fell and by reason thereof the plaintiff was injured. He brought this suit in the court below against the contractor, to recover damages for the injury he thus sustained, with the result of a verdict in his favor for \$4,000. Upon the trial the defendant asked the court below to instruct the jury that "if Somerset, the defendant, was the contractor for the erection of the hotel in question, for the Sea Isle Hotel Company, the owner, and after completion delivered possession of it to the said Sea Isle Hotel Company on June 30, 1888, which company accepted it, and if the accident in question happened after June 30, 1888, and while said owner or his lessee was in possession, then the plaintiff is not entitled to recover against the defendant." This point was refused, and it fairly presents the important question in the case. The contention of the plaintiff is that the accident was caused by the defective construction of the porch; that it was not according to the plans and specifications called for by the contract; that timber inferior in size and quality to those called for by the plans were used; that these defects were not observable after the building was completed, and, in point of fact, were unknown to the company when it accepted the building from the contractor. We must assume these allegations as substantially found by the jury, and the question arises, What is the responsibility of the contractor under such circumstances? That he would be

responsible to the company for any loss sustained by it in consequence of his failure to erect the building in conformity to the plans and specifications may be conceded. There was a contractual relation between them, and for breach of a contract, not known to, and approved by, the company, he would be liable. Is he also liable for injury to a third person, not a party to the contract, sustained by reason of defective construction? It is very clear that he was not responsible by force of any contractual relation, for, as before observed, there was no contract between these parties, and hence there could have been no breach. If liable at all, it can only be for a violation of some duty. It may be stated, as a general proposition, that a man is not responsible for a breach of duty where he owes no duty. What duty did the defendant owe to the plaintiff? The latter was not upon the porch by the invitation of the defendant. The proprietor of the hotel, or whoever invited or procured the presence of the plaintiff there, may be said to have owed him a duty,—the duty of ascertaining that the porch was of sufficient strength to safely hold the guests whom he had invited. The plaintiff contended, however, that, as the hotel company was not responsible, the contractor must necessarily be so. This, however, is moving in a circle. It by no means follows that, because A is not responsible for an accident, B or some other person must be.

Authorities are not abundant upon this point, for the reason that it is comparatively new. I do not know of any direct ruling upon it in this State. The true rule, which we think applicable to it, may be found in Wharton on Negligence, § 489. It is as follows: "There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency. Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and after he has finished his work, and it has been accepted by the city, a traveler is hurt while passing over it by a defect caused by the contractor's negligence. Now, the contractor may be liable upon his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent, responsible agent, breaking the causal connection." In section 440 the same learned author refers to the case of a contract with the postmaster-general to furnish certain road-worthy carriages; and after the delivery of the carriages the plaintiff is injured in using one of them, by reason of the carriage having been defectively built. "No doubt," says Mr. Wharton, "had the carriage been built for the plaintiff, he could have recovered from the con-

tractor. But there is no confidence exchanged between him and the contractor; and between them, breaking the causal connection, is the postmaster-general, acting independently, forming a distinct legal center of responsibilities and duties." This rule is distinctly recognized in *Winterbottom v. Wright*, 10 Mees. & W. 115. There one Atkinson contracted with the postmaster-general to provide a mail-coach to carry the mail-bags over a certain route. The driver was injured while in this service from a hidden defect in the coach. In a suit by him against Atkinson, it was held that he could not recover; Alderson, J., saying: "The contract in this case was made with the postmaster-general; and the case is just the same as if he had come to the defendant, and ordered a carriage, and had handed it at once over to Atkinson. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." *Francis v. Cockrell*, L. R. 5 Q. B. 501; *Heaven v. Pender*, L. R. 11 Q. B. Div. 508; *Coltiss v. Selden*, L. R. 3 C. P. 495, and other English cases, recognize the doctrine that in such instances there is no duty owing from the contractor to the public.

As was said by Martin, B., in *Francis v. Cockrell*, *supra*: "The law of England looks at proximate liabilities as far as possible and endeavors to confine liabilities to the persons immediately concerned." In *Loose v. Oute*, 51 N. Y. 494, it was held that the manufacturer and vendor of a steam boiler is only liable to the purchaser for defective materials, or for any want of care and skill in its construction, and if after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs, in consequence of such defective construction, to the injury of a third person, the latter has no cause of action, because of such injury, against the manufacturer. We do not find that any of the cases cited on behalf of the plaintiff conflict with the above views. In *Godley v. Hagerly*, 20 Pa. 887, the builder was the owner, and he was properly held responsible for an inherent weakness in the building by which an accident occurred. In *Carson v. Godley*, 26 Pa. 111, the warehouse was erected under the personal superintendence of the owner, and, having leased it to the government, he was held liable to a person whose goods were destroyed by the fall of the building, in consequence of its insufficiency for the purpose for which it was erected and leased. In *Thomas v. Winchester*, 6 N. Y. 897, the court held a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into market, to be liable to all persons who, without fault on their parts, are injured by using it. We think this case was correctly decided, but it has no application. The druggist owed a duty to every person to whom he sold a deadly poison to have it properly labelled to avoid accidents. Just here the analogy between his case and the one in hand ceases. The defendant owed no duty to the public, as before stated; his duty was to his employer. We need not pursue the subject further. We regard the weight of authority with the views above indicated. Moreover, they are sustained by the better reason. The consequence of holding the opposite doc-

trine would be far-reaching. If a contractor who erects a house, who builds a bridge or performs any other work, the manufacturer who constructs a boiler, piece of machinery or a steam-ship, owes a duty to the whole world, that his work or his machine or his steam-ship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned. We are of opinion that the defendant's first point should have been affirmed. So, also, his second point, which asked for a binding instruction in his favor.

This disposes of the case, and we should stop here, were it not that we do not wish any conclusion to be deduced from our silence in regard to the portions of the charge referred to in the fourth and fifth assignments. In these portions of the charge the learned judge used very strong expressions in regard to the alleged departure of the contractor from his plans and specifications. When the court characterizes such departure as "gross and almost criminal negligence," and as "glaringly and knowingly" done, "for which he could have no excuse, except the desire to increase his profits," the defendant has not much chance with the jury. Such intense expressions are ill suited to a judicial charge, and may seriously interfere with a calm and impartial consideration of the facts by the jury. More than this, it was assuming the province of the jury, for the facts are for them. Were there nothing else in the case, we would reverse upon these assignments alone. We prefer, however, to place our decision upon a ground which controls the case.

*Judgment reversed.*

George GUEST *et al.*, *Appts.*,  
v.

LOWER MERION WATER CO. *et al.*

(.....Pa.....)

1. A water company is a public corporation exempt from mechanics' liens where it is bound to furnish water at reasonable rates and after twenty years to transfer its works to a municipality at cost with 10 per cent thereon less dividends received if required to do so, and which is protected from competition until it is able to declare an 8 per cent dividend during five years.
2. A mechanics' lien on a public corporation is not authorized by the Act of April 7, 1870, providing for the sale of the property and franchises of a corporation on execution.

(May 27, 1891.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas for Montgomery County striking from the record a mechanics' lien which they were trying to enforce against property of the defendant Water Company. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Messrs. Bickel & Hobson* for appellants.

*Messrs. Henry C. Boyer and Morgan & Lewis* for appellees.

**McCellum, J.**, delivered the opinion of the court:

The Lower Merion Water Company was incorporated under the Act of April 29, 1874 (Pub. Laws, 98), and its powers, privileges and duties are defined by the 84th section thereof. It is clothed with the right of eminent domain, and it is protected from competition until it "shall have, from its earnings realized and divided among its stockholders, during five years, a dividend equal to 8 per cent per annum upon its capital stock." It is bound to furnish a sufficient quantity of pure water at reasonable rates and the court of common pleas of the proper county may, on the petition of any citizen using the same, make such order in the premises as may seem just and equitable, and enforce its decrees by the usual process. It may, at the expiration of twenty years from its introduction of the water, be required to transfer to the municipality in which it is located its works at their cost with 10 per cent thereon less the dividends it has received. This partial summary of its powers and duties clearly stamps it as a public corporation. It was decided in *Foster v. Fowler*, 60 Pa. 27, that the structures necessary to the operations of such a company are not subject to a mechanics' lien, and the present case is ruled by it if the Act of April 7, 1870 (Pub. Laws, 58), which allows the personal, real and mixed property, rights and franchises of a corporation to be sold on a writ of *fiery facias*, does not supersede it. It is contended that the Act referred to has rendered the reasoning on which the decision in *Foster v. Fowler*, *supra*, rests, and which is undoubtedly sound, inapplicable, and our sole inquiry is whether this contention is well founded. It should be noted at the outset that the principle of the case cited was distinctly approved in *Girard Pt. Storage Co. v. Southwark Foundry Co.*, 105 Pa. 248, where a mechanics' lien was sustained on the ground that the public was not directly interested in the business of the defendant corporation. In that case it was conceded that if the Girard Point Storage Company was in the nature of a public corporation its works would be protected from the incumbrance of a mechanics' lien. The case was heard in 1884, and this concession is evidence, at least, that it was not then suggested or supposed that the Act of 1870 could have any part in the decision of it, nor can we now see how that Act affects the claim of the appellants to a lien for their work and materials. The only execution process allowed for the enforcement of a mechanics' lien is a writ of *levari facias* to sell the building and curtilage bound by it, and the form of the writ is prescribed by the Statute which gives the lien. The levy and sale on the writ of *fiery facias* allowed by the Act of 1870 may embrace the property, franchises and rights of the corporation in any and every county of the Commonwealth and pass the title thereto as effectually as if "said property, franchises and rights were located, used, levied upon and sold in the county wherein said writ of execution was issued." It is obvious that such comprehensive process was not designed for the collection of a judgment founded on a mechanics' lien. This lien is statutory and in the procedure for its enforcement the judgment and execution are restricted to the property bound by it. It is the policy of the law to keep intact the property belonging to and essential to the operations of a public corporation, and hence its creditors will not be permitted to divide such property and sell a part of it. It would be a signal abandonment of this policy, and it would invite a division of the property to allow it to be sold on mechanics' lien process. This could not be done prior to the Act of 1870, and we discover nothing in that which authorizes it. The *fiery facias* allowed by that Act is not a substitute for the ordinary *fi. fa.* under the 72d section of the Act of June 16, 1836, but it is in lieu of sequestration under the 73d section of it. The process and procedure provided by the 72d section remain, and the process provided by the 73d section is superseded by the special *fi. fa.* given by the Act of 1870. The condition precedent to sequestration was an ordinary *fi. fa.* returned unsatisfied in whole or in part, and this must precede the writ which takes its place. By this precedent return on the ordinary *fi. fa.* the insolvency of the corporation is discovered, and the necessity of recourse to a sale for the benefit of its creditors, of its franchises and property essential to its operation, is demonstrated. It was decided in *Bayard's App.*, 72 Pa. 458, that a sale on the *fi. fa.* given in lieu of sequestration did not change the rule of distributions, but that its proceeds were for the benefit of all its creditors, and on the footing of moneys made by a sequestrator under the Act of 1836. The proceeds of a sale of real and personal property under the 72d section of that Act were applicable to the liens in their order.

The view that we have taken of the Act of 1870, and its effect upon the established practice in the appropriation of the property of a corporation to the payment of its debts, is sustained in an opinion by our Brother Mitchell in *Flagg v. Farnsworth*, 12 W. N. C. 500, and adopted by Judge McDermott in *Bank v. Mfg. Co.*, 18 W. N. C. 174. These were common pleas discussions, but the reasoning which supports them is clear, satisfactory and, in our opinion, fully vindicated the judgments. While the precise question has not heretofore arisen in this court it is plain that this was the view entertained by Chief Justice Thompson, in *Philadelphia & B. C. R. Co's App.*, 70 Pa. 355, and by Justice Williams in *Bayard's App.*, *supra*. As the property described in the claim in this case is essential to the operations and is part of the works of the corporation, *Foster v. Fowler*, *supra*, sustains the action of the court in striking off the lien.

*Judgment affirmed.*

## ILLINOIS SUPREME COURT.

UNION COAL CO., *Pff. in Err.*,  
v.  
CITY OF LA SALLE.

(....ILL.....)

1. A question not raised by the pleadings as to the power of a city to sell coal under its streets cannot be raised for adjudication by stipulation of the parties in an action by the city for trespass in removing such coal where no contract has been in fact made or attempted before the suit, although the stipulation authorizes a settlement of the rights of the parties on the basis of a contract providing the court will uphold the power of the city to make it.
2. The right of the court to decide upon its merits the issue presented by the pleadings cannot be affected by a stipulation between the parties as to matters not covered by the pleadings and which attempts to present a question which the court ignores because not properly before it.
3. A city having the legal title to its streets in trust for the public can maintain trespass for the removal of coal underlying the streets, and recover the full value of the coal, although no actual damage has been done to the surface of the streets.

(January 22, 1891.)

**E**RROR to the Appellate Court, Second District, to review a judgment affirming a judgment of the Circuit Court for La Salle County in favor of plaintiff in an action brought to recover damages from defendant for mining and taking away coal from beneath the streets and public squares of plaintiff City. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Duncan & Gilbert* for plaintiff in error.

*Messrs. R. D. McDonald and F. J. O'Brien* for defendant in error.

*Bailey, J.*, delivered the opinion of the court:

Some controversy arises in this case as to the precise questions presented by the record to the trial court for its adjudication, and, consequently, as to the precise questions presented to this court for its decision by the appeal. The issue made by the pleadings is that of a trespass committed by the defendant by entering upon certain *strata* of coal underlying the public streets of the City of La Salle, and taking therefrom large quantities of coal, and converting the same to its own use. This is the entire scope of the case made by the declaration and plea, and the only judgment which the trial court thereby obtained jurisdiction to pronounce was that of guilty or not guilty of the trespass thus alleged. The stipulation of the parties as to the facts admits that the territory embraced within the City of La Salle was formerly owned by the State, it being a portion of the lands donated by the United States to aid in the construction of the Illinois & Michigan Canal; that in 1838 the trustees of said canal, by virtue of the authority conferred upon them by law, platted and laid off said territory into lots, blocks, streets, alleys and public

squares; that underlying said streets, alleys and public squares are several veins of coal, said coal being beneath *strata* of solid rock several hundred feet in thickness, so that it can be mined without injury to said streets, and without impairing their usefulness as public highways; that said canal trustees conveyed to sundry persons all the lots and blocks so platted by them, and that the defendant owns, by purchase from the various owners, all the coal underlying the lots and blocks in the portion of said City in question in this suit, and is desirous, in connection therewith, of obtaining, by purchase or otherwise, the right to mine the coal underlying said streets and alleys; that said City is willing to sell said coal, and the right to mine it, at a certain price, but that a controversy exists as to the right of said City to sell and dispose of said coal; that the defendant has, without permission, mined and removed coal from beneath the streets of said City to the amount, in value, of \$1,050; that the parties have agreed that, in case the City has the right to sell said coal, the reasonable damage for the coal mined by the defendant is \$50 per acre for the coal actually mined, and, in case the City has the right to sell said coal, it is willing to sell for a like sum per acre all the coal not mined underlying all the streets, alleys and public squares of said City west of Joliet Street; that, in case it shall be determined by the final adjudication of the courts of this State that said City has a legal right to sell and dispose of the coal underlying its streets, alleys and public squares, a judgment shall be rendered against the defendant for the value of the coal thus mined computed at the rate aforesaid, but that, if it shall be finally decided by said courts that said City has no right to sell and dispose of said coal, judgment shall be entered in this case in favor of the defendant, "the City not desiring, but expressly waiving all right, to recover merely nominal damages for the mining of said coal, or any damage whatever, in case it has no legal right to sell said coal;" that the question both parties desire to have determined is as to the right of the City to sell and dispose of the coal aforesaid at its market value, it being conceded that no actual damage has been done to the surface of the streets, or their use for public purposes, or will be occasioned to them by mining said coal.

The contention is that under this stipulation a question not raised by the pleadings, and in respect to which there is no present controversy between the parties, viz., whether the City has the legal right or power to sell to the defendant the remaining coal underlying its streets, alleys and public squares, and license the defendant to mine and remove the same, is presented for adjudication, and that the court, before it could properly render a judgment of guilty against the defendant for the alleged trespass, was obliged to pass upon that question, and hold that such right to sell and license existed. It is manifest that the question thus sought to be raised was purely speculative, the effort being to obtain in advance the opinion of the court as to the validity of a contemplated contract before it is entered into, or

any rights in relation to it have accrued to either party, they thus seeking, in effect, to employ the court as their legal adviser in a matter about which they intend to negotiate. It is not the province of the courts to pronounce opinions or to give advice upon questions which are merely speculative. Judicial investigation, ordinarily at least, should be limited to rights which have actually accrued; and all attempts to obtain from the courts decisions in relation to rights which have not yet accrued, or to the validity of transactions which have not yet been entered into, ought to, and usually do, prove abortive.

Under the pleadings, the right of the plaintiff to recover depended solely upon whether the evidence presented at the trial established the defendant's guilt of the trespass alleged, and it was not within the power of the parties to so change the established order of legal proceedings as to make such right depend upon the opinion the court might form as to the validity or invalidity of a contract in relation to another subject matter which the parties were seeking to negotiate. Nor does it seem to be material that some of the legal principles involved in such proposed contract may have had a collateral bearing upon the issue presented by the pleadings. It is sufficient to say that the validity of such contract was not in issue, and was not, and could not be, submitted to the court for its decision in the manner here attempted. The court was therefore entirely at liberty to disregard the stipulation, so far as it attempted to obtain a decision of a matter not properly before it. If it had attempted to decide that question, there was no legal mode by which it could embody such decision in its judgment; and its opinion in relation to it, if it had seen proper to pronounce one, would have been a mere *obiter dictum*. But if it should be conceded that the portion of the stipulation which calls for the decision of a question not at issue was in all respects valid and binding, both upon the parties and the court, it cannot be doubted, we think, that it should receive a strict construction, or at least a construction which would confine its operation to the cases specifically provided for. Its terms are that, in case it is decided that the City has a legal right to sell and dispose of the coal underlying its streets, alleys and public squares, the judgment should be for the plaintiff for the value of the coal already mined; but that, if the decision should be that the City has no such right, judgment should be entered for the defendant. There is no stipulation, however, as to what judgment should be entered in case the court declined to pass on that question at all. As to that possible, and indeed very probable, outcome of the litigation, the stipulation was silent. There was no provision that in that event the suit should be dismissed, or that judgment should go for or against either party. It follows that the court, by declining to pass upon the question thus sought to be submitted, was left entirely at liberty to decide the issue presented by the pleadings upon the merits, wholly untrammelled by any of the requirements of the stipulation.

It remains to be seen whether, under the facts established by the stipulation of the parties, the court properly found the defendant

guilty. Where the ultimate facts upon which the right to recover depends are admitted, as they are here, the right to recover becomes a question of law; and whether that question was properly decided by the trial court is therefore open for consideration here. By our Statute the acknowledgment and recording of a plat by the owner of lands within a city, by which such lands are subdivided and platted into blocks, lots, streets, alleys, public squares, etc., is declared to operate, both at law and in equity, as a conveyance in fee by the owner to the city of such portions of the lands platted as are embraced within the streets, alleys and other grounds dedicated to the use of the public; and it is provided that the lands embraced within such streets, alleys and other public places shall be held by the city, in its corporate name, in trust for the uses and purposes set forth and intended by the plat. Rev. Stat. 1874, chap. 109, § 8; Rev. Stat. 1845, p. 115; Rev. Laws 1893, p. 699.

It results from these provisions of the Statute that the legal title to the streets and alleys in question in this suit is vested in the City of La Salle in trust for the use of the public for the purposes of streets and alleys. *Illinois & M. Canal Trustees v. Haven*, 11 Ill. 554; *Manly v. Gibson*, 18 Ill. 808; *Hunter v. Middleton*, Id. 50; *Chicago v. McGinn*, 51 Ill. 266; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 437; *Gebhardt v. Reeves*, 75 Ill. 801; *Chicago v. Rumsey*, 87 Ill. 348; *Brooklyn v. Smith*, 104 Ill. 429. The trust thus vested in the City is not a mere dry or passive trust, but one in the execution of which the City has and holds the possession, control, management and supervision of the trust property. This management, supervision and control of streets and alleys is expressly vested in the municipal authorities by statute. Rev. Stat. 1874, chap. 24, § 62.

It is the duty of a trustee to defend and protect the title to the trust estate; and, as the legal title is in him, he alone can sue and be sued in a court of law. Upon this principle, it is held that a trustee may maintain an action for any trespass upon the land held by him in trust. *Walker v. Fawcett*, 7 Ired. L. 44; 1 Perry, Tr. § 828.

That the entry by the defendant upon the strata of coal underlying the streets of La Salle, and mining coal therefrom, was a trespass, cannot admit of doubt. The defendant had no more right to mine the coal under said streets than it would have had to enter upon the lands of any other proprietor, and mine coal therefrom. The owners of lots abutting upon the streets of a city have no title to the fee in the streets, their interest being limited to a mere easement, viz., the right of using the streets for purposes of ingress and egress to and from their lots, and for the ordinary purposes of travel. Their sale to the defendant of the coal underlying their lots gave to it no greater rights than they themselves had, and therefore vested in the defendant no title or license to mine beyond the street line. Mining beyond that was a trespass, for which the defendant is clearly liable to an action. In whom is the right of action to recover damages for such trespass vested? Clearly, not in the owners of the abutting property. *Hunter v. Middleton*,

*supra*. The City, the owner of the fee in the streets, is the party, and the only party, authorized to sue; and in such suit it is entitled to recover, not merely nominal damages, but full compensation for the injury done to its freehold.

The conclusion we have reached is supported by the decisions of other States where, as here, the legal title to the land covered by the streets is vested in the municipality. Thus, in *Des Moines v. Hall*, 24 Iowa, 284, it was held that under the Statute of Iowa the laying off and recording of a town plat or an addition thereto had the effect of vesting in the municipal corporation the fee-simple title and exclusive right of dominion over the streets and alleys dedicated to the public use, and that neither the original proprietor nor his grantee had the right to the subterraneous deposits of coal within the limits of such streets, and that the corporation might maintain an action against such proprietor for the coal mined and taken beneath the same. In *Hawesville v. Hawes*, 6 Bush, 282, it was held that where the absolute title to streets, and not merely an easement over them, is vested in the municipal authorities, such authorities own the coal under the surface of the streets; and the lessees of the heirs of the original owners of certain land over which such streets had been platted having mined and removed the coal under such streets, and paid to said heirs a certain rental therefor, it was held that the municipal authorities might waive the tort committed by the removal of said coal without their consent, and sue and recover from said heirs the rental so received by them as money had and received. We are satisfied, both upon reason and authority, that the plaintiff in this case was entitled to maintain its action of trespass against the defendant, and to recover as damages the full value of the coal actually mined.

*The judgment will be affirmed.*

REPUBLIC LIFE INSURANCE CO., *Appt.*,

v.

Charles P. SWIGERT, Auditor of Public Accounts, *et al.*

(....Ill....)

1. A statute empowering the state auditor to institute proceedings for the dissolution of insurance companies which upon examination seem to be insolvent, or in such condition as to render their further continuance in business hazardous to the insured or to the public, and to apply for an injunction to prevent their further proceeding with the business, and for a receiver, is not unconstitutional as impairing the obligation of contracts.

2. An order will be treated as a part of the record and legitimately before the court for examination on the rehearing of an appeal, if the case was submitted by both parties at the

first hearing, upon the theory that the order was properly in the record.

3. In a statutory proceeding by the state auditor to wind up a corporation, to which the stockholders are not made parties, the corporation has the duty to protect their rights, and it may therefore object to the making of an order directing the receiver to bring suits for unpaid stock subscriptions.

4. A corporation may, if it acts in good faith, lawfully receive from its subscribers, who have paid a certain percentage of their subscriptions, a surrender of the certificates held by them, and issue, in lieu thereof, certificates for as many fully paid shares of stock as the money paid in will buy, thereby releasing them from further liability so far as the claims of the company itself are concerned.

5. Error may be assigned upon an interlocutory order which is continued in force by the final decree, and involves and determines a matter of substantial right.

6. A receiver appointed in a statutory proceeding instituted by the state auditor, to wind up an insolvent insurance company, has no authority to sue for unpaid stock subscriptions which the company has released by a contract binding on itself, either by the terms of the statute or by the order of appointment, or by an assignment to him by the company of its effects, made in pursuance of such order. Such receiver does not represent the rights of creditors.

7. An order for the payment of a dividend to creditors, made during the course of proceedings for the winding up of an insolvent insurance company, to which no objection was taken until a rehearing had been granted of an appeal from the final decree in the case, and upon which the receiver has acted and had his report confirmed, will not be disturbed.

(Schofield, Ch. J., *dissentia*.)

(October 31, 1890.)

**E**RROR to the Circuit Court for Cook County to review a decree enjoining defendant from the further prosecution of its business, and appointing a receiver for it, and authorizing him to sue for unpaid stock subscriptions. *Reversed in part.*

The facts are stated in the opinion.

*Mr. C. Beckwith*, with *Messrs. George F. Westover* and *F. H. Kales*, for plaintiff in error:—

A receiver cannot intermeddle in questions affecting the rights of parties in the disposition of property in his hands.

*Re Colvin*, 8 Md. Ch. 278; *Omyyn v. Smith*, 1 Hogan, 81; *Hesing v. Atty-Gen.* 104 Ill. 292; *Blatchford v. Newberry*, 100 Ill. 484.

Corporations have the right and authority, in good faith, to buy and sell their stock.

*Chicago, P. & S. W. R. Co. v. Marselles*, 64 Ill. 145; *Chetlain v. Republic L. Ins. Co.* 86 Ill. 290; *Hyds v. Lynde*, 4 N. Y. 887; *Strong v. Brooklyn Cross Town R. Co.* 98 N. Y. 426.

An assignee for the benefit of creditors cannot bring suit to set aside a transaction binding upon his assignor.

*Boulton v. Dement*, 11 West. Rep. 487, 123 Ill. 142; *Hawes v. Leader*, Cro. Jac. 370; *Brownell v. Curtis*, 10 Paige, 210, 4 L. ed. 948; *Bostrwick v. Menck*, 40 N. Y. 858; *Yeatman v. New Orleans Sav. Inst.* 95 U. S. 764, 24 L. ed.

NOTE.—Dissolution of corporation. See notes to *Re Oshkosh Mut. F. Ins. Co. (Wis.)* 9 L. R. A. 274; *People v. North River Sugar Ref. Co. (N. Y.)* 9 L. R. A. 83; *Snell v. Chicago (Ill.)* 8 L. R. A. 888; *Chicago Mut. L. Ind. Assn. v. Hunt (Ill.)* 2 L. R. A. 649; 12 L. R. A.



589; *Donaldson v. Farwell*, 98 U. S. 481, 28 L. ed. 998; *Jones v. Yates*, 9 Barn. & C. 532; *Thompson v. Dougherty*, 13 Serg. & R. 448; *Seay v. Bank of Rome*, 66 Ga. 609, 615; *Dobbins v. Walton*, 37 Ga. 614, 619; *Lane v. Morris*, 8 Ga. 468; *Fouche v. Brower*, 74 Ga. 266.

In all the States, where direct power is not given by statute, the courts hold that assignees in insolvency, or for the benefit of creditors, cannot impeach the conveyances of their grantors.

*Estabrook v. Messeremith*, 18 Wis. 516; *Hawks v. Pritelaff*, 51 Wis. 160; *Frost v. Citizen's Nat. Bank*, 68 Wis. 284; *Brigham v. Clafin*, 81 Wis. 607; *Bromley v. Goodrich*, 40 Wis. 181; *Sandwich Mfg. Co. v. Wright*, 23 Fed. Rep. 681; *Burnsey v. Town*, 20 Fed. Rep. 558; *Simon v. Openheimer*, 20 Fed. Rep. 558; *Brownell v. Curtis*, 10 Paige, 210, 4 L. ed. 948; *Leach v. Kelsey*, 7 Barb. 466; *Van Heusen v. Radcliff*, 17 N. Y. 580; *Southard v. Benner*, 72 N. Y. 424; *Bouton v. Dement*, 11 West. Rep. 487, 128 Ill. 143; *Clapp v. Nordmeyer*, 25 Fed. Rep. 71; *Flower v. Cronish*, 25 Minn. 478; *Merrill v. Reesler*, 87 Minn. 82; *Maiders v. Culter*, 1 Duv. 164; *Vandyke v. Christ*, 7 Watts & S. 873; *Jones v. Yates*, 9 Barn. & C. 532.

In the absence of legislation enlarging his powers, a receiver has only such rights of action as were possessed by the person, company or corporation over whose estate he administers.

*Coope v. Bowles*, 42 Barb. 87, 28 How. Pr. 10; *Curtis v. McIlhenny*, 5 Jones, Eq. 290; *Butterworth v. O'Brien*, 89 Barb. 192; *Hyde v. Lynde*, 4 N. Y. 887; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 487, 2 L. ed. 979; *Yeager v. Wallace*, 44 Pa. 294; *Ingersoll v. Cooper*, 5 Blackf. 426; *Manlove v. Burger*, 88 Ind. 211.

If creditors have any rights they must assert them in their own names.

*Coope v. Bowles*, *Curtis v. McIlhenny*, *Hyde v. Lynde*, *Verplanck v. Mercantile Ins. Co.* and *Yeager v. Wallace*, *supra*; *Clapp v. Peterson*, 104 Ill. 26; *Re Duckworth*, L. R. 2 Ch. 578; *Waterhouse v. Jamieson*, L. R. 2 H. L. 37; *Leafchild's Case*, L. R. 1 Eq. Cas. 281; *Farnsworth v. Wood*, 91 N. Y. 806; *Jacobson v. Allen*, 20 Blatchf. 528; *Piccatagua F. & M. Ins. Co. v. Hill*, 60 Me. 178.

**Mr. E. B. Sherman**, for the Auditor:

The Act of 1874 in regard to the dissolution of insurance companies, under which the petition was filed by the Auditor in this case, is valid and constitutional as to insurance companies incorporated under special charters granted before its passage, and such corporations are subject to all the provisions thereof.

*Ward v. Farwell*, 97 Ill. 598; *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 83; *Ang. & A. Priv. Corp.* § 774, and cases cited; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Reapers Bank v. Willard*, 24 Ill. 488; *Moore v. Whitcomb*, 48 Mo. 543; *Munn v. People*, 60 Ill. 93; *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77; *Re Jackson Marine Ins. Co.* 4 Sandf. Ch. 559, 7 L. ed. 1208; *Slee v. Bloom*, 5 Johns. Ch. 880, 1 L. ed. 1115; *Goven v. Penobscot R. R. Co.* 44 Me. 140; *Veazie v. Mayo*, 45 Me. 560; *Com. v. Farmers & M. Bank*, 21 Pick. 542; *Commercial Bank of Rodney v. State*, 4 Smedes & M. 489; *State v. Matthews*, 44 Mo. 523; *Bank of Columbia v. Atty-Gen.* 8 Wend. 588; *Tennessee v. Sneed*, 12 L. R. A.

96 U. S. 69, 24 L. ed. 610; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1086; *St. Clair County Turnp. Co. v. People*, 53 Ill. 174; *United States v. Union Pac. R. Co.* 98 U. S. 605, 25 L. ed. 151.

Possession being taken by the court, through its receiver, and being for the sole purpose of collecting and marshaling the assets, and dividing them among the creditors and other persons entitled thereto, the defendant, not objecting to such orders or any of them, must be taken as having consented thereto.

*Post v. Dorr*, 4 Edw. Ch. 412, 5 L. ed. 928; *Gregg v. Brower*, 67 Ill. 525, 581; *Petrie v. People*, 40 Ill. 384, 344; *Turner v. Jenkins*, 79 Ill. 228, 232.

**Mr. John N. Jewett**, with *Messrs. Hutchinson & Luff*, for the Receiver.

**Messrs. Sleeper & Whiton** for the Commercial National Bank.

**Baker, J.**, delivered the opinion of the court:

On the 25th of May, 1877, the State Auditor filed his petition in the Circuit Court of Cook County against the Republic Life Insurance Company, under the provision of the Act in regard to the dissolution of insurance companies, approved February 17, 1874. The Auditor alleged in his petition that he had caused an examination to be made of the assets and liabilities of the Company, and that, from such examination, he was of the opinion that the condition of the Company was such as to render its further continuance in business hazardous to the insured therein. The prayer of the petition was that the Company might be enjoined and restrained from further proceeding with its insurance business, and that a receiver might be appointed to take charge of the real estate and effects of the Company, in pursuance of the Act aforesaid, and with the power therein prescribed, and usually vested in a receiver. On the same day that the petition was filed, the Company waived service of process, and entered its appearance, and filed an answer, which was as follows: "Now comes the said defendant, by its solicitor, and saith that it cannot deny the matters in said bill alleged, and it prays to be hence dismissed," etc. Thereupon, and on the same day, on motion of the solicitors for the Auditor, and no objection being made by the Company, Samuel D. Ward was appointed receiver. It was also ordered that the Company, its officers, agents, attorneys and servants, be enjoined and restrained, until the further order of the court from further proceeding with its business, or from any transfer of the property other than to the receiver, and from receiving or paying out any moneys; and that neither the receiver, nor the defendant, nor its officers, agents, servants or attorneys, should exact or take from its policy-holders any sum or sums of money to accrue from the premiums on policies beyond what might be justly due or payable on or as of the 25th day of May, 1877. It was specified in the order appointing the receiver that said Samuel D. Ward "be, and is hereby, appointed receiver of all and singular the real estate, personality, choses in action, bonds, bills, notes, securities, evidences of indebtedness, books, records, moneys, checks, drafts and

property and assets of every nature, real and personal, of and belonging to said defendant, or in any manner held in trust for or subject to the control of said defendant, as the same are on this 25th day of May, with power to take possession of the same forthwith, and to institute any and all necessary proceedings or actions to recover the same, either at law or in equity." And it was further ordered that the president and secretary of the Company should forthwith execute and deliver to the receiver all necessary deeds, conveyances and assurances of title, proper and requisite to carry out the foregoing order, and to vest in the receiver full title to all and singular the properties, assets and choses in action of the defendant; and that said receiver should have and exercise all and singular the rights and powers conferred upon such receiver by the statutes of this State in that behalf; and that he should have the usual powers of a receiver in equity, with liberty to apply to the court, from time to time, for such further directions and orders as might be necessary to the discharge of his trust. In conformity with this order and decree, the officers of the Company made to the receiver deeds for all the real estate of the Company, and on May 27, 1877, the president and secretary executed and delivered to him an assignment of all the property of the Company, and immediately turned over to him such property. On December 1, 1877, the receiver presented to the court a petition in which it was stated that at a meeting of the stockholders of the Republic Life Insurance Company held on the 11th day of June, 1878, the following resolutions were adopted, to wit: "Resolved, that the board of directors of this Company be, and the same is hereby, instructed and empowered to receive from such of the stockholders as may desire and to cancel all outstanding certificates of the stock of this Company upon which but 20 per cent has been paid, and to issue, in place thereof, a new certificate to each stockholder for the number of shares at par represented by the 20 per cent already paid, or secured to be paid, by such stockholder or stockholders. Resolved, that the remainder of the stock of this Company be held as unsold stock, subject to sale and issue as the directors shall deem best, but at par and for cash only, exclusive of expense and commissions."

It further appeared from said petition that, in pursuance of said resolutions, a large number of the subscribers to the stock of said Company surrendered their certificates of stock upon which but 20 per cent had been paid, and received in lieu thereof certificates for one fifth the number of shares of stock so surrendered, which said new certificates represented the holders thereof as entitled to the number of shares of full-paid stock therein respectively specified. It also appeared from the petition that the largest proportion of the liabilities of the Company were contracted before the said 11th day of June, 1878, when, by vote of the stockholders, the directors were authorized to issue full-paid certificates of stock on the surrender of the certificates on which only 20 per cent had been paid. The petition stated: "Your petitioner knows of no resources out of which he will be able to realize any money to pay the balance of the liabilities of said Com-

pany over and above 20 or 25 per cent thereof, unless the same can be collected of said stockholders and subscribers to said stock." The prayer of the petition was for the direction of the court in the premises, and for such other and further order in reference to the matter of commencing proceedings against said subscribers and stockholders as shall seem just and proper.

On January 31, 1878, an order was entered in said cause, which was as follows, to wit: "Samuel D. Ward, receiver of said defendant, having heretofore—to wit, on 1st day of December, A. D. 1877—filed his petition herein asking for the direction of the court in reference to further legal proceedings against the subscribers to the stock and stockholders of said defendant, and it appearing to the court that said receiver has published a notice, etc., that the application contained in said petition would be heard on this day, etc., and said application now coming on to be heard, after argument by counsel for said receiver and for said complainant, and the court being advised in the premises, it is ordered by the court that the said receiver be, and he is hereby, authorized and directed to institute such legal or equitable proceedings as he may be advised are necessary and proper against the subscribers to the stock and stockholders of said defendant, or against such of them as he may be advised are or may be indebted to the said Company; and that he institute such proceedings against resident and nonresident subscribers to stock and stockholders, or either of them, and proceed with all convenient speed with the same, for the purpose of collecting a sufficient amount to pay the debts and liabilities of said defendant." On the 22d day of June, 1881, the cause came on for a hearing in the circuit court, and the court rendered a final decree therein, overruling the prayer of the Company in its answer to be dismissed out of court, and decreeing that the Company be perpetually enjoined, restrained and prohibited from the further prosecution of its business, and that the previous appointment of Ward as receiver be ratified and confirmed. Thereafter a writ of error was sued out of this court by the Republic Life Insurance Company. The errors assigned upon the amended record which was filed in this court were that the court erred in not dismissing the petition of the Auditor as prayed for in the answer of the plaintiff in error; and that the court erred in making each and every of the orders and decrees set forth in the record aforesaid. In the briefs and arguments which were filed on behalf of the plaintiff in error prior to the rehearing, the grounds of objection urged to the decree and orders of the court were that the allegations of the petition filed by the Auditor were not sufficient to sustain the final decree, and that it was therefore erroneous; that the law authorizing the appointment of a receiver, and the dissolution and winding up of the Company and its affairs, was violative of the contract clauses of both the Federal and State Constitutions, and the Act therefore void, and the decree erroneous; and that, even assuming the Act to be valid, and the allegations of the petition to be sufficient, the court had no power, on the application of the receiver, to authorize him to

call in question the surrender of subscriptions to capital stock, and the receipt of paid-up stock for the money paid on such subscriptions, as being in fraud of the rights of creditors; and that such transaction could be impeached only by and on the application of creditors of the Company.

Section 1 of the Act of 1874, now under consideration, provides "that if the auditor of state, upon examination of any insurance company incorporated in this State, is of the opinion that it is insolvent, or that its condition is such as to render its further continuance in business hazardous to the insured therein, or to the public, . . . he shall apply by petition to a judge of any circuit court of this State to issue an injunction restraining such company, in whole or in part, from further proceeding with its business until a full hearing can be had, or otherwise, as the court may direct." Rev. Stat. 1889, chap. 73, § 103. The further clause of this section provides that the court "may in all such cases make such orders and decrees, from time to time, as the exigencies and equities of the case may require, and in any case, after a full hearing of all parties interested, may dissolve, modify or perpetuate such injunction, and make all such orders and decrees as may be needful to suspend, restrain or prohibit the further continuance of the business of the Company." Section 5 of the Act provides for the appointment by the court of one or more receivers, "to take charge of the estate and effects of the Company, including such securities as may be deposited with the auditor or treasurer of state, and to collect the debts due and property belonging to it, with power to prosecute and defend suits in the name of the corporation, or in their own names, to appoint agents under them, and do all other acts necessary for the collection, marshaling and distributing of the assets of the company, and the closing of its concerns." Rev. Stat. 1889, chap. 73, § 107.

The petition which was filed by the Auditor in this cause contained all the averments that section 1 of the Act requires to enable the court to grant an injunction, and to appoint a receiver. The allegations of the petition conferred jurisdiction to render a decree appointing a receiver, and perpetually enjoining the further prosecution of the business of the corporation, and decreeing its involuntary dissolution, and especially so since the Company answered that it could not deny the matters alleged in the petition. The constitutional question which is argued by counsel was fully considered by this court in *Ward v. Farwell*, 97 Ill. 598. It was there held that the Statute now under consideration was constitutional. It is not necessary to again state the reasons which led to that conclusion.

Was the order which was entered by the court on the 31st day of January, 1878, directing the receiver to institute proceedings against stockholders, erroneous?

Preliminary to giving attention to this question, there are several matters which may properly be examined. It is urged that said order of January 31, 1878, is not in the record, except as a matter of evidence. The record consists of the record which was originally filed in this court and of an additional or sup-

plemental record which was afterwards filed. This latter record contains the pleadings and the orders and proceedings in the cause. It is informally made up, and after the statement that "petitioner, in support of his motion for a perpetual injunction, introduced on the hearing the following evidence," follow the various petitions, answers, proceedings and orders in the cause. The certificate of the clerk is that the transcript is a true, perfect and complete transcript of the record, prepared in accordance with the stipulation of counsel, contained in the record. The stipulation was filed in the cause, and immediately precedes the certificate of the clerk, and it is, in substance, that the record first filed in this court, "together with the foregoing record, as made up for said supreme court, . . . shall be taken as the complete record in said cause, for the purposes of this suit." There is also indorsed upon said record a stipulation, signed by the solicitors for the defendants in error, that the errors assigned upon the record originally filed may be considered as assigned and made upon said amended record; and one of the errors so assigned is that "the court erred in making each and every of the orders and decrees set forth in the record aforesaid." It would seem that the transcript was made up for this court in the way in which it was by consent of counsel for both parties, and probably for the purpose of avoiding the supposed necessity of copying the pleadings, proceedings and orders twice in the record, and at the same time showing that the same were given in evidence in support of the motion for a perpetual injunction. Upon the first hearing of this cause in this court, it was submitted by both parties to the controversy upon the theory that the order in question was properly in the record, and before the court for review. The case was heard and determined upon that assumption. We must now regard that order as a part of the record, and as legitimately before us for examination.

It is suggested that it is for the interest and benefit of the corporation that a sufficient amount should be collected from its stockholders to pay its debts, and that it cannot be heard to complain of the order directing suits to be brought against such stockholders. In *Ward v. Farwell*, *supra*, it was held that, on a petition filed by the auditor to dissolve an insurance company, or to restrain its further transaction of business, the stockholders of such corporation were not necessary parties to the proceeding. It would seem, then, that in any matter which affects the rights or interests of the stockholders the company must, from the very nature of the case, have the right to protect its stockholders, and that it is its duty so to do. A contrary conclusion would be subversive of justice, and in antagonism with first principles.

It is claimed that the order of the court now under investigation does not direct the receiver to proceed, either at law or in equity, against stock subscribers or stockholders, whether they have surrendered their certificates of partly-paid stock or not. It must be conceded that it does not in express terms direct or authorize such suits; but, in order to apprehend the full scope of the order, it is necessary to

take into consideration one or two matters which we have not thus far stated. Section 6 of the charter of plaintiff in error provides as follows: "The real and personal property of each individual stockholder shall be held liable for any and all liabilities of the Company, to the amount of stock held or subscribed by him, and not actually paid in. In all cases of losses not exceeding the means of the corporation, each stockholder shall be liable to the amount of unpaid stock held by him." A corporation may, if it acts in good faith, buy and sell shares of its own stock. *Chicago, P. & S. W. R. Co. v. Marseilles*, 84 Ill. 145, 648; *Chelatin v. Republic L. Ins. Co.* 86 Ill. 220; *Olapp v. Peterson*, 104 Ill. 26.

The surrender by stockholders to the Company of the certificates of stock upon which 20 per cent had been paid, and the issuance to such stockholders of certificates for paid-up stock, was, in substance, and in legal effect, a purchase by the Company of the unpaid stock at its par value. The transaction was not *ultra vires*. It was based upon resolutions adopted by the corporation at a stockholders' meeting. It does not appear that any stockholder has ever objected either to the resolutions or to the transfers of stock which, in conformity therewith, took place between the corporation and such of the stockholders as elected to avail themselves of the privilege given thereby. The contracts were valid as between the Company and the stockholders who gave up their part-paid stock, and received, in lieu thereof, full-paid stock for one fifth of the amount relinquished. The transaction was binding upon the Company, and the stockholders who sold their stock to the corporation should be protected against further payments upon their subscriptions, unless there were at the time of such transaction existing creditors in respect to whose rights it was fraudulent. It is to be noted that thereafter, as between such stockholders and the Company, there was no indebtedness to the Company in regard to the subscriptions for stock. Such being the law, and the condition of affairs being such as has already been sufficiently indicated herein, the circuit court made the order of January 31, 1878, authorizing and directing the receiver to institute legal or equitable proceedings, not only against such of the subscribers to the stock and stockholders as he should be advised "are or may be indebted to the said Company," but also "against the subscribers to the stock and stockholders of said defendant." The language of the order is broad enough to cover suits prosecuted upon the liability of the stockholders to the creditors, and where the only liability is to the creditors. Construing the order in the light of the petition of the receiver upon which it was based, the purpose of it was clearly to authorize and direct the receiver to sue for and recover from the stockholders subscriptions for stock which they had, under the resolutions of the 11th of June, 1878, surrendered to the Company. We think, therefore, that the grounds which are urged by plaintiff in error for the reversal of that order clearly appear upon the face of the order, when properly construed.

It is suggested that the order in question is merely an interlocutory order and that error 12 L. R. A.

cannot be assigned thereon. But that order is still in force by virtue of the final decree, and it involves and determines a matter of substantial right; and we understand that, under such circumstances, error may be assigned upon an interlocutory order.

If the order directing proceedings against the stockholders who had transferred their unpaid stock to the corporation was valid, and was not erroneous, it seems it must necessarily be so either because the assignment made by the Company to the receiver invested the latter with such title, right or power as would enable him to maintain such suit, or because a receiver has authority, under the rule which prevails in the chancery courts, to avoid the voluntary and lawful acts of the person or corporation whose estate he represents, or may be clothed with such power by the court of chancery which appointed him, or because the Statute for the dissolution of insurance companies makes the receiver appointed, in conformity with its provisions, the representative of the creditors of the Company that is restrained from the further prosecution of its business.

We will first consider the matter of the deed of assignment. It has been suggested that the transfer of the unpaid stock to the Company did not operate as an absolute discharge of the stockholders' indebtedness for such stock, but was a discharge *sub modo* only; that the debts continued to exist just as they did before, for the purpose of liquidating the claims of the creditors; that the Company continued to be the creditor, and the subscribing stockholders the debtors, so far as the creditors of the Company are concerned; and that, the legal title and interest in the debts remaining in the Company for the benefits of its creditors, such legal title and interest, and the right of the Company to control the claims, passed to the receiver by virtue of the Company's assignment to him, in pursuance of the order of the court directing such assignment. The statement of this theory is qualified by the expression, "for the benefit of the creditors," and other expressions of like import. It is to be borne in mind that there are no creditors who were parties to the proceeding the record of which is now before us. The statement also includes the element of "the right of the Company to control the claims." But the transaction in question was lawful and valid so far as the Company itself was concerned, and was binding upon it, and it had no right to impeach it (only the creditors were entitled to the privilege), and the Company had no authority to enforce or "control" the claims, and it could not pass by its deed of assignment to anyone, either assignee or receiver, any right of control or enforcement that it did not of itself have. It would seem that the Company, by its deed of assignment to the receiver, did not transfer to him any rights greater or in addition to those that would have been conveyed had the assignment been made to an assignee under the Voluntary Assignment Law. The provisions of the assignment now under investigation are no broader or more comprehensive than those that would have been contained in a deed made to such assignee; and, even if they were, it would be immaterial, for, in the nature of things, one cannot transfer to another a right

which he does not have, unless he is acting under a power.

In the case of *Bouton v. Dement*, 123 Ill. 142, 11 West. Rep. 487, this court, speaking of an assignment under the Act relating to assignments for the benefit of creditors, said: "The company, by its assignment, conveyed no greater right in respect to its property than the company itself possessed. It is a rule of extensive prevalence that a general assignment for the benefit of creditors does not pass to the assignee any interest in property before fraudulently transferred by the assignor, nor any right to impeach or set aside such fraudulent transfer, such right belonging to the creditors only. . . . As held by this court, an administrator cannot, even for the benefit of creditors, avoid a fraudulent conveyance made by his intestate. . . . We think consistency with our decision with respect to administrators requires the adoption of the rule above stated. It would seem, upon principle, that the same rule in this respect which exists in regard to an administrator should be held to apply to an assignee under a voluntary assignment. We do not perceive that our Statute respecting assignments makes any change of the rule. The assignee under the above doctrine is not the representative of creditors, but the agent of the assignor for the distribution of the property assigned. The assignee's duty . . . is confined to the distribution of the property assigned to him. Any interest in property before fraudulently transferred by the assignor was not assigned to the assignee."

In the cases passed upon by this court in respect to an administrator, and in respect to an assignee under the Assignment Act, there were the same elements that were claimed here, at least so far as the assignment made by the company is concerned. These elements are the existence of creditors at the time of the transfers of property, and in respect to which creditors such transfers were, or were claimed to be, fraudulent, and a subsequent vesting in another person, either by operation of law or by conveyance of the property rights of the party who has made the supposed fraudulent transfers, and an attempt by such person to enforce the right of creditors to reach, in payment of their debts, the property fraudulently transferred by the person to whose property rights the person making such attempt has succeeded. And there was the same element lacking that is lacking here, *i. e.*, the right sought to be enforced had not been vested in the person from whom title and interest were derived. We think that consistency with this decision in *Bouton v. Dement*, in regard to an assignee under a voluntary assignment, as well as consistency with the decision of the court in regard to an administrator, requires that the same rule should be adopted in this case in respect to the effect of the assignment that was executed by the plaintiff in error to the receiver. In other words, the receiver took by the assignment made by plaintiff in error no right to control or enforce the claims against the stockholders growing out of the transaction between the Company and some of the stockholders whereby certificates of stock were surrendered to the Company in payment of unpaid subscriptions to capital stock.

12 L. R. A.

The only authority to impeach the sale of the stock to the Company being in the creditors of the corporation, the receiver, Ward, if he has such authority, must have it either because the doctrine applicable to proceedings in chancery invests him with an agency and right to act on behalf of the creditors in that regard, or gives the court of equity, by virtue of its inherent powers, the prerogative to so invest him, or upon the ground that the Statute for the dissolution of insurance companies clothes him with the right to enforce the rights of the creditors in that behalf. We understand the rule to be that, where a receiver is appointed for the purpose of taking charge of the property and assets of a corporation, he is, for the purpose of determining the nature and extent of his title, regarded as representing only the corporate body itself, and not its creditors or shareholders, being vested by law with the estate of the corporation, and deriving his own title under and through it; and that, for purposes of litigation, he takes only the rights of the corporation, such as could be asserted in its own name; and that upon that basis only can he litigate for the benefit of either stockholders or creditors. In *High on Receivers* (§ 315) the rule is formulated substantially and almost in words as stated above, except that the rule is qualified in said section by the statement that when acts have been done in fraud of the rights of creditors, but which are valid as against the corporation itself, the receiver holds adversely to the corporation. The only authority cited as sustaining the qualification found in the text is the case of *Curtis v. Leavitt*, 15 N. Y. 44. That case was decided upon the basis of such qualification. It was assumed and conceded by counsel upon the argument of the case that the receiver succeeded to the rights of the creditors. It was announced in the opinion of the court that, "for all the purposes of the present controversy," they would "proceed upon this assumption." The receivership there in question was constituted under the statutory provisions in which were found the expressions: "Appoint one or more receivers to take charge of the property and effects of the corporation;" "the property that may belong to it;" "are vested with all the estate, real and personal, of such corporation;" "as trustees for the benefit of creditors and stockholders;" "deemed vested with all the real and personal estate of the debtor;" and "power to sue in their own name or otherwise and recover all the estate, debts and things in action belonging or due to such debtor, in the same manner and with the like effect as such debtor might or could have done if no attachment had been issued or trustees appointed." Comstock, J., in his opinion said: "It has been said in this, as in other cases, that the receiver represents the creditors and the stockholders, but, for all the purposes of inquiry into his title, he really represents the corporation. He is by law vested with the estate of the corporate body, and takes his title under and through it. It is true, indeed, that he is declared to be a trustee for creditors and stockholders, but this only proves that they are the beneficiaries of the fund in his hands, without indicating the sources of his title, or the extent of his powers. If, then, in a con-

trovercy between the receiver and third parties in respect to the corporate estate, it is possible to form a conception of rights, legal or equitable, belonging to the shareholders as individuals, which the corporation itself could not assert in its own name, the receiver does not represent those rights. So far as the shareholders are concerned, he can litigate respecting the fund upon precisely the grounds which would be available to the corporation, if it were still in existence, solvent and no receivership had been constituted. In regard to creditors, I should certainly incline to take the same view of his rights and powers under the statutes referred to."

In *Alexander v. Relfs*, 74 Mo. 495, it was said in the opinion of the court: "When acts have been done in fraud of the rights of creditors, the receiver may litigate for their benefit, though the acts in question be valid as to the corporation itself, in which case he holds adversely to the corporation." This language was wholly unnecessary to the decision of the case, and the only authority cited therefor was *High, Receivers*, § 815, and cases cited, which we have mentioned and considered above.

In *Hyde v. Lynde*, 2 N. Y. 887, it was said by Bronson, Ch. J.: "The recovery in this case seems to have gone upon the ground that the receiver had greater rights than those which belonged to the company. But for most, if not for all, purposes, he took the place, and stands as the representative, of the company. He is as much bound by a settlement which the company was authorized to make as was the company itself. It would be strange, indeed, if the legal acts of a corporation did not bind the receiver of its effects. . . . If the settlement, though a lawful act in itself, had been made for an illegal purpose; if, for example, the parties had known that there were valid claims against the company to the payment of which the defendant ought to contribute, and yet the note was given up without consideration, for the purpose of defrauding either the creditors or the other members of the corporation,—the persons defrauded would undoubtedly have a remedy. But I do not see how the receiver could sue. It would be like the case of a conveyance of property for the purpose of defrauding the creditors of the grantor, which, though void as against the persons intended to be defrauded, is nevertheless valid against the grantor, and all who represent him. A receiver of the effects of such a grantor could not avoid the grant. Neither can this receiver avoid a settlement which bound the corporation, though, in the supposed case, it was a fraud upon the creditors, and other members of the company. The person injured must sue."

In *Farnworth v. Wood*, 91 N. Y. 808, the court said: "The rights of certain creditors to prosecute their claims against certain of the stockholders never were the property of the corporation, nor rights of action vested in it, nor is there any provision of the Statute which transfers their rights of action from the creditors to the receiver."

In *Coops v. Bowles*, 42 Barb. 87, it was held that a receiver is not clothed with any right to maintain an action which the parties or the estate which he represents could not maintain; 13 L. R. A.

and that he must show a cause of action existing in those parties, and that by the appointment of the court, lawfully made in a matter where the court had jurisdiction, the power had been conferred on him, in his representative capacity, to prosecute the action.

In *Piscataqua F. & M. Ins. Co. v. Hill*, 60 Me. 178, a bill in equity was brought in behalf of the creditors of the corporation by the plaintiffs, who were trustees, under a winding-up statute which gave them power to take charge of the estate and effects of the corporation, and to collect its debts, and to prosecute and defend suits. The defendant was a stockholder, director and treasurer of the company. The bill charged that he had illegally surrendered securities to stockholders; that he had illegally sold to the company a large amount of stock, and received payment therefor, when he knew the company was insolvent; and that he had committed a variety of other acts, which were set out in detail, done by virtue of contracts with the company, which were alleged to be illegal, fraudulent and void. A demurrer to the bill was sustained, and it was dismissed. It was there said: "The trustees represent the corporation alone, and not its creditors or stockholders. . . . The claims of the creditors and of the stockholders, if they have any, are, in the first instance, against the corporation, and they have no other except as provided by law. If the conduct of the corporation, its officers or stockholders, has been such as to give other remedies to the creditors, such may properly be pursued in their own names. So far as their rights are in question, they must be vindicated by themselves, and not by others in their behalf."

In *Waterhouse v. Jamieson*, 2 Paters. (Scotch) 1812, and L. R. 3 H. L. 29, Lord Westbury said before the House of Lords: "I take it to be quite settled that the rights of creditors against the stockholders of a company, when enforced by a liquidation, must be enforced by him in right of the company. What is to be paid by the shareholders is to be recovered in that right. What is due to the company is that only which is in fact recoverable by the company. The liquidator, therefore, standing in the place of the company, the question is, Has he a right to impeach the memorandum, set aside the articles, reduce the certificate and recover, in right of the company, that which the company could not for one moment, as against a bona fide shareholder, be entitled themselves to recover? I entirely adopt, in few words, what fell from my noble and learned friend [Lord Cairns] in the case of *Re Duckworth*, L. R. 2 Ch. 578, where my noble and learned friend used these words: 'The liquidator represents the creditors only because he represents the company, and through the company the rights of the creditors are to be enforced.' . . . Could the company recover against him? If there had been no winding-up order, the question would not have admitted of a moment's doubt, and the winding-up order does not place the liquidator in a better position against the shareholder than the company were in." In the same case, Lord Chelmsford said: "It is contended on the part of the respondent that, under the winding-up order, the liability of the appellant is entirely

changed; that it is competent to the official liquidator, who, it is said, represents not only the company, but also the creditors of the company, to show that the company was founded on misrepresentation; that the allegation in the memorandum and articles of association that £100,000 had been paid was false; that the statement on the register of £100 having been paid on the appellant's shares was also false; and that the liquidator is therefore entitled to make calls upon the appellant to the extent of £100, not actually, but only nominally, paid on each of his shares. Upon examining the Companies' Act of 1862, I find nothing to warrant the assertion that the powers of the liquidator are as extensive and searching into the constitution of a company as is there alleged. He is appointed for the purpose of assisting the court in the winding-up of a company, but in all his proceedings he appears to be merely substituted for the company."

In *Leifchild's Case*, L. R. 1 Eq. 381, John and Robert Claypole conveyed a patent-right to the British & Foreign Cork Company, and received shares of paid-up stock therefor. No money was paid. A portion of these shares was afterwards transferred to Leifchild. It was contended that the transaction was a fraud on creditors, and the liquidator applied to have Leifchild's name put upon the list of contributors, it being claimed that the shares transferred to him were not paid-up shares. It was held that the right of creditors was only to get payment of their debts from those shareholders who were liable to contribute to the payment, and that the holders of paid-up shares were not liable to so contribute. It was further held that it was not necessary to inquire whether the creditors could obtain any relief by bill in chancery.

Defendants in error cite numerous cases in which it has been decided that a receiver could bring suit to set aside a transaction which was binding upon the person or corporation over whose estate he was appointed. Almost all of the cases cited by defendants in error fall in one or another of the four classes following: Where the receiver, by force of some statute, can act for the creditors; where the act complained of was *ultra vires*, and not binding upon the corporation; where the receiver was appointed in a proceeding prosecuted by creditors, which was supplemental to execution, and the receiver had the rights of the creditors at whose instance and to secure whose claims he was appointed; and where the receiver was suing for property or assets that belonged to the debtor. With the law of such cases we have no fault to find. To analyze and examine the various cases cited would unduly expand the proportions of this opinion, and would accomplish no useful purpose. We do not wish to be understood as saying that there is no conflict in the authorities in regard to the matter under consideration; but we think the decided weight of authority sustains the rule in respect to the powers of receivers, where there has been no enlargement of their powers by legislative enactment, that they have such rights of action only as were possessed by the persons or corporations upon whose estates they administer. A receiver is the right hand

and creature of the court of equity, and he has such powers as are conferred upon him by the order appointing him, and the course and practice of the court. It will hardly be claimed, however, that the court of chancery, even with all its inherent powers, is authorized, in the absence of legislative sanction, to clothe its receiver with power to seize and enforce a property right which belongs only to parties who are not before the court, nor asking its assistance.

What are the powers of a receiver under the provisions of the Act for the dissolution of insurance companies? And to what extent have his powers, according to the usual course and practice of the court, been increased thereby? Section 5 of the Act provides for the appointment of "one or more persons to be receivers, to take charge of the estate and effects of the company, including such securities as may be deposited with the auditor or treasurer of state, and to collect the debts due and property belonging to it, with power to prosecute and defend suits in the name of the corporation, or in their own names, to appoint agents under them, and do all other acts necessary for the collection, marshaling and distributing of the assets of the company, and the closing of its concerns." Rev. Stat. 1889, chap. 78, § 107. Section 6 of the Act is as follows: "The receiver shall pay all debts due from the company if the funds in his hands are sufficient therefor, and, if not, he shall distribute the same ratably among the creditors who prove their debts, in such manner as the court may direct, and receivers may be authorized by the court to sell, convey and dispose of, and convert into money, any of the securities or assets of the company, for the purpose of paying such debts and distributing such funds. If there is a balance remaining after the payment of the debts, the receiver shall distribute the same among those who are justly entitled thereto, as members, stockholders, or otherwise, or their legal representatives." Rev. Stat. 1889, chap. 78, § 108. These two sections contain all of the powers that are expressly given to the receiver by the Statute. It will be noted that no provision is made in the Act for the execution of an assignment by the corporation to the receiver. It would seem that the property rights of the company are committed, by force of the Statute and by virtue of the decree of the court appointing a receiver, to the charge of such receiver, to be sued for, sold, conveyed and disposed of, and converted into money, as the court may direct. It appears that a decree ordering the execution of an assignment, and the making of an assignment to the receiver, are not necessary in order to vest in the latter full and exclusive charge and control, under the direction of the court, of the property rights of the company. In this particular case such decree and such assignment were in fact made, and so, in any view that may be taken, the property rights of the corporation have in fact vested in Ward, the receiver and assignee. The powers of the receiver specially designated in the Statute do not seem to be essentially different from those mentioned in the Voluntary Assignment Act as being given to the assignee under a voluntary assignment. In both Acts the powers

specified seem to be limited to the enforcement of property rights derived from the corporation or assignor, respectively. Section 5 of the Dissolution Act defines the powers and property rights of the receivers. It says they are "to take charge of the estate and effects of the company," "to collect the debts due and properly belonging to it" (the company), "to prosecute and defend suits in the name of the corporation, or in their own names," "to do all acts necessary for the collection, marshaling and distributing of the assets of the company," and "to do all acts necessary for the closing of its concerns." Section 6 defines the duties of the receiver in respect to paying out and distributing such moneys as may be in his hands, and also gives him power, when authorized by the court, to sell, convey and dispose of, and convert into money, any of the securities or assets of the company. The property rights donated him, or given into his charge, are the estate and effects of the company, the debts due the company, and the property belonging to it. We have already seen that in this case there were no debts due the Company, from the stockholders here in question. To say "the estate and effects of the company" means precisely the same thing as saying "the estate and effects owned by the company," *Ohio & M. R. Co. v. Barker*, 125 Ill. 308; *Montgomery v. Wyman*, 130 Ill. 17. We do not find any words in said sections which afford any pretense for claiming that the powers of the receiver are so enlarged thereby as to include the right to impeach a transaction which the corporation could not challenge, but which the creditors could arraign, unless such enlargement is accomplished by the use of the words "the assets of the company," or follows by necessary implication from the power given the receiver to marshal assets, or by like implication from the power donated "to do all acts necessary for the closing of the concerns" of the company. As now used, the expression "the assets of a person, corporation or estate" is generally equivalent to the expression "the property of such person, corporation or estate." From the connection in which the expression "the assets of the company" is found in this Statute, we think it has reference only to the estate, effects, securities, debts and property specified in said Statute, and which are to be placed in charge of the receiver. There may be frequent occasion for the application by the receiver of the equitable doctrine of marshaling, without any such amplification of the funds to be administered by him as is contended for by the defendants in error; and so there is no sufficient justification for saying that such enlargement follows by necessary intentment. The expression "the concerns of the company" falls in the same category with the phrase "the assets of the company." Although broad enough, in one sense, to include the enforcement of claims which the company could not enforce, but which its creditors could, yet we think, from the context, that they were not intended to thus magnify the powers of the receiver. The expression may be given a signification which is both reasonable and usual, and is also consistent with the other parts of the Statute, and with the functions of a receiver according to the course and

practice of the court, without holding that there is any enlargement of the powers of the receiver beyond what is specified in the Statute, and therefore it cannot be held that an expression in that behalf results by implication. An administrator is merely the representative of his intestate. An assignee is not the representative of creditors, but is the agent of the assignor for the distribution of the property assigned. A receiver, *virtute officii*, and without regard to any expansion of his powers by statute or by an authorized decree of court, is only a custodian of property. He is ordinarily, in respect to his title, and in respect to the litigations in which he may engage, merely the representative of the owners of the property submitted to his control. But so far as his powers are derived from a statute, or from a lawful decree of the court, and the powers do not involve rights which at the time of his appointment were vested in such owners, he is not merely their representative, but is the instrument of the law, and the agent of the court which appointed him. Such right and authority as the law and the court rightfully give him, he possesses; and, in respect to such right, he is not circumscribed and limited by the right which was vested in and available to the owners.

It is claimed by counsel for defendants in error, and the claim is supported by very able and learned arguments, that the Legislature, in enacting the law here under consideration, invested the court of equity with jurisdiction and authority to make final settlement of the unfinished business of the corporation, and close up its concerns, and that this authority, when supplemented by the powers inherent in the court of chancery, was amply sufficient to warrant the court in making the order which is here called in question, and in doing all other acts necessary for the accomplishment of the ultimate purposes contemplated by the Act. But, as we have already seen, the ultimate purposes intended by the Act are to perpetually enjoin insurance companies which fall within its purview from the further continuance of the business for which they were organized, and to enable the court, through its receivers, to administer upon the estates, effects, securities, property and assets owned by such companies, and upon the debts due them. The means by which these objects are to be accomplished are designated and fixed by the Statute itself. The ninth section of the Act provides: "The mode of summoning parties into court, the rules of practice, course of procedure, and powers of courts, in cases arising under this Act, shall be the same as in ordinary proceedings in equity in this State, except as herein otherwise provided." As we have already, in substance, remarked in another connection, it is not a power inherent in the court of chancery, and it is not in conformity with the course of procedure and rules of practice which obtain in ordinary proceedings in equity, for the court to clothe its receiver with power to seize and enforce a property right which belongs only to parties who are not before the court, and who are not asking its assistance. Nor is it provided in the Statute, nor legitimately deducible therefrom, as is the case in respect to the statutes in force in some jurisdictions, that the



receiver may represent creditors, and bring suits to set aside acts of the persons or corporations whose property is in charge of the receiver, which were in fraud of such creditors. The Legislature has made no provision of this kind, and, in its absence, it does not devolve upon the courts, by judicial legislation, to assume a jurisdiction that they have not heretofore possessed. Our conclusion upon this branch of the case is that the order made by the circuit court on January 31, 1878, authorizing and directing the receiver to institute proceedings against the subscribers to the stock and stockholders of plaintiff in error, was erroneous.

One of the assignments of error is that the court erred in making each and every of the orders and decrees set forth in the record. It is claimed that an order made in January, 1878, directing the receiver to pay a "dividend of fifteen per cent of all accepted valuations made by him of policies and certified by the actuary of the state insurance department, and of all other admitted liabilities of the said Republic Life Insurance Company," etc., was erroneous. The Statute provides for the payment of dividends to "creditors who prove their debts," and it is claimed that this statutory requirement was disregarded in making said order. As we understand the record, no objection was made to this order upon the first submission of the case nor until after the awarding of a rehearing. The receiver, acting in good faith upon this order, paid out \$93,568.99, and his report of such payments was confirmed by the court. There was no objection taken in the court below, either to the order or to the report. The order was a final

and appealable order. But no appeal was taken, or writ of error sued out, until after the entry of the final decree in the cause. We think that, under the circumstances, the objections now urged should not be considered by us. The order, without any examination by us, should be allowed to stand for the protection of the receiver.

*The final decree perpetually enjoining the plaintiff in error from further prosecution of its business is affirmed. The order and decree licensing the receiver to set aside the transactions by which unpaid stock was surrendered and paid-up stock issued, is reversed.*

**Magruder, J.:**

This is a controversy between creditors on the one side and stockholders on the other. Having acted as attorney for one of the creditors in the court below, I have taken no part in the decision of this case.

**Scholfield, Ch. J., dissenting:**

I do not concur in the foregoing opinion. I think that the Statute conferred ample power upon the circuit court to make the order in question. Although the corporation may be estopped to sue these subscribers for stock, the receiver is not, for he represents, as to the transaction whereby they claim to be protected from suit by the corporation, both the corporation and its creditors, and it is his duty to collect the amounts subscribed for the benefit of the creditors. 2 Morawetz, Priv. Corp. § 867, and authorities cited; High, Receivers, § 815; *Curtis v. Leavitt*, 15 N. Y. 44; *Sawyer v. Hoag*, 84 U. S. 17 Wall. 619, 21 L. ed. 735.

## LOUISIANA SUPREME COURT.

Louis LAFITTE

v.

NEW ORLEANS CITY & LAKE R. CO.,  
App't.

(...La....)

\*1. Street-railroad companies are not liable for wilful and tortious acts of their servants committed outside of the scope of their employment.

\*Head notes by McENERY, J.

NOTE.—Carrier liable for tortious acts of its agents.

A failure by a carrier of passengers to use the utmost care, not only safely to transport its passengers, but to protect them from violence and insults from those on the train, will render it liable for any damages naturally and directly resulting therefrom. *Spohn v. Missouri Pac. R. Co.* 101 Mo. 417.

A common carrier of passengers undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract. *New Jersey S. R. Co. v. Brockett*, 121 U. S. 637, 30 L. ed. 1049.

A common carrier is responsible for the wilful misconduct of its servant against a passenger. *Goddard v. Grand Trunk R. Co.* 57 Me. 202.

It is wholly immaterial that the master did not authorize or even know of the servant's act or neglect, or even that he disapproved or forbade it, if the act or neglect be in the course of the servant's 12 L. R. A.

ants committed outside of the scope of their employment.

2. They are under obligations to carry their passengers safely and properly, to treat them respectfully, and, if this duty is intrusted to a servant, he is responsible for the manner in which he executes the trust. They must protect their passengers, not only from violence and insults of strangers, but a fortiori against the violence and insults of their own servants.

employment. *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 438, 14 L. ed. 509; *Philadelphia, W. & R. R. Co. v. Quigley*, 62 U. S. 21 How. 210, 16 L. ed. 75; *Higgins v. Watervliet Turnp. Co.* 46 N. Y. 27; *Stewart v. Brooklyn & C. R. Co.* 90 N. Y. 591; *New Jersey S. R. Co. v. Brockett*, *supra*.

A railway company is liable for the malicious and criminal acts of its employes toward passengers while they are executing what they suppose to be the orders of the company, even though the orders do not in fact contemplate such acts. *McKinley v. Chicago & N. W. R. Co.* 44 Iowa, 314; *Chicago & E. R. Co. v. Flexman*, 108 Ill. 546, 8 Am. & Eng. R. R. Cas. 354; *Gasway v. Atlanta & W. P. R. Co.* 58 Ga. 216, 16 Am. Ry. Rep. 99.

But the acts of a servant beyond the scope of his employment are not chargeable to the master. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.

If, through the negligence or wilful act of the conductor or of a brakeman, or of both, a jet of wa-

(December 15, 1890.)

**A**PPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiff in an action brought to recover damages because of abuse to which he was subjected while a passenger on defendant's car. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Buck, Dinkelspiel & Hart* for appellant.

*Messrs. P. E. Theard & Sons*, for appellee :

A street railway company is answerable in damages for the insulting conduct of one of its drivers towards a passenger.

*Williams v. Pullman Palace Car Co.* 40 La. Ann. 87; *Goddard v. Grand Trunk R. Co.* 57 Me. 202; *Keene v. Lizardi*, 5 La. 481; *Block v. Bannerman*, 10 La. Ann. 1; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502; Rev. Civ. Code, arts. 2815, 2817.

A street railway company is also responsible for the unlawful and unwarranted arrest of a passenger, on a malicious charge made by one of its drivers that the passenger had passed a counterfeit coin. Proof of actual damage in such cases is not necessary.

*Sportorno v. Fourichon*, 40 La. Ann. 428; *Lobe v. Carey*, 33 La. Ann. 914; *Perret v. New Orleans Times Newspaper*, 25 La. Ann. 170; *Love v. McComas*, 14 La. Ann. 198.

Where it is shown that the arrest was entirely without probable cause, malice will be inferred.

*Northern v. Williams*, 6 La. Ann. 578; *Hardy v. Stevenson*, 29 La. Ann. 172; *Letulor v. Hunt-*

*ington*, 24 La. Ann. 830; *Thezan v. Thezan*, 29 La. Ann. 448.

**McEnery, J.**, delivered the opinion of the court :

The plaintiff sued the defendant Company for \$20,000 for damages for abuse when in defendant's car, and for damages for malicious prosecution, and false arrest and imprisonment. There was judgment for the plaintiff for the sum of \$400, from which the defendant appealed. The facts are that on the 27th day of December, 1889, the plaintiff entered the street-car of the defendant Company. He handed to the driver of the car, through the change gate, one silver dollar for change. The drivers of the cars are instructed to furnish change to the amount of two dollars to passengers. The driver returned to the plaintiff 95 cents, 15 cents of which he placed in the fare-box for himself and friends. There was some altercation about the change being short five cents. The driver gave the plaintiff five cents to make good the deficiency. After going several squares, the driver charged the plaintiff with having handed a counterfeit dollar to him, for which he had given him the change. The driver, in the hearing of the passengers, threatened to have the plaintiff arrested when he reached the station. He frequently looked at the plaintiff in a menacing manner, which attracted attention, and placed the plaintiff under suspicion. When the car reached the station the driver and the starter at the station had the plaintiff arrested by a policeman, and confined in prison for a short while. There was a charge of passing counterfeit money lodged

ter is dashed upon a passenger while being carried, it is a breach of the contract. *Terre Haute & I. R. Co. v. Jackson*, 61 Ind. 12, 6 Am. & Eng. R. R. Cas. 178.

#### *Assaulting passenger.*

Where an agent commits an assault in the line of his duty and within the scope of his employment, the master is liable. *Hamilton v. Third Ave. R. Co.* 18 Abb. Pr. N. S. 818; *Hamilton v. Third Ave. R. Co.* 3 Jones & S. 118.

It is a joint trespass, for which a joint or several action against either the principal or agent could be sustained. *Priest v. Hudson River R. Co.* 40 How. Pr. 456.

A railroad company is responsible for an assault and battery by the conductor of one of its trains upon a passenger in seizing or attempting to seize his property to enforce payment of his fare. *Ramsden v. Boston & A. R. Co.* 104 Mass. 117. See *Moore v. Fitchburg R. Corp.* 4 Gray, 465; *Hewett v. Smith*, 8 Allen, 420; *Holmes v. Wakefield*, 12 Allen, 580.

Striking him, throwing him down, trampling on him, etc., is ground of action against the company for assault and battery. *Priest v. Hudson River R. Co.* 10 Abb. Pr. N. S. 60.

Where a person is assaulted and grossly insulted by a brakeman employed on the train, the company is liable. *Goddard v. Grand Trunk R. Co.* 57 Me. 202.

Where a conductor on a train makes an indecent assault on a female passenger the company is liable for compensatory damages. *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 9 Am. Ry. Rep. 118.

#### *Removing trespasser from train.*

Removing a trespasser from a train of cars while the train is moving very slowly is not negligence 12 L. R. A.

or wantonness *per se*. *Southern Kansas R. Co. v. Sanford (Kan.)* 11 L. R. A. 432.

Where a boy fifteen years old gets upon a freight train, for the purpose of riding, without paying his fare, and is commanded by the brakeman to jump off the train while in dangerous motion, and in fear of being thrown off obeys the command and is injured thereby, the company is liable. *Kansas City, F. S. & G. R. Co. v. Kelly*, 36 Kan. 655.

A child riding upon a platform without the payment of fare is a trespasser; but if the driver ejects him in a manner endangering life or limb, the company is liable. *Biddle v. Hestonville, M. & F. Pass. R. Co.* 8 Cent. Rep. 404, 112 Pa. 551. See *Duff v. Allegheny Valley R. Co.* 91 Pa. 458; *Hestonville Pass. R. Co. v. Connell*, 88 Pa. 522; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375.

A street-car company is liable for the act of its driver in attempting to put off a boy who is trespassing upon the car, who jumps off and receives injuries resulting in death, if the driver's acts caused a belief that he was about to inflict bodily punishment upon the boy. *Hogan v. Central Park, N. & E. R. R. Co.* 38 N. Y. S. R. 702. See *McCann v. Sixth Ave. R. Co.* 117 N. Y. 505.

#### *Ejecting passenger from train.*

Although a servant of a carrier may be obliged to use force in the enforcement of reasonable regulations established by the carrier, the carrier will not be protected if he uses excessive or unnecessary force. *New Jersey S. B. Co. v. Brockett*, 121 U. S. 637, 30 L. ed. 1049; *Sanford v. Eighth Avenue R. Co.* 23 N. Y. 345.

If the conductor, acting in the performance of his duty, exceeds the degree of force necessary and proper to accomplish the purpose of removal, and

against plaintiff. The prosecution was dismissed, as the dollar which it is alleged was counterfeit was a good coin. There is some conflict of testimony as to the exact point where the plaintiff was arrested. But we believe his statement is corroborated that he was arrested at the request of the driver by the policeman, in response to the "whistle,"—a signal for the officer which he blew before the car stopped,—just as he was stepping from the car. The petition of plaintiff contains two causes of action,—one for abuse and defamation when in defendant's car, and the other for malicious prosecution. On the latter cause, the record does not show that the charge against plaintiff, and his consequent arrest, instigated by the driver of the car, was done in the exercise of the functions in which he was employed. The driver had no instructions to make arrest for the passing of counterfeit money. No inference of such authority can be drawn from the fact of changing money for passengers. He does this at his own risk and responsibility; the Company loses nothing if counterfeit coin is accepted by the driver, as he is charged with it. It has no interest, therefore, in the arrest of the person attempting to pass counterfeit money, other than that which induces every citizen to make known crime when committed. It may be, as alleged by plaintiff, that the act was malicious, willful and tortious, but, as it was not done within the scope of the driver's employment, the defendant Company cannot be held responsible in damages. Rev. Civil Code, art. 3820; *Williams v. Pullman Palace Car Co.* 40 La. Ann. 88; *Gerber v. Viosea*, 8 Rob. (La.) 150; *Ware v. Baratarias & L. Canal*

*Co.* 15 La. 169; *Dyer v. Risley*, 28 La. Ann. 6; *Cooley, Torts*, p. 536.

The plaintiff was a passenger on defendant's street-car line. He had paid his fare to his destination. He behaved himself with propriety. He was not drunk or disorderly. The complaint against him for passing counterfeit money was groundless. He was subjected to insult and defamation by the driver in the presence of other passengers. If not subjected to arrest within the car, he was practically placed under surveillance by the driver from the time he was charged with passing the counterfeit dollar until he arrived at his destination. In the case of *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 88, we quoted from and approved of the law as expressed in the case of *Goddard v. Grand Trunk R. Co.*, 87 Me. 202. In that case the court said: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. He must not only protect his passengers against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants." *Ibid.* The same doctrine is laid down in the case of *Keene v. Lizardi*, 5 La. 431; also referred to and affirmed in the cases of *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 88, and *Mallach v. Ridley*, 15 N. Y. S. R. 4.

There was no conductor on defendant's car. The driver was in exclusive control of the car, and charged with the safe delivery of the passengers. He was the only servant of the Com-

pany, and injury results, the company is also liable. *Jackson v. Second Ave. R. Co.* 47 N. Y. 274. See *Ramsden v. Boston & A. R. Co.* 104 Mass. 117; *Higgins v. Water-villet Turnp. & R. Co.* 46 N. Y. 23. See notes to *South-ern Kansas R. Co. v. Sanford* (Kan.) 11 L. R. A. 432.

If the agent uses more force than is necessary to eject a passenger, or uses vile epithets toward him, such conduct should always be considered by the jury in aggravation of damages. *Quigley v. Central Pac. R. Co.* 11 Nev. 360.

Where a passenger stricken with apoplexy is removed from a street-car by the driver, in a helpless condition, and laid in the street, on a bleak, drizzling day, and there abandoned, the company is liable. *Conolly v. Crescent City R. Co.* 41 La. Ann. 87.

His mistake in supposing that the passenger was drunk, when he had ridden a considerable distance without misbehavior, will not excuse the company from liability. *Ibid.*

The refusal of a passenger to pay his fare will not justify any act which would put human life in peril, and a passenger has a right to repel an attempt to eject him in order to save his own life, from the unjustifiable assault of the conductor. *Hoffman v. New York Cent. & H. R. R. Co.* 87 N. Y. 24; *Bounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129; *Lynch v. Metropolitan Elev. R. Co.* 90 N. Y. 77; *Ramsden v. Boston & A. R. Co.* 104 Mass. 121; *Noble v. Cunningham*, 74 Ill. 58; *Northwestern R. Co. v. Haak*, 65 Ill. 242; *Robinson v. Webb*, 11 Bush, 464, cited in *New Jersey S. B. Co. v. Brockett*, 121 U. S. 637, 30 L. ed. 1051.

#### Action of damages for personal injury or death.

It is essential to the maintenance of an action for a tort that damages should accompany the act complained of; otherwise it is *damnum absque injuria*, for which no action lies. *Knapp v. Roche*, 94 N. Y. 12 L. R. A.

839; *Commercial Bank of Albany v. Ten Eyck*, 48 N. Y. 806; *People v. Stephens*, 71 N. Y. 541.

A railway company cannot be held liable in damages because its conductor informed a husband in a brusque manner, in the presence of his wife, that they must pay their fares or get off, and, at the next station, said in a decided or rude tone that they must get off. *Rose v. Wilmington & W. R. Co.* 106 N. C. 168.

Where the enforcement of a regulation was attended with unnecessary or cruel severity, the declarations of the servant made at the time are competent evidence against the carrier, and a part of the *res gestæ*. *Vicksburg & N. R. Co. v. O'Brien*, 119 U. S. 99, 30 L. ed. 290; *Ohio & N. W. R. Co. v. Porter*, 92 Ill. 437; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 190.

Where there was evidence tending to show that after defendant had notice that its brakeman had committed the injuries complained of it retained him in its service and promoted him, it might be such a ratification of the brakeman's act as to authorize the jury to award exemplary damages. *Bass v. Chicago & N. W. R. Co.* 39 Wis. 636, 18 Am. Ry. Rep. 414; *Bass v. Chicago & N. W. R. Co.* 43 Wis. 654, 15 Am. Ry. Rep. 45; *Gasway v. Atlanta & W. P. R. Co.* 58 Ga. 216, 16 Am. Ry. Rep. 99.

A verdict against a railroad company for an assault committed upon a passenger by one of its employees is sustained by evidence that the person committing the assault was at the time acting as brakeman under the authority of the defendant, though not on his regular train. *Conger v. St. Paul, M. & M. R. Co.* (Minn.) Jan. 12, 1891. See notes to *Smith v. Kanawha County Ct.* (W. Va.) 8 L. R. A. 82; *Conolly v. Crescent City R. Co.* (La. Ann.) 8 L. R. A. 134; *Dillingham v. Anthony* (Tex.) 8 L. R. A. 636; *Quim v. South Carolina R. Co.* (S. C.) 1 L. R. A. 652.

pany to whom the passengers could look for protection. It is difficult to estimate damages to feelings and reputation. If the plaintiff was possessed of any pride, or had any regard for his character, his humiliation in the presence of others, when in defendant's car, must have produced the severest mortification. Under the facts presented in this case, it was the peculiar province of the jury to estimate the damages. In the case of *Griffin v. Shreveport & A. R. Co.*, 41 La. Ann. 808, we said: "While we are not bound by the findings of a jury, even on questions of fact or of damage, and

do not hesitate to reverse them when manifestly erroneous or excessive, yet we give them the weight to which they are justly entitled, and do not lightly disturb them."

The claim for damages for the false arrest and malicious prosecution did not go to the jury. Their finding was confined to the insult, abuse and defamation while in defendant's car. We see no reason to disturb the amount awarded by the jury.

*Judgment affirmed.*

Petition for rehearing overruled.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

Phineas FONSECA

v.

CUNARD STEAMSHIP CO. (Limited).

(.....Mass.....)

1. A ticket for a voyage purporting to be a contract, containing written and printed stipulations which cover the greater part of two quarto pages, bearing the signature of the carrier's agent with a blank space for that of the passenger, charges the latter with notice of the stipulations, and they are binding on him although he did not read them.
2. The fact that a passenger does not sign a ticket which constitutes a contract and has a blank space for his signature does not relieve him from the effects of its stipulations.
3. A contract to carry a passenger exempting the carrier from liability even for negligence, if it was valid where it was made, will be

upheld by the courts of a State in which such contracts are held void as against public policy.

(May 12, 1891.)

**R**EPORT by the Superior Court for Suffolk County (Pitman, J.) for the opinion of the Supreme Judicial Court of an action brought to recover damages for injuries to his trunk and contents while said trunk was in defendant's possession for transportation, in which a verdict had been entered for plaintiff. *Judgment for defendant.*

Plaintiff was a steerage passenger on defendant's steamship "Samarra" from Liverpool to Boston on a trip commencing November 7, 1888. He had with him his trunk containing clothing and personal effects. During the voyage the trunk and contents were entirely ruined by defendant's negligence.

At the time plaintiff engaged passage he re-

**NOTE.—Passengers; stipulation in contract of carriage.**

The right of a passenger to be carried upon a railroad upon a "tourist's" or "round-trip" ticket depends upon the written contract signed by him thereon, and not upon representations made by an officer of the company. *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249.

Where a passenger ticket contains limitations of the carrier's liability printed thereon, with a blank space thereunder for the passenger's signature, but the passenger is not requested to sign his name thereto, and the conditions are not made known to him, there is no contract and no restriction or limitation of the liability of the carrier. *Kansas City, St. J. & C. B. R. Co. v. Rodebaugh*, 88 Kan. 45; *Freeman v. Detroit, M. & M. R. Co.* 9 West. Rep. 117, 65 Mich. 577.

A stipulation that an express company shall not be liable for money lost by its default, unless claim therefor is made in writing, at its office, within thirty days after its delivery to the company, is reasonable and valid. *Glenn v. Southern Exp. Co.* 68 Tenn. 594.

Where the failure to make the claim occurs without fault or negligence of the parties entitled to the money, it will be excused and will not prevent a recovery. *Ibid.*

The fact that a ticket, on its face nontransferable, was sold without requiring the purchaser to sign it, does not relieve him from the terms of the contract. *Drummond v. Southern Pac. Co.* (Utah) Feb. 3, 1891, citing *Illinois Cent. R. Co. v. Read*, 37 Ill. 484; *Railroad Co. v. McGowan*, 26 Am. & Eng. R. Cas. 274; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 391, 32 L. ed. 249.

12 L. R. A.

The giving plaintiff a free pass does not estop him from showing that he was not to take his passage upon the terms therein expressed, but was traveling on the company's offer to pay his expenses on a trip for the purpose of certain negotiations. *Grand Trunk R. Co. v. Stevens*, 95 U. S. 685, 24 L. ed. 535.

One holding a commutation ticket, and claiming the right to travel as a passenger on the ground that he is a member of a partnership named on the face of the ticket, must show the conductor that his name appears indorsed thereon in compliance with the conditions specified on the reverse side of the ticket. *Granier v. Louisiana W. R. Co.* 48 La. Ann. 890.

The burden of proof of knowledge, by a passenger, of a memorandum on his ticket limiting the liability of a railroad company, and of his assent to it, rests upon the company. *Baltimore & O. R. Co. v. Harris*, 79 U. S. 13 Wall. 65, 20 L. ed. 264, citing *Bissell v. Michigan, S. & N. I. R. Co.* 23 N. Y. 258; *Champion v. Bostwick*, 18 Wend. 175; *Cary v. Cleveland & T. R. Co.* 29 Barb. 36; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Najao v. Boston & L. R. Co.* 7 Allen, 329; *Great Western R. Co. v. Blake*, 7 Hurst. & N. 987; *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 388, 13 L. ed. 458; *Brown v. Eastern R. Co.* 11 Osh. 97; *Bean v. Green*, 13 Mo. 422; *Dorr v. New Jersey Steam Nav. Co.* 4 Sandf. 136, 11 N. Y. 435. See notes to *McGowan v. Morgan's L. & T. R. & S. Co. (La.)* 5 L. R. A. 318; *Wightman v. Chicago & N. W. R. Co. (Wia.)* 2 L. R. A. 126; *Dewire v. Boston & M. R. R. (Mass.)* 2 L. R. A. 166; *Missouri Pac. R. Co. v. Ivey (Tex.)* 1 L. R. A. 591.

ceived from defendant's agent a ticket entitled "Passenger Contract Ticket," upon the bottom of which appeared "The passenger's luggage is carried only on the conditions on the back hereof."

On the back of the ticket among other things was written "The Company is not liable for loss of or injury to the passenger or his luggage, or delay in the voyage, whether arising from the act of God, the queen's enemies, perils of the sea, rivers or navigation, restraint of princes, rulers and peoples, barratry or negligence of the Company's servants (whether on board the steamer or not), defect in the steamer, her machinery, gear or fittings, or from any other cause, of whatsoever nature."

The defendant relied on the provisions of the contract to defeat the action. The court found for the plaintiff and reported the case for the consideration of this court.

Further facts appear in the opinion.

**Mr. John H. Appleton** for plaintiff.

**Messrs. George Putnam and Thomas Russell** for defendant.

**Knowlton, J.**, delivered the opinion of the court:

It is not expressly stated in the report that the law of England was put in evidence as a fact in the case; but it seems to have been assumed at the trial, if not expressly agreed, that this law should be considered, and the argument before this court has proceeded on the same assumption. It is conceded that the presiding justice correctly found and ruled as follows: "That the contract was a British contract; that by the English law a carrier may by contract exempt himself from liability, even for loss caused by his negligence; that in this case, as the carrier has so attempted, and the terms are broad enough to exonerate him, the question remains of assent on the part of the plaintiff." That part of his ruling which is called in question by the defendant is as follows: "This has been decided in Massachusetts to be a question of evidence, in which the *lex fori* is to govern. That, although it has been decided that the law conclusively presumes that a consignor knows and assents to the terms of a bill of lading or a shipping receipt which he takes without dissent, yet a passenger ticket, even though it be called a "contract ticket," does not stand on the same footing. That in this case assent is not a conclusion of law, and is not proved as a matter of fact."

The principal question before us is whether the plaintiff, by reason of his acceptance and use of his ticket, shall be conclusively held to have assented to its terms. It has often been decided that one who accepts a contract, and proceeds to avail himself of its provisions, is bound by the stipulations and conditions expressed in it whether he reads them or not. *Grace v. Adams*, 100 Mass. 506; *Monitor Mut. F. Ins. Co. v. Buffum*, 115 Mass. 348; *Rice v. Dwight Mfg. Co.* 2 Cush. 80; *Hoadley v. Northern Transp. Co.* 115 Mass. 304; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 73 N. Y. 90. This rule is as applicable to contracts for the carriage of persons or property as to contracts of any other kind. *Grace v. Adams*, *supra*; *Boston & M. R. Co. v. Chipman*, 146 Mass. 107, 12 L. R. A.

5 New Eng. Rep. 572; *Parker v. South-Eastern R. Co.* L. R. 2 C. P. Div. 416, 428; *Harris v. Great Western R. Co.* L. R. 1 Q. B. Div. 515; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Hill v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 851.

The cases in which it is held that one who receives a ticket which appears to be a mere check, showing the points between which he is entitled to be carried, and which contains conditions on its back which he does not read, is not bound by such conditions, do not fall within this rule. *Brown v. Eastern R. Co.* 11 Cush. 97; *Malone v. Boston & W. R. Corp.* 12 Gray, 383; *Henderson v. Stevenson*, L. R. 2 App. Cas. 470; *Quimby v. Vanderbilt*, 17 N. Y. 806; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535. Such a ticket does not purport to be a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unusual stipulations. The precise question in the present case is whether the "contract ticket" was of such a kind that the passenger taking it should have understood that it was a contract containing stipulations which would determine the rights of the parties in reference to his carriage. If so, he would be expected to read it, and if he failed to do so he is bound by its stipulations. It covered with print and writing the greater part of two large quarto pages, and bore the signature of the defendant Company affixed by its agent, with a blank space for the signature of the passenger. The fact that it was not signed by the plaintiff is immaterial. *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846, and cases there cited. It contained elaborate provisions in regard to the rights of the passenger on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day of the week. No one who could read could glance at it without seeing that it undertook expressly to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination. In that particular it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads. In reference to this question the same rules of law apply to a contract to carry a passenger as to a contract for the transportation of goods. There is no reason why a consignor who is bound by the provisions of a bill of lading, which he accepts without reading, should not be equally bound by the terms of a contract in similar form to receive and transport him as a passenger.

In *Henderson v. Stevenson*, *supra*, the ticket was for transportation a short distance, from Dublin to Whitehaven, and the passenger was held not bound to read the notice on the back, because it did not purport to be a contract, but a mere check given as evidence of his right to carriage. In later English cases it is said that this decision went to the extreme limit of the law, and it has repeatedly been distinguished from cases where the ticket was in a different form. *Parker v. South-Eastern R. Co.* L. R. 2 C. P. Div. 416, 428; *Harris v. Great Western R. Co.* L. R. 1 Q. B. Div. 515; *Burke v. South-Eastern R. Co.* L. R. 5 C. P. Div. 1.

The passenger in the last-mentioned case had a coupon ticket, and it was held that he was bound to know what was printed as a part of the ticket. *Stears v. Liverpool, N. Y. & P. S. S. Co.*, 57 N. Y. 1, is in its essential facts almost identical with the case at bar, and it was held that the passenger was bound by the conditions printed on the ticket.

In *Quimby v. Boston & M. R. Co.*, *supra*, the same principle was applied to the case of a passenger traveling on a free pass, and no sound distinction can be made between that case and the case at bar.

We are of opinion that the ticket delivered to the plaintiff purported to be a contract, and that the defendant corporation had a right to assume that he consented to its provisions. All

these provisions are equally binding on him as if he had read them.

The contract being valid in England where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy. *Greenwood v. Gustis*, 6 Mass. 358; *Forepaugh v. Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508, and cases cited; *Re Missouri Steamship Co.* L. R. 42 Ch. Div. 326, 337; *Liverpool & G. W. S. Co. v. Phenix Ins. Co.* 129 U. S. 897, 33 L. ed. 788.

*Judgment for the defendant.*

## GEORGIA SUPREME COURT.

GEORGIA PACIFIC R. CO., *Plf. in Err.*,

W. H. DOOLY.

(....Ga....)

1. An employe is not bound by a rule that the regular compensation for services covers all risks, and that remaining in the service will be considered an acceptance of such condition of employment where he has not expressly agreed to the rule.

2. An instruction that a railroad bed is in a defective condition when it is not rea-

sonably safe for the passage of trains over it need not be qualified by reference to other railroads in the State.

3. A judgment will not be reversed for improperly allowing a former verdict to go to the jury with other papers where it was not known to or read by them until their own verdict was agreed upon.

(December 1, 1890.)

**ERROR** to the Superior Court for Fulton County to review a judgment for \$16,044 in favor of plaintiff in an action brought to recover damages for personal injuries alleged to

**NOTE.**—*Employe assumes the ordinary risks of his employment.*

A servant when he enters the service takes upon himself the ordinary risks of his employment and no other (*Roth v. Northern P. Lumbering Co.* 18 Or. 206; *Nadau v. White River Lumber Co.* 76 Wis. 120; *Fort Hill Stone Co. v. Orm*, 84 Ky. 183; *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189, 30 L. ed. 1114), for the reason that both himself and his employer had the risks in contemplation in fixing the compensation. *Anderson v. Bennett*, 16 Or. 515. See *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 383, 28 L. ed. 789.

He assumes no other risks unless the unusual and unreasonable risks are open and visible, and known to and comprehended by the employe. *Nadau v. White River Lumber Co.* and *Fort Hill Stone Co. v. Orm*, *supra*.

What risks are assumed. See *notes to Foley v. Pettie Mach. Works (Mass.)* 4 L. R. A. 51; *Howard v. Delaware & H. Canal Co. (Vt.)* 6 L. R. A. 76; *Taylor v. Evansville & T. H. R. Co. (Ind.)* 6 L. R. A. 584; *Pidcock v. Union Pac. R. Co. (Utah)* 1 L. R. A. 181.

Among the ordinary risks which he assumes are injuries caused by the negligence of a fellow servant in the same common employment. *Anderson v. Bennett*, *supra*.

When the plaintiff entered into the defendant's employment he assumed the usual hazards of the service and such risks as were apparent to observation. *Fredenburg v. Northern Cent. R. Co.* 114 N. Y. 584; *Gibson v. Erie R. Co.* 63 N. Y. 449.

But if the danger or risk is such that a prudent man is bound not to assume, his remaining in the service will make him chargeable with their assumption. *Devlin v. Wabash, St. L. & P. R. Co.* 4 West. Rep. 54, 37 Mo. 545, 23 Am. & Eng. R. R. Cas. 524; *Mayes v. Chicago, R. I. & P. R. Co.* 63 Iowa, 582.

12 L. R. A.

The servant should take notice of risks which arise during the course of his employment. *Snowden v. Idaho Quartz Min. Co.* 55 Cal. 443; *Missouri Furnace Co. v. Abend*, 107 Ill. 51; *Smith v. Sellers*, 40 La. Ann. 627.

An employe assumes the danger incident to a machine of which he has the optional use. *International & G. N. R. Co. v. McCarthy*, 64 Tex. 632.

A servant ordinarily assumes the risks of latent defects in machinery and appliances used by him. *Louisville & N. R. Co. v. Allen*, 78 Ala. 494; *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; *Spicer v. South Boston R. Co.* 138 Mass. 433; *McDermott v. Pacific R. Co.* 30 Mo. 115; *Painton v. Northern Cent. R. Co.* 83 N. Y. 7.

He is deemed to have assumed the risk where an accidental injury results from an unexpected cause. *Lindall v. Bode*, 72 Cal. 245; *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind. 440; *Richards v. Rough*, 53 Mich. 212.

A servant assumes the risk of the known dangers or of obviously defective implements, where the method of the use is within his control. *Jenney Electric Light & P. Co. v. Murphy*, 115 Ind. 568, citing *Indianapolis & St. L. R. Co. v. Watson*, 13 West. Rep. 322, 114 Ind. 20; *Louisville, N. A. & C. R. Co. v. Frawley*, 7 West. Rep. 44, 110 Ind. 18, 28 Am. & Eng. R. R. Cas. 308; *Umback v. Lake Shore & M. S. R. Co.* 83 Ind. 191; *Philadelphia, W. & B. R. Co. v. Keenan*, 103 Pa. 124; *Green & C. St. P. R. Co. v. Bresmer*, 97 Pa. 103; *English v. Chicago, M. & St. P. R. Co.* 24 Fed. Rep. 906.

If he consents to work at a place exposed to danger, knowing the dangers and risks, he cannot complain that the place might have been made safe by the exercise of reasonable care. *Roth v. Northern P. Lumbering Co.* 18 Or. 205. See *Sullivan v. India Mfg. Co.* 113 Mass. 390.

have resulted from defendant's negligence. *Affirmed.*

The sixth ground insisted on in the court below for the granting of a new trial was for alleged error in giving the following instruction: "It is important, as you must perceive, to understand when, in the sense of the law, a roadbed is in a defective condition. It is in such condition when the roadbed is not reasonably safe for the passage over it of the company's trains. There is no obligation, however, on the company to have the roadbed absolutely safe. Where the roadbed of a railroad is in a reasonably safe condition, and therefore not defective, the company, of course, would not be responsible for any injury which, notwithstanding, occurred to an employé from the derailing of a train."

The further facts sufficiently appear in the opinion.

*Messrs. Jackson & Jackson*, for plaintiff in error:

There was manifest error in the ruling complained of in the fifth assignment. To insure even approximate justice, all extrinsic matter should be excluded from the jury.

*Woolfolk v. State*, 81 Ga. 564.

Exculpatory affidavits of jurors to sustain a verdict should not be considered.

*Satter v. Glenn*, 43 Ga. 64.

A employé continuing to work for his employer after a printed copy of the employer's regulations were delivered to him must be considered as having agreed to them.

*Harmon v. Salmon Falls Mfg. Co.* 35 Me. 447, 58 Am. Dec. 718; *Stevens v. Reeves*, 9 Pick. 197, 200.

If being acquainted with the dangers and knowing the risks he works near machinery which is not boxed or covered, he assumes the risks, and the master is under no obligation to indemnify him against the consequences. *Roth v. Northern P. Lumbering Co. supra.*

But he does not assume a risk unless he has, or is presumed to have, knowledge or notice thereof. *Pittsburgh, O. & St. L. R. Co. v. Adams*, 3 West. Rep. 387, 106 Ind. 151; *Sullivan v. India Mfg. Co. supra*; *Clapp v. Minneapolis & St. L. R. Co.* 39 Minn. 26; *Clowers v. Wabash, St. L. & P. R. Co.* 3 West. Rep. 416, 21 Mo. App. 213; *Louisville, N. A. & C. R. Co. v. Frawley, supra*; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755; *Galveston, H. & S. A. R. Co. v. Lempe*, 59 Tex. 19; *Beau v. Oceanic Steam Nav. Co.* 24 Fed. Rep. 124.

The negligence of a railroad in failing to provide a safe place and tools is not a risk incident to the service, or one assumed by the employé; and if injury result from such negligence the company is liable, unless the employé had full knowledge of the unsafe condition of the place. *Little Rock, M. R. & G. R. Co. v. Leverett*, 48 Ark. 833, citing *St. Louis, I. M. & S. R. Co. v. Higgins*, 44 Ark. 300; *Elmer v. Looker*, 135 Mass. 575; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Pierce, Railroads*, 370; *Davis v. Central Vermont R. Co.* 55 Vt. 84, 11 Am. & Eng. R. R. Cas. 175; *Missouri Pac. R. Co. v. Lyde*, 37 Tex. 505, 11 Am. & Eng. R. R. Cas. 190; *Texas-Mexican R. Co. v. Whitmore*, 58 Tex. 276, 11 Am. & Eng. R. R. Cas. 199; *Galveston, H. & S. A. R. Co. v. Lempe*, 59 Tex. 19, 11 Am. & Eng. R. R. Cas. 201; *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149, 11 Am. & Eng. R. R. Cas. 211; *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 632, 11 Am. & Eng. R. R. Cas. 247; *Brown v. Atchison, T. & S. F. R. Co.* 81 Kan. 1, 15 Am. & Eng. R. R. Cas. 271.

A servant directed by the order of his master

Dooly was charged conclusively with notice of the terms of Rule 23. It had been promulgated to him in the usual way.

*Carroll v. East Tennessee, V. & G. R. Co.* 82 Ga. 478; *Hill v. Western U. Teleg. Co.* 85 Ga. 425.

*Messrs. Hoke Smith and Burton Smith*, for defendant in error:

Failure of the court on motion of defendant's counsel to detach the first verdict from the declaration is not reversible error.

*Onofri v. Com. (Pa.)* 9 Cent. Rep. 762.

Failure of the court to limit ordinary care to the conduct of roads in Alabama was not error.

*Wilson v. Louisville & N. R. Co.* 85 Ala. 269; *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518; *Louisville & N. R. Co. v. Chaffin*, 84 Ga. 519; *Krogg v. Atlanta & W. P. R. Co.* 77 Ga. 214.

No such regulation as Rule 23 could be made, for it was unreasonable.

*Hill v. Western U. Teleg. Co.* 85 Ga. 425; *Western U. Teleg. Co. v. Graham*, 1 Colo. 280,

9 Am. Rep. 136; *Trus v. International Teleg. Co.* 60 Me. 9, 11 Am. Rep. 160; *Western U. Teleg. Co. v. Fontaine*, 58 Ga. 423; *Lake Shore & M. S. R. Co. v. Spangler*, 5 West. Rep. 785,

44 Ohio St. 471, 29 Am. & Eng. R. R. Cas. 819; *Kansas Pac. R. Co. v. Peavy*, 29 Kan. 169,

11 Am. & Eng. R. R. Cas. 261; *Ross v. Des Moines Valley R. Co.* 89 Iowa, 249; *Roesner v. Hermann*, 8 Fed. Rep. 732.

The current of authority is against such contracts when express, and should much more be against the effort to create such a contract by a presumption based upon a presumption.

*Fish v. Chapman*, 2 Ga. 349; *Southern Rop.*

outside the contract of hiring is carried away from his implied assumption of risks. *Pittsburgh, O. & St. L. R. Co. v. Adams*, 3 West. Rep. 387, 106 Ind. 151.

#### Duty of master to secure safety of servant.

A servant does not stand on the same footing as a master, as respects the matter of care in inspecting and investigating risks to which he may be exposed. *Cook v. St. Paul, M. & M. R. Co.* 34 Minn. 45.

The servant has a right to presume that the master will do his duty in investigating the risks to which the servant may be exposed, so that when directed to perform a service he may be justified in assuming the risk. *Cook v. St. Paul, M. & M. R. Co.* 34 Minn. 45; *Russell v. Minneapolis & St. L. R. Co.* 22 Minn. 230; *Hutchinson v. York, N. & B. R. Co.* 5 Exch. 343; *Gibson v. Pacific R. Co.* 46 Mo. 163.

The servant has the right to assume that the machinery and implements furnished him are safe and suitable for the employment, and is not, as the master is, required to inspect them for that purpose. *Fort Wayne, J. & S. R. Co. v. Gildersleeve*, 39 Mich. 133; *Speed v. Atlantic & P. R. Co.* 71 Mo. 306; *Cone v. Delaware, L. & W. H. Co.* 81 N. Y. 207, 2 Am. & Eng. R. R. Cas. 57.

An employé is not bound to find out whether the master has used care in the selection of fellow employées; he is warranted in assuming that the master has done his duty in that respect. *United States Rolling Stock Co. v. Wilder*, 2 West. Rep. 918, 118 Ill. 100.

A servant is not bound to inform himself as to the safety of the premises or material to be used, where the master has superior means of knowledge, and the circumstances authorize the servant to rely upon him because of want of equal opportunity. *Bogenschutz v. Smith*, 84 Ky. 380; *Wood, Meat, and S. 791*, citing *Malone v. Hawley*, 46 Cal. 409; *Baxter v. Roberts*, 44 Cal. 187; *Sizer v. Syracuse, B. & N. Y. R.*

*Co. v. Newby*, 36 Ga. 644; *Southern Exp. Co. v. Purcell*, 87 Ga. 112.

**Simmons, J.**, delivered the opinion of the court:

The controlling question in this case is as to the proper construction and effect of Rule 23, which was relied upon by the Railroad Company to discharge it from all liability to the employé. That rule is as follows: "The conditions of employment by the Company are that the regular compensation paid for the services of employés shall cover all risks incurred, and liability to accident from any cause whatever, while in the service of this Company. If an employé is disabled by accident, or other cause, the right to claim compensation for injuries will not be recognized. Allowance, when made in such cases, will be as a gratuity, justified by the circumstances of the case and previous good conduct of the party. The fact of remaining in the service of the Company will be considered acceptance of these conditions. All officers employing men to work for this Company will have these conditions distinctly understood and agreed to by each employé before he enters the service of the Company." It appears from the evidence that Dooly was employed as flagman on the 21st of June, 1887, and then receipted for a copy of the book of rules and regulations, which contained Rule 23. He was promoted from the position of flagman to that of conductor, while he was in possession of the book of rules. He was familiar with the rule which required em-

ployés to know the rules and regulations. The accident happened on August 2, and he had been in possession of the rule-book about forty-two days. Under this state of facts, the able counsel for the plaintiff in error insisted that, as Dooly had receipted for the book of rules, and kept them in his possession up to the time of the accident, and remained in the employment of the Company, he thereby assented to Rule 23, and as matter of law was bound by it, and that the court should have so charged, instead of leaving it to the jury to say whether he assented to the rule or not. Under the facts of this case we do not think the court should have charged the jury that Dooly, on account of this rule, could not recover. It will be seen that the last clause of the rule is: "All officers employing men to work for this Company will have these conditions distinctly understood and agreed to by each employé before he enters the service of the Company." It affirmatively appears from the evidence that this clause of the rule was not complied with by the officer of the Company employing Dooly. Dooly's attention was not called to this specific rule. Nothing was said to him about it. Therefore he could not have "distinctly understood and agreed" to it. The object of this clause of the rule was to have each employé make an express contract with the Company, waiving his right to recover for any "accident from any cause whatever while in the service of the Company." If an express contract to this effect had been made by Dooly under the common law (which governs this case) it is likely he would have

*Co. 7 Lans. 67; Strahlendorf v. Rosenthal*, 30 Wis. 674; *Haskin v. New York Cent. & H. R. R. Co.* 65 Barb. 129; *Spelman v. Fisher Iron Co.* 56 Barb. 151.

But where he accepts the service subject to risks, with knowledge of the kind of tools and implements used, the master is not required to furnish new appliances or to elect between the expense of so doing and damages for injuries to servants. *Sweeney v. Berlin & Jones Envelope Co.* 2 Cent. Rep. 45; 101 N. Y. 830. See *De Forest v. Jewett*, 88 N. Y. 264; *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; *Gibson v. Erie R. Co.* 63 N. Y. 449; *note to Myham v. Louisiana E. L. & P. Co.* (La. Ann.) 7 L. R. A. 172.

#### *Duty and obligation of master.*

It is the duty of the employer to apprise the employé of any defects in the machinery which are beyond the reach of the observation of the latter. *McDade v. Washington & O. R. Co.* 8 Cent. Rep. 794; 5 Mackey, 144.

A master is bound to disclose latent defects and dangers not apparent, of which he has or ought to have knowledge; and his duty in this respect is greater to a young or inexperienced servant. *Pittsburgh, C. & St. L. R. Co. v. Adams*, 3 West. Rep. 387, 105 Ind. 151, citing *Atlas Engine Works v. Randall*, 100 Ind. 298; *Hill v. Gust*, 55 Ind. 45; *Hawkins v. Johnson*, 3 West. Rep. 290, 105 Ind. 29; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Mann v. Oriental Print Works*, 11 R. I. 153; *Union Pac. R. Co. v. Fort*, 84 U. S. 17 Wall. 554, 21 L. ed. 739; *Lalor v. Chicago, B. & Q. R. Co.* 52 Ill. 401; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572; *Chicago & N. W. R. Co. v. Bayfield*, 87 Mich. 205; *Dowling v. Allen*, 74 Mo. 13.

When there are hazards incident to the occupation, unknown to the servant, which the master knows or ought to know, it is his duty to warn the servant; and on failure to do so he is liable for any injury that may result to the servant in consequence of such neglect. *Missouri Pac. R. Co. v.* 12 L. R. A.

*Callbreath*, 66 Tex. 528; *Missouri Pac. R. Co. v. Watta*, 64 Tex. 508; *Walah v. Peet Valve Co.* 110 Mass. 23; *Wood, Mast. and S.* 714; *Rock v. Indian Orchard Mills*, 8 New Eng. Rep. 60, 142 Mass. 522.

As to the duty of the master to inform his servant of risks to which the latter is subjected in the course of his employment, see *note to Brazil Block Coal Co. v. Gaffney* (Ind.) 4 L. R. A. 850.

#### *Rules to insure safety of employés.*

A railroad company must make and promulgate rules which, if faithfully observed, will give reasonable protection to its employés, and this obligation cannot be relieved from by custom. *Bushby v. New York, L. E. & W. R. Co.* 10 Cent. Rep. 240, 107 N. Y. 374; *Abel v. Delaware & H. Canal Co.* 6 Cent. Rep. 615, 103 N. Y. 561; *Slater v. Jewett*, 85 N. Y. 61; *Beal v. New York Cent. & H. R. Co.* 70 N. Y. 171; *Sheehan v. New York Cent. & H. R. Co.* 91 N. Y. 320; *Dana v. New York Cent. & H. R. R. Co.* 92 N. Y. 692.

Failure of an employé to observe the rules of a railroad company, which were wholly disregarded by the railroad people, cannot be treated as contributory negligence. *Atkyn v. Wabash R. Co.* 43 Fed. Rep. 193.

The rules of a railway company for the government of its employés are not obligatory upon those who are ignorant of them and to whom they have not been promulgated. *Central R. & Bkg. Co. v. Ryles*, 84 Ga. 420; *Mackey v. Baltimore & P. R. Co.* (D. C.) 18 Wash. L. Rep. 707. See *Brunswick & W. R. Co. v. Clem*, 80 Ga. 584; *Carroll v. East Tennessee, V. & G. R. Co.* 82 Ga. 452.

Where the printed rules of a company require each conductor to inform himself of the condition of the cars, a conductor who fails to do so, and is injured by reason of defective brakes cannot recover. *Alexander v. Louisville & N. R. Co.* 83 Ky. 582.



been bound by it; but, inasmuch as he made no express contract, we do not think he was bound by the rule. It is insisted, however, that although he made no express contract, there was an implied contract between him and the Company, because the Company gave him the rule-book, which contained this rule; and as he had time and opportunity to read it, and remained in the employment of the Company, he impliedly agreed to the rule, and therefore could not recover. We think that wherever a corporation employs a person and gives him its printed rules governing his conduct as an employé, and he can read, and has had sufficient time to become acquainted with the rules of the employer, he is bound by every rule of the employer which is to govern his conduct while in the service, whether he has read the rule or has knowledge of it or not. The employer has the right to make the rules for the government of his employés. It is to his interest to do so, and he has the right to have those rules obeyed; and an employé has no right to violate them, and set up as an excuse his want of knowledge of them, after he has had an opportunity to become acquainted with them. He is bound by every reasonable rule which is to govern him in his work or conduct. If one of these rules should require him to couple cars with a stick, and he should undertake to couple them with his hand, and in consequence should be injured, he would not be allowed to say that he had no knowledge of the rule. Or if one of the rules should require him to give so many days' notice before quitting the employer's service, or in default thereof lose his pay, he could not, if he quit the service without such notice, recover his wages because he was ignorant of the rule. This is the principle upon which the cases cited by counsel for the plaintiff in error were decided. *Harmon v. Salmon Falls Mfg. Co.* 35 Me. 447, 58 Am. Dec. 718, and note; *Preston v. American Linen Co.* 119 Mass. 403; *Collins v. New England Iron Co.* 115 Mass. 23; *Stevens v. Reeves*, 9 Pick. 198; *Bradley v. Salmon Falls Mfg. Co.* 30 N. H. 487. It will be seen by reading these cases that the rules in each one of them were to govern the conduct of the employé while in the service of the employer, and prescribed penalties for non-compliance. But where the rule requires the employé to waive certain rights which are not connected with his duty as an employé, then, in our opinion, it does not bind him, although he has knowledge of it, unless he has expressly agreed thereto. The fact that he kept the rules in his possession, and remained in the service of the Company, would not bar his right to recover, unless he expressly agreed to that particular rule. And this is especially so in this case, as the rule itself requires that the employé shall distinctly understand and agree to it. We think, therefore, that the charges complained of on this point, and set out in grounds 7, 8, 9 and 9a of the motion for a new trial, were more favorable to the railroad than they ought to have been. Under the above view the special exceptions taken in the seventh and eighth grounds are not material, and would not, if they were sustained, be cause for reversal. The error complained of in the sixth ground is that "the court did not qualify its instruction by reference to roadbeds of other

railways reasonably well-conducted in the State of Alabama;" counsel contending that the criterion as to what constituted a roadbed in reasonably good condition was the condition of other well-conducted railroads in Alabama; The court could not have made this qualification without evidence to predicate it upon, and, if evidence had been offered as to the roadbeds of other railways in Alabama, it would have been inadmissible, as we held in *Louisville & N. R. Co. v. Chaffin*, 84 Ga. 519.

The fifth ground complains that the court erred in refusing, on motion of counsel for the defendant, to have the verdict rendered on a former trial detached from the declaration before the same was handed to the jury, he insisting that such former verdict would prejudice the defendant's case notwithstanding any instruction which the court might give to the jury on the subject. Speaking for myself, I think the trial judge should have granted this motion. The general rule is that it is a ground for new trial for any paper or writing to go to the jury and be read by them which is calculated to prejudice or influence them against any of the parties, unless it has been properly admitted in evidence; and I think the verdict of a former jury in the same case might be calculated to prejudice or influence the minds of a succeeding jury, although it had been set aside. It represents the opinion of their twelve predecessors in the same case that the plaintiff or the defendant is entitled to recover, and, when the plaintiff, their opinion also as to the amount of the recovery; and it cannot be denied that the unanimous judgment of twelve upright and intelligent citizens, under oath, sometimes carries great weight, not only with twelve succeeding jurors in the case, but with the community at large. Whether this be sound or not, we all think the better practice is, when either party so requests, to detach, erase or in some way conceal the former verdict so that the jury cannot know from the papers in the case what that verdict was.

Another rule on this subject is that, if a paper or writing calculated to prejudice or influence the jury gets before them illegally, but is not read by them, a new trial will not be granted upon this ground. And the record in this case shows, by the affidavits of eight of the jurors (the other four being inaccessible), that this first verdict was not known or read by them until after the second verdict had been agreed upon and signed by the foreman. This being true, the jury could not have been influenced by the first verdict. If it was not read by them it is the same as though it had not been delivered to them; and, substantial justice having been done between the parties, we will not grant a new trial upon this ground of the motion alone. As to papers, writings, verdicts, etc., getting before the jury illegally, and the rules governing the subject, see 2 Thomp. Trials, §§ 2576, 2580; *Killen v. Sistrunk*, 7 Ga. 294; *Biggins v. Brown*, 12 Ga. 271; *Walker v. Hunter*, 17 Ga. 384; *Lovett v. State*, 60 Ga. 257; *Wilkins v. Maddrey*, 67 Ga. 766; *Harri-man v. Wilkins*, 20 Me. 98; *Green v. State*, 38 Ark. 818; *St. Louis, I. M. & S. R. Co. v. Higgins* (Ark.) 14 S. W. Rep. 654.

The motion also complains that the verdict was contrary to evidence and excessive. We

think there was sufficient evidence to sustain the finding of the jury. If the evidence for the plaintiff is to be believed, the Railroad Company was very negligent in allowing its cross-ties to become so rotten as this evidence shows them to have been. While the verdict is a large one, the facts of the case show that Dooly was badly and permanently injured, and that from this injury his heart has become displaced or enlarged, so much so that he must

be in constant dread of death. An eminent physician testified that if he were in Dooly's condition he would not run a hundred yards for the universe. We deem it unnecessary to discuss the other grounds of the motion, because the points made therein are immaterial, and would not work a reversal of the case if they were sustained.

*Judgment affirmed.*

## OHIO SUPREME COURT.

### FARMERS' CO-OPERATIVE TRUST CO.,

*Pff. in Err.,*

*v.*

John FLOYD *et al.*

(....Ohio St....)

- \*1. A person who contracts, as agent, without having in fact authority to do so, is personally responsible to those who, in ignorance of his want of authority, contract with him, though he act in good faith, believing that he is invested with such authority.
- \*2. This liability is founded upon the implied promise of the person so contracting as agent that he has authority to bind the principal; and the measure of damages is the loss sustained by the other contracting party by reason of his not having the valid contract which the agent assumed to make.
- \*3. The corporate powers, business and property of corporations formed for profit must be exercised, conducted and controlled by a board of directors, who cannot be chosen until 10 per cent of the capital stock specified in the articles of incorporation has been sub-

\*Head notes by the COURT.

*NOTE.—Agency; responsibility of agent on his contracts.*

A person not a party to a note or bill of exchange cannot be made liable upon it upon proof that the ostensible party signed or indorsed as his agent. *Chitty, Bills and Notes, 36; Snelling v. Howard, 51 N. Y. 877; Meeker v. Claghorn, 44 N. Y. 361; Barker v. Mechanics Ins. Co. 3 Wend. 94, 20 Am. Dec. 664; Pentz v. Stanton, 10 Wend. 271, 25 Am. Dec. 558; De Witt v. Walton, 9 N. Y. 571; Beekham v. Drake, 9 Mees. & W. 79; Stackpold v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Briggs v. Partridge, 64 N. Y. 337; Eastern R. Co. v. Benedict, 5 Gray, 566.*

An agent accepting a bill in his own name binds himself and not his principal. *Bank of Rochester v. Montearth, 1 Denio, 402, 43 Am. Dec. 681.*

There can be no recovery on a note or bill against one whose name does not appear upon it. When an agent acts in his own name, he binds himself and not his principal. *Thomas v. Bishop, 2 Strange, 956; Allen v. Colt, 6 Hill, 318; Barlow v. Bishop, 1 East, 432, 3 Esp. 266; Leadbitter v. Farrow, 5 Maule & S. 345.*

If an agent in the course of his agency sign a bill in his own name he and not the principal is liable. *Joyson v. Richard, 12 Jones & S. 20; Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 45.*

An agent is liable on a note given by him in his principal's name without authority. *Rossiter v. 12 L. R. A.*

scribed. Persons contracting as directors when less than that amount of stock has been subscribed are without authority to create any corporate obligation, and become personally liable, though acting in good faith.

(October 28, 1890.)

**ERROR** to the Circuit Court for Jefferson County to review a judgment reversing a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to render defendants personally liable for a debt contracted by them in the name and on account of the Wool Growers' Exchange, an alleged corporation. *Reversed.*

*Statement by Williams, J.:*

The original action was commenced in the Court of Common Pleas of Jefferson County, on the 3d day of January, 1885, by the Farmers' Co-operative Trust Company, the plaintiff in error, against John Floyd, Davidson S. Gault, John Medill, A. C. Ault and John F. Hartshorn, who are the defendants in error here, and William M. Lee, J. D. Whitham, Benjamin Griffith, R. C. Vance, S. N. Orr,

*Rossiter, 8 Wend. 494, 24 Am. Dec. 63; Bartlett v. Tucker, 104 Mass. 386; Dusenberry v. Ellis, 3 Johns. Cas. 70, 2 Am. Dec. 144; Dung v. Parker, 52 N. Y. 490; Collen v. Wright, 8 El. & Bl. 647; Hochster v. Baruch, 5 Daly, 440.*

The character in which a person draws a bill may be shown as between himself and his principal, though he may be personally liable to third persons. *Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 45.*

A principal who justifies a party dealing with his agent in believing that he has given the agent authority is responsible only for that appearance of authority which is caused by himself, and not for an appearance of conformity to the authority caused only by the agent. *Edwards v. Dooley, 120 N. Y. 540.*

Belief of the authority of an agent may be such as to estop the principal from denying his authority in the particular transaction; but if not, then persons treating with him have no remedy, unless against the agent himself who misled them. See *note to Hubbard v. Tenbrook (Pa.) 2 L. R. A. 824.*

A person assuming to be an agent is not liable for a contract which he makes in the name of his principal, unless it contains apt words to charge him personally. *Senter v. Mouroe, 77 Cal. 347, citing Hall v. Crandall, 29 Cal. 568; Lander v. Castro, 43 Cal. 497. See notes to McKenney v. Edwards (Ky.) 3 L. R. A. 397; Wheeler v. McGuire (Ala.) 2 L. R. A. 808.*

John Farris, John Coad, Nathaniel Wells and Virginius P. Duvall. Summons was duly served upon those who are defendants in error in this court, but no service was obtained upon the other defendants in the action below. On the 8th of May, 1885, the plaintiff filed an amended petition, which (omitting the caption) is as follows: "The said plaintiff complains of the said defendants and says that it is a corporation duly organized under the laws of and doing business in the State of Pennsylvania; that the said defendants, from the 6th day of May, 1878, until the 11th day of April, 1888, were associated together in the buying and selling of wool, and doing a general merchandizing business in wool, under the name and style of the 'Wool Growers' Exchange,' that the places of business of said association were at Steubenville, Jefferson County, Ohio, and the City of Philadelphia, State of Pennsylvania; that in the formation of said association the said defendants, John F. Hartshorn, Nathaniel Wells, S. N. Orr, Benjamin Griffith, William M. Lee, J. D. Whitham, A. C. Ault, Davidson S. Gault, Virginius P. Duvall and John Floyd, undertook, in their names as incorporators, to organize a corporation for said association under the laws of the State of Ohio, under the name of the 'Wool Growers' Exchange,' and did obtain a pretended certificate of incorporation from the secretary of state of the State of Ohio for that purpose, but said plaintiff avers that said defendants, or either of them, or any person for them or on their behalf, never had or procured said association to be properly or legally incorporated under the laws of the State of Ohio, or of any other State. Said plaintiff avers that said pretended incorporators set forth in their said pretended certificate, filed with the secretary of state, that the capital stock of said organization shall be fifty thousand dollars (\$50,000), and yet they, said pretended incorporators, gave notice to the pretended stockholders to meet for the purpose of choosing directors when less than \$3,000 of the capital stock had been subscribed, and less than \$2,000 of the capital stock paid in, and said pretended stockholders, including said incorporators, did meet on the 19th day of June, 1878, and held an election under said notice, and elected said defendants, William M. Lee, president; John Floyd, vice-president; J. D. Whitham, treasurer; Benjamin Griffith, secretary; and Davidson S. Gault, R. C. Vance, S. N. Orr, John Medill, John Farris and John Coad, directors of said pretended corporation. Plaintiff says that afterwards, to wit, March 16, 1881, the said defendant A. C. Ault was added to said pretended board of directors. Plaintiff says that at no time has there been more than \$3,000 of the pretended capital stock of \$50,000 of said pretended corporation subscribed, nor more than \$2,000 paid in, and that all of said defendants, incorporators, officers and directors knew during all the time they conducted the business of said association that not more than \$3,000 of the capital stock had been subscribed, and not more than \$2,000 paid in. Said plaintiff further says that said incorporators, nor any of them, nor any person for them, gave any notice by publication of the opening of the books of said corporation for subscription to the capital stock; neither were the books or-

dered opened nor in fact opened, for subscription to the capital stock. Said plaintiff further says that from the time of the organization of said pretended corporation or association until its close by assignment, on the 11th day of April, 1888, said defendants had control of the affairs of said association and did a large business in the buying and selling of wool, amounting to thousands of dollars annually, borrowed large sums of money, contracting a large indebtedness. Plaintiff further says that on or about April 1, 1881, said defendants removed the business of the said association to Philadelphia, State of Pennsylvania, contrary to the provisions of the pretended charter of said association. Plaintiff says that between the 1st day of August and the 1st day of December, A. D. 1883, it sold to said defendants, doing business under the name of the 'Wool Growers' Exchange,' as aforesaid, 81,840 pounds of wool, which was delivered to said defendants at the City of Philadelphia, State of Pennsylvania, and that on the 8th day of January, 1883, there was a balance due said plaintiff from said defendants on account of said wool so sold and delivered to them, the sum of \$8,195. Plaintiff says that the said pretended charter obtained by said defendants was under the Act of the General Assembly of the State of Ohio, entitled 'An Act Supplementary to An Act Entitled "An Act to Provide for the Creation and Regulation of Incorporated Companies in the State of Ohio," passed May 1, 1852,' passed April 18, 1867, as amended April 20, 1874, as amended April 11, 1876, as amended March 12, 1877, as amended March 28, 1878, and that said pretended charter sets forth the object of said association as follows: 'That we have associated ourselves together for the purpose of forming an organization to establish a wool-house, and handle wool, merchandise, produce and furnishing supplies to wool-growers and others, on commission and purchase or sale, or in such other manner as will be for the best interest of the stockholders herein, and to do a general commission business in the articles above enumerated, and also for the purposes of disseminating through bureaus or journals useful knowledge and information pertaining to the improvement and protection of wool-growing interests.' Plaintiff says that under said pretended charter and said Act of the General Assembly of the State of Ohio, under which the said pretended charter was obtained, said defendants had no authority or power as a corporation to buy or sell wool, and that therefore all of said acts of said defendants in a pretended corporate capacity, in the buying and selling of wool, and in the buying of said wool from said plaintiff, were *ultra vires* and invalid. Plaintiff says that said defendants, on the 8th day of January, 1883, through said defendant J. D. Whitham, their agent, executed and delivered to plaintiff, as evidence of said indebtedness, a promissory note, of which the following is a true copy:

" 'Cochranstown, Pa., Jan. 8, 1883.  
 " 'March 20th, after date, for value received, we jointly and severally promise to pay to the Farmers' Co-operative Trust Company, or order, thirty-one hundred and ninety-five dollars, with interest; and in case of default of payment at maturity, an additional five per cent for the

collection of the same. And we jointly and severally empower any attorney of record in this Commonwealth, or elsewhere, to appear for us, or either of us, and confess judgment against us, or either of us, for the same and accrued interest, together with said five per cent attorneys' fees, with costs of suit, release of errors and without stay of execution. And for value received we jointly and severally do waive the right and benefit severally of any law of this or any State exempting property, real or personal, from sale; and if levy is made on land, we do also jointly and severally waive the right of inquisition, and consent to the condemnation thereof, with full liberty to sell the same on *à. fa.*, with release of errors thereon.

"J. D. Whitham, Treas.

"J. D. Whitham."

"Plaintiff further says that no part of said sum has been paid. Plaintiff says that at the time of the sale of the said wool and the acceptance of said promissory note it had no knowledge of the manner in which said defendants were conducting said business, but relied upon all the members of said association, jointly and severally, for the payment of their said claim. Said plaintiff further says that said Wool Growers' Exchange, as a corporation or association, is wholly insolvent, having no property whatever out of which it can make its said claim, and that the debts against said Wool Growers' Exchange are more than \$40,000. Plaintiff says that at the time of the selling of said wool and the issuing of said promissory note as aforesaid all of said defendants were the active business managers of said association, and had full knowledge of the failure of said association, as aforesaid, to obtain and carry into effect a complete charter, and had also full knowledge that the buying or selling of wool was beyond the scope and authority of said pretended corporation as aforesaid. Plaintiff avers that said defendants, J. D. Whitham, R. C. Vance, S. N. Orr and A. C. Ault, did business under their initials, and that plaintiff does not know, and cannot ascertain, their full name. Plaintiff therefore says that said defendants are jointly and severally indebted to said plaintiff in the sum of \$3,195, with interest from the 8th day of January, A. D. 1883. Wherefore plaintiff prays judgment against said defendants, and each of them, for same sum of \$3,195, with interest upon the same from the 8th day of January, 1883, and costs of suit."

Hartshorn made default. The other defendants who were served with process demurred generally to the amended petition, and, after the demurrers were overruled, filed a joint answer, controverting all the allegations of the petition except the averment of the plaintiff's incorporation. The plaintiff, upon the trial, obtained a verdict for the full amount claimed in the petition. The court overruled the motion filed by the answering defendants for a new trial, and rendered judgment against them on the verdict, and also rendered judgment against Hartshorn on default for the same amount. A bill of exceptions was duly taken by the defendants, from which it appears that at the trial the parties gave evidence tending to prove, on their respective parts, the issues

joined by the pleadings. To enable the plaintiff to recover under the instructions given by the court to the jury, it was necessary for them to find that there had not been subscribed to the capital stock of the Wool Growers' Exchange an amount equal to 10 per cent thereof; that the plaintiff was ignorant of this defect in the incorporation; and that the defendants themselves, or through an agent appointed by them, actually participated in the transaction which the plaintiff set forth in the petition. The burden of establishing these facts, the jury were instructed, was on the plaintiff.

The defendants requested that certain instructions be given to the jury, which, together with the action of the court with respect to them, are set out in the bill of exceptions as follows: "I am requested by counsel to charge the following propositions: '*Proposition 1.* If the said Medill, Floyd, Ault and Gault, who have filed a joint answer herein, under all the circumstances of the case, without negligence on their part, believed, and had a good right to believe, that the condition as to the subscription of \$5,000 of the capital stock of the Wool Growers' Exchange had been complied with prior to the election of officers, then they are not liable to plaintiff, if the articles of incorporation were duly filed with the secretary of the State of Ohio, and said Wool Growers' Exchange did proceed to carry on, and did carry on, the business for which they were incorporated.' This, gentlemen, I refuse to charge. Mere belief is not sufficient. I am also requested by defendants to charge as follows: '*Proposition 2.* If you are satisfied from the evidence in this case that the defendants answering in this case, knowingly, and with the design to defraud the public generally, combined together and held forth false and deceptive colors, and did acts which are wrong, and have thereby injured the plaintiff, they must make him whole by responding to the full extent of that injury, and the Act of incorporation in such case, when the same is defective, and the organization thereunder was effected without the requisite amount of stock subscribed, will not protect the defendants from such liability. But if, on the contrary, you are satisfied from the evidence that the said defendants, in good faith and without negligence, proceeded to the organization of the corporation, and thereafter carried on business as a corporation in good faith, believing and having cause to believe that the requisite amount of stock had been subscribed, and that the corporation was otherwise regularly organized, then, and in such case, the Act of incorporation will protect them from personal liability in this action to the plaintiff, although in fact it should now turn out that the organization was effected when less than the requisite amount of stock had been subscribed.' This I refuse. Actual fraud on the part of the defendants is not essential to the case of the plaintiff, nor will good faith and sincere belief alone afford a shield."

The defendants excepted to the refusal of the court to instruct the jury as requested by them, and also excepted generally to the charge given; and those of them against whom judgment was rendered (except Hartshorn, who, refusing to join as a plaintiff in error, was made a party defendant) prosecuted error to the circuit court,

where the judgment was reversed upon the following grounds, as stated in the journal entry: "First. The court of common pleas erred in overruling the separate demurrers of plaintiffs in error to the amended petition of defendant in error, the Farmers' Co-operative Trust Company. Second. The court of common pleas erred in refusing to give the propositions numbered one and two of the request of the plaintiffs in error to the jury, as requested by plaintiffs in error, and in the charge as given by the court to the jury so far as inconsistent with said requests."

It is sought by the present proceeding in error to reverse the judgment of the circuit court, and have that of the common pleas affirmed.

**Messrs. John M. Cook, Estep & Estep and A. H. Batten**, for plaintiff in error:

The subscribing of 10 per cent of the capital stock was a condition precedent to the commencement of the business by the association, and if 10 per cent was not subscribed, these parties, defendants in error, who conducted the business, made themselves individually responsible for all liabilities incurred, and the question of fraud had nothing to do with it.

If there was a corporation by the issuing of the certificate, it was a lifeless thing until the 10 per cent or \$5,000 was subscribed.

Act March 21, 1851, §§ 10, 44; Swan & C. Stat. p. 168; *Medill v. Collier*, 16 Ohio St. 599; *Second Nat. Bank v. Hall*, 85 Ohio St. 158; *Raccoon River Nav. Co. v. Eagle*, 29 Ohio St. 288; *Chamberlain v. Painesville & H. R. Co.* 15 Ohio St. 225; *Ashtabula & N. L. R. Co. v. Smith*, Id. 328; 1 Swan & C. Stat. p. 276, §§ 5, 6, 9; *Jessett v. Valley R. Co.* 34 Ohio St. 601; *Powers v. Hamilton & L. R. Co.* 33 Ohio St. 429; *Fay v. Noble*, 7 Cush. 184; *Fuller v. Rouse*, 57 N. Y. 28; *Coppin v. Greenlee & R. Co.* 88 Ohio St. 279.

Directors and managers of a corporation are agents, and governed by the rules of law respecting agency.

Thompson, Liability of Officers, §§ 77-79, 351-353, 395, 401; Field, Priv. Corp. §§ 79, 80, 81, 156, 178; Story, Ag. § 264.

These directors had no authority to act for the corporation.

2 Morawetz, Priv. Corp. § 588.

They were not officers *de facto*.

Id. § 640.

A stranger contracting with the corporation might plead it was a *de facto* corporation, but these parties are estopped from taking advantage of their own wrong. It would be a fraud to permit them to do so.

*Lawler v. Walker*, 18 Ohio, 156; *Bartholomew v. Bentley*, 1 Ohio St. 87; *Straus v. Eagle Ins. Co.* 5 Ohio St. 60; *Bank of Chillicothe v. Swayna*, 8 Ohio, 287; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104, 41 Am. Rep. 85.

If defendants in error did not know that the 10 per cent of the capital stock was not subscribed, they might have known; it was their business to know, hence they are responsible.

*Seale v. City Bank*, 20 Ohio Law Bulletin, 50; *Cole v. Cassidy*, 188 Mass. 487.

Persons who carry on the business of a corporation before it is legally authorized to transact business are personally liable for debts contracted by them.

12 L. R. A.

*Medill v. Collier*, 16 Ohio St. 599; *Kaiser v. Lawrence Sav. Bank*, *supra*.

There being in law no corporation authorized to transact business, there is no principal, and the agent is personally bound on the general doctrine of agency.

Story, Ag. § 264; Ang. & A. Priv. Corp. § 303.

If the agents of a corporation incur debts within their apparent power, the members of the company should sustain the loss rather than innocent creditors.

2 Morawetz, Priv. Corp. 610, 828.

**Messrs. W. P. Hays and J. F. Eaton**, for defendants in error:

Before the defendants can be held responsible, they must have been guilty of fraud.

*Zinn v. Medel*, 9 W. Va. 580; *Bartholomew v. Bentley*, 15 Ohio, 659; Thompson, Liability of Officers, 401; *Steddings v. Edwards*, 12 Gray, 203; Taylor, Priv. Corp. § 628; *Spring's App.* 71 Pa. 11; *Coppin v. Greenlee & R. Co.* 88 Ohio St. 270.

The subscription of 10 per cent stock is not a prerequisite to corporate existence or to the right to carry on business.

*State v. Robinson*, 12 Ohio Law Bull. 269; *Eaton v. Aspinwall*, 19 N. Y. 119; *Second Nat. Bank v. Hall*, 85 Ohio St. 159.

The corporation, the Wool Growers' Exchange, having assumed, by entering into the contract with plaintiff, to have requisite power, and plaintiff having dealt with the corporation as a corporation, both parties are estopped to deny it.

*Stout v. Zulick*, 5 Cent. Rep. 335, 48 N. J. L. 599; *Worcester Med. Inst. v. Harding*, 11 Cush. 286; *McBroom v. Lebanon Corp.* 31 Ind. 268; *Troy Cong. Soc. v. Perry*, 6 N. H. 164; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 348; Taylor, Priv. Corp. § 739; Ang. & A. Priv. Corp. § 635; *Whitney v. Wyman*, 101 U. S. 892, 25 L. ed. 1050.

Defendants are protected in the absence of fraud from the debts of the corporation because it, the Wool Growers' Exchange, was a *de facto* corporation.

*Society Peru v. Cleveland*, 1 West. Rep. 506, 48 Ohio St. 481; *Rowland v. Meader Furniture Co.* 88 Ohio St. 269.

There are only four classes of cases where corporate officers can be made liable for the debts of the corporation, where injury results:

1. Where their acts are *malum in se*.
2. Where their acts are prohibited by law.
3. Where the statute under which the corporation is organized provides for a liability against the officers.

4. Where their acts are fraudulent.

Ang. & A. Priv. Corp. 591, 595, 596, 599, 606-607. See especially, *Whitney v. Wyman*, *supra*; *Humphreys v. Mooney*, 5 Colo. 288; *Stout v. Zulick*, *supra*; *Garride Coal Co. v. Maxwell*, 20 Fed. Rep. 187, 23 Fed. Rep. 197.

**Williams, J.**, delivered the opinion of the court:

The circuit court, it appears from the record, reversed the judgment of the court of common pleas because of alleged errors in overruling the demurrers to the amended petition, and refusing the instructions which the defendants requested to be given to the jury. It sufficiently

appears from the petition that in 1878 the defendants attempted to form, under the laws of this State, a corporation called the "Wool Growers' Exchange," for the purpose, as declared in the articles of incorporation, of dealing in "wool, merchandise, produce, and furnishing supplies to wool-growers and others, on commission and purchase or sale, and to do a general commission business in the articles above enumerated; and also for the purpose of disseminating, through bureaus or journals, useful knowledge and information pertaining to the improvement and protection of wool-growing interests." The amount of the capital stock was fixed at \$50,000, in shares of \$10 each. When less than \$8,000 of stock had been subscribed, and less than \$2,000 paid in, an election was held by the defendants and others, at which the defendants were chosen as directors of the concern. These directors organized by selecting from their number the customary officers of a corporation. Thereafter, in 1883, while the defendants, against whom the judgment in the case was rendered, were acting as such directors, controlling and managing the business of the Wool Growers' Exchange, wool was purchased in its name from the plaintiff to the amount averred in the petition; and the balance, \$3,195, of the purchase price, for which, with interest, the plaintiff recovered judgment, remains unpaid. The defendants had knowledge that 10 per cent of the stock of the corporation had not been, and never was, subscribed or paid in, but the plaintiff was ignorant of that fact. There is no allegation in the petition that the defendants were actuated by any fraudulent purpose, or had any design to cheat or defraud the plaintiff. Without such purpose or design, it is claimed that the defendants could not be made liable, and therefore the lack of such averment is a fatal defect in the petition. Whether it be so or not is the question raised by the demurrers. The instructions refused present a question somewhat different in form, though much of the same nature, which is, whether a personal liability was incurred by the defendants if in the transaction with the plaintiff they acted in good faith, believing that the requisite amount of stock to authorize the organization of the corporation had been subscribed.

Upon both questions the circuit court held with the defendants, and if its holding upon either was correct, its judgment must be affirmed. A somewhat extended examination has satisfied us, however, that upon neither is the decision in harmony with the great weight of authority. The courts of this country and of England, with few exceptions, adhere to the doctrine so clearly laid down by *Mr. Justice Story* in his *Commentaries on the Law of Agency*, where it is said: "Wherever a party undertakes to do any act as the agent of another, if he do not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal. There can be no doubt that this is, and ought to be, the rule of law in the case of a fraudulent representation made by the agent, that he has due authority to act for the principal; for it is an intentional deceit. The same rule may

justly apply where the agent has no such authority, and he knows it, and he nevertheless undertakes to act for the principal, although he intends no fraud. But another case may be put, which may seem to admit of more doubt; and that is, where the party undertakes to act as an agent for the principal, bona fide, believing that he has due authority, but in point of fact he has no authority, and therefore he acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude. This whole doctrine proceeds upon a plain principle of justice; for every person so acting for another, by a natural, if not by a necessary, implication, holds himself out as having competent authority to do the act; and he thereby draws the other party into a reciprocal engagement. . . . If he has no such authority, and acts bona fide, still he does a wrong to the other party; and if that wrong produces an injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such an assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party, who has been misled by it. Indeed, it is a plain principle of equity, as well as of law, that where one of two innocent persons must suffer a loss, he ought to bear it who has been the sole means of producing it, by inducing the other to place a false confidence in his acts, and to repose upon the truth of his statements." *Story, Ag. § 264.* In the note to this section many cases which sustain the text are cited. And in the notes to *Thomson v. Davenport*, in 2 *Smith, Lead. Cas.* 8th ed. pt. 1, commencing on page 408 of the eighth edition, a number of the cases on the same subject are collected. In addition to those, other cases might be referred to, among them the following: *Walker v. Bank of State*, 9 N. Y. 582; *White v. Madison*, 26 N. Y. 117; *Weare v. Gove*, 44 N. H. 196.

In the last case cited above it is held that, "although no fraud or wrongful motive can be imputed to the agent, still his act is an affirmation that he has authority to make the contract, and he may justly be held responsible for the truth of it; and it is no more than reasonable that he should suffer the consequences of his mistake rather than the party who is misled by it, because, before holding himself out as such agent, it is his duty to ascertain whether his claim so to act is well founded or not; and he surely cannot be heard to complain that others have confided in his assertion of authority, and upon the strength of it have entered into reciprocal engagements with him. Even if wholly innocent of any wrongful purpose, his case falls within the familiar principle that when one of two innocent persons must suffer a loss it ought to be borne by him who has been the means of causing it, by inducing the other to confide in the truth of his representations."

While, however, the authorities generally agree that where a person, not having in fact authority to make a contract as agent, yet does so under the bona fide belief that such authority is vested in him, is nevertheless personally responsible to those who contract with him in

ignorance of his want of authority, a diversity of opinion is found in the cases in regard to the exact nature of the liability, and the character of the action by which it may be enforced.

In *Jenkins v. Hutchinson*, 18 Q. B. 746, it is intimated by Erle, J., that an action of deceit would lie in such cases, notwithstanding the good faith of the agent, and some authorities may be found to that effect. Another class of cases hold that the liability is upon the contract; but it is believed that whether the agent is so liable depends upon the intention of the parties as discovered from the contract itself; and on this question the form of the agreement and the mode of signature may be quite conclusive. The rule, as stated in *Story on Agency*, is that an agent cannot be sued on the very instrument itself, as a contracting party, unless there be apt words to charge him. Section 264a. Still another class of cases establish the rule, which we are inclined to adopt, that in cases like the one we are considering the agent is liable upon his implied promise that he possesses the authority he assumes to have. 2 Smith, Lead. Cas. 8th ed. pt. 1, p. 408, and cases there cited; *Lewis v. Nicholson* 18 Q. B. 512. In *White v. Madison*, *supra*, in a learned opinion, it is held that the liability of the agent in such cases rests upon the ground that he warrants his authority, and not that the contract is to be deemed his own. *Bartholomew v. Bentley*, 15 Ohio, 660, is referred to as establishing both that the liability of the agent in cases of this kind is founded on fraud and that the petition should charge a fraudulent intent in direct terms. That was an action in case for deceit, under the practice which prevailed before the adoption of the Code of Civil Procedure. The questions arising upon the demurrer related to the form of the remedy and the sufficiency of the declaration in such an action. They are stated by Birchard, J., to be: "First. Can a special action on the case for fraud, which has resulted in damage of the plaintiffs, be maintained in a case like this, upon sufficient declaration? Second. Is this declaration good upon demurrer?" The court answers the first question in the affirmative, and in speaking of the declaration says: "The objection taken by counsel is a want of certainty. The action is founded on a fraudulent combination, and for holding out false colors at the commencement of the banking operations, and at various subsequent periods. The only direct charge of a fraudulent intention is in the withdrawal of the funds, and this, for aught that appears, may have been long since the bills in plaintiff's hands were issued. . . . It is thought that the averment of a fraudulent design should have been made in positive terms, as to each specific act relied upon to sustain the action." Under the practice then in force, pleadings were subject to demurrer unless they were appropriate in their form and allegations to the particular action pursued; and we do not understand it to be there decided that no other action could be maintained on the facts of that case. A different action was maintained in *Medill v. Collier*, 16 Ohio St. 599, which, so far as the grounds upon which the liability of the bank directors was placed, is not greatly dissimilar to the case before us.

Under our present system of pleading it is 12 L. R. A.

not important what was formerly the most appropriate remedy. Upon the facts stated in the petition, the law, we think, implied a promise on the part of the defendants that in making the contract with the plaintiff they had authority to bind the corporation they assumed to represent; and if they had not, they are answerable for the consequences. That they were without such authority seems clear. It was held by this court in *Bartholomew v. Bentley*, 1 Ohio St. 87, that while mere irregularities in organizing a corporation would not subject the officers to private liability, to protect them from such liability the provisions of the Act of incorporation must be substantially pursued. By our statutes, under which the proceedings were taken for the formation of the corporation referred to in the petition, the corporate powers, business and property of corporations formed for profit must be exercised, conducted and controlled by a board of directors, all of whom must be stockholders; the articles of association must state the amount of the capital stock, and the number of shares into which it is divided; and at least 10 per cent of that amount must be subscribed before directors can be chosen. So that the subscription of the necessary amount of the capital stock to authorize the election of directors is not only a matter of substance, but is essential to the organization of the corporation, and necessary to the transaction of business by it. It is the security which the law requires shall be provided, before the corporation enters upon its business, for the protection of those who may deal with it. The statutory liability of the stock subscribers is an additional security. In the effort to form the corporation in question neither of these securities was provided. Counsel contend that it is nevertheless a corporation *de facto*, and estopped to deny its liability to the plaintiff. If it were, it is not readily perceived how this would aid the defendants. Until there were stock subscriptions to an amount warranting the organization, the subscribers could not be compelled to pay beyond the sum required at the time of the subscription; nor would the statutory liability attach, unless there were some ground of estoppel, not appearing in this case. The implied undertaking of the defendants was, that they represented a corporation with the capital stock required by law; while the one to which they insist the plaintiff shall be compelled to resort was, if a *de facto* corporation, so only in name, without substance or capacity; and if the doctrine of estoppel could be brought to the aid of the plaintiff against it, the defendants are not in a position to require a resort to that remedy to relieve them from the liability they have incurred.

The case appears to have proceeded in the trial court upon the theory that, if the defendants were liable at all, the amount which the plaintiff was entitled to recover was the balance due on the contract. This was not necessarily the measure of recovery. As we have already seen, the action in such cases is not founded on the contract made for the supposed principal, but on the implied promise of the agent that he had authority to bind the principal; and the damages which may be recovered for its breach is the loss sustained by the plaintiff by

reason of his not having the valid contract which the agent undertook that he should have. The damages may sometimes exceed the amount due on the contract made in the name of the principal, for it is held they may include the costs and expenses of an unsuccessful action against the principal to enforce the contract. *White v. Madison, supra*; *Simons v. Patchett*, 7 El. & Bl. 568; *Collen v. Wright*, Id. 301, 2 Smith, Lead. Cas. 410.

In *Morawetz on Corporations* it is said that the measure of damages, in an action against the directors or officers of a corporation who induce a person to deal with it before the capital indicated in its charter has in fact been provided, is the loss sustained "by reason of the difference between the capital which he actually received, and that which he was entitled to expect." Under this rule, we think, the plaintiff might properly recover the balance remaining unpaid on the purchase price of the wool sold. *Prima facie*, that is the amount of the plaintiff's loss, and it does not exceed the amount of the capital which the corporation was required by law to have before it could be represented by directors, and which the defendants, by assuming to act for it, undertook that it did have.

It is true the petition alleges that the corporation is insolvent, with an indebtedness exceeding 10 per cent of the capital stock; but whether the claims of other creditors stand upon a like footing with that of the plaintiff, or can or will be enforced against the defendants, does not appear. Besides, if the proper stock subscriptions had been obtained, the corporation might not have become insolvent; or be-

fore it did, the plaintiff's claim might have been paid or secured. If in such case the plaintiff could recover no more than a sum equal to the proportion of the capital which should have been provided that his claim bears to the whole indebtedness contracted in the corporate name, it would be necessary to take an account of the assets and liabilities to determine the amount of the recovery. That rule applied to this case would require that the defendants be charged with an amount equal to the necessary stock subscriptions and the statutory liability of the subscribers, and that all the creditors be brought in to have their claims adjusted before the amount of the verdict could be arrived at. The plaintiff has not sought to compel the defendants to provide a fund for the payment of other creditors who are not themselves asserting their claims, nor have the defendants complained because they were not compelled to do so. Whether the defendants could in the trial court, if they had deemed it to their advantage, have had the claims of all the creditors adjusted, the aggregate liabilities ascertained, and the total amount the defendants could be called upon to pay determined and apportioned among the creditors, we need not decide. They did not make that claim in the court below, nor do they make it here. In our opinion, the court of common pleas committed no error in overruling the demurrers to the petition, nor in refusing the instructions requested by the defendants.

*The judgment of the Circuit Court is reversed, and that of the Court of Common Pleas affirmed.*



## CONNECTICUT SUPREME COURT OF ERRORS.

Loren A. GALLUP, Trustee in Insolvency of  
Almon Bartlett,  
c.

George S. SMITH.

(39 Conn. 354.)

1. A probate judge cited by the probate judge of another district to act in his place, who acts with the assent of the clerk, is a judge *de jure*, although the statute prescribes that the "clerk of the court shall cite" the judge in such cases, as that provision is merely directory.
2. The most satisfactory and conclusive test of the question whether or not the provisions of a statute are mandatory or directory is whether the prescribed mode of action is of the essence of the thing to be accomplished, in other words, whether it relates to matters material or immaterial, to matters of convenience or of substance.
3. Evidence that no witnesses were sworn or hearing had before a probate judge, as stated in the records of the probate court, is inadmissible.

(September 12, 1890.)

**A**PPEAL by defendant from a judgment of the Court of Common Pleas for New London County in favor of plaintiff in an action brought to recover for property alleged to have

been taken by defendant, and which was a part of the estate of which plaintiff had been appointed trustee. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. S. Lucas, C. F. Thayer and G. E. Parsons*, for appellant:

A plaintiff who sues as trustee must prove a legal appointment to such office when his right to sue in that capacity is put in issue; and he cannot avail himself of the *de facto* doctrine in aid of his appointment when the defective title of the appointing power is matter of public record, or when he has set the appointing power in motion for his own advantage.

*Powers v. Mulvey*, 51 Conn. 433; *Mourry v. Hawkins*, 57 Conn. 453.

The Statute provides for the organization of a new tribunal when the probate judge is disqualified, which, when organized, shall have power to affect the rights and property of the citizen; and such a power can only be acquired by a strict compliance with statutory requirements. This makes the Statute mandatory.

*People v. Schermerhorn*, 19 Barb. 558.

The plaintiff was bound to know the law relative to the citation of the foreign judge, and also that nothing is presumed in favor of courts of limited jurisdiction.

*Griswold v. Mather*, 5 Conn. 435.

**NOTE.**—*Statutes, when mandatory and when directory; constitutional provisions.*

The provisions of a new Constitution are mandatory and prohibitory unless by direct words they are declared to be otherwise. Cal. Const. art. 1, § 22.

The North Carolina constitutional provisions regarding the forms and methods to be observed by the General Assembly in the enactment of laws are mandatory, and not merely directory. *State v. Patterson*, 98 N. C. 600.

A constitutional provision that the style of a law shall be: "It is enacted by the General Assembly as follows,"—if anything more than directory, cannot be decreed to apply to that species of enactments which are usually denominated joint resolutions, and which are often used to express the legislative will in cases not requiring a general law. *Hoyt v. Sprague*, 103 U. S. 613, 26 L. ed. 535.

In respect to the impropriety and danger of applying the rules of interpretation as to directory provisions of statutes to the interpretation of constitutional provisions, see *Cooley*, Const. Lim. 78, 83; *Hunt v. State*, 22 Tex. App. 306; *May v. Rice*, 91 Ind. 546; *Swann v. Buck*, 40 Miss. 238; *Seat of Government Case*, 1 Wash. Terr. 113; *State v. Patterson*, *supra*.

Ohio Const., art. 2, § 6, providing that "no bill shall contain more than one subject, which shall be clearly expressed in its title," relates only to bills in their progress through the General Assembly, and is directory merely, being a rule prescribed for that body, to which the supervision of its observance is left. *Weil v. State*, 46 Ohio St. 450.

Failure by the Alabama Code Commissioners to incorporate all of the Acts of the 1893-97 Session, amending sections of the Code of 1876, into the Code of 1896, does not invalidate any such amending Act omitted, as the requirement upon them to so incorporate such amendments was only directory. *South v. State*, 86 Ala. 617.

**Enabling Statutes.**

Enabling Statutes impliedly prohibit any other  
12 L. R. A.

than the statutory mode of doing the acts which they authorize to be done. *Veazie v. China*, 50 Me. 513; *Dalton v. Murphy*, 30 Miss. 59; *Beltzhoover v. Gollings*, 101 Pa. 298; *Wendel v. Durbin*, 26 Wis. 390.

**Duties imposed by statute.**

Where the intent of the Legislature is not to devolve a mere discretion, but to impose a positive and absolute duty, the provisions of the statute are mandatory. *Rock Island Suprs. v. United States*, 71 U. S. 4 Wall. 444, 18 L. ed. 423; *Hogan v. Devlin*, 2 Daly, 184.

Where a duty is imposed upon officers by statute, whether by words peremptory or merely permissive, it is mandatory in favor of a party having an absolute interest in the subject matter. *Martin v. Brooklyn*, 1 Hill, 545.

Where the salary of an officer is declared to be a county charge which the supervisors shall audit and allow the provision is imperative and leaves them no discretion. *Morris v. People*, 3 Denio, 381.

So where work is required by a municipal charter to be done by contract. *Re Manhattan R. Co.* 3 Cent. Rep. 329, 102 N. Y. 301; *Re Emigrant Indust. Sav. Bank*, 75 N. Y. 338; *Re Merriam*, 84 N. Y. 506; *Re Weil*, 88 N. Y. 543; *Re Lange*, 85 N. Y. 307.

A provision requiring publication by a common council of the passage and adoption of certain resolutions two days prior to their passage in a prescribed manner is mandatory. *Re Douglass*, 46 N. Y. 42.

A statute which makes it the duty of supervisors to raise money by tax for county buildings is mandatory. *Caswell v. Allen*, 7 Johns. 63.

Provisions in a statute imposing conditions precedent to the right of a municipal corporation to incur a debt or make a contract are mandatory. *Bladen v. Philadelphia*, 60 Pa. 464.

**Statutes conferring new rights and remedies.**

Statutes providing the form and mode of exercising new rights, privileges and immunities are

The *de facto* doctrine, like that of estoppel *in pais*, is one of protection to the public and third persons on the ground of public policy, and it will always be enforced as a means of protection; never for the purpose of positive gain.

*Townsend Sav. Bank v. Todd*, 47 Conn. 190; *Warner Glove Co. v. Jennings*, 58 Conn. 74. See *State v. Carroll*, 38 Conn. 449; *Brown v. O'Connell*, 36 Conn. 432; *Douglass v. Wickwire*, 19 Conn. 489; *Plymouth v. Painter*, 17 Conn. 585; *Balls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957; *People v. Collins*, 7 Johns. 549; *State v. Bates*, 36 Vt. 387; *Lyndon v. Miller*, 36 Vt. 329.

An officer *de facto* cannot take advantage of the doctrine himself.

*Courser v. Powers*, 34 Vt. 517; *Grace v. Teague*, 81 Me. 559.

The issue required plaintiff to prove himself a trustee *de jure* at the time this action was brought.

*Grace v. Teague*, *supra*; *Pooler v. Reed*, 73 Me. 129; *Andrews v. Portland*, 4 New Eng. Rep. 780, 79 Me. 484.

The jurisdiction of our courts of probate may be questioned in a collateral proceeding, even though the jurisdictional facts appear of record to have been found by the court.

The court cannot acquire it by deciding that it has jurisdiction, when the facts necessary to give it do not exist.

*Hawes, Jurisdiction*, § 36; *Sears v. Terry*, 26 Conn. 281; *People's Sav. Bank v. Wilcox*, 1

New Eng. Rep. 818, 15 R. I. 253; *Gregory v. Gregory*, 1 New Eng. Rep. 796, 78 Me. 187; *Gregory v. Sherman*, 44 Conn. 471; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 597.

The evidence offered would have proved that the court had no jurisdiction, and it is well settled that the judgment of a court acting without authority is not merely voidable, but absolutely void.

*Elliott v. Piercol*, 26 U. S. 1 Pet. 328, 7 L. ed. 164; *Wilcox v. Jackson*, 38 U. S. 18 Pet. 496, 10 L. ed. 264; *Hickey v. Stewart*, 44 U. S. 3 How. 750, 11 L. ed. 814; *Thompson v. Whitman*, *supra*; *Ex parte Sawyer*, 124 U. S. 200, 31 L. ed. 402.

*Messrs. Brown & Perkins* for appellee.

*Loomis, J.*, delivered the opinion of the court:

The complainant, as trustee of the insolvent estate of Almon Bartlett, seeks to recover, for the benefit of creditors, the value of certain personal property belonging to the insolvent's estate, which, it is alleged, the defendant wrongfully took and converted to his own use.

It is conceded that the defendant, having taken the property, knowing that Bartlett was in failing circumstances, to apply on a pre-existing debt due from Bartlett to him, cannot withhold it from the plaintiff if he is rightfully acting as trustee. The defendant's contention is

mandatory and must be substantially followed. *Wheaton v. Peters*, 38 U. S. 3 Pet. 591, 8 L. ed. 1055; *Jollie v. Jaques*, 1 Blatchf. 618; *Baker v. Taylor*, 2 Blatchf. 62; *Newton v. Cowe*, 4 Bing. 294; *Avanzo v. Mudie*, 10 Exch. 206; *Brooks v. Cock*, 3 Ad. & El. 141; *Henderson v. Maxwell*, L. R. 5 Ch. Div. 392.

80 statutes providing for disposition of estates by married women are mandatory. *Armstrong v. Ross*, 20 N. J. Eq. 117; *Willard v. Eastham*, 15 Gray, 228; 2 Roper, Husb. and W. 132; *Clancy, Husb. and W.*, 27; 2 Story, Eq. Jur. § 4 1261, 1262.

In statutory proceedings every act which is jurisdictional or of the essence of the proceeding or prescribed for the benefit of the party affected is mandatory. *Weed v. Lyon*, 1 Walk. Ch. 77; *Thurston v. Prentiss*, 1 Mich. 193; *Galpin v. Abbott*, 6 Mich. 17; *Re Selby*, Id. 198; *Whitney v. Thomas*, 23 N. Y. 231; *Re Ford*, 6 Lans. 92; *United States v. Wyn-gall*, 5 Hill, 16; *Oloots v. Frazier*, Id. 563; *Sharp v. Speir*, 4 Hill, 76; *Sharp v. Johnson*, Id. 92; *Hascall v. Madison University*, 3 Barb. 174; *O'Donnell v. McIntyre*, 37 Hun, 615; *Duanesburgh v. Jenkins*, 46 Barb. 294; *Wheeler v. Mills*, 40 Barb. 644; *Re Folsom*, 2 Thomp. & C. 55.

Where a statute in granting a new power prescribes how it shall be exercised, it can lawfully be exercised in no other way. *Best v. Gholson*, 39 Ill. 466; *Franklin Glass Co. v. White*, 14 Mass. 286; *State v. Cole*, 2 McCord, L. 117; *Head v. Providence Ins. Co.* 6 U. S. 2 Cranch, 127, 2 L. ed. 229.

Under the maxim *expressio unius est exclusio alterius*, where grants of power and authority have expressly fixed or limited the time with reference to essential antecedent acts, all other time is excluded. *Childs v. Smith*, 55 Barb. 45.

When a statute creates a right and declares when it may be exercised, it cannot be exercised at any other time. *Dow v. Young* (Me.), 4 New Eng. Rep. 508.

Where an existing right or privilege is to be exercised only in a prescribed manner the mode prescribed is imperative. *Union Bank v. Laird*, 15 U. 12 L. R. A.

3, 2 Wheat. 390, 4 L. ed. 229; *Stayton v. Hulings*, 7 Ind. 144.

The provisions of the Arkansas statute respecting the sale of property assigned for the benefit of creditors are mandatory, and not directory. *Jaffray v. McGehee*, 107 U. S. 361, 37 L. ed. 436. See *French v. Edwards*, 90 U. S. 13 Wall. 505, 20 L. ed. 702.

Provisions in a Registry Law that certain conditions must be complied with before a vote may be received at an annual election are imperative. *State v. Hilmantel*, 21 Wis. 556; *State v. Stumpf*, 23 Wis. 630; *Re McDonough*, 105 Pa. 426.

#### Grant of special powers.

Special powers given to corporations, to courts or officers must be exercised with strict adherence to the directions of the statute giving them. *Chollar Min. Co. v. Wilson*, 65 Cal. 374; *Des Moines v. Gilchrist*, 67 Iowa, 210; *Pensacola v. Reese*, 20 Fla. 427; *Childs v. Smith*, 55 Barb. 45; *Seymour v. Judd*, 2 N. Y. 464; *Pittsburg v. Walter*, 69 Pa. 366; *Gordon v. Winchester Bldg. & A. T. Asso.* 13 Bush, 110; *Becket v. Uniontown Bldg. & Loan Asso.* 36 Pa. 211; *Workingmen's Bldg. & Loan Asso. v. Coleman*, 39 Pa. 423; *Cope v. Thames Haven Dock R. Co.* 3 Exch. 841; *Freud v. Dennett*, 4 C. B. N. S. 576; *Sutherland, Stat. Const.* 589.

Where a statutory power is to be exercised and preliminary notice to persons to be affected is required the provision is mandatory. *Lane v. Burnap Drain Comrs.* 39 Mich. 728; *Burnett v. Scully*, 55 Mich. 374; *Bennett v. Olney*, 56 Mich. 684; *Welker v. Potter*, 18 Ohio St. 85.

Where power is given to public officers, whenever public or individual right calls for its exercise, the language used, though permissive in form, is in fact peremptory. In all such cases it is held that the intent of the Legislature was not to devolve a mere discretion, but to impose a positive and absolute duty. *Rock Island County v. United States*, 71 U. S. 4 Wall. 426, 13 L. ed. 419. See *Wood v.*

that the plaintiff is not a lawful trustee for the alleged reason that the court which appointed him was illegally constituted.

The facts appear from the records of the probate District of Montville, which were admitted in evidence against the defendant's objection, to prove that the plaintiff was a lawful trustee to take possession of the property of Bartlett. These records showed a regular petition to the court by Loren H. Gallup, as creditor of the insolvent, in due form praying for the appointment of a trustee to take possession of the property of Bartlett for the benefit of his creditors as provided by statute, and an order of notice by the court thereon fixing the date of hearing the petition, made by the regular judge of the probate court. But before the day appointed by the court for the hearing, Comstock, the regularly appointed judge, had been consulted as counsel in matters growing out of the estate, and he thereupon and for that reason declined to act further in the matter, and cited in Judge A. O. Gallup, the lawful probate judge of the adjoining district of Salem, by sending him a letter signed by the court asking him to act as judge of the Court of Probate for the District of Montville in the matter,—all of which was made a matter of record and signed by Comstock, the regular judge. The judge of the adjoining district, in obedience to the citation, held the court in the Montville District on the day appointed, and after a full hearing found the allegations of the petition true, and that

Bartlett had failed to satisfy the claim of the petitioning creditor, and therefore granted the prayer of the petition and decreed Bartlett insolvent, and appointed the plaintiff trustee in due form, and he proceeded with the settlement of the estate.

The only thing relied upon by the defendant to invalidate the plaintiff's appointment as trustee is the simple fact that the judge of the adjoining district held the court pursuant to a citation by the judge of the Montville District, rather than by the clerk. It is found, however, that the latter was present during all the proceedings on the part of the judge so cited in, and it was not claimed that the clerk had designated any other judge to hold the court or made the least objection to any of the proceedings.

The defendant appeals to the language of the Statute to support his position, which provides that "when any judge of probate shall decline or be disqualified to act as such judge, or shall be unable to discharge his duties, or when the office of judge of probate in any district shall become vacant, the clerk of the court of probate of the district in which such disqualification, inability or vacancy exists . . . shall cite in the judge of probate of an adjoining district, etc."

The force of the argument in behalf of the defendant depends entirely upon the assumption that the above Statute is mandatory and not directory merely, and that therefore the

Shultz, 4 Hun, 306; People v. Otsego County Suprs. 51 N. Y. 401.

#### *Authority conferred by statute.*

Authority conferred by statutes in derogation of the common law must be strictly pursued. Ramsay v. Hommel, 68 Wis. 12; Potts v. Cooley, 51 Wis. 355; Moseley v. Tift, 4 Fla. 408. See note to Beeson v. Busenbark (Kan.) 10 L. R. A. 839.

Provisions fixing or prescribing the mode of exercising a power or franchise must be strictly pursued. Head v. Armory, 6 U. S. 2 Cranch, 127, 2 L. ed. 229.

Negative words in granting power or jurisdiction cannot be directory. Bladen v. Philadelphia, 60 Pa. 464.

And affirmative words in a statute may be construed as negative of what is not affirmed. Bryan v. Sundberg, 5 Tex. 428; Stradling v. Morgan, Plowd. 206; Slade v. Drake, Hob. 298.

In all cases, especially in courts of inferior jurisdiction where authority to proceed is conferred by statute, and the manner of obtaining jurisdiction is so prescribed, and where one may be divested of his estate by the proceeding thereunder, such proceeding must be strictly pursued. Corwin v. Merritt, 3 Barb. 341; Harrington v. People, 6 Barb. 607; Cohoes County v. Goes, 13 Barb. 188; People v. Schermerhorn, 19 Barb. 541; People v. Brooklyn Common Council, 22 Barb. 405; Morse v. Williamson, 35 Barb. 472; Bloom v. Burdick, 1 Hill, 130; Sherwood v. Reade, 7 Hill, 431; Sharp v. Spier, 4 Hill, 76; *Ex parte* Albany Common Council, 3 Cow. 358; Barnard v. Viele, 21 Wend. 66; Atkins v. Kinnan, 20 Wend. 249; Brisbane v. Peabody, 3 How. Pr. 109; Denning v. Smith, 3 Johns. Ch. 332, 1 L. ed. 637; Sherman v. Dodge, 6 Johns. Ch. 107, 2 L. ed. 69; Porter's Dwar. Stat. 224; Sutherland, Stat. Const. 587.

#### *The words "may," "shall" and "must."*

In a direction to a public body in a matter in which the public have an interest, as, that a bridge

may be maintained by the county, the word "may" means "must." Newburgh & C. Turnp. Road v. Miller, 5 Johns. Ch. 113, 1 L. ed. 1027; Malcolm v. Rogers, 5 Cow. 183; Phelps v. Hawley, 52 N. Y. 23; Spangler v. Jacoby, 14 Ill. 297; Schuyler County Suprs. v. People, 25 Ill. 181; Sheckert v. East Saginaw, 22 Mich. 104.

A statute providing that a tax certificate may be of a certain form, the word "may" was held equivalent to "shall" and is mandatory. Clark v. Schatz, 24 Minn. 300; Keller v. Houlihan, 32 Minn. 496; Wilberforce, Statute Law, 204.

When a statute directs the performance of an act for the promotion of justice or the public good, if it is necessary to secure these objects, the word "may" will be construed as mandatory. Johnston v. Pate, 95 N. C. 68. See Rex v. Barlow, 2 Salk. 600; Coy v. Lyons City Council, 17 Iowa, 1; Clark County Justices v. Paris, W. & T. R. Co. 11 B. Mon. 143; Baltimore v. Marriott, 9 Md. 160; State v. Harris, 17 Ohio St. 608; New York v. Furze, 3 Hill, 612; Minor v. Mechanics Bank of Alexandria, 26 U. S. 1 Pet. 46, 7 L. ed. 47; Mason v. Pearson, 50 U. S. 9 How. 248; 13 L. ed. 125; Rock Island County Suprs. v. United States, 71 U. S. 4 Wall. 485, 18 L. ed. 419; Galena v. United States, 72 U. S. 5 Wall. 705, 18 L. ed. 500.

The word "shall" or "may" when used in a statute is imperative only when public interest or rights are concerned. Malcom v. Rogers, 5 Cow. 188.

The word "may" when used instead of "shall," in a statute prescribing the duty of an officer, ordinarily imports a duty that is directory; but when the public interest is concerned, or the rights of third persons are affected, the words are construed to mean the same thing. Smith v. King, 14 Or. 10.

"May" means "must" in all cases where the Legislature means to impose a positive instead of a discretionary power. Minor v. Mechanics Bank of Alexandria, 26 U. S. 1 Pet. 46, 7 L. ed. 47. See note to People v. Bloomington Twp. Highway Comrs. (Ill.) 6 L. R. A. 162.

precise mode prescribed must be pursued. But if we apply to the Statute the most approved tests established by high authority we shall see that the assumption is not well founded.

In the first place the provision in question contains mere matter of direction and there are no negative words importing that the act must be done by the clerk rather than by the court. This was the test laid down in *Pearse v. Morrice*, 2 Ad. & El. 96; *Rea v. St. Gregory*, Id. 99; *Rea v. Hipswell*, 8 Barn. & C. 466; *Stayton v. Huisinga*, 7 Ind. 144, and in *Bladen v. Philadelphia*, 60 Pa. 464.

In *People v. Cook*, 14 Barb. 290, which was approved by the Court of Appeals in 8 N. Y. 67, the rule was laid down that "statutes directing the mode of proceeding by public officers are directory, and are not regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute."

In *Voazie v. China*, 50 Me. 518, it is said: "Where words are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may and often have been construed to be directory."

In *People v. Schermerhorn*, 19 Barb. 558, it was held that "statutory requisitions are deemed directory when they relate to some immaterial matter, where compliance is a matter of convenience rather than of substance."

Whether the word "may" is permissive or obligatory depends upon the intent and object of the Legislature. It means "must" when third persons or the public have an interest in the performance of the act. *Hains v. Herring*, 68 Tex. 468, citing *Newburg & C. Turnp. Road v. Miller*, 5 Johns. Ch. 113, 1 L. ed. 1087; *Malcom v. Rogers*, *supra*; *Sedgwick Stat. and Const. L. 434*.

#### Permissive words in statute.

Whether words when used in a statute are merely permissive or imperative depends on the intention as disclosed in the nature of the act, and in the context. *Minor v. Mechanics Bank of Alexandria*, 26 U. S. 1 Pet. 46, 7 L. ed. 47; *Lewis v. State*, 8 Head, 127; 1 Kent, Com. 463.

Where a statute confers power on a corporation to be exercised for the public good, the words "power and authority" and "authorized and empowered" imply duty and obligation and are mandatory. *Baltimore v. Marriott*, 9 Md. 160; *Alleghany County Pub. School Comra. v. Alleghany County*, 20 Md. 449; *People v. Herkimer County Supra*, 56 Barb. 452; *Barnes v. Thompson*, 2 Swan, 317.

Permissive words in respect to courts or officers are imperative in those cases in which the public or individuals have a right that the power so conferred be exercised. *Tarver v. Tallapoosa Comra. Ct.* 17 Ala. 527; *Mitchell v. Duncan*, 7 Fla. 13; *Reg. v. Adamson*, L. R. 1 Q. B. Div. 201.

They will be construed as mandatory for the purpose of sustaining and enforcing rights, but not for creating a right or determining its character; they are peremptory when used to clothe a public officer with power to do an act for justice's sake or which concerns the public interests or rights of third persons. *Re Banks*, 28 Ala. 28; *Rex v. Barlow*, 2 Salk. 609; *Johnston v. Pate*, 36 N. C. 68; *Sutherland*, Stat. Const. 587.

But statutes which are permissive in form, or which declare that it shall be lawful to do or procure to be done certain things, are not imperative. *Sutherland*, Stat. Const. 593, citing *Minor v. Me-* 12 L. R. A.

*Lord Mansfield*, in *Rea v. Loadale*, 1 Burr. 445, made the question whether a statute should be considered mandatory or not depend upon "whether that which was directed to be done was or was not of the essence of the thing required." A similar principle was adopted in this State in *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550, and in *Colt v. Eves*, 12 Conn. 243, both cases relating to the time specified in statutes for the performance of a required act. In the former the town clerk was required under a penalty to return an abstract of the assessment list of the town to the comptroller by the first day of March. In the latter case a city charter required that a certain number of jurors should be chosen on the first Monday of July, and they were not chosen until the eighth day of August. In both cases it was held that, as there was nothing to indicate that the exact time specified in the statute was essential, it should be considered merely as directory.

All the rules to which we have adverted are consistent with and furnish some support for the position that the Statute under consideration is merely directory.

It is of course difficult to lay down a general rule to determine in all cases when the provisions of a statute are merely directory and when mandatory or imperative, but, of all the rules mentioned, the test most satisfactory and conclusive is, whether the prescribed mode of action is of the essence of the thing to be ac-

chanics Bank of Alexandria, 26 U. S. 1 Pet. 46, 7 L. ed. 47; *Julius v. Oxford*, L. R. 5 App. Cas. 214; *Backwell's Case*, 1 Vern. 152.

#### Protection of personal and property rights.

Statutory requirements intended for the protection of the citizen and to prevent a sacrifice of his property are not directory, but mandatory. The power of the officer in such cases is limited by the manner and conditions prescribed for its exercise. *French v. Edwards*, 80 U. S. 13 Wall. 506, 20 L. ed. 702. See *Clark v. Crane*, 5 Mich. 154.

A requirement of the statute can never be dispensed with as directory where the act or its omission can by any possibility work injury, however slight, to anyone affected by it. *Koch v. Bridges*, 45 Miss. 247.

Where a statutory power or jurisdiction is granted, whether to a court or to an officer, in the exercise of which one may be divested of his property, the provisions regulating the procedure are mandatory as to the essential acts. *Potter's Dwar. Stat.* 224.

So every material requirement of the laws for condemning private property must be strictly observed. *Kroop v. Forman*, 31 Mich. 144; *Bennett v. Olney*, 56 Mich. 684; *People v. Hillsdale & C. Turnp. Co.* 2 Johns. 192.

Statutes providing for commitments to the custody of state lunatic hospitals are to be strictly followed. *Leggate v. Clark*, 111 Mass. 308; *Chase v. Hathaway*, 14 Mass. 222; *Leonard v. Leonard*, 14 Pick. 280.

What the law requires to be done for the protection of the taxpayer is mandatory. *Clark v. Crane*, 5 Mich. 154; *Marsh v. Chesnut*, 14 Ill. 223; *Torrey v. Millbury*, 21 Pick. 67; *Sibley v. Smith*, 2 Mich. 486.

Under provisions in a statute intended for the protection of the citizen, and to prevent a sacrifice of his property, the power of the officer is limited by the measure and conditions prescribed for its exercise. *French v. Edwards*, 80 U. S. 13 Wall. 506, 20 L. ed. 702. See generally *Walker v. Chapman*, 23

complished, or, in other words, whether it relates to matter material or immaterial—to matter of convenience or of substance.

The thing to be accomplished in this case was to obtain a probate judge from some district adjoining Montville, in order to continue the proceedings legally commenced and pending in the Probate Court of Montville. To accomplish this the judge of the adjoining district should be informed if possible by someone directly connected with the court in the other district, of the exigency that had arisen, and that his presence and official assistance were desired; but whether asked to attend by the court or by the clerk of the court would seem about as immaterial as whether he would take one road or another or one vehicle or another to get there.

There is, however, one reason urged by the defendant for a strict compliance with the statutory requisition which deserves consideration, for, if true, we would be unwilling to pronounce the Statute merely directory. The reason alleged is, that the clerk was mentioned because the law was unwilling, so to speak, to trust a disqualified judge with the selection of another judge to take his place. There would be some force in this suggestion if the disqualified judge could substitute any person of his own choice; but the choice is limited by law to the judges of the adjoining probate districts—all duly qualified public officers, elected by

the people of their respective districts to perform the same judicial duties that are required of them in the districts to which they may be invited. It is impossible that the law should apprehend danger to be guarded against from a choice among these officials. Should there happen to be in a given case a personal disqualification, such an one would of course be set aside upon general principles. It would seem impossible that injury should result from a choice by a disqualified judge, when he cannot choose any but qualified judges to try the case, whom the law must regard as equally well qualified.

And besides, the clerk to whom, as the defendant contends, the law has exclusively committed the selection, might also have a personal interest in the same matter, but of which, strangely enough, the law takes no account at all, as it would if it was so scrupulously guarding against such a danger.

If the purpose of the law in the case under consideration is as claimed, our statutes in analogous cases are all strangely defective and inconsistent. By section 678 of the General Statutes, a justice of the peace, disqualified to try a case before him, can designate some other justice to act in his stead; and by section 745 of the Statutes, when a judge of the court of common pleas is unable or disqualified to act, he may himself call in, or in his absence the clerk of the court may call in, another judge. In the long time that these provisions have

Ala. 116; State Auditor v. Jackson County, 65 Ala. 142; Wheeler v. Chicago, 24 Ill. 106; Shawnee County Comra. v. Carter, 2 Kan. 115; McDonough v. Gravelier, 9 La. 546; O'Neal v. Virginia & M. B. Co. 18 Md. 1; Westhampton v. Searle, 127 Mass. 502; Bird v. Perkins, 83 Mich. 21; Clark v. Crane, *supra*; Flint & P. M. R. Co. v. Auditor-General, 41 Mich. 636; State v. Jersey City, 85 N. J. L. 381; Kelly v. Craig, 5 Ired. L. 129; Magee v. Com. 46 Pa. 353; Spear v. Ditty, 8 Vt. 419.

#### Tax Laws.

Statutory provisions regulating the assessment and levy of taxes are mandatory when their object is the protection of the taxpayer; but regulations intended to promote dispatch, method, system and uniformity in modes of proceeding are merely directory. 1 Desty, Taxn. 515.

Acts required by a statute to make a tax chargeable are conditions precedent and must be strictly complied with. Hewes v. Reis, 40 Cal. 255.

In Tax Laws provisions for the levy of a tax are imperative, and permissive words in the statute may be construed as commands, and performance of the duty may be enforced. Jones v. State, 17 Fla. 411; Cooley, Taxn. 231; People v. Otsego County Supra. 51 N. Y. 401; Indianapolis v. McAvoy, 85 Ind. 587.

An act providing for the levy of a tax to pay the funded indebtedness of a city is imperative. Gallena v. United States, 72 U. S. 5 Wall. 705, 13 L. ed. 560.

A provision requiring notice when time for redemption from tax sale will expire is imperative. Doughty v. Hope, 3 Denio, 594, 1 N. Y. 79; Cruger v. Dougherty, 43 N. Y. 107; Westbrook v. Willey, 47 N. Y. 457.

#### Provisions of statute, when directory.

A clause in a statute is directory when the provisions contain mere matter of direction, and no more; but not when they are followed by words of positive prohibition. *Re Casick's App.* 10 L. R. A. 223, 126 Pa. 459; *Pearse v. Morrice*, 2 Ad. & El. 94, 12 L. R. A.

Some cases hold that whether a statute is directory or not depends upon whether the act shall be done in a particular manner or time and not otherwise (*Stayton v. Hulings*, 7 Ind. 144; *Rex v. St. Gregory*, 2 Ad. & El. 99); but this rule as to the use or non-use of negative words is by no means general. *Dubuque Dist. Twp. v. Dubuque*, 7 Iowa, 284.

A law which directs a particular act to be performed, but which does not imperatively command it, as a condition precedent to anything further, is directory only. See generally *Wiley v. Flournoy*, 39 Ark. 609; *Milner v. Clarke*, 61 Ala. 253; *State Auditor v. Jackson County*, 65 Ala. 142; *Kelsey v. Abbott*, 13 Cal. 609; *Adams v. Seymour*, 30 Conn. 402; *Silsbee v. Stocklee*, 44 Mich. 551; *People v. Auditor-General*, 41 Mich. 23; *Rubey v. Huntsman*, 32 Mo. 501; *Life Asso. of America v. St. Louis County Assessors*, 49 Mo. 512; *Morrill v. Taylor*, 6 Neb. 236; *State v. Washoe County Comra.* 14 Nev. 140; *Young v. Joelin*, 13 R. I. 675; *Davis v. Farnes*, 23 Tex. 236; *Lane v. James*, 25 Vt. 451.

The provisions of a law which are merely directory are not to be construed into conditions precedent. *Whitney v. Emmett*, 1 Bald. 303.

An Act of Incorporation, by which the president and directors are "empowered and directed to enter into reasonable agreements with the proprietors" of the land to be used, cannot be taken as mandatory on the company, but contemplates a voluntary agreement. *Binney v. Chesapeake & O. Canal Co.* 33 U. S. 8 Pet. 201, 8 L. ed. 917.

Provisions are directory where they relate to some immaterial matter not of the essence of the thing to be done, and where a departure from the statute will cause no injury to any person affected by it. *McKune v. Weller*, 11 Cal. 49; *Best v. Gholson*, 39 Ill. 465; *Clark v. Crane*, 5 Mich. 151; *Hurford v. Omaha*, 4 Neb. 333; *Marah v. Chesnut*, 14 Ill. 223; *Norwegian Street*, 81 Pa. 349; *State v. Lean*, 9 Wis. 222.

A provision requiring a surrogate to take from appellant a bond with sureties is directory. *Bloom v. Burdick*, 1 Hill, 130.

been in operation no mischief has ever been disclosed calling for a remedy, and we do not believe the provision in the Probate Law under consideration was inserted on account of any evil resulting or anticipated from allowing one judge to cite in another to act in his stead. The requirement under consideration is not a material one for the reason alleged and no other reason has been suggested.

Is it, then, arbitrarily prescribed as one essential qualification of the substituted judge that he should be cited in in a particular manner? What virtue can there be in the mere citation, other than to signify to him from a responsible source that he is wanted, and induce him to come? We believe the prescribed notice or citation is a mere matter of convenience and not at all a matter of substance.

A brief history of our legislation on this subject will furnish further support for this position. In the several revisions of our statutes, from 1821 to 1866 inclusive, will be found only a general provision that "in case a judge of probate shall be disqualified, the judge of any adjoining district may act in his stead," with no provision whatever for citing him in—thus distinguishing and pointing out the matter of substance, while considering the rest so immaterial as that it might be safely left to the mere discretion of the judge or clerk or some party interested in the pending litigation.

The requirement under consideration (so far as the Revised Statutes are concerned) first appears in the Revision of 1876, where it probably originated, as we are unable to find it from a somewhat hurried examination of the Session Laws prior to that time. The principal object of the change, we think, was to promote the convenience of the judge to be cited, and to assure him that the call to act came from a responsible source directly connected with the court. Under the present law no duty to act will be imposed on the judge of the adjoining district unless he shall be cited in in the manner prescribed, but he may waive the formality, and if he does so, he may act upon less formal notice with the consent of the clerk and the court, and if he does so, his acts become those of a judge *de jure*, and no one has a right to complain. This conclusion renders unnecessary any decision of the interesting questions discussed by counsel relative to the application of the *de facto* doctrine.

In the argument before this court, counsel for the defendant objected to certain amendments that had been made to the original record by the acting probate judge, and asked this court to hold, as matter of law, that the alterations were no part of the record. If such a question was properly before us it would be obviously difficult to comply with any such request, but it will suffice to say that in the court below the

A provision that execution against a married woman shall direct levy and collection from her separate property, and not otherwise, is directory only. *Thompson v. Sargent*, 15 Abb. Pr. 453.

#### *Mode and manner of doing an act.*

Where the provision of the statute is the essence of the thing to be done, and by which jurisdiction is obtained, it is mandatory; otherwise, when it relates to form and manner after jurisdiction obtained, and is incident to the jurisdiction, it is directory. *Marchant v. Langworthy*, 6 Hill, 646; *Striker v. Kelly*, 7 Hill, 9.

A statute directing the mode of proceeding is directory, and not to be regarded as essential to the validity of the proceedings themselves, unless so declared in the statute. *People v. Cook*, 8 N. Y. 67, 14 Barb. 290.

A statute requiring an execution sale of lands to be made separately in lots or parcels, and not in gross, is directory, and a sale in gross made thereunder is voidable only. *Cunningham v. Cassidy*, 17 N. Y. 276.

Where a statute directs a thing to be done in a certain manner it implies that it shall not be done in any other manner. *Dane*, Abr. 591, 598.

Where legislation points out specifically how an act is to be done, and imposes a special limitation, that mode must be strictly pursued, and no discretion can be indulged. *Hudson v. Jefferson County Ct.*, 28 Ark. 369.

As when a statute directs that a public record shall be kept for a certain purpose, entries to be made therein in a certain way, entries made in any manner other than that prescribed are unlawful. *United States v. O'Connor*, 31 Fed. Rep. 449.

#### *Provisions in statute fixing time for doing an act.*

Statutes fixing the time for the doing of an act are considered as only directory, where the time is not fixed for the purpose of giving a party a hearing or for some other important purpose. *Fay v. Wood*, 8 West. Rep. 835, 65 Mich. 300, 12 L. R. A.

Where a statute directs the doing of a thing in a certain time without any negative words restraining the doing of it afterwards, the provision as to time is directory, and not a limitation of authority. *Pond v. Negus*, 3 Mass. 232; *People v. Allen*, 6 Wend. 486; *People v. Peck*, 11 Wend. 604; *People v. Holley*, 12 Wend. 481; *Re Heath*, 3 Hill, 42; *People v. Cook*, 14 Barb. 290, 8 N. Y. 67; *Barnes v. Badger*, 41 Barb. 98; *Mead v. Gale*, 2 Denio, 232; *Dawson v. People*, 25 N. Y. 399; *People v. Board of Police*, 46 Hun, 298.

In such case where no injury appears to have resulted, the fact that the act was performed after the time limited will not render it invalid. *People v. Board of Police*, *supra*. See *Re Broadway Widening*, 63 Barb. 579; *Witheril v. Mosher*, 9 Hun, 412; *People v. Wheeler*, 18 Hun, 540.

Under a peremptory statute the duty must be performed at the time specified, while under a directory statute while it should be performed at the time specified yet it may be valid if performed afterward. *Webster v. French*, 13 Ill. 308.

When a statute specifies the time within which a public officer is to perform an act regarding the rights and duties of others it will be considered directory unless the nature of the act or the language of the statute shows that it was intended as a limitation of power. *People v. Allen*, 6 Wend. 487; *Jackson v. Young*, 5 Cow. 299.

Provisions of a law fixing the time for intermediate steps, after jurisdiction acquired, are directory. *United States Trust Co. v. United States F. Ins. Co.*, 18 N. Y. 199.

Where a statute requires an official act to be done by a given day, for a public purpose, it is construed as merely directory. *Re Heath*, 3 Hill, 42.

A provision limiting the time for a referee to report is directory. *Re Empire City Bank*, 13 N. Y. 200.

A provision requiring a judge to file his decision in writing within twenty days after trial is directory. *Stewart v. Slater*, 6 Duer, 84.

A statute requiring the court to limit the time of the sentence of a convict is merely directory. *Miller v. Finkle*, 1 Park. Cr. Rep. 374.

finding is very explicit that the defendant's objection to the records in question was upon the sole ground that the acting judge of the probate court had been cited in to hold the court by the judge of the court, instead of by the clerk as required by the literal terms of the Statute, so that this was the only question respecting the records brought before us for review.

One other question only, raised in the court below and decided adversely to the defendant, remains for our consideration. The finding states the question as follows: "The defendant also offered evidence that no witnesses were sworn or hearing had before said A. O. Gallup" (the acting judge) "on July 30, 1889, as stated in the records of the probate court, to which the plaintiff objected, and the court excluded said evidence."

The facts offered to be proved did not attack the jurisdiction of the court, but its irregular mode of proceeding, and under the common-law rule the records of the probate court as to all material facts except jurisdictional ones, necessarily made a part of it and upon which the judgment depends, import absolute verity. But without the common law, the prohibition contained in section 436 of the General Statutes, that "no order or decree of a court of probate shall be attacked collaterally except for fraud, or set aside save by appeal," would preclude the defendant from offering such evidence.

*There was no error in the judgment complained of.*

In this opinion the other Judges concurred.

### NEW YORK COURT OF APPEALS (3d Div.).

Constance B. PRICE

v.

Walter J. PRICE *et al.*

(....N. Y....).

1. **No dower right exists in favor of a woman whose marriage was annulled because the husband had a wife living, although she had not been heard from within five years before the second marriage, which was contracted by both parties in good faith, and was therefore valid under 2 Rev. Stat., 189, § 6, until its nullity was pronounced by a court.**

2. **The express denial of dower in New York statutes, where a divorce is granted for the wife's adultery, does not by implication give dower in case of annulment of a marriage made in good faith, because the husband had a former wife living.**

(April 21, 1891.)

**CROSS-APPEALS** from judgments of the General Term of the Supreme Court, First Department, reversing a judgment entered in the office of the Clerk of New York County, upon the report of a referee dismissing the bill which was filed to secure the admeasurement of dower in the estate of Walter W. Price, deceased, and allowing and admeasuring such dower. *Reversed.*

Statement by *Follett, Ch. J.*:

Cross-appeals from an interlocutory and final judgment of the General Term of the Supreme Court in the First Judicial Department, awarding dower to the plaintiff. April 23, 1889, Walter W. Price and Susanna Butler intermarried in England, and lived together, as husband and wife, at Birmingham, for about one year, when he came to the United States, where he resided until his death. July 1, 1865, Price and Constance Bridget Tallon, the plaintiff in this action, intermarried at the City of New York, and lived together as husband and

wife until July, 1871, having two children born unto them, who survive. In May, 1873, Price began an action in the supreme court of this State to have his last marriage annulled, on the ground that his first wife was then living, which resulted in a judgment entered April 15, 1874, annulling the marriage. The court found that the first wife, Susanna, had absented herself from her husband since 1848, had not been heard of by him for more than five years, and that the marriage between Walter W. Price and Constance B. Tallon was contracted in good faith, believing that his former wife was dead. It was adjudged that their marriage was null and void, but "only from the time that its nullity is hereby pronounced, to wit, from and after the date of this judgment." It was further adjudged that the children of the marriage were legitimate, and entitled to succeed in the same manner as legitimate children to the real and personal estate of the father and mother, or either of them. At the date of the entry of this judgment Walter W. Price owned the real estate described in the interlocutory judgment in this action, about fourteen acres of which he conveyed in July, 1875, to Walter J. Price. June 6, 1876, Walter W. Price died seized of all of said real estate except that so conveyed, which he disposed of by will. This action was begun by the plaintiff, June 7, 1880, to have dower admeasured in the real estate of which Walter W. Price was seized at the date of the entry of the judgment annulling the marriage. The defendants are the devisee, grantees and mortgagees of the devisees of Walter W. Price. They set up in their answers, among other defenses, (1) that the marriage was null and void, and had been so adjudged; (2) that February 25, 1874, the plaintiff received from Walter W. Price a sum of money in satisfaction of all claims to dower in his property.

*Messrs. Charles Jones and George H. Starr*, for plaintiff:

Dower "is a title inchoate and not consummate till the death of the husband, but it is an interest which attaches on the land as soon as

NOTE.—See notes to *Adams v. Storey* (Ill.) 11 L. R. A. 791; *Goss v. Froman* (Ky.) 8 L. R. A. 102. 12 L. R. A.

there is the concurrence of marriage and seisin."

4 Kent, Com. 50.

The marriage between the plaintiff and Walter W. Price is valid.

*Valleau v. Valleau*, 6 Paige, 207, 3 L. ed. 957; *Whits v. Lowe*, 1 Redf. 376; *Cropsey v. McKinney*, 80 Barb. 47; *Griffin v. Banks*, 24 How. Pr. 218; *Roderigas v. East River Sav. Inst.* 63 N. Y. 460; *Brouer v. Bowers*, 1 Abb. App. Dec. 214.

The supreme court has held that a widow of such a marriage is entitled to dower in the estate of the husband.

*Jones v. Zoller*, 29 Hun, 551, 32 Hun, 280; *Price v. Price*, 33 Hun, 76; *Jones v. Fleming*, 37 Hun, 227.

The marriage of the plaintiff with Walter W. Price being valid, and she being his lawful wife, had dowerable capacity, and her dower right or title was an interest which "attached on the land" of which her husband was seised during the coverture.

4 Kent, Com. 50; *Wait v. Wait*, 4 N. Y. 95; *Steele v. Ward*, 80 Hun, 557.

The plaintiff has never been barred or divested of the dower right or interest which attached to the lands by virtue of marriage and seisin.

The statute prescribes the cases and the manner in which the wife may be barred or divested of her inchoate right of dower and of dower.

1 Rev. Stat. title 8, § 740.

She cannot be barred or divested of this interest or estate in any other way.

*Wait v. Wait*, *supra*; *People v. Faber*, 92 N. Y. 149.

In case of a divorce by which the marriage was dissolved, dower was not barred or divested unless the divorce was for the misconduct of the wife, here meaning her adultery.

*Schiffer v. Pruden*, 64 N. Y. 47.

*Mr. James R. Marvin*, for defendant Josephine Little:

A divorce at common law avoided the marriage *ab initio*. "It was equivalent to a sentence of nullity under our Statute. It placed the parties in the same relation to each other as though there had been no marriage."

*Wait v. Wait*, 4 N. Y. 100; 2 Kent, Com. 78; *Williamson v. Parisien*, 1 Johns. Ch. 393, 1 L. ed. 184; *Fenton v. Reed*, 4 Johns. 52.

The marriage in question was a voidable marriage. The plaintiff was the wife of Price *de facto* only. Dower attaches to such a marriage provided it exists at the death of the husband.

4 Kent, Com. 36; Co. Litt. 33 b, 32 a; 1 Bl. Com. 434, *note*; Bishop, Mar. and Div. § 57; *Burger v. Hill*, 1 Bradf. 376; 1 Williams, Exrs. 358; 1 Washb. Real Prop. p. 198; 1 Scribner, Dower, p. 109; *Wait v. Wait*, 4 Barb. 202.

The divorce in the case at bar was a *vinculo matrimonii*.

Such a divorce "bars the claim for dower, for to entitle the party claiming dower she must have been the wife at the death of the husband."

4 Kent, Com. § 53, 54; 2 Bl. Com. 180, *note a*.

The Legislature never intended to give the plaintiff dower in the lands of Price, and at the same time deny to the children of the marriage the right to inherit the same property.

12 L. R. A.

*Spicer v. Spicer*, 16 Abb. Pr. N. S. 112.

*Mr. David Willcox*, with *Messrs. Bristow, Peet & Opdyke*, for defendants Paine, F. N. Price and Dunne and, with *Mr. Stephen Brown*, for defendants L. M. Price and the Glens' Falls Ins. Co.:

Under the rules of the common law this attempted marriage was void.

*Williamson v. Parisien*, 1 Johns. Ch. 393, 1 L. ed. 184; *Finn v. Finn*, 62 How. Pr. 88; *Elliott v. Gurr*, 2 Phillim. Eccl. 16.

A second marriage in the lifetime of a former wife is also prohibited by the Statute.

Rev. Stat. pt. 2, chap. 8, title 1, art. 1, § 5; 2 Edmonds, Stat. 144; *Blossom v. Barrett*, 37 N. Y. 484; *Appleton v. Warner*, 51 Barb. 270; *People v. Liscomb*, 60 N. Y. 559.

At common law a voidable marriage could not be attacked collaterally in the absence of a decree of nullity; but if its nullity was adjudged during the lifetime of the parties, by the decree it became a void marriage, and was therefore void *ab initio*.

*Jaques v. Public Administrator*, 1 Bradf. 499; *Finn v. Finn*, 62 How. Pr. 86.

The marriage in this case was voidable.

*Valleau v. Valleau*, 6 Paige, 207, 3 L. ed. 957; *Cropsey v. McKinney*, 80 Barb. 47; *White v. Lowe*, 1 Redf. 376.

It is impossible that a contract attempted by persons who were incapable of contracting, and for that reason adjudged null, can nevertheless be a valid contract.

2 Edmonds, Stat. 144, § 1.

Without qualification of any sort, the Statute expressly provides that the judgment of nullity shall be evidence of the invalidity of the marriage, and this court has several times stated that such is its effect.

*Keen's Case*, 7 Coke, 140; *Aughtie v. Aughtie*, 1 Phillim. Eccl. 201; *Elliott v. Gurr*, 2 Phillim. Eccl. 16; *Perry v. Perry*, 6 Paige, 507, 2 L. ed. 1006.

In such cases no material rights could exist on either side, since the decree adjudged that a lawful marriage had never existed.

*Re Ensign's Estate*, 4 Cent. Rep. 376, 103 N. Y. 297; *Van Cleef v. Burns*, 118 N. Y. 549.

The claim that dower arises from a marriage which is void, whether by reason of the Statute alone or by reason of a judgment pronounced in accordance with statutory provisions, is contrary to the authorities.

*Cropsey v. Ogden*, 11 N. Y. 228; Co. Litt. 32a; 2 Bishop, Mar. and Div. §§ 690, 706; *Keen's Case*, *supra*; 1 Scribner, Dower, 146, subd. 19; *Valleau v. Valleau*, *supra*; *Spicer v. Spicer*, 16 Abb. Pr. N. S. 112; *Bird v. Bird*, 1 Lee, Eng. Eccl. 628; *Chase v. Chase*, 55 Me. 21; *Bodding v. Clariat*, L. R. 22 Ch. Div. 597.

*Mr. Frank L. Hall*, with *Messrs. De Forest & Weeks*, for defendants, the Rector, etc., of St. John the Evangelist's Church.

*Messrs. Hughes & Northrup* for defendant Walter J. Price.

*Follett, Ch. J.*, delivered the opinion of court:

The primary question underlying this case is whether when a wife absents herself from her husband for five successive years without being known by him to be living within that time, and he contracts a second marriage,



which is annulled, in an action between them, because the first wife is living, such second wife is entitled to dower in the real estate owned by him at the date of the entry of the judgment of nullification. In this State the right to dower arises out of the rules of the common law, except in so far as they have been changed by our statutes. By the common and canon law, a marriage by one having a spouse living and undivorced, though the spouse had been absent and believed to be dead, was void *ab initio*, and the person contracting a second marriage was guilty of a felony. 1 Scribner, Dower, p. 115, par. 5; 1 Bl. Com. 436; 2 Steph. Com. 11th ed. 256; 2 Kent, Com. 79; 1 Bishop, Mar. and Div. § 299.

An examination of the legislation on the subject of marriages between persons, one of whom has a spouse living, becomes necessary to enable us to determine whether the rule of the common law has been changed. By chapter 2 of the first year of James II., it was enacted that a person marrying a second time, whose husband or wife had been continually absent for seven years immediately preceding the second marriage, and not known by such person to be living within that time, should not be guilty of bigamy. The rule prescribed by this statute has remained the law of England to this day. 4 Steph. Com. 11th ed. 90.

A statute containing the same provisions, though reducing the period of absence to five years, was enacted in this State, February 7, 1788 (2 J. & V. 214), which, with slight modifications, has been continued in force to the present time. 1 Rev. Acts 1801, 122; 1 Rev. Laws 1818; 2 Rev. Stat. 687; Penal Code, §§ 298, 299.

It was held in this State that the Statute concerning bigamy did not render such a second marriage valid. *Fenton v. Reed*, 4 Johns. 52; *Williamson v. Parisien*, 1 Johns. Ch. 889, 1 L. ed. 182. And such is the rule in England. Shelf. Mar. and Div. 89, 223, 230, 479. Such was the condition of the law when the Revised Statutes of this State were enacted, and, experience having proved that the Statute in respect to bigamy had induced the contraction of second marriages by persons having spouses who had been absent for five years, and believed to be dead, which after the return of the absent husband or wife were found to be void and the issue illegitimate, it was, for the purpose of alleviating some of these consequences, enacted (2 Rev. Stat. 189): "Sec. 5. No second or other subsequent marriage shall be contracted by any person, during the lifetime of any former husband or wife of such person, unless . . . and every marriage contract in violation of the provisions of this section shall, except in the case provided for in the next section, be absolutely void. Sec. 6. If any person whose husband or wife shall have absented himself or herself, for a space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority." It was also provided (2 Rev. Stat. 143): "Sec. 20. The chancellor (supreme court) may, by a sentence of nullity, declare void the mar-

riage contract for either of the following causes, existing at the time of the marriage: . . . (2) That the former husband or wife of one of the parties was living, and that the marriage with such former husband and wife was then in force." "Sec. 23. When it shall appear and be so decreed that such second marriage was contracted in good faith, and with the full belief of the parties that the former husband or wife was dead, the issue of such marriage, born or begotten before its nullity be declared, shall be entitled to succeed, in the same manner as legitimate children, to the real and personal estate of the parent who at the time of the marriage was competent to contract, and the issue so entitled shall be specified in the sentence of nullity."

By these provisions such marriages ceased to be void, and became voidable and subject to be annulled, with the consequences incident to the annulment of marriages by the rules of the common law, except in so far as they were changed by the above sections and the two hereinafter quoted. By the common law, neither dower nor curtesy arises from a voidable marriage, if it be annulled during the lifetime of the parties, and, when annulled by the judgment of a competent court, they are in the same situation in respect to each other, and to rights in the property of each other, as though a marriage had never been entered into, and the children born of it are illegitimate unless legitimated by statute. *Aughtie v. Aughtie*, 1 Phillim. Eccl. 201; *Osgo v. Acton*, 1 Ld. Raym. 531; 1 Bishop, Mar. and Div. §§ 116-118; 2 Bishop, Mar. and Div. §§ 690, 712; 1 Bishop, Mar. Women, §§ 247, 479, 483; 1 Brightly, Husb. and W. 7, 322; 2 Brightly, Husb. and W. 366; 1 Roper, Husb. and W. 332; Stewart, Mar. and Div. §§ 147, 429, 437.

And, in the absence of a statute saving the right to dower, the dissolution *a vinculo* of a valid marriage, for the fault of either party, bars it. *Barrett v. Failing*, 111 U. S. 528, 23 L. ed. 505; *Frampton v. Stephens*, 21 Ch. Div. 164; 14 Am. & Eng. Encyclop. Law, 537; 5 Am. & Eng. Encyclop. Law, 921.

It is contended by the learned counsel for the plaintiff that the rule of the common law was altered by the sections of the Revised Statutes hereinbefore set forth, and by the two next quoted, which are the only ones relied on as effecting a change: "Sec. 8. In case of divorce dissolving the marriage contract for the misconduct of the wife she shall not be endowed." 1 Rev. Stat. p. 741, § 8. "Sec. 48. A wife being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share in his personal estate." 2 Rev. Stat. 146, § 48. The last section was repealed by chapter 245, Laws 1880, after it had been made a part of section 1760 of the Code of Civil Procedure. In *Wait v. Wait*, 4 N. Y. 95, it was held that a judgment dissolving a valid marriage for the adultery of the husband did not cut off the wife's inchoate right to dower in lands of which he was at the date of the judgment or theretofore had been seised, and, she having survived, dower was assigned. The court rested its decision on the ground that the

sections denying a wife's right to dower, when divorced for her adultery, by fair implication saved it when a divorce was granted for the adultery of the husband. The learned judge who wrote an opinion in the case last cited seems to have overlooked *Charruau v. Charruau*, 1 N. Y. Legal Obs. 184; *Day v. West*, 2 Edw. Ch. 592, 6 L. ed. 515, and *Reynolds v. Reynolds*, 24 Wend. 198, and the judgment has not escaped criticism (*Moore v. Hegeman*, 27 Hun, 68, affirmed, 92 N. Y. 521; 2 Bishop, Mar. and Div. § 706), but the result reached by it has been lately confirmed by statute. Code Civil Proc. § 1754.

The changes effected by the Revised Statutes in the rights of parties entering in good faith into a marriage, while one has a living and undivorced spouse who has been absent for five years, and not known to be living, are: (1) the marriage is not void from the beginning, but voidable; (2) when judicially annulled, it is only void from the date of the judgment; (3) when so annulled, the issue may be adjudged entitled to succeed to the estate of the parent who was competent to marry, in the same manner as legitimate children; (4) it has been held that, while such a marriage remains unannulled, the cohabitation of the parties is not adulterous (*Valleau v. Valleau*, 6 Paige, 307, 8 L. ed. 957); also that the survivor is entitled to administration (*White v. Lowe*, 1 Redf. 376), and, before the passage of the Acts for the protection of married women, that the husband could hold and transfer the personal property of the wife. *Cropesey v. McKinney*, 80 Barb. 47.

We do not express the opinion that other changes than those mentioned have not been wrought, for we are only concerned with the claim that it has changed the common law in respect to the right of a wife to dower under such a marriage after it has been judicially annulled. The absence of a husband or wife for five years, unheard of during that time, and who is believed to be dead, is not in this State a cause for an absolute divorce. The effect of a judgment annulling a marriage upon the right of a wife to dower has never been determined in this State in any reported case except in the one at bar.

In *Spicer v. Spicer*, 16 Abb. Pr. N. S. 112, the second marriage, through which the wife claimed dower, was never dissolved, and she survived her husband; nevertheless dower was denied her. In *Jones v. Zoller*, 29 Hun, 551, 32 Hun, 280 (*S. C. sub nom. Jones v. Fleming* 87 Hun, 228), reversed, 104 N. Y. 418, 6 Cent. Rep. 518, the second marriage had not been dissolved, and the wife survived her husband.

In *Brouer v. Bowers*, 1 Abb. App. Dec. 214, and *Griffin v. Banks*, 24 How. Pr. 218, reversed, 87 N. Y. 621, the voidable marriages considered

remained in force until the death of one of the spouses, and were never judicially annulled.

In the case at bar the learned general term rested its judgment on the authority of *Wait v. Wait*, *supra*, which was decided upon the ground that the sections above quoted preserved the wife's inchoate right of dower in case she was innocent and he guilty; but in the case at bar it was found and adjudged, in the action wherein the marriage was annulled, that both parties contracted their marriage in good faith, believing that the husband's former wife was dead, which judgment is declared by the statute to be conclusive between them. 2 Rev. Stat. p. 144, § 87.

The referee, upon the trial of the issue in this action, found, and the general term affirmed the finding, that both parties contracted their marriage in good faith. But we do not think those sections (8 and 48) relate to the rights of persons whose marriages are annulled, but only to those of persons divorced for adultery. There now is, and always has been, a broad distinction made by the common law, and in the statutes of this State, between actions brought to annul marriages by reason of the incapacity of the parties to legally contract them, and actions brought for their dissolution by reason of acts committed after their due and legal solemnization. The former class was provided for by article 2, chap. 8, pt. 2, Rev. Stat., and the latter by the third and fourth articles of the same chapter. The same distinction is still preserved by the Code of Civil Procedure. Title 1, chap. 15, Code Civil Proc. Section 48, above quoted, is contained in the third article, which relates to divorce *a vinculo* on the ground of adultery, and has no application to actions or judgments annulling marriages for causes existing prior to their solemnization. The word "misconduct," in the eighth section (1 Rev. Stat. 741), has been held by this court to mean "adultery" (*Van Cleef v. Burns*, 118 N. Y. 549); and the section is not applicable to this class of actions. The plaintiff is not entitled at common law, nor under the statutes of this State, to dower in any of the lands described in her complaint. The conclusion reached renders it unnecessary to consider the other questions raised by the defendants' appeals, or those presented by the appeal taken by the plaintiff.

*The judgments and orders reviewed, subsequent to the judgment entered on the report of H. H. Anderson, referee, reversed, and the judgment entered on the report of H. H. Anderson, referee, on the 8th day of August, 1883, dismissing the complaint with costs, is affirmed, with costs to each of the defendants appearing by separate attorneys.*

All concur.

## ARKANSAS SUPREME COURT.

J. T. RUCKS *et al.*, *Appts.*,

J. T. RENFROW *et al.*

(....Ark....)

**Declarations of voters**, made before or after election and not as part of the *res gestæ*, are not 12 L. R. A.

admissible in an election contest to show their disqualification.

(April 11, 1891.)

**A**PPEAL by contestants from a judgment of the Circuit Court for Cleveland County, reversing a judgment of the County Court in

favor of persons contesting the declared result of an election held for the purpose of having a county seat chosen for Cleveland County. *Affirmed.*

The facts sufficiently appear in the opinion.

*Messrs. U. M. Rose and G. B. Rose*, with *Mr. G. H. Rousseau*, for appellants:

A contested election for county seat is a contest of all the voters favoring one location against all those favoring the other. The parties being too numerous to be all brought into court, some of them are permitted to prosecute and defend for the whole, but any citizen of the county can be allowed to participate in the litigation.

Story, Eq. Pl. § 97; Pom. Eq. Jur. § 260.

In such cases, those appearing in the suit are trustees for the benefit of those who are jointly interested with them. The admissions of a beneficiary, or of the real party in interest, may be received against the trustee, or the person in whose name the suit is brought.

Greenl. Ev. § 180; *People v. Pease*, 27 N. Y. 59; *State v. Olin*, 23 Wis. 819; *French v. Lighty*, 9 Ind. 477; *Patton v. Coates*, 41 Ark. 111.

*Messrs. Met L. Jones and W. S. Amis*, for appellees:

In an election held under the Laws of Arkansas the voter cannot, after his vote has been cast, by any declaration of his, change the result found by the judges of election founded upon his vote, and proof of his declarations as to his disqualifications are not admissible.

*Patton v. Coates*, 41 Ark. 112; *Gilleland v. Schuyler*, 9 Kan. 581; *Beardstown v. Virginia*, 76 Ill. 46, 81 Ill. 549; 1 Greenl. Ev. § 124; *Beal v. Beal*, 79 Ind. 282; *McCrary, Elections*, §§ 272, 278; *Little v. State*, 75 Tex. 616; *Davis v. State*, Id. 420.

*Hughes, J.*, delivered the opinion of the court:

This is an appeal from a judgment of the Circuit Court of Cleveland County that at an election held on the 17th day of August, 1889, to determine whether the county seat of that county should be located at the Town of Rison or the Town of Kingsland in said county, Rison had received a majority of the legal votes cast at said election, and that the county seat be removed to said Town of Rison from the former county-seat location at Toledo, and that Rison should thereafter be the county seat of said county. The case was brought to the circuit court on appeal from the judgment of the county court, in which, upon the canvass of votes cast at the election by the clerk of county court, and the filing of his certificate in said court showing that Rison had received 1,009 votes and Kingsland 1,002 votes, the appellants and others gave notice that they would contest the election, and afterwards filed a written notice of contest setting out the ground upon which they relied, upon which the county court made orders for the taking of depositions, and set the cause for hearing. This was before the court had proceeded to judgment, and thus appellants became parties to the record, and made the appellees parties, the former representing Kingsland, and the latter Rison. The judgment of the county court was for Kingsland, from which appellees appealed to the circuit court, where a trial *de novo* was had, resulting in a judgment for Rison, from which this appeal was taken. It will be observed that there was no independent suit to contest the election after the judgment of the county court was rendered, but that appellants made themselves parties in the interest of Kingsland, and made the appellees parties in the interest of Rison, pending the determination of the election by the county court, and before any judgment had been rendered. They had a right to become parties, and appeal from the judgment of the county court, though no provision has been made by statute for an appeal in such a case. *McOullough v. Blackwell*, 51 Ark. 159, and authorities cited. It is contended and shown by evidence that many illegal votes were cast at the election, some by minors, some by persons convicted of infamous crimes, some by nonresidents of the county and some by persons who had not resided long enough in the county and townships in which they voted to become legal voters.

The circuit court refused the following declaration of law, asked for by appellants, and gave the converse, asked for by the appellees: "The declarations of voters, made after or before the election, showing their want of qualifications to vote, so far as age and residence are concerned, are competent and legal testimony to show that such voters did not possess such qualifications." Exceptions were saved, and it is insisted here that this is the law. The adjudicated cases on this question are not numerous, and are divided. The principal cases that hold such declarations admissible are *People v. Pease*, 27 N. Y. 59; *State v. Olin*, 23 Wis. 819; *People v. Cicott*, 16 Mich. 288. Among those which hold such evidence inadmissible are *Gilleland v. Schuyler*, 9 Kan. 582, by Judge Brewer; *Davis v. State*, 75 Tex. 420; *Beardstown v. Virginia*, 81 Ill. 542,—where it is held that "the declarations of a person made some time after having voted at an election, admitting or stating facts showing that he was not a legal voter, are inadmissible to show his disqualification to vote." The declarations of a voter as to his qualifications may be so contemporaneous with his voting as to be part of the *res gesta*, and as such competent evidence. *Ibid.*; *Patton v. Coates*, 41 Ark. 117.

Judge McCrary, in his work on Elections, § 448, says: "The English authorities, though not entirely uniform, are generally in favor of admitting such declarations, and, perhaps, the weight of authority in this country is the same way, though it cannot be denied that the tendency in the more recent, and we think also the better considered, cases is to exclude the evidence as hearsay."

The case of *People v. Pease*, *supra*, was decided by five judges against three dissenting. The case of *People v. Cicott*, *supra*, was decided by an equal division of the judges. Judge Cooley says: "If votes were taken *cave voce*, so that it could always be determined with absolute certainty how every person had voted, the objection to this species of scrutiny after an election had been held would not be very formidable. But when secret balloting is the policy of the law, and none is at liberty to inquire how any elector has voted, except as he may voluntarily have waived his privilege, and where conse-

quently the avenues to correct information concerning the votes cast are carefully guarded against judicial explanation, it seems exceedingly dangerous to permit any question to be raised upon this subject." Cooley, Const. Lim. p. 789. Such declarations of a voter are not admissible, on the ground that they are in derogation of an existing right of the voter, and against his interest. They are hearsay, and their admission would violate a sound rule of law, and also a sound public policy. There was no error in the circuit court's declaration of the law in this behalf.

We have reached a conclusion in the case which makes it unnecessary to discuss or determine the other questions of law raised upon the trial, and presented here by the bill of exceptions. Of the persons under age who are said to have voted for Rison we find that there are nine as to whom the evidence does not show for what place they voted. It is charged that five convicts, whose names are given, voted for Rison, and that six persons, whose names are given, voted for Rison out of their township. Again, it is contended that two persons who had not been in the State, and ten who had not been in the township in which they voted, long enough to become qualified electors voted for Rison, but the evidence fails to show how any of these persons voted. It is insisted that a number of persons who had not been residents of the county long enough to become qualified voters voted for Rison, and yet no evidence appears showing for what place nine of these voted. The disqualification as voters of nine of the minors included in the above was shown only by their admissions made after the election. Unqualified persons, voting at the election, could not change the result, unless it were shown for what place they voted. *People v. Cicott, supra*. Of the minors who are said to have voted for Kingsland we find no evidence

showing for what place four of them voted. Of those who are said to have voted in the wrong township for Kingsland, there is one as to whom there is no evidence how he voted. All of the above have been excluded in the estimate we make of the vote, under the rule laid down above. We have estimated that the following illegal votes were cast for Rison at the election: two by persons under twenty-one years of age; nine by persons voting in the wrong townships; three by persons not long enough in the State; three by persons who were nonresidents of the county,—in all, seventeen. And that the following illegal votes were cast at the election for Kingsland: four by persons under age; ten by persons voting in the wrong townships; three by persons convicted of infamous crimes; four by persons who did not reside in the county; eight by persons who had not resided in the county long enough to become qualified voters,—total, twenty-nine.

Deducting from the 1,009 votes returned for Rison, 17 illegal votes cast for Rison, we have 992 legal votes for Rison. Deducting from the 1,002 votes returned for Kingsland the 29 illegal votes cast for Kingsland, we have 973 legal votes for Kingsland. It thus appears that there was a majority of 19 legal votes for Rison. In this estimate two votes are counted about whose identity there might have been some contest, but the exclusion of these could not change the result. In the view we have taken of the case, it is unnecessary to consider the exclusion of certain depositions offered at the trial in behalf of Rison, or to consider the offer by citizens of Kingsland, made before the election, to pay \$675 for the purpose of building a high school for colored people at Kingsland, if the county seat should be located at Kingsland.

*The judgment of the Circuit Court is affirmed.*

## TEXAS SUPREME COURT.

Henry STEUSOFF, *Appt.*,

*v.*

STATE of Texas, *ex rel.* Gustavus LACOUR.

(...Tex....)

**A citizen of the State is not ineligible to hold office** in the county of his residence, because he moved there so short a time before election that he cannot vote, where neither the Constitution nor statutes provide that a county officer must be a voter in the county.

(March 27, 1891.)

**APPEAL** by defendant from a judgment of the District Court for Liberty County, in favor of relator in a proceeding to oust defendant from the office of tax assessor. *Reversed.*

The facts are stated in the opinion.

*Mr. Sam R. Perryman*, for appellant:

The Constitution having prescribed the qualifications of a tax assessor—that he shall reside in the county and shall keep his office at such place as may be required by law—neither the Legislature of the State nor any of the

### NOTE.—State citizenship.

A citizen of the United States residing in any State of the Union is a citizen of that State. *Gasties v. Ballou*, 81 U. S. 6 Pet. 761, 8 L. ed. 573; *Butchers Benev. Assn. v. Crescent City L. S. L. & S. H. Co.* ("Slaughter House Cases"), 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Smith v. Moody*, 26 Ind. 290. He is entitled to all the rights and privileges of a citizen of that State. *Hannon v. Hounihan*, 35 Va. 429.

In general the national character of a person is to be decided by that of his domicile. See *note to Warren v. Board of Registration* (Mich.) 2 L. R. A. 208, 12 L. R. A.

In order to effect such a change of domicile as constitutes a change of citizenship, there must be actual residence in the place, with the intention that it is to be a principal and permanent residence. *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690.

Mere intention to change residence does not constitute a change. There must be added thereto the fact of living in the new place for some period of time. *Penfield v. Chesapeake, O. & S. W. R. Co.* 20 Fed. Rep. 494.

Eligibility to office. See *notes to State v. Peelle* (Ind.) 8 L. R. A. 223; *De Turk v. Com.* (Pa.) 5 L. R. A. 853.

courts have power to add or require others not therein prescribed.

McCrary, Elections, 2d ed. § 252, p. 226.  
Messrs. Hume & Kleberg for appellee.

Gaines, J., delivered the opinion of the court:

This was an information in the nature of a *quo warranto*, brought in the name of the State of Texas upon the relation of Gustavus Lacour, for the purpose of removing appellant from the office of tax assessor of Liberty County. The appellant was chosen to that office at the general election held in November, 1890, and thereupon qualified and entered upon the discharge of the duties of the place. The relator was the appellant's predecessor in the office. The ground upon which the reversal was sought was that the respondent was not a legal voter in the county at the time either of his election or of qualification, and that, therefore, he was not eligible to the office. The facts were that the appellant had been a resident and voter in Liberty County for many years; but in March, 1889, he removed with his family to the City of Houston, where he engaged in a mercantile business. In June, 1890, he moved back to Liberty County, and resumed his residence. There was testimony tending to show that he took up his residence in Houston for a temporary purpose, and that it was never his intention to abandon permanently his home in Liberty County, but there was also evidence tending to establish the contrary conclusion. However, the jury found that he "had not lived in the county six months prior to the election," etc.; and this may, for the purposes of this opinion, be assumed to be a finding of the issue against the appellant, and the establishment of the fact that he was not a qualified voter in the county at the time he received a majority of the votes. We then have the question, Did the fact that he was not a legal voter in the county render him ineligible to the office of tax assessor? There is no express provision to the effect that the tax assessor of a county must be a voter therein either in our Constitution or laws, and, if we decide such to be the law, we must hold that the rule results from the fundamental principles of our form of government. It is said by a recent text-writer: "Where no limitations are prescribed, the right to hold office under our political system is an implied attribute of citizenship, and is presumed to be co-extensive with that of voting at an election held for the purpose of choosing an incumbent for the office, those, and those only, who are competent to select the officer being deemed competent also to hold the office." Mechem, Pub. Off. § 67. The cases cited in support of this doctrine are *State v. Smith*, 14 Wis. 565, and *State v. Murray*, 28 Wis. 96. These cases involved the question of the eligibility of an alien to hold office under the Constitution and laws of Wisconsin, and the decisions were that citizens of the State only could hold office under the State. They are not authority, in any sense, for the proposition that a citizen of the State would be ineligible to office because for the time being he might be disqualified by reason of a change of residence from voting in a particular county. A similar question arose in *State v. McMillen*, 12 L. R. A.

23 Neb. 385, and there the court held that the claimant to an office was not eligible because at the time of the election he had not become a citizen of the State. In the opinion in that case it was said that, in the absence of any constitutional or statutory law upon the subject, none but voters are qualified to hold office. The case, however, did not call for so broad an announcement. In *Atchison v. Lucas*, 83 Ky. 451, the Court of Appeals of Kentucky decided that a woman could not hold the office of jailer, but placed their decision upon a general construction of the Constitution of the State, and not upon the fact that none but male persons were given the right to vote.

But even if the rule announced in the Nebraska case cited above be sound law, we do not think it could be properly applied to the case before us. If it be invoked to sustain a decision that none but the citizens of a State can hold offices under the state government, there is much to be said in its support. But in this State, when a candidate at an election has received a plurality of the votes, and at the same time been debarred of the right to vote upon the sole ground that he has not resided in the county for the period of six months before the election, we think the reason for the rule altogether ceases. It follows, we think, that, even upon the principles laid down in the cases first cited, the appellant should be held eligible to the office to which he was chosen. But there is a broader view of this question.

In *Barker v. People*, 3 Cow. 708, the chancellor who declared the opinion of the court said: "Eligibility to office is not declared as a right or principle by any express terms of the Constitution, but it results as a just deduction from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and appoint any person who is not made ineligible by the Constitution. Eligibility to office, therefore, belongs, not exclusively or specially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever not excluded by the Constitution." When a Constitution has been framed which contains no provision defining in terms who shall be eligible to office, there is strength in the argument that the intention was to confide the selection to the untrammelled will of the electors. Experience teaches us that, in popular elections, those only are chosen who are in sympathy with the people both in thought and aspiration; and that no law is needed to secure the selection of those only who reside in the county or district in which these functions are to be performed. The Constitution of 1869 contained the provision that "no person shall be eligible to any office, state, county or municipal, who is not a registered voter in the State." Art. 3, § 14. The omission of a similar article in our present Constitution is not without significance. But in this case we are not called upon to decide whether or not the appellant would have been eligible to the office of tax assessor if he had not been a citizen of the State. He was a citizen of the State. Did the fact that he had changed his residence so short a time before the election as to deprive him of his vote at that election render him ineligible to the office

of governor or to any other state or district office? We think not, and, if not, we see no good reason why he should be held ineligible to a county office. The demurrer to the information should have been sustained.

The judgment is reversed, and here rendered for the appellant.

EMPIRE MILLS, *Appt.*,  
v.  
ALSTON GROCERY CO. *et al.*  
(.....Tex. App.....)

1. The law of comity does not require that a mercantile corporation organized under the laws of another State shall be allowed to do business in Texas, as the repeal, in 1885, of a statute granting the privilege of organizing mercantile corporations is a direct prohibition against the operation of such corporations in the State.
2. A person is not estopped from denying that a so-called corporation, with which he has made a contract, is in fact a legal corporation, and from claiming that the stockholders are individually liable on the contract.

**NOTE.—Corporations; individual liability on contracts.**

Persons who enter into a contract in the name of a corporation which has no legal existence become individually liable thereunder. *Glenn v. Bergmann*, 2 West. Rep. 597, 20 Mo. App. 343; *Johnson v. Corser*, 84 Minn. 855.

To shield its members from personal liability on its contracts, the corporation must obtain its franchise in good faith; it cannot become incorporated in one State to do business in another. In such case the organization may be inquired into collaterally. *Booth v. Wonderly*, 36 N. J. L. 250.

Yet it has been held that a Connecticut corporation which did all its business and performed all its corporate acts in New York, except holding its elections, did not thereby lose its corporate character, nor render its members liable as co-partners. *Merrick v. Van Santvoord*, 84 N. Y. 208; *Danforth v. Penny*, 3 Met. 564; *Second Nat. Bank of Cincinnati v. Hall*, 35 Ohio St. 158. See notes to *Leighton v. Campbell* (R. I.) 9 L. R. A. 187; *Metropolitan Elev. R. Co. v. Kneeland* (N. Y.) 3 L. R. A. 253; *McKensey v. Edwards* (Ky.) 3 L. R. A. 397.

**Foreign corporation; law of comity.**

By state comity the rule is established that a corporation organized under the laws of a State may transact business beyond the borders of such State. Its residence in one State creates no insuperable objection to its power of contracting in another. *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 621, 10 L. ed. 275; *Townsend v. Jemison*, 50 U. S. 9 How. 416, 13 L. ed. 198; *McDonogh v. Murdoch*, 56 U. S. 15 How. 413, 14 L. ed. 752; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 352, 14 L. ed. 999; *Dred Scott v. Sandford*, 60 U. S. 19 How. 594, 15 L. ed. 779; *Home Ins. Co. v. Morse*, 87 U. S. 20 Wall. 456, 22 L. ed. 399; *Fire Asso. of Phila. v. New York*, 119 U. S. 118, 30 L. ed. 843; *Mathews v. Springer*, 2 Abb. U. S. 298; *Day v. Newark I. R. Mfg. Co.* 1 Blatchf. 693; *New York Dry Dock v. Hicks*, 5 McLean, 115; *Farmers L. & T. Co. v. McKinney*, 6 McLean, 4; *Clarke v. New Jersey Steam Nav. Co.* 1 Story, 542; *Taylor v. Carpenter*, 2 Woodb. & M. 15; *Ang. & A. Priv. Corp.* § 273; *Taylor, Priv. Corp.* chap. 7, pt. 5; *Wood's Field, Priv. Corp.* § 225; *Potter, Corp.* § 10; *Morawetz, Priv. Corp.* § 359, 361.

But the comity of States does not extend to a 12 L. R. A.

3. Stockholders are liable as partners on contracts of a corporation which they have undertaken to form for a certain business, under the laws of another State, solely because a corporation for such business could not be legally organized in the State where it was to be carried on.

(February 25, 1891.)

**MOTION** by appellees for a rehearing of an appeal from a judgment of the County Court for Dallas County in their favor in an action brought to render them liable as partners for a debt which they had contracted as a corporation, the first hearing having resulted in a reversal of the judgment. *Motion denied.*

The facts appear in the opinion.

*Messrs. Dickson & Moroney* for appellees, in support of the motion.

*Messrs. McCormick & Spence and Walton, Hill & Walton* for appellant, *contra.*

*Davidson, J.*, delivered the opinion of the court:

Appellant sued appellees to recover an alleged indebtedness. Appellees were sued as a co-partnership firm, composed of several par-

case where the corporation was authorized to do business anywhere but in the State of its incorporation. *Land Grant R. & T. Co. v. Coffey County Comrs.* 6 Kan. 245; *Hill v. Beach*, 12 N. J. Eq. 81. See notes to *Boulware v. Davis* (Ala.) 9 L. R. A. 601; *Pennypacker v. Capital Ins. Co.* (Iowa) 8 L. R. A. 236; *First Nat. Bank of Deadwood v. Gustin-Minerva Consol. Min. Co.* (Minn.) 6 L. R. A. 678.

**Persons dealing with, not estopped to deny its incorporation.**

The general rule, that one who contracts with a body under a designation which implies its corporate existence recognizes it as invested with the attributes of a corporation, and is estopped from afterwards questioning its corporate existence, cannot be denied. But the rule has been confined to cases where the corporation, or those claiming under the corporation, assert some rights under the contract. *Glenn v. Bergmann*, 2 West. Rep. 597, 20 Mo. App. 343.

Illustrations of this rule are found in the cases of *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13; *Smith v. Heidecker*, 39 Mo. 157; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Farmers & M. Ins. Co. v. Needles*, 52 Mo. 17; *National Ins. Co. v. Bowman*, 60 Mo. 252, and *Stoutimore v. Clark*, 70 Mo. 471.

The propriety of applying the rule to a case where a party makes a contract with a body believing it to be a corporation, when in fact such body is no corporation, thereby leaving him remediless to enforce his contract against anyone, has been expressly denied. *Hurt v. Salisbury*, 55 Mo. 310, 313; *Glenn v. Bergmann*, *supra*; *Richardson v. Pitts*, 71 Mo. 128; *Heath v. Goslin*, 80 Mo. 310.

The case must be determined by the simple proposition whether at the date of the contract defendants had power to bind anyone but themselves. If they had not, they are personally liable, on the principle which makes a pretended agent liable whose principal had no existence as a legal entity. *Blakely v. Bennecke*, 59 Mo. 195; *Heath v. Goslin*, *supra*.

If a party who contracts with a corporation thereby estops himself, when sued on the contract, from denying the power of the corporation to make it, the principle does not apply when a corporation seeks to enforce a contract as assignee of one of the original parties. *Wilks v. Georgia Paa*, R. Co. 79 Ala. 130.

ties, whose names are set out in the petition. The partnership was denied under oath by all the defendants. By first supplemental petition appellant alleged that appellees had obtained an Act of incorporation from the State of Iowa for the purpose of carrying on a general mercantile business in this State; that appellees conducted a mercantile business in Dallas, Tex., and nowhere else; that said business began in March, 1886, and continued until August 16, 1887, when the Company dissolved, and Alston continued to conduct said business until November, 1887. Appellant further alleged appellees filed their Act of incorporation in Iowa, "purposely to evade and to practice a fraud upon the laws of Texas; that the laws of Texas prohibited, and did not permit or allow, the formation of such corporations, at the time specified, for the purposes or objects intended by defendant Company, and for the business conducted by the defendant Company; that the same was contrary to the public policy, and in violation of the laws of the State of Texas; and that said Act of incorporation was a fraud upon Texas, and was procured fraudulently as to both States, Iowa and Texas." Appellees filed a general demurrer thereto, which was sustained. They also filed denials of partnership under oath. The court directed a verdict to be returned against appellant, which was done, and judgment was entered accordingly. Appellant prosecuted his appeal to this court, and during this term of this court the judgment was reversed, and the cause remanded; and in due time appellees filed their motion for rehearing, in which it is urged that the court erred in remanding the case, and suggested that the rehearing be granted, and the judgment be affirmed. In the opinion heretofore rendered this court held that "in so far as it [the Act of incorporation of appellee Company] was intended to operate in this State, it is absolutely void, and that in conducting said business appellees were in fact and in law co-partners, and not a corporation, and that the court erred in rendering judgment for appellees." In this motion for rehearing appellees contend that, by a rule of comity, a corporation organized in one State is permitted to transact business in other States, "unless such rule of comity is expressly repealed;" and that "this repeal will not be implied from the fact that, in the State where such corporation seeks to do business, a corporation for like purposes could not be organized;" and virtually that the power of a State to "repeal this general rule of comity does not extend to foreign corporations," etc. If appellee be correct, then the rule of comity would be superior to the statutory provisions of the State where the corporation was seeking to do business. Appellee states his proposition in advance of and beyond what we understand the law to be. "A corporation is the creature of a statute immediately creating it, or authorizing proceedings for its organization." "The powers of a corporation, under statutes, are such, and such only, as the statutes confer." Sutherland, Stat. Const. § 882; Morawetz, Priv. Corp. § 4, and notes; 4 Am. & Eng. Encyclop. Law, p. 206, and notes, and collated authorities on pages 206-209. All the authorities on the subject agree that such is the law. Again, it may be said in this connection that "it is a fundamen-

tal principle that the laws of a State can have no binding force, *proprio vigore*, outside of the territorial limits and jurisdiction of the State enacting them." Morawetz, Priv. Corp. 1st ed. § 500; Story, Conf. L. § 7; Sedgw. Stat. and Const. L. 69. "Hence it follows that a State cannot grant to any person the right to exercise a franchise in a foreign State or country; for a franchise is the result of a law authorizing particular individuals to do acts or enjoy immunities which are not allowed to the community at large." Same authority. See also Morawetz, Priv. Corp. § 585.

"A grant of corporate existence is a grant of special privileges to the incorporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. It must dwell in the place of its creation, and cannot migrate to another sovereignty. The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States." Morawetz, Priv. Corp. 1st ed. § 500; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 588, 10 L. ed. 807; *Runyan v. Coster*, 89 U. S. 14 Pet. 129, 180, 10 L. ed. 886; *Land Grant R. & T. Co. v. Coffey County Comrs.* 6 Kan. 252; *Thompson v. Waters*, 25 Mich. 281; *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287; *Francisco Texan Land Co. v. Laigle*, 59 Tex. 389; *Wright v. Bundy*, 11 Ind. 398; *Miller v. Ewer*, 27 Me. 509; *Merrick v. Van Santvoord*, 84 N. Y. 208, 220; *McCall v. Byram Mfg. Co.* 6 Conn. 428, 435, note a; *Paul v. Virginia*, 75 U. S. 8 Wall. 181, 19 L. ed. 860; *Smith v. Alford*, 68 Barb. 428.

The rule of comity is entirely in subjection to the sovereign will of the State, and can only exist by permission of the State in which it is sought to employ it. A corporation has no implied authority to do any act in a foreign State which is not permitted by the laws of the latter to individuals generally. Morawetz, Priv. Corp. 1st ed. § 505, and note 1. Speaking of the limit of the rule of comity, the same author says: "By the common law, the right of acting in a corporate capacity is not accorded freely and without conditions to everyone, but must be derived from an Act of the Legislature. It is evident that there are reasons of public policy underlying this restriction, and it cannot be assumed that its effect may be nullified by the comity extended towards foreign States. To obtain a charter for the purpose of evading the laws of a foreign State, under cover of the rule of comity, would be a fraud upon the State granting the charter; and to attempt to act under such charter in the foreign State would be a fraud upon the latter." Morawetz, Priv. Corp. 1st ed. § 508. Comity was never accorded for the purpose of giving any State an unlimited power to dispose of the franchise of acting in a corporate capacity in other States, or to "spawn corporations" for that purpose. *Land Grant R. & T. Co. v. Coffey County Comrs.* 6 Kan. 254. No rule of comity will allow one State to charter corporations to operate in another State, unless there is willingness on the part of the foreign State that it

should be so. To hold otherwise would be to say that the right of one State, aided by comity, is superior to the sovereign will of the other. This involves the surrender of sovereignty to a rule of comity, and to a matter of international etiquette, which no independent nationality should for a moment think of doing. It is not necessary that a State should by express enactment exclude foreign corporations in order to indicate that they shall not be allowed to act within its jurisdiction; the will of the State may be implied from its general policy and legislation. "Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made." *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 592, 10 L. ed. 309; *Myers v. Manhattan Bank*, 20 Ohio, 301, 302; *Starkweather v. American Bible Soc.* 73 Ill. 50; *United States Trust Co. v. Lee*, 78 Ill. 144; *American & F. O. U. v. Yount*, 101 U. S. 356, 25 L. ed. 890. In this last-cited case *Mr. Justice Harlan*, speaking of the rule of comity, said: "In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise, within any other State, the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State, or by its public policy, to be deduced from the general course of legislation, or from the settled adjudications of its highest court." Page 356 of said case. See *Taylor, Priv. Corp. Having Capital Stock*, § 384. (In accordance with these principles, see authorities collated in note to above-cited section. They are too numerous to cite here.) Therefore an Act of incorporation, procured for the purpose from one State to evade the laws of another State, and to carry on its business in the latter State, would constitute it a fraud upon the State granting the corporate powers, as well as upon the State in which it is sought to organize and operate the corporation. It is equally well settled that the corporation cannot exercise its corporate powers in the foreign State when it is prohibited from doing so by direct enactment of the Legislature of that State; it is also as well settled that the Act of incorporation cannot be put into operation there if the will of the State can be implied from its general policy and legislation, nor can it exercise its powers therein if the settled adjudications of the higher court of the State are adverse thereto.

Applying these rules to the action of the court sustaining the general demurrer, we are of opinion that said ruling was erroneous. The first supplemental petition presented issues and facts which clearly avoided appellees' denial of partnership. The Act of incorporation, if in accord with the laws of Iowa, but procured for the purpose of evading the laws and public policy of Texas, or the general policy of her legislation, or the adjudications of her courts of last resort, would be void and of no effect; and because the appellees may have carried on business in Dallas, Tex., holding themselves out as a corporate body, that fact would not constitute a corporation. By an examination

of the laws and the Constitution of Texas, we are led to the conclusion that appellees, even had they organized under the Laws of Iowa, could not have carried on a corporate business in this State, as general merchants, by virtue of such Act of incorporation. The Constitution provides that "no private corporation shall be created except by general laws." Const. 1876, art. 12, § 1. By an Act of the Legislature provision was made for the creation and operation of such companies. Rev. Stat. 1879, art. 566, subd. 27. This subdivision of said article was repealed by an Act of the Legislature in 1885 (Acts 1885, p. 59). Said article 566 was amended again in 1887, but subdivision 27 was not re-enacted. This repeal of said subdivision 27 was an emphatic denial to all parties of the right to organize mercantile corporations in this State, and directly prohibitory of such corporations operating in Texas. The Statute granted the privilege, and then revoked it. This superseded the rule of comity, and prohibited the foreign corporations. Not only so, but the Legislature, during the same Session of 1887, enacted another law, requiring foreign corporations, under heavy penalties, to obtain permits to do business in this State. Acts 1887, p. 116. This was prohibitory legislation of a decidedly marked and stringent character. So far as this is concerned, it is immaterial that said Act may have been held unconstitutional, for it very clearly expresses the legislative policy as to foreign corporations. It did not change or alter the policy already in vogue, but only the more strongly emphasized it as to these corporations. It would hardly be contended that, in repealing subdivision 27 of article 566 of the Revised Statutes, the Legislature intended to exclude and debar the citizens of Texas from this field of corporation business, and leave it open to corporations from foreign States and nations under the rule of comity. Legislatures are not presumed to do unwise or foolish things, they are not presumed to legislate against the interests, rights and privileges of the citizens of their own States, nor are they presumed to intend to legislate adversely to the citizens of their own country and in favor of foreign corporations. Under the first supplemental petition of appellant, it became a question whether the appellee's Act of incorporation in Iowa was sought as an evasion of, and a fraud upon, the laws of Texas, or the public policy of her general legislation, and it became a question, and an issue therein, to be determined on the trial, whether the Act of incorporation was a fraud upon either or both of said States. These matters, as well as other things, were pleaded in said petition. The petition was not subject to the general demurrer interposed, when viewed from this standpoint.

In the motion for rehearing it is contended that appellant dealt with the appellees as a corporation, and that it is thereby estopped from denying the corporate capacity of appellees. This is a question of fact to be determined on the trial. Appellant contends that appellees were partners. He alleges that the "Act of incorporation" of appellees constituted, in law and in fact, no corporation. These are questions of law and fact. If appellees had organized a valid corporation, and were authorized



to do business as such corporation in this State, and appellant so dealt with them, he might be estopped from denying their corporate capacity. But if appellees were not a valid corporation, and had no authority and were not permitted to do business as such corporation, then he would not necessarily be estopped from denying their corporate powers and existence. That appellees called themselves a corporation does not constitute them a corporate body. Obligors are bound, not by the style which they give to themselves, but by the consequences which they incur by reason of their acts. It matters not what they call themselves. *Chaffe v. Ludeling*, 27 La. Ann. 607; *National Bank of Watertown v. Landon*, 45 N. Y. 410, 414; *Ridenour v. Mayo*, 40 Ohio St. 9. "A corporate creditor, seeking to enforce the payment of his debt, may, however, ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving the prescribed method of becoming incorporated was not complied with by the company in question." *Cook, Stock and Stockholders*, 1st ed. § 283; *Bigelow v. Gregory*, 73 Ill. 197; *Abbott v. Omaha Smelt. & Ref. Co.* 4 Neb. 416; *Hill v. Beach*, 12 N. J. Eq. 81; *Garnett v. Richardson*, 35 Ark. 144; *Coleman v. Coleman*, 78 Ind. 844; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104; *Martin v. Fewell*, 79 Mo. 401, 410.

The creditor "is not estopped from so doing, since he is not repudiating a contract, but is enforcing it. The fact that he contracted with them under a corporate name is immaterial, since, at common law, parties may carry on business under any name they choose." *Cook, Stock and Stockholders*, § 283. The defense relied on was based on the idea and assertion that the appellees constituted a corporation, and were not partners. This is one of the principal grounds urged for the rehearing. Appellees testified that they were incorporated, and so held themselves out to the world. It is true it was testified that they told parties that they were incorporated. But that did not make it so. The law requires some things of parties who may have the legal right to incorporate, and these requisites must be complied with before the corporation can be organized legally. Unless it be so organized, and in strict accord with the law authorizing its creation or formation, it cannot exercise the function of a corporation. *Franco-Texas Land Co. v. Laigle*, 59 Tex. 389; *Bigelow v. Gregory*, *Abbott v. Omaha Smelt. & Ref. Co.*, *Garnett v. Richardson*, *Coleman v. Coleman*, *Kaiser v. Lawrence Sav. Bank*, *Martin v. Fewell* and *Ridenour v. Mayo*, *supra*.

"The question as to the existence of a partnership is a mixed question of law and fact; and the testimony of a witness in respect to it amounts, frequently, to nothing more than the expression of an opinion." *Ridenour v. Mayo*, 40 Ohio St. 13. So it may be of a corporation, even where the corporation is authorized by the law of the land, and the corporation has made an attempt to comply with and incorporate under the statute, but has failed in the attempt. But it is admitted and testified by appellees that the laws of Texas prohibited their pretended Act of incorporation, and that, so far as Texas was concerned, they could not

secure a charter, and were not permitted to incorporate here. They not only failed to show themselves a corporation, but utterly excluded that idea, and conclusively proved that they could not be a corporation under the laws of Texas, because prohibited therefrom by the laws of said State. Where a company relies on its corporate capacity, the fact that it is a corporation must be made to appear, and the burden is upon the company to do so. Authorities above cited. Corporations as such can only possess such powers as are conferred on them by the Statute creating them or authorizing their creation. This is universally so. If it fails to incorporate under such law, then it is invalid, because there is nothing from which it can spring, nor on which it can base its life and existence. Without the law of its creation, it is not a creature. It is artificial, and can have no existence, and no authority, except as conferred by the law of its creation. Abrogate the law, and the corporate body cannot organize. But it does not follow that, because of a failure to comply with the law, its contracts are void. It is still a company of individuals making contracts and dealing in the affairs of the world. These contracts are not necessarily void. The company or members thereof might sue and be sued as co-partners on such contracts. This would not lead to the repudiation of their contracts, but to the enforcement thereof. There is a very marked distinction to be noticed as to the relations such a company would occupy towards the State as to its corporate capacity, and its attitude towards individuals with reference to contracts entered into with such individuals, and financial transactions carried on between them. This is distinctly recognized in this State. *Texas Land & Mortg. Co. v. Worsham*, 76 Tex. 556. Our supreme court says in that case: "We do not think that a failure of the corporation to procure a permit, even if such failure had the effect of preventing it from further prosecuting its business in this State, should have the further effect of closing the courts of the State to it so as to preclude it from asserting rights and recovering property already acquired." Authorities heretofore cited show this distinction is recognized everywhere where equity prevails. Because the Act of incorporation is void, it does not follow that contracts made with the Company are void, or non-enforceable in the courts. "The mere assumption of corporate powers, without any attempt at incorporation, cannot, of course, protect the members from liability." *Cook, Stock and Stockholders*, § 284; *Pettis v. Atkins*, 60 Ill. 454; *Fuller v. Rowe*, 57 N. Y. 23. They would be partners. *Fuller v. Rowe*, *supra*.

By the rule of comity, a corporation organized under the laws of a State may transact business beyond the borders of that State. By this rule it will be observed that the corporation is required to organize, and that organization must take place under the laws of the State where said organization is authorized, and not elsewhere. An attempt to organize the corporation is not sufficient, and does not meet the requirement and demand of the law, nor does it comply with the rule of comity. A failure to so organize falls short of the requirements of the law, as well as of the rule of com-

ity. The corporation must organize, else it is not a corporation. The rule of comity does not supply corporate powers nor confer corporate capacity. "It merely enables a body of incorporators, chartered by one State, to act in a corporate capacity in another State, subject to all the laws and regulations of the latter." *Morawetz, Priv. Corp.* § 505; *Bank of Augusta v. Earle*, 88 U. S. 13 Pet. 588, 589, 10 L. ed. 807, 808; *Metropolitan Bank v. Godfrey*, 28 Ill. 579; *Ohio L. Ins. & T. Co. v. Merchants Ins. & T. Co.* 11 Humph. 1; *Hill v. Beach* 13 N. J. Eq. 81; *Ang. & A. Corp.* 250 *et seq.*; *Aspinwall v. Ohio & M. R. Co.* 20 Ind. 492; *Thompson v. Waters*, 25 Mich. 232; *Bard v. Poole*, 12 N. Y. 505; *Merriek v. Van Santvoord*, 84 N. Y. 220; *Smith v. Alford*, 63 Barb. 428; *Wright v. Bundy*, 11 Ind. 398; *McCall v. Byram Mfg. Co.* 6 Conn. 428, 435, and *note a*.

An examination of the case before us discloses no organization by appellees as a corporation at any time or place. One of the witnesses testified that they organized their business in Dallas, Tex., but no evidence is adduced on the subject of their organization as a corporate body. The Act of incorporation required them to elect a president, vice-president, and other officers, and a board of directors, and, so far as we have been able to ascertain, this was not done. They were required to hold annual meetings, and this was not done, although it continued in business for a year and a half about. At the end of this time Mr. Alston says he bought up the stock, and continued business a few months longer. They did no act in Iowa save to file their Act of incorporation. It was never contemplated that they should or would do anything more than that in that State. It was testified also that the reason, and the only reason, said Act of incorporation was resorted to and procured in that State, was because such a business as they contemplated could not be incorporated in Texas. Appellees did not act in good faith in

procuring their Act of incorporation, as is disclosed by their own evidence. In order that such corporate character be sustained, even if the parties had fully incorporated and organized as a corporate body, it is necessary that both the State creating the corporation and the corporation created shall have acted in good faith in conferring and taking the corporate privileges. These things, being matters of proof, must be shown by evidence, and it devolved upon appellees to show this. "A corporation must have obtained its franchise in good faith, in order to preserve its corporate character in its contracts, and shield its members from personal liability on such contracts." A corporation cannot incorporate in one State for the purpose of carrying on all of its corporate business in another. The stockholders would be held to be partners. *Hill v. Beach*, 12 N. J. Eq. 81; *Cook, Stock and Stockholders*, § 288. See also *Land Grant R. & T. Co. v. Coffey County Comrs.* 6 Kan. 245; *Morawetz, Priv. Corp.* 1st ed. § 513; *Erie R. Co. v. State*, 81 N. J. L. 543, 544. That the Alston Grocery Company could, as a corporation, maintain suits, or could even have so done as such corporation, in this State, while in business, would hardly be affirmed by any lawyer; but that it could have, as a firm of individuals or partners, maintained or defended such suits, could not be successfully denied. The authorities already cited amply and fully sustain these positions. We are of the opinion that appellees were partners, and that appellant's suit was properly brought.

The record shows that the Alston Grocery Company was not a corporation, and this is conclusively proven by themselves by their testimony. We are further of the opinion that the motion for a rehearing manifests no reason why we should recede from the opinion heretofore rendered herein, and *said motion is therefore overruled*.

## MINNESOTA SUPREME COURT.

### MAINE TRUST & BANKING CO., *Respt.*,

*v.*

Patrick J. BUTLER, Impleaded, etc., *Appt.*

(....Minn....)

\*1. To limit and qualify an indorsement made upon the back of a negotiable promissory note, the indorser must clearly and unmistakably

\*Head notes by COLLINS, J.

express his intention to exempt himself from future conditional liability; he must use the phrase "without recourse" or its equivalent.

2. The payee of such a note signed his name to an assignment thereof written out on the back of the same, when transferring it to another person for value. *Held*, that this was not a qualified indorsement, and that the payee was liable as an ordinary indorser.

(Gillman, Ch. J., and Dickinson, J., dissent.)

NOTE.—Indorsement and transfer of commercial paper without recourse.

An indorser is one who writes his name upon a negotiable instrument prior to transferring it by delivery. *Anderson, Dict.* 589.

An indorsement without recourse, made to evade liability for the solvency of prior parties, does not make the transfer less complete. *Welch v. Lindo*, 11 U. S. 7 Cranch, 159, 3 L. ed. 801; *Waite v. Foster*, 33 Me. 424; *Fitchburg Bank v. Greenwood*, 2 Allen, 484; *Hayne v. Ditto*, 27 La. Ann. 622; *Story, Prom. Notes*, § 146; 2 *Randolph, Com. Paper*, § 720.

Payment of a note by a new note of an indorser, 12 L. R. A.

which is accepted in full satisfaction, and a transfer of the note to the indorser by an indorsement without recourse, give him an immediate right of action against the maker, either on the note as equitable assignee, or for money paid to the maker's use. *Stanley v. McElrath*, 10 L. R. A. 545, 549, 32 Cal. 449.

To complete a contract of indorsement, in addition to writing the name on the back, the further act of delivering the instrument to the person to whom title is to be transferred is necessary, as indorsement imports delivery. *Clark v. Sigourney*, 17 Conn. 519.

(March 12, 1891.)

**A**PPEAL by defendant Butler from an order of the District Court for Hennepin County overruling his motion for new trial in an action brought to enforce his alleged liability as indorser of a promissory note in which a judgment had been entered against him in favor of plaintiff. *Affirmed.*

The facts are stated in the opinion.

**Mr. T. R. Huddleston** for appellant.

**Messrs. George H. Taylor and Charles J. Bartleson** for respondent.

**Collins, J.**, delivered the opinion of the court:

The defendant, Butler, payee of the negotiable promissory note on which this action was founded, made and signed a writing on the back of it, thus: "For value received I hereby assign and transfer the within note, together with all interests in and all rights under the mortgage securing the same, to L. D. Cooke." It is contended by appellant that this was but a naked assignment of the paper, and that Butler cannot be held as an indorser of the same. We have carefully examined the authorities at our command, and have been unable to add a single one to those cited by appellant's counsel in support of his position, namely, *Hailey v. Falconer*, 33 Ala. 586, and *Aniba v. Yeomans*, 39 Mich. 171. In the Alabama case the payee of the note wrote these words upon its back: "For value received . . . I transfer unto J. P. Hailey all my right

and title in the within note, to be enjoyed in the same manner as may have been by me,"—signing the name. It was held that this was a qualified indorsement, exempting the signer from liability, precisely as if nothing had appeared but his name, and the words "without recourse" above or underneath it. In its opinion the court stated the law to be that any words in an indorsement which clearly demonstrate an intention of the indorser to make it a qualified one will have that effect. The rule on this subject was correctly stated beyond a doubt, but misapplied, in our judgment. We think this apparent from the examples of qualified indorsement given by the court in support of its position. All clearly demonstrated the indorsee's intention to exempt themselves from future liability, in the plainest language. It was said, among other things, that a design to qualify the indorsement was apparent from the use of the words, "to be enjoyed in the same manner as may have been by me," the effect being to restrain the more general words found in other parts of the indorsement; that they must be given effect, and were meaningless, unless intended to exempt the indorser from liability by providing that the indorsee should not enjoy the right and title transferred to him in a "manner" different from that enjoyed by the indorser himself. The conclusion reached was largely made to depend upon the clause, "to be enjoyed in the same manner as may have been by me," and not upon the fact that the assignment was expressed, instead of being left for implication. There are no words

If the accommodation paper is a bond, which the obligee refuses to accept, it is void in the hands of a third person, for want of delivery, although he is a purchaser for value. *Parker v. McDowell*, 95 N. C. 219; *Ray v. Banks*, 6 Jones, L. 118. And see *Respass v. Latham*, Bush, L. 138; *Dewey v. Cochran*, 4 Jones, L. 184, and *Southerland v. Whitaker*, 5 Jones, L. 5, approved but distinguished.

Where an accommodation note was made payable to the order of the cashier of a particular bank, to be discounted at that bank, but the bank refused to discount it, and it was afterwards discounted by a third party, the note was held void, there being no proof of consideration, although the cashier indorsed it "without recourse." *Parker v. McDowell*, *supra*. Compare *Southerland v. Whitaker* and *Dewey v. Cochran*, *supra*.

An indorser who puts his name above that of the payee of a note disqualifies himself from recourse to his payee as liable to him in the order of time. The parties must sue or be sued on negotiable paper in the order in which they have seen fit to sign it. *Sweet v. Powers*, 72 Mich. 393. See *Greusel v. Hubbard*, 61 Mich. 25.

By the law of Kentucky and of Virginia, every reasonable effort must be made to recover of the drawer by suit, before the assignee can have recourse against the assignor or indorser. *Bank of United States v. Weisiger*, 27 U. S. 2 Pet. 331, 7 L. ed. 441.

#### "Without recourse," effect of indorsement.

The expression "without recourse," does not throw suspicion on the paper (*Stevenson v. O'Neal*, 71 Ill. 314; *Kelley v. Whitney*, 45 Wis. 110; 2 *Randolph, Com. Paper*, § 723); nor will it affect its negotiability (*Rice v. Stearns*, 3 Mass. 226; *Lomax v. Picot*, 2 Rand. 200); nor will it render an indorser liable who was not so otherwise. *Collier v. Mahan*, 21 Ind. 110.

12 L. R. A.

An indorsement on the back of a note of the words, "I sign this note to N. H. Garretson without recourse,"—although there is a plain misuse of words, passes title to the note. *Brotherton v. Street*, 124 Ind. 690.

An assignment of "all my right and title" indorsed on a note "to be enjoyed in the same manner as may have been by me" is equivalent to an indorsement without recourse. *Hailey v. Falconer*, 33 Ala. 586.

The words "without liability in case of nonacceptance or nonpayment" written after indorser's signature, are equivalent to the words without recourse. *Ibid.*; *Story, Prom. Notes*, § 133, 144.

Where an executor indorses as such to the testator's widow, under a special agreement on her part releasing the estate it is a special indorsement without incurring liability. *Wade v. Wade*, 36 Tex. 529.

An order indorsed payable to A "at his own risk" will not render the indorser liable as such, and the note will still remain negotiable. *Rice v. Stearns*, *supra*.

Where a stranger to the instrument indorses it "without recourse," he may still be held liable as an original promisor. *Childs v. Wyman*, 44 Me. 438.

The words "old firm in liquidation," added to a partnership indorsement, will not render it an indorsement without recourse. *Fassin v. Hubbard*, 55 N. Y. 465.

Evidence that an indorsement in blank was "without recourse" is inadmissible. *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647. See article in 18 Cent. L. J. 332-334.

The Codes of some of the States provide for indorsements without recourse, and regulate the rights and liabilities of the parties in such cases. See 2 *Randolph, Com. Paper*, 363, enumerating the various States. See *note* to *Adrian v. McCaskill* (N. C.) 3 L. R. A. 759.

of this import in the assignment now under consideration. But if the law was correctly determined in *Hailey v. Falconer*, the indorsement was restrictive as well as qualified, and this was the real question at issue in *Aniba v. Yeomans, supra*. There the indorsement made by the payee read: "I hereby transfer my right, title and interest of the within note to S. A. Yeomans," but the controversy was not as to the liability of the indorser,—it was whether the indorsee could recover of the maker as a bona fide holder for value. It was determined that he could not; that the right and title passing under the customary indorsement in blank was much greater than the mere right, title and interest of the payee; and that no greater right, title and interest than he had could pass under such a transfer. The indorsee could look to the maker, but not beyond nor differently. He could not be permitted to fall back upon the indorser nor to collect from the maker in case the payee could not have collected. The result of this decision was to give to the indorsement a more restrictive effect than an indorsement "without recourse" would have had, for it is well settled that such an indorsement does not destroy the negotiable character of the paper upon which it has been placed. But the remark which counsel attempts to make pertinent here was clearly *obiter*, for the issue was, as before stated, as to the restrictive character of the indorsement, and not whether the indorser qualified a liability he would have assumed by the ordinary indorsement in blank. The indorsement of a promissory note is commonly accomplished in the manner just mentioned. When so done, two contracts are entered into,—one, that of the sale or assignment, completely executed; the other, that of a future, but conditional, liability, executory and by implication, from the sale and assignment. Both are as complete, however, as if each was expressed with great formality and precision above the signature. In the case at bar we find the executed contract carefully, but unnecessarily, detailed, and the question resolves itself into an inquiry whether by reason of this particularity, a formal expression of that which the law would import from the signature alone, the other contract, executory as to future liability upon condition,—also imported from the bare signature of the indorser,—is negatived, and has been excluded. It would seem obvious that, when writing out upon the back of the paper just what would have been inferred from his signature, the indorser has incurred no greater liability,—has done no more than he would, had he simply placed his signature there. How can it be said, then, that he has done less, in the absence of that clear declaration of his intent to exempt himself, mentioned in all of the authorities, as necessary in the case of a qualified indorsement? The reason given seems to be that because one part of this double contract of indorsement, always inferred, has been expressed, the other part, also always inferred, must, of necessity, be excluded. Whenever the view contended for by appellant has been adopted, it has been predicated upon

12 L. R. A.

the maxim, *expressio unius, est exclusio alterius*. We agree with the author of one of the leading text-books, who asserts that the less common maxim, *expressio eorum qua tacite insunt nihil operatur*, is the one that should obtain. Many examples could be given where the expression, in contracts, of things tacitly implied, has no effect; for illustration, a written warranty of the quality of provisions would not exclude or negative the implied warranty of title. The appellant in this case, with much care, indicated his purpose to sell and transfer the note, but he failed to limit and qualify his indorsement by words which would clearly indicate such an intent, if in fact it existed. It was incumbent upon him to do so if he intended or expected to escape the liability of the ordinary indorser. The phrase "without recourse," or its equivalent, which must be used on such occasions, is a very simple one, and in everyday use. The appellant did not insert in his contract of indorsement this phrase, or words equivalent thereto. To relieve one who puts his name on the back of a negotiable promissory note from liability as an indorser he must insert in the contract itself words clearly expressing such an intention. Although the appellant's assignment of the paper was expressed instead of implied, he did not thereby exempt himself from the liability of an indorser in blank. *Sears v. Lantz*, 47 Iowa, 658; *Adams v. Blathon*, 66 Me. 19; *Dan. Neg. Inst.* § 688, notes b and c; *Randolph, Com. Paper*, § 704; 1 *Edwards, Bills and Notes*, § 398. See also *Dixon v. Clayville*, 44 Md. 573; *Kilpatrick v. Heaton*, 8 Brev. 92; *Shelby v. Judd*, 24 Kan. 168; *Dunning v. Heller*, 103 Pa. 269; *Richards v. Frankum*, 9 Car. & P. 221.

Order affirmed.

Gillilan, Ch. J., and Dickinson, J.:

We dissent. When the payee or indorsee of a promissory note merely writes his name on the back of it, the presumption is that he does it for the purpose of a double contract,—a contract of transfer and a contract of conditional liability. In such case the law implies the two contracts, because, that being the form in which, by the law-merchant, the two contracts are entered into, it presumes the parties intended both. The implication is not made contrary to their manifest intention. All the authorities agree that by writing over the signature they may exclude any implication. The only difference in the cases is as to what will have that effect. In our opinion, when the writing expresses, no matter in what form, the purpose with which the name is indorsed, it excludes the implication of any other purpose. When the writing expresses one contract, the parties will be presumed to have expressed all they intended; the written will be presumed to be the entire contract. It shows that the parties were not content with the implication of intention which the law raises upon the bare signature on the back of the note; for why should they take pains to express in writing one of the contracts which would be implied from the bare signature, if they intended not only that contract, but the other also?

Horace BROWN, Appt.,

Alice BALFOUR, Defendant, and Bankers' Life Association, Garnishee, *Repts.*

(....Minn.....)

\* 1. No part of the fund set apart appropriated in accordance with the rules, regulations and by-laws of either of the societies or associations enumerated in Gen. Stat. 1878, chap. 34, § 368, or by any society or association similar thereto (§369), to be paid over to the family of a deceased member (unless the amount exceeds the sum of \$5,000), can be seized or appropriated by legal process to satisfy a debt due from a member of the family, or from the society or organization itself.

2. The Bankers' Life Association, a corporation organized under the laws of this State for the purpose of life insurance upon the co-operative or assessment plan, is an association of the same character as those mentioned in said section 368, and its funds are exempt from execution to the same extent.

(April 8, 1891.)

**A**PPEAL by plaintiff from an order of the District Court for Hennepin County discharging the garnishee, from which plaintiff sought to collect the amount due on a judgment which he had recovered against defendant. *Affirmed.*

The facts are stated in the opinion.

Mr. Frederick B. Lathrop, for appellant:

Defendant claimed exemption under laws which provide that funds shall under no circumstances be liable to be seized, taken or appropriated to pay any debt of a deceased member. This Statute must be construed strictly. The exemption applies only against collection of a debt of a deceased member.

*Olson v. Nelson*, 3 Minn. 58; *Temple v. Scott*, 3 Minn. 419; *Grimes v. Bryne*, 2 Minn. 89; *Barker v. Kelderhouse*, 3 Minn. 207.

The words "shall be exempt from execution" do not establish a general exemption unmodified by the words "to pay any debt of a deceased member." For if so construed, the remainder of the section after the word "execution" is superfluous and insignificant. The Statute must be construed so that "if it can be prevented no clause, section or word shall be void, superfluous or insignificant."

*McNamara v. Minnesota* (1), *R. Co.* 12 Minn. 388; *King v. Kelly*, 26 Minn. 524; *Rothschild v. Boelter*, 18 Minn. 361.

Defendant cannot claim a liberal construction under the rule of "benevolent design." Respondent is not a benevolent society.

*Sheren v. Mendenhall*, 23 Minn. 92; *State v. Critchett*, 37 Minn. 13; *Forster v. Moulton*, 35 Minn. 459; *Walter v. Hensel*, 42 Minn. 204; *State v. St. Louis Citizens Ben. Assn.* 6 Mo. App. 163.

Insurance money is not exempt, nor can liberal rules of construction be invoked to make it so.

*Norris v. Massachusetts Mut. L. Ins. Co.* 131 Mass. 294; *Troy v. Sargent*, 132 Mass. 408, 409.

\* Head notes by COLLINS, J.

12 L. R. A.

Respondent claims that this fund belongs to the family. If that is true, defendant is entitled to one fifth of it in her own right. The wife is a member of the family.

*Ballou v. Gile*, 50 Wis. 614; *Bates v. Deverson*, 128 Mass. 834.

There are five in the family, and each shares equally.

*Jackman v. Nelson*, 6 New Eng. Rep. 615, 147 Mass. 300.

The share of each beneficiary vests in him separately.

*Union Mut. Aid Assn. of Battle Creek v. Montgomery*, 70 Mich. 587.

Defendant is sole beneficiary. This is an insurance contract governed by ordinary rules of construction. Respondent is not a benevolent association, but a mutual insurance company.

*Walter v. Hensel and Foster v. Moulton*, *supra*; *Com. v. Wetherbee*, 105 Mass. 149; *State v. Nichols*, 78 Iowa, 747; *State v. Merchants' Bch. Mut. Ben. Soc.* 72 Mo. 147; *State v. St. Louis Citizens Ben. Assn. supra*.

The contract is embodied in the application, constitution and certificate. If there is apparent conflict, if not *ultra vires*, the application prevails.

*Harding v. Littlehale*, 150 Mass. 100; *Walter v. Hensel, supra*; *Massachusetts Catholic O. F. v. Callahan*, 6 New Eng. Rep. 95, 146 Mass. 391.

The terms of the contract are all in the application, and defendant is there designated as the sole beneficiary. It expresses the intent of the parties and must be enforced.

*Walter v. Hensel*, 42 Minn. 208; *Story v. Williamsburgh Masonic Mut. Ben. Assn.* 95 N. Y. 475; *Folmer's App.* 87 Pa. 183-188; *Massachusetts Catholic O. F. v. Callahan and Harding v. Littlehale, supra*; *Durain v. Central Verein of the H. S. 7* Daly, 168; *Wells, Fargo & Co. v. Pacific Ins. Co.* 44 Cal. 397; *Bloomington Mut. L. Ben. Assn. v. Blue*, 6 West. Rep. 642, 120 Ill. 121; *Eastman v. Provident Mut. B. Assn.* 5 L. R. A. 712, 65 N. H. —.

Mr. John D. O'Brien, for Alice Balfour, respondent:

The terms of the contract are to be construed with a view to effectuate the purposes for which the Association was organized, and the same liberal rule of construction which prevails in the case of wills is applicable to the disposition of funds created by mutual benefit associations.

*Union Mut. Aid Assn. of Battle Creek v. Montgomery*, 70 Mich. 587; *Durall v. Goodson*, 79 Ky. 224; *Bacon, Benefit Societies*, § 258, and cases cited.

If there is any irreconcilable repugnancy between them, the terms of the application must give way to the paramount conditions of the charter.

*Walter v. Hensel*, 42 Minn. 208; *Supreme Council Am. L. of H. v. Perry*, 1 New Eng. Rep. 715, 140 Mass. 580.

The garnishee under its charter could not issue a certificate which would divert the fund into a channel other than that provided for by its charter.

*Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 18 Bush, 489.

The deceased, by the express terms of his

contract, had no power to designate his wife or anybody else except his family as beneficiary, even had he so desired.

Bacon, Benefit Societies, § 55, and cases cited.

If deceased had no authority to designate Mrs. Balfour, of course she could not have it in her power to defeat both the express terms of the contract and the design for which the association was organized by diverting the fund from its proper channel and subjecting it to the claims of her creditors.

*Daniels v. Pratt*, 8 New Eng. Rep. 480, 143 Mass. 231; Bacon, Benefit Societies, 312.

The fund is exempt by virtue of chap. 34, § 368, Gen. Stat. 1878, and also by virtue of § 17, chap. 184, Gen. Laws 1885.

*Schilling v. Boes*, 85 Ky. 357.

It is the duty of the court to construe the Statute liberally and in such a manner as to carry out the benevolent purpose sought to be provided for, and in no event, unless absolutely required by its language, to construe it so as to defeat such purpose.

*Supreme Council Am. L. of H. v. Perry*, supra; *Ballou v. Gile*, 50 Wis. 614.

*Meurs. Warner, Richardson & Lawrence* for the garnishee.

*Collins, J.*, delivered the opinion of the court:

The plaintiff (appellant), having previously obtained a judgment against defendant, garnished the Bankers' Life Association, a corporation organized in the year 1880 in the manner prescribed and under the provisions of title 3, chap. 34, Gen. Stat. 1878, which title relates to corporations other than those for pecuniary profit. The general plan, as shown by the articles of incorporation, was to unite and associate in membership male persons possessing certain specified qualifications, for the purpose of obtaining employment while living, and at their decease for securing and rendering pecuniary assistance in a stated amount to their families, by means of assessments upon the survivors, the amount being paid over in each case,—when collected,—to the person designated to receive the same for the family by the deceased member when making application for membership or thereafter. The Association had no capital stock, its entire assets being derived from its members. When joining, each paid into its treasury a sum equal in amount to his age, styled a "guaranty deposit," and another sum equal in amount to 2 per cent of the guaranty deposit, in full for the first casual assessment against him, both of these sums being set apart as a beneficiary fund to be paid over to the families of deceased members. The applicant also paid a membership fee and his *pro rata* proportion of the annual expense assessment for the unexpired portion of the current fiscal year. Thereafter the member was assessed, periodically, for operating expenses, and, casually, for such sums as became necessary for the payment of death claims, the casual assessment being 2 per cent of the guaranty deposit for each death claim. The garnishee was beyond doubt an insurance society or association doing business on the co-operative or assessment plan, incorporated for the sole purpose of mutual protection, and for the payment

of stipulated sums of money to the families of deceased members. It was therefore expressly exempted, by section 368, chap. 34, supra, from the provisions of the general Life Insurance Laws of the State; and by subsequent legislation it had been made subject to certain rules laid down for the regulation and government of all corporations, associations and societies of its character. Gen. Laws 1885, §§ 5, 6, chap. 184.

Mathew A. Balfour became a member of this Association on March 7, 1887, and died January 7, 1890, leaving as members of his family a widow, the defendant, and four minor children. In the certificate of membership—in the ordinary form—issued to him when joining, the Association agreed and covenanted, subject to certain provisos, of no consequence in these proceedings, to pay to his family, and on the receipt of the representative thereof named in his application, the sum of \$2,000 within sixty days after due proof of his decease. Due proof of his death was made, but for reasons going to the merits, and not with respect to this defendant's right to act as plaintiff, and as the duly designated representative of the deceased member's family, the Association refused to pay. Legal proceedings were had for a recovery upon the certificate, the widow being plaintiff, which resulted in a verdict in her favor on June 20, 1890, for the sum of \$2,085. The garnishee summons was served on the Association the following day. It would be a waste of time for us to discuss or determine in this proceeding just what right or interest this defendant has in the amount to be paid over when judgment is entered upon that verdict, whether she holds the whole in her own right or simply in trust, or whether she has an absolute title to one fifth, as a member of a family consisting of five persons. She recovered upon the certificate solely, claiming no rights except such as were found therein; and in this proceeding, at least, the terms of the certificate must govern the plaintiff.

Whatever the widow's interest in the fund, whether great or small, the amount thereof is beyond the reach of her creditors, so long as it remains unpaid. Section 369 of said chapter 34 (the same being § 2 of chap. 128, Gen. Laws 1877), reads as follows: "When any benevolent association or society similar to those enumerated in section 1 of this Act [§ 368] set apart or appropriated a beneficiary fund to be paid over to the families of deceased, or to any member of said families, any such fund, not exceeding the sum of \$5,000, so provided and set apart according to the rules, regulations or by-laws of said association or society to the family of any deceased member, or to any member of said family, shall be exempt from execution, and shall under no circumstances be liable to be seized, taken or appropriated by any legal or equitable process to pay any debt of such deceased member."

The rule of construction laid down by this court (*McNamara v. Minnesota Cent. R. Co.* 12 Minn. 388, Gil. 269; *King v. Kelly*, 25 Minn. 524), that a statute must be construed so that, if it can be prevented, no clause, section or word shall be void, superfluous or without significance, is quoted by appellant's counsel, and we readily agree with him that this rule

must be regarded when construing section 869. Force and effect should be given to each part, and the legislative intent discovered, if possible. This particular portion of the section has not been made quite as plain, perhaps, as it has in later legislation upon this class of associations (sec. 17, chap. 184, *supra*); but the difference in the language, if there be any, is scarcely perceptible. If, as claimed by appellant, these clauses in reference to an exemption of the fund (one prohibiting its seizure upon execution, the other its appropriation in payment of the debts of the deceased), relate to the same subject matter,—the indebtedness of the member, and to no other indebtedness,—the clause or provision in reference to an execution is surplusage, for the succeeding clause covers the whole ground; it absolutely and without the slightest opportunity for misapprehension forbids the application of any part of the fund in payment of the decedent's liabilities. From the language used in the Statute under consideration it is not only evident that the law-makers took special care to protect the fund created and set apart in these associations and societies from demands which might be asserted by creditors of deceased members, but that they intended to and did go further in the matter of protection and exemption. Having in mind the worthy and benevolent design made so prominent in organizations of this character, realizing that the fund accumulated by assessment upon the living was for the relief and assistance of the families of deceased members, not for the benefit of creditors, and appreciating, undoubtedly, the unwisdom of prohibiting the use of the money in payment of debts contracted by members, and, at the same time, allowing it to be seized by the creditor of a beneficiary in payment of his debt, or otherwise allowing it to be diverted from coming into the hands of those for whom it was designed and created, the legislators expressly enacted that it should be exempt from execution, in addition to providing that no part should go to the creditors of the member. The object which seems to have been kept in view and to have been accomplished by the use of words which prevent the interposition of legal process whereby the money may be turned aside from a benevolent channel and placed in the hands of a creditor of a member, or of one of his family,—a beneficiary,—or even of a creditor of the Association, was the relief and assistance, when most needed, of those for whom the fund was de-

signed and created, the complete immunity of the fund itself from the process of the courts. Obviously the amount due upon the decease of a member has been placed beyond seizure for the debt of a member, or a beneficiary, or of the Association itself. Language, found in an Act creating a similar association in the State of Kentucky, almost precisely that of section 869, has recently been construed by the Supreme Court of that State. It was held that the fund was exempt whether garnished for the debt of a member or for an indebtedness due from one of his family. *Schilling v. Boes*, 85 Ky. 357.

Unless the construction we have determined upon, or that, at least, adopted by the court just mentioned, can be given to the words under consideration, they are wholly superfluous, and without meaning, at all times. In fact, without so construing them, the entire section would be valueless as a rule, because inapplicable to nearly all co-operative or assessment life insurance organizations. Almost without exception these associations provide in their articles of incorporation and in their membership certificates, as did this garnishee, that the fund shall be paid to his family upon the decease of a member. At no time has he an interest which may subject the money to the payment of his debts. On the other hand, construing the section as we have indicated gives it significance and effect as to each of these societies and associations; their plans are promoted, and objects encouraged; and they are the better enabled to accomplish their benevolent and charitable purposes. In addition to this, such construction is in harmony with all legislative action upon the subject of co-operative and assessment associations, as well as with the universal rule of construction that, when applied to such organizations, a liberal construction is required of their articles, and of the Statutes in favor of the objects of their bounty, and to prevent the application of their funds to the benefit of those who are strangers. The purposes and objects to be attained by such organization should not be defeated by a strict construction of their articles of association or of the Statutes. *Jewell v. Grand Lodge A. O. U. W.* 41 Minn. 405; *Supreme Council Am. L. of H. v. Perry*, 140 Mass. 580, 1 New Eng. Rep. 715; *Ballou v. Gile*, 50 Wis. 614.

*Order discharging garnishes affirmed.*

**Mitchell, J.**, being absent at the time, took no part in the making or filing of this decision.

## SOUTH CAROLINA SUPREME COURT.

Sarah E. CRAWFORD *et al.*, *Repts.*,  
v.

OMAN & STEWART STONE CO., *Appt.*

(.....S. C.....)

**1. The word "shipped" in a contract by a lessee of a quarry to pay certain rates for stone shipped cannot be construed to include stone not**

shipped although quarried and ready for shipment.

**2. The words "dimension stone" in a quarry lease fixing prices for such stone must be construed in their technical trade meaning in the absence of anything in the contract to indicate the contrary, where both parties are quarry-men.**

NOTE.—Construction of terms used in contracts.

Where the whole of a written instrument shows that the parties employed technical language in a 22 L. R. A.

sense different from its ordinary meaning, those words are to be taken in their primary meaning, and not in their technical meaning. *Atkinson v.*

3. Whether terms of art were used in their ordinary meaning or not in a contract between men familiar with the business to which the terms relate cannot be left to the jury, although they may determine the meaning of the terms in that business.

(March 12, 1891.)

**A** PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Fairfield County in favor of defendants in an action brought to recover the contract price for certain land quarried by defendant on plaintiffs' land. *Reversed.*

The lease under which this controversy arose was as follows:

"This agreement entered into by and between the parties following, witnesseth that Robert Crawford and S. E. Crawford, his wife, both of township nine, Fairfield County, and State of South Carolina, have this day leased to the Oman & Stewart Stone Company, a firm doing business in Nashville, Tennessee, with headquarters at Oman, Watson County, Kentucky, the exclusive right and privilege of quarrying granite on the lands owned by said Crawford and wife, in said township, for the term of ten years,

with the privilege to the said Oman & Stewart Stone Company of renewal for another five or ten years, at their election, on the following conditions and terms, viz.: The said Oman & Stewart Stone Company are to have the exclusive right of quarrying granite on any part of the lands owned by said Crawford and wife that may appear to said Oman & Stewart Stone Company as proper and advisable. Said Oman & Stewart Stone Company are to have the right to build such houses, derricks or other machinery, roads, tramways or railroads, as may seem to them necessary in the operation of the quarry or quarries they may choose to open or operate. Said Oman & Stewart Stone Company are to have the right of way over the lands of said Crawford and wife for such roads, tramways or railroads as they may choose to make or travel over in conducting their business of quarrying. The right to use and remove any stone quarried or unquarried on the lands of said Crawford and wife in said township is hereby conveyed to said Oman & Stewart Stone Company. Said Company have the further privilege of cutting down and removing or using such timbers as may be on the ground or in the way of hauling granite. In consideration of the aforementioned privileges

Sinnott, 67 Miss. 502; Elph. Interp. Deeds, Rule 16, p. 76.

The word "lamp," as used in a contract for the furnishing and use of natural gas, is to be construed with reference to the context, the time, place and habits of the people with reference to which it is used, and the popular understanding of the word in the localities where natural gas is generally used. *Saltsburg Gas Co. v. Saltsburg (Pa.)* 10 L. R. A. 198, and note.

The term "solid rock" is not uncertain or ambiguous; and in the absence of proof that it was used in any other than its plain and popular sense, proof of surrounding circumstances is not admissible on the question of its meaning in a written contract. *Fruin v. Crystal R. Co.* 4 West. Rep. 603, 89 Mo. 397.

Custom may control and vary the meaning of words, giving even to such words as those of number a sense entirely different from that which they commonly bear. 2 Parsons, Cont. 60; *Hinton v. Locke*, 5 Hill, 437; *Eaton v. Smith*, 20 Pick. 150. See note to *MacCulsky v. Klosterman (Or.)* 10 L. R. A. 785.

The Iowa Code, § 3832, providing that when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it, does not distinguish between verbal and written agreements. *Cobb v. McElroy*, 79 Iowa, 608.

When a word has attached to it by the courts a settled technical meaning parties are to be supposed to use it with the same meaning. *Clark v. Pinney*, 7 Cow. 681; *Ellmaker v. Ellmaker*, 4 Watts, 99; *Hart v. Hammett*, 18 Vt. 127.

Yet the legal meaning, no matter how settled, must yield to the sense in which the term is used by the parties. *Browning v. Wright*, 3 Bos. & P. 24; *Biddlecombe v. Bond*, 4 Ad. & El. 323; *Mallan v. May*, 13 Mees. & W. 51; *Robertson v. French*, 4 East, 180; *Stanley v. Western Ins. Co.* L. R. 3 Exch. 71; *Schuykill Nav. Co. v. Moore*, 2 Whart. 491.

This is eminently the case with informal documents, emanating from business men, in which they must be supposed to have used terms in their common business sense. 2 Wharton, Cont. § 632, 633.

12 L. R. A.

Terms of art having a distinctive meaning among specialists may be explained by specialists. *Pollen v. LeRoy*, 30 N. Y. 549; *Collender v. Dinmore*, 55 N. Y. 300; *Colwell v. Lawrence*, 38 Barb. 642; 2 Wharton, Cont. § 630.

*The meaning of terms of art or business is for the jury.*

This is the rule where testimony is necessary to determine the meaning of the term; but when the meaning is determined, the construction of the contract with the meaning so determined is for the court. *Barnard v. Kellogg*, 77 U. S. 10 Wall. 338, 19 L. ed. 397; *Starg v. Connecticut Mut. L. Ins. Co.* 77 U. S. 10 Wall. 539, 19 L. ed. 1088; *May v. Rice*, 101 U. S. 231, 25 L. ed. 797; *School Dist. No. 8 of Thompson v. Lynch*, 38 Conn. 390; *Paris & D. R. Co. v. Henderson*, 99 Ill. 86; *Eaton v. Smith*, 20 Pick. 150; *Star Glass Co. v. Morey*, 103 Mass. 570; *Pick v. Woodward*, 13 Gray, 83; *State v. Hastings*, 24 Minn. 73; *Nash v. Drisco*, 51 Me. 417; *McAvoy v. Long*, 13 Ill. 147; *Pierce v. State*, 13 N. H. 538; *Festerman v. Parker*, 10 Ired. L. 477; *Bradley v. Wheeler*, 44 N. Y. 496; *Edwards v. Goldsmith*, 15 Pa. 45; *Evans v. Wain*, 71 Pa. 69; *Brown v. Hatton*, 9 Ired. L. 819; *Wason v. Rowe*, 16 Vt. 523; *Nelson v. Harford*, 8 Mees. & W. 303; *Ford v. Beech*, 11 Q. B. 852; *Simpson v. Margitson*, 11 Q. B. 33; *Hodgson v. Davies*, 2 Campb. 530; *Hutchinson v. Bowker*, 5 Mees. & W. 583.

*The construction of the contract is for the court.*

The construction of a written contract is for the court alone, as soon as the true meaning of the words used and the surrounding circumstances, if any, have been ascertained as facts, and it is the duty of the jury to take the construction from the court. *Levy v. Gadsby*, 7 U. S. 3 Cranch, 180, 2 L. ed. 404; *Emery v. Owings*, 6 Gill, 191; *Woodman v. Chesley*, 39 Me. 45; *Randall v. Thornton*, 43 Me. 238; *Nash v. Drisco*, 51 Me. 417; *Pratt v. Lanegdon*, 13 Allen, 544; *Smith v. Faulkner*, 13 Gray, 251; *Globe Works v. Wright*, 103 Mass. 207; *Jones v. Bunker*, 33 N. C. 324; *Collins v. Benbury*, 5 Ired. L. 118; *DiSora v. Phillips*, 10 H. L. Cas. 688; *Renns v. Pinksley*, L. R. 1 Exch. 342. See notes to *Minneapolis Mill Co. v. Goodnow (Minn.)* 4 L. R. A. 302; *Newhall v. Appleton (N. Y.)* 3 L. R. A. 859.



to said Oman & Stewart Stone Company, they agree and bind themselves to pay annually to said Crawford and wife one cent and one quarter of one cent for every cubic foot of granite shipped of dimension stone during the first five years of this lease, and one cent and one half of one cent per cubic foot of dimension stone during the second five years and all subsequent terms of this lease. For all other stone shipped not dimension stone they agree to pay fifty cents per carload. Any and all improvements erected or made by said Company on the lands of said Crawford and wife are to remain the property of said Company, and the right is reserved to them to remove them at any time during this lease. In witness whereof we have affixed our names this 22d day of December, 1884.

“Robt. Crawford,

“S. E. Crawford.

“For Oman & Stewart Stone Company, A. R. Stewart, President.

“Witness: J. W. Jones.”

Further facts appear in the opinion.

*Messrs. Ragsdale & Ragsdale*, for appellant:

The contract was wholly in writing, and its terms were not converted. It was therefore error to submit the question of its proper construction to the jury. The court, and the court alone, should construe a written contract.

*Moury v. Stogner*, 8 S. C. 251; *Hammond v. Port Royal & A. R. Co.* 15 S. C. 10; *Russell v. Arthur*, 17 S. C. 477; *De Camps v. Carpin*, 19 S. C. 124; *Arnold v. Bailey*, 24 S. C. 497.

*Messrs. H. A. Gaillard and H. N. Obear* for respondents.

*McIver, J.*, delivered the opinion of the court:

On the 22d of December, 1884, the plaintiffs and defendant entered into a written agreement, styled a “lease,” a copy of which is set out in the case, and should be embraced in the report of this case. By the terms of this agreement the defendant, among other things, was to have the exclusive right of quarrying granite on the lands of the plaintiffs for the term of ten years, with the privilege to defendant of renewal for another term of five or ten years, at its election, in consideration whereof the defendant agreed to pay annually to the plaintiffs “one cent and one quarter of one cent for every cubic foot of granite shipped of dimension stone during the first five years of this lease, and one cent and one half of one cent per cubic foot of dimension stone during the second five years and all subsequent terms of this lease. For all other stone shipped not dimension stone they agree to pay fifty cents per carload.” The defendant, having worked the quarry for some two or three years, abandoned it, whereupon this action was commenced, on the 31st of January, 1889. In the complaint the plaintiffs undertook to state two causes of action,—the first for breach of the written contract in not paying the price agreed upon for the stone quarried, and the second for damages for ceasing to work the quarry. But as the second cause of action has been practically eliminated by the ruling of the circuit judge on the motion for a new trial, to which no exception has been taken by the plaintiffs,

we are confined to a consideration of the first cause of action. In support of this cause of action the plaintiffs, after alleging the making of the written contract, substantially as above stated, except that feature which prescribes the price of stone shipped other than dimension stone, allege that defendant “has quarried 200,000 blocks of granite, known as ‘Belgian blocks,’ and that said defendant has already shipped 110,000 of said Belgian blocks, and is ready to ship, and is preparing to ship, the remaining 90,000 of said blocks.” They then proceed to allege that the 200,000 Belgian blocks “so quarried by the defendant are equivalent to 86,000 cubic feet of granite; that said Belgian blocks are ‘dimension stone,’ and that there is due and payable to the plaintiffs by the defendant, under said agreement, upon the said 86,000 cubic feet of stone, the sum of \$450;” for which sum judgment is demanded. Testimony was adduced tending to show how much stone had been shipped by the defendant, how much was at the quarry cut into Belgian blocks, but not shipped, and also as to what was the meaning of the term “dimension stone,” which seems to be a term of art, as to which there was considerable conflict among the witnesses. The plaintiff Robert Crawford, who, as agent for his wife, his co-plaintiff, seems to have had entire charge of the business, testified that he regarded Belgian blocks as dimension stone, but there is no testimony that the defendant so regarded them. The circuit judge charged the jury that the defendant was liable, not only for the stone actually shipped by them, but also for such as had been quarried and left at the quarry, using these words, “Whatever was quarried and ready for shipment may be considered in this contract as articles shipped;” and, as to the rate that should be charged for the Belgian blocks, while they were not dimension stone, yet if the testimony satisfied the jury that the term “dimension stone” was not used in its ordinary technical sense, but was intended to embrace Belgian blocks, then they could so find, and allow the plaintiffs to recover for the Belgian blocks, at the rate fixed by the contract for dimension stone. The jury having found a verdict in favor of the plaintiffs for the whole amount claimed, \$450, defendant appeals upon the following grounds: “(1) For that his honor erred in charging the jury that, if the 75,000 Belgian blocks were quarried, then whatever was quarried and ready for shipment may be considered in this contract as articles shipped, and that the plaintiffs could recover therefor against the defendant. (2) In that his honor erred in this: that having charged the jury that, the parties being quarrymen, there was a presumption that they contracted with reference to the technical meaning of ‘dimension stone,’ and having charged, further, that Belgian blocks were not ‘dimension stone’ in its technical sense, it was error to submit to the jury the question whether the plaintiffs had rebutted this presumption, when they had offered no testimony whatever to rebut the same.”

The action being based upon a written contract, it is quite clear that the rights and liabilities of the parties must be determined by the terms of such contract, and it seems to us equally clear that, under the provisions of this

contract, the plaintiffs had no right to demand, and the defendant was under no obligation to pay for, any stone until it was shipped or sent to market, for such is the express provision of the contract. It does not provide that defendant shall pay for the stone when it is quarried, or even when it is prepared for market, but only when it is "shipped." Such being the contract of the parties expressed in no equivocal terms, we do not see by what authority a court can undertake to change those terms. It may have been, and doubtless was, a very material matter to the defendant that it should not be required to pay until the stone was shipped, as it may have been dependent for the means of paying for the stone upon its sales of the same, and the proceeds of such sales could scarcely be realized before the stone was shipped. Again, it is not difficult to understand that one of the material elements which entered into the calculation of the defendant, in making a contract in reference to such a heavy and unwieldy article, would be the rates of transportation which it might be able to obtain, and hence there might have been a very good reason for inserting in the contract the provision that the defendant was to pay only for the stone shipped. The testimony shows that the defendant was largely dependent for transportation upon a private railroad, which not being under the control of the public authorities of the State, its owners could fix any rates they pleased, and thus effectually destroy the business of the defendant; and in fact there is testimony from one of the owners of this railroad, who was interested in a rival quarry, that the rates of transportation on that railroad were raised for the express purpose of putting an embargo on the business of the defendant, which did have the effect of stopping its operations. In view of this contingency, which the testimony shows must have been known to both parties, it seems to us that the contract, as it was written, and as, we think, it must be construed, so far from being an unreasonable one, was just the reverse, and that the insertion of the provision whereby the defendant was only to pay for the stone shipped was a very prudent and proper precaution, in view of the contingency above mentioned, which, as the event proved, did happen; for it can scarcely be supposed that the defendant intended to bind itself to pay for stone which it could not get to market except by paying such rates of transportation as would effectually destroy the profits of the business, and perhaps bring it in debt every year. It may be that it was an unwise contract on the part of the plaintiffs to make their pay contingent upon the amount of stone shipped, without first taking measures to secure such rates of transportation as would enable the defendant to carry on the business with reasonable success; but courts do not sit for the purpose of relieving parties from unwise bargains, and when parties of full age and capacity, without fraud or imposition (of which there is no pretense here) enter into a contract, they will be held to its performance according to the terms inserted in such contract, unless, perhaps, it is so wholly unreasonable and unconscientious as to afford a presumption that the parties must have intended something different from that which the words they used

clearly import. But, as we have said, we do not see anything so unreasonable in the terms of this contract, as written, as would afford any ground for such a presumption. The suggestion made by the circuit judge that the parties could not have contemplated that the defendant should work the quarry from year to year, taking from it blocks of stone of any kind, and become the owners of such blocks without becoming responsible for the payment of the contract price therefor, and hence that whatever stone was quarried and ready for shipment may be considered, under this contract, as shipped, and consequently that if there were, as estimated, 75,000 Belgian blocks left at the quarry, the defendant was liable to pay the contract price for the same, cannot be approved. In the first place, we do not think that it necessarily follows that the defendant would "become the owner of such blocks;" for if the defendant has abandoned the work, as the testimony shows, leaving that, or any other, number of Belgian blocks at the quarry, we do not see how it would become the owner of the same. On the contrary, if such is the case, we see no reason why the plaintiffs may not resume possession of the quarry, together with all the stone left there which had been taken out of the quarry and cut into Belgian blocks, and, if so, then the plaintiffs have been benefited, rather than injured, thereby. But, be all this as it may, we think that, the parties having clearly expressed in writing the terms of the contract, which do not appear to us to be so unreasonable as to warrant a court in changing those terms, they must be held to the plain meaning of the terms they have used; and hence that the circuit judge erred in instructing the jury that whatever stone was quarried and ready for shipment may be regarded as shipped, under the terms of this contract, and that defendant was liable to the plaintiffs for the contract price of the same.

It seems to us, also, that the second exception is well founded. Inasmuch as the contract prescribed one price for dimension stone and another and much lower price for all other stone, it was of course very material to determine what was meant by the term "dimension stone," and especially whether Belgian blocks were embraced in that term. Now, as the term "dimension stone" was a term of art, it was competent, under the well-settled rule, to receive evidence of experts as to the technical meaning of that term. 1 Greenl. Ev. § 280; 8 Am. & Eng. Encyclop. Law, 867, 868, and notes. Accordingly such evidence was received in this case, and as it was conflicting, a question of fact was presented as to the meaning of the term "dimension stone," and especially whether it included Belgian blocks, which it was the province of the jury to determine; and it was for the court to instruct them as to the proper construction of the contract, accordingly as they found one or the other meaning of the term to be correct. It seems to us that the true rule upon this subject is well stated by Parke, B., in *Neilson v. Harford*, 8 Mees. & W. 806, in the following language, taken from one of the notes to the passage in the Encyclopedia above cited: "The construction of all written instruments belongs to the court alone, whose duty it is to construe

all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court either absolutely, if there be no words to be construed (or, perhaps, it would be better to say interpreted) as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained, or conditionally, when those words or circumstances are necessarily referred to them."

This rule was illustrated in the case of *Hutchinson v. Bowker*, 5 Mees. & W. 535, where an offer had been made by letter to sell a certain quantity of "good barley," and the letter, in reply, after stating the offer, contained the following: "Of which offer we accept, expecting you to give us fine barley and good weight." And it was held that, although the jury might find the mercantile meaning of "good" and "fine," as applied to barley, yet they could not go further and find that the parties did not understand each other. The question whether there was a sufficient acceptance was a question to be determined by the court upon a proper construction of the letters, Parke, B., saying: "The law I take to be this: that it is the duty of the court to construe all written instruments. If there are peculiar expressions used in them, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what is the meaning of such expressions, but for the court to decide what is the meaning of the contract." So, as was said by Shaw, C. J., in *Eaton v. Smith*, 20 Pick. 150 (quoting again from the Encyclopedia): "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be to instruct the jury what will be the legal effect of the contract or instrument as they shall find the meaning of the word modified and explained by the usage." It seems to us, therefore, that the circuit judge erred when he instructed the jury that while a Belgian block was not a dimension stone, if

that word is to be interpreted in its technical sense, yet the question for the jury to determine in this case was whether the term "dimension stone" was used in this contract in its ordinary technical sense, or in some other sense. The written contract showed what terms had been used by the parties, and, in view of the fact that one of those terms—"dimension stone"—was a term of art, the only question for the jury was, What was the meaning of that term in the art to which it applied? and not whether the parties used that term in a sense different from that which it ordinarily bore. This would be allowing a party, by parol evidence, to prove that the understanding between the parties was different from that which the terms they have used ordinarily and properly import, which is not permissible, as it would be, in effect, varying the terms of a written contract by parol. See *De Camps v. Carpin*, 19 S. C. 131.

We must look alone to the written contract for the words used by the parties, and where some of the words are terms of art, it is for the jury to say, from the testimony adduced, what is the proper and technical signification of such terms, and there the province of the jury terminates, and it is for the court to determine the true construction of the contract, reading the terms of art used therein in the sense as thus ascertained by the jury. But the jury are not at liberty to say that, though the words used by the parties properly mean one thing, yet the evidence shows that the parties intended them to mean something else; for that would permit the jury to substitute for the words actually used by the parties other words which they have not used. In this case both of the parties who were active in making this contract were quarry-men, with considerable experience in the business, and, when they used a term of art, it must be presumed that they used it in its technical sense, and as it would ordinarily be understood by quarry-men, and, in the absence of anything in the contract itself indicating that they intended to use that term in any other or broader sense, this presumption is conclusive.

*The judgment of this court is that the judgment of the circuit court be reversed, and the case be remanded to that court for a new trial.*

McGowan, J., concurs.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

George T. SCOTT

v.

Benjamin P. ELDRIDGE *et al.*

(....Mass....)

1. **Conspiring to commit an abortion**  
is not a felony at common law.
2. **An arrest for a past misdemeanor**

NOTE.—*Conspiracy.*

An agreement to procure an abortion is not a felony at common law. *Com. v. Demain*, Bright. 441. See *Reg. v. Banks*, 12 Cox, C.C. 308. See note to *Tennessee v. Jackson* (Tenn.) 1 L. R. A. 370. 12 L. R. A.

cannot be made without warrant on the authority of a letter from a police officer of another State.

(May 20, 1891.)

**EXCEPTIONS** by defendants to rulings made by the Superior Court for Suffolk County during the trial of an action brought to recover damages for an alleged unlawful arrest and detention of plaintiff by defendants, which resulted in a verdict in plaintiff's favor, *Overruled.*

The facts sufficiently appear in the opinion. *Messrs. Thomas J. Gargan and Patrick M. Keating*, for defendants:

Conspiracy to commit abortion is a felony in this State.

Pub. Stat. chap. 207, § 9.

If the letter from the Philadelphia police department furnished the defendants, who are unfamiliar with legal technicalities, with reasonable ground to believe that a felony had been committed by the prisoner in Pennsylvania, it was not necessary that the letter should in terms technically import a felony; it was sufficient if the language in its popular sense would import such an offense.

*Com. v. Carey*, 12 Cush. 246, 251.

While the States are foreign to each other for certain purposes, in respect of an arrest and detention for crimes committed, they are to each other as the counties in England, and the doctrine of the common law concerning arrest and detention should govern.

*Com. v. Andrews*, 2 Mass. 14, 19; *Com. v. Upprichard*, 8 Gray, 434, 438; *Com. v. Holder*, 9 Gray, 7; *Com. v. White*, 123 Mass. 430, 435.

In England, an officer has a right to arrest a person without a warrant if he has reasonable cause to believe that person has committed a felony either in the county in which he is arrested or in some other.

When a person who has committed an offense in one State has been found in another, it has been the frequent practice, on receipt of a request by telegraph or otherwise from an officer of the former State, to arrest the offender without a warrant and detain him to await the arrival of a requisition and an agent from the State where the offense was committed. This can be lawfully done.

*State v. Anderson*, 1 Hill, L. 327; *Re Henry*, 29 How. Pr. 135.

The information received by the defendants led them to believe that the plaintiff had committed a felony and justified the arrest without a warrant and detention for a reasonable time for the purpose of having him answer to a complaint for the offense.

*Rohan v. Sawin*, 5 Cush. 281, 287.

Whether there was reasonable cause for the belief entertained by the defendants that the plaintiff had committed a felony, and whether they detained him an unreasonable time without getting a warrant, are questions of fact which the court should have submitted to the jury under proper instructions.

*Rohan v. Sawin*, *supra*; *Haskins v. Hamilton Mt. Ins. Co.* 5 Gray, 432, 438; *Douglas & Mfg. Co. v. Gardner*, 10 Cush. 88-92; *Spoor v. Spooner*, 12 Met. 281, 284, 285; *Ellis v. Paige*, 1 Pick. 43, 49.

*Messrs. George R. Swasey and James H. Flint*, for plaintiff:

If the arrest could have been legal at the outset, it became illegal by defendants detaining plaintiff and discharging him without issuing any legal process against him, and, becoming illegal, it was so from the beginning.

*Russell v. Hanscomb*, 15 Gray, 166; *Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. Rep. 119, 120; *The Six Carpenters' Case*, 8 Coke, 290; *Oxley v. Watts*, 1 T. R. 12; *Melville v. Brown*, 15 Mass. 82.

An officer to justify himself must make a true return of his doings.

*Munroe v. Merrill*, 6 Gray, 236; *Brock v. Stimson*, 106 Mass. 520.

12 L. R. A.

The crime mentioned in the letter is not such as to constitute a felony.

*Burrill*, Law Dict. title *Conspiracy*; *Bouvier*, Law Dict. title *Conspiracy*; *Rapalje & Lawrence*, Law Dict. title *Conspiracy*; *Com. v. Shedd*, 7 Cush. 514; *Com. v. Smith*, 11 Allen, 243.

A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

U. S. Const. art. 4, § 2.

No case can arise demanding a more searching scrutiny into the evidence than one arising under this part of the Constitution of the United States.

*Ex parte Smith*, 8 McLean, 186.

To justify the delivery of "a person charged in any State with crime, who shall flee from justice and be found in another State," it is necessary to have proof that the person did in fact "flee from justice." The evidence that the person has fled from justice must not only be satisfactory to the governor but must be legally sufficient before the executive authority can be exercised. He cannot act upon rumor, nor upon the mere representation of a person, nor upon the demanding governor's certificate. It should be sworn evidence, such as will authorize a warrant of arrest in any other case.

*Re Jackson*, 2 Flipp. 183; *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544.

The accused may "insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process."

*Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250; *Ex parte Sheldon*, 34 Ohio St. 319.

Every definition of "fugitive from justice" includes the element of flight in order to escape punishment or detection.

*Bouvier*, Law Dict. title *Fugitive from Justice*; *Burrill*, Law Dict. title *Fugitive from Justice*; *Rapalje & Lawrence*, Law Dict. title *Fugitive from Justice*; *State v. Washburn*, 48 Mo. 240; *United States v. O'Brian*, 3 Dill. 381; *United States v. White*, 5 Cranch, C. C. 38; 6 Pa. Law Jour. p. 418; *Moore*, Extradition, §§ 573, 580.

Proof of flight must be established beyond a reasonable doubt.

*Re Clark*, 9 Wend. 221.

The alleged fugitive must have been charged with the crime in the State where it was committed. The word "charged" contemplates that the person arrested and delivered up committed the offense in another State, and is in such State charged either by indictment, information or accusation known to the law of such State before some court, magistrate or officer thereof.

*Smith v. State*, 21 Neb. 552; *State v. Huford*, 28 Iowa, 391.

Even if a warrant had been issued, that alone would be insufficient.

*Tullis v. Fleming*, 69 Ind. 15; *People v. Brady*, 56 N. Y. 182; *Ex parte Lorraine*, 16 Nev. 63; *Re Heyward*, 1 Sandf. 701.

The prosecution must have been first begun in the State where the offense was committed. *Ex parte White*, 49 Cal. 433; *Ex parte Oubeth*, Id. 435.

And by indictment, affidavit or accusation. *State v. Hufford*, *supra*; *Ex Doo Woon*, 18 Fed. Rep. 898; *Ex parte Morgan*, 20 Fed. Rep. 298.

The affidavit must allege that the crime was committed in the demanding State, and that the accused committed it.

*Ex parte Smith*, 3 McLean, 121.

The executive is not authorized to make a demand unless the party was charged in the regular course of judicial proceedings.

*Kentucky v. Dennison*, 65 U. S. 24 How. 66, 16 L. ed. 717; *Malcolmson v. Scott*, 56 Mich. 459.

By the common law of England neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate.

*Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458; *Wright v. Court*, 4 Barn. & C. 596; 1 Hale, P. C. 587-590; 2 Hale, P. C. 76-81.

An officer acting on irresponsible information acts at his peril and is no better off than any other citizen.

*Malcolmson v. Scott*, *supra*.

No one has authority without process legally issued in this State to arrest a person charged with crime in another State, and fleeing here for refuge.

*State v. Shelton*, 79 N. C. 605; *Morrell v. Quarles*, 35 Ala. 544.

Where preliminary arrest is regulated by statute, the law must be observed.

Moore, Extradition, § 597.

In Massachusetts there is a statute provision for a warrant.

Pub. Stat. 218, § 7.

Where the warrant was not in proper form, the arrest was illegal.

*Price v. Graham*, 3 Jones, L. 546; *Ex parte Oubeth*, *supra*; *Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. Rep. 116.

Magistrates can issue warrants and order the arrest of fugitives before demand, and the implication at least is that such arrests cannot be made otherwise.

*Com. v. Deacon*, 10 Serg. & R. 135; *Ex parte Romanes*, 1 Utah, 23; *State v. Buzine*, 4 Harr. (Del.) 572.

Treating this crime as a felony, which it is not, failure to get a warrant, or take the prisoner before a magistrate at the earliest possible moment, rendered the party making the arrest a trespasser *ab initio*.

*Cochran v. Toher*, 14 Minn. 385; *Hayes v. Mitchell*, 69 Ala. 452; *Ocean S. S. Co. v. Williams*, 69 Ga. 251; *Harris v. Atlanta*, 62 Ga. 290; *Re Henry*, 29 How. Pr. 185; *Burke v. Bell*, 36 Me. 317; *Potter v. Swindle*, 77 Ga. 419.

Even if a warrant is obtained, if the wrong man is arrested, the arrest is illegal.

*Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. Rep. 116.

Art. 4, § 2, of the Constitution of the United States "does not contain a grant of power. It confers no right; it is the regulation of a pre-

viously existing right. It makes obligatory upon every member of the confederacy the performance of an act which previously was of doubtful obligation."

*Re Petter*, 28 N. J. L. 311. See *Com. v. Track*, 5 Met. 586; *Com. v. Hall*, 9 Gray, 262; *Hawley v. Butler*, 48 Barb. 101; *Ex parte Cubreth*, 49 Cal. 435; *Re Leland*, 7 Abb. Pr. N. S. 64.

The Constitution and statutes of the United States provide only for the surrender of fugitives when a demand is made, and there is no provision or occasion for arrest until such demand is made. The laws are incomplete, and need further elaboration and explanation for practical purposes, and this is accomplished by local legislation, which is intended solely to further and interpret the United States statutes and Constitution.

*Ex parte Ammons*, 84 Ohio St. 518; *Brown's Case*, 112 Mass. 409; *Ex parte Rosenblatt*, 51 Cal. 285; *Re Mohr*, 78 Ala. 508.

C. Allen, J., delivered the opinion of the court:

The case is shortly as follows: A letter came to the defendant Eldridge, who was the chief of the department of inspectors of the police of Boston, from someone who purported to be the chief of detectives of the police of Philadelphia, saying that a colored man named Robert Scott, *alias* George R. Scott, who was described in detail, was wanted, and asking that if found he should be arrested and charged with conspiracy to commit an abortion, adding, "I hold our coroner's warrant." In pursuance of this request, the defendants Eldridge and Robinson, the latter being an inspector under Eldridge, arrested the plaintiff, detained him for twenty-four hours, and then discharged him from custody without any legal complaint having been made or legal process issued. The plaintiff brought this action for the arrest. At the trial, the defendants contended that being a party to a conspiracy to commit an abortion was a felony according to the laws of Pennsylvania, and put in evidence Brightly & Purdon's Dig. p. 431, §§ 156, 157; and they asked the court to instruct the jury that if the defendants had reasonable ground to believe that the plaintiff had committed a felony in Pennsylvania they were justified in arresting and detaining him. The court refused to give this instruction and ruled that no justification was shown for the arrest. A verdict was accordingly returned for the plaintiff.

The statutes of Pennsylvania which were put in evidence relate to the offense of abortion, and not to that of conspiracy. No statute of Pennsylvania relating to conspiracy being shown, we must go to the common law to ascertain if such a conspiracy is a felony; and by the common law it clearly is not. *Reg. v. Button*, 11 Q. B. 929; *People v. Mather*, 4 Wend. 229, 265; 2 Bishop, Crim. Law, § 240. There was therefore nothing to show that the defendants had any reason to think that the plaintiff had committed a felony. We cannot accept the defendant's suggestion in the argument, that the latter furnished ground to believe that the plaintiff had committed an abortion in Pennsylvania, which is a felony under the Statutes referred to. The letter is plain in its

request to charge him with a conspiracy, which is an offense of a less grade than felony.

Even if the plaintiff had committed the offense of conspiracy in Massachusetts, the defendants would have had no right to arrest him without a warrant. On reasonable suspicion of felony a peace officer may make an arrest without a warrant, even though it turns out that in fact no felony has been committed; but he may not without a warrant make an arrest for a past misdemeanor, though the offense has been committed, unless he is specially authorized by statute to do so. *Com. v. Carey*, 12 Cush. 246, 252; *Com. v. McLaughlin*, 12 Cush. 615; *Rohan v. Savin*, 5 Cush. 281; *Kurtz v. Moffitt*, 115 U. S. 487, 499, 29 L. ed. 458, 460; *Samuel v. Payne*, 1 Doug. 359; 1 Lead. Crim.

Cas. 157, and Bennett's *note*, 197 *et seq.* If a peace officer would have had no right to arrest the plaintiff for a past misdemeanor committed in Massachusetts, certainly he could have no greater right in respect to a misdemeanor committed in another State. So that, even assuming that the plaintiff had committed a misdemeanor in Pennsylvania (which was not shown), his arrest without a warrant was illegal.

This view of the case being decisive, we have no occasion to consider whether it is necessary in case of a felony committed in another State to pursue the course pointed out in the Statute (Pub. Stat. chap. 207, § 9), or the other objections urged by the plaintiff against the validity of his arrest.

*Exceptions overruled.*

## ALABAMA SUPREME COURT.

GLENN, *Appt.*,  
v.  
JACKSON *et al.*

(....Ala.....)

**An innkeeper is not liable for the theft of a valise left by a transient guest who has paid his bill and gone away, although it was checked for him by a porter, where the latter had**

no authority to check it and no other person at the hotel had any notice that the valise was left.

(May 1, 1891.)

**A** PPEAL by plaintiff from a judgment of the City Court of Birmingham, in favor of defendants in an action brought to recover compensation for the loss of plaintiff's valise from the check room of defendants' hotel. *Affirmed.*

### NOTE.—Responsibility of innkeeper as bailee.

Bailments for the benefit of the bailor, *depositum* or *mandatum*, are founded upon express contract, and require the assent of the bailee to make him responsible. In such case the bailee is required to use only slight care, and he can be made liable only for fraud or gross negligence. *Heatherington v. Richter*, 31 W. Va. 353.

To charge an innkeeper on the custom or common law of the realm for the loss of goods, (1) the inn ought to be a common inn; (2) the party ought to be a traveler or passenger; (3) the goods must be in the inn (and for this reason the innkeeper is not bound to answer for a horse put out to pasture); (4) there must be a default on the part of the innkeeper or his servants in the safe keeping of the guest's goods; (5) the loss must be to movables; and therefore if the guest be beaten at an inn the innkeeper shall not answer for it. *Calye's Case*, 8 Coke. 82 a; *Indermaur*, *Epitome Lead. Com. Law Cas.* 11.

To make one liable at the common law for goods lost at his inn, it must appear that the guest visited the inn for purposes which the common law recognizes as the purposes for which inns are kept. *Carter v. Hobbs*, 12 Mich. 52.

A sleeping-car company, so far as it renders services similar in kind to an innkeeper, is subject to the same liabilities. *Pullman Palace Car Co. v. Lowe* (Neb.), 6 L. R. A. 800, and *note*.

### For what property responsible.

The innkeeper is bound for the safe keeping of the beasts of the guest, and his goods; that is, his luggage, apparel, money, etc.; and if any of them are stolen or lost while the relation of host and guest continues, he must make good such loss or damage. *Russell v. Fagan* (Del.) 6 Cent. Rep. 335.

Goods within the outbuildings, and cattle within the yards belonging to the inn, which are the property of travelers stopping at the inn, are within the protection of the rule. *Clute v. Wiggins*, 14 Johns. 175; *Hilton v. Adams*, 71 Me. 19. 12 L. R. A.

### Liability of innkeeper for property lost or stolen.

His responsibility for goods and moneys of his guest extends to moneys stolen from the guest, unless stolen by his servant or companion. *Shultz v. Wall*, 8 L. R. A. 97, and *note*, 134 Pa. 232.

He is, like a common carrier, an insurer of the goods of his guests, and nothing short of inevitable accident, casualty of war or the fault of the guest himself, can excuse him for their loss. *Russell v. Fagan*, *supra*.

Where a porter of a hotel receives from a traveler a check for baggage, the hotel proprietor at that instant incurs a liability for the safe keeping of such baggage and the limitation of the authority of the porter, unknown to the guest, forbidding him to receive baggage, is immaterial. *Coskery v. Nagle* (Ga.) 6 L. R. A. 483.

The failure of the guest to inform the porter that the baggage contains valuables is not such negligence as will prevent his recovery against the proprietor for its loss. *Ibid*.

Innkeepers; responsibility of; liability as insurer; liability as bailee. See *notes* to *Shultz v. Wall* (Pa.) 8 L. R. A. 97; *Coskery v. Nagle* (Ga.) 6 L. R. A. 483; *Pullman Palace Car Co. v. Lowe* (Neb.) 6 L. R. A. 809.

### When not liable.

An innkeeper as such is not liable to a guest for goods stolen from the latter from a sea-bathing house belonging to the former. *Minor v. Staples*, 71 Me. 316.

When the guest pays his bill and leaves the house to be gone a considerable time, and ceases to be a guest of the house, if money was left with the clerk without the knowledge of the proprietor, by a subsequent arrangement with the clerk, the proprietor would not be liable. *Whitemore v. Haroldson*, 3 Lea, 312.

A hotel keeper is not liable for the value of effects retained in his custody during the absence of a traveler who has taken a check or receipt therefor, if they are lost or destroyed by inevitable ac-

The facts are stated in the opinion.

*Messrs. Carmichael & Thach* for appellant.

*Messrs. White & Howe* for appellees.

*Coleman, J.*, delivered the opinion of the court:

The material facts, briefly stated, are substantially as follows: Defendants were proprietors of the Florence Hotel. The plaintiff had been in the habit of stopping at the Florence Hotel as a guest for two or three days each week, for about a year, but under no continuous special contract. On the morning of the 23d of November, 1888, being in his room, the plaintiff rang the bell for a servant, and he handed his valise, in which was wearing apparel, etc., to the porter who responded to the bell call, with directions to take it down and check it, and leave the check for him at the clerk's office; that he soon after went down, found a check on the register, which the porter, who had taken his valise down, informed him was his check; that he settled his hotel bill with the clerk, surrendered his room, and left, without any contract that he would return; that two or three days afterwards he returned to the hotel, presented his check (No. 35) and called for his valise. The check-room was examined, but the valise could not be found. The number corresponding to 35 was in the check-room on a hook. The check-room was just opposite the office of the clerk, and was

without a door, and was used only for storing and checking the baggage of guests. The evidence showed that plaintiff did not notify the clerk or anyone connected with the hotel, except the porter to whom he gave the valise, that his baggage was to be placed in the check-room, and the clerk who was on duty testified that he had no notice or knowledge that plaintiff's valise had been placed in the check-room. It was further in evidence that the servants and porters in the hotel had instructions neither to check nor deliver baggage without notice and permission of the clerk of the hotel who might be on duty. There was no other evidence tending to show that the valise was ever placed in the check-room, or when it was taken or stolen, or by whom. Plaintiff did not pay or agree to pay anything for keeping his baggage. The common-law liability of innkeepers, except so far as modified by statute, is recognized and applied in this State. Rates of charges, and reasonable limitations upon their liability, may be fixed by special contract. A guest may also be guilty of such proximate contributory negligence as to exonerate innkeepers from responsibility. *Lanter v. Youngblood*, 78 Ala. 592; Story, Bailm. §§ 483, 484; Story, Cont. § 744-749.

The strict common-law liability of innkeepers is for the protection of the goods of their guests, and while the relation of innkeeper and guest exist. The words of the common law were, *eorum bona et catalla infra hospitium*.

*cident. McElwaine v. Balmoral Hotel Co. Montreal L. Rep. 7 Super. Ct. 129.*

#### *Relation of guest and host must exist.*

The relation of innkeeper and guest exists if one takes his meals at the inn but does not reside there, even though he lives within the same town. *Walling v. Potter*, 35 Conn. 183.

Whether the plaintiff sustained the relation of guest or boarder in the defendant's inn at the time of the loss of the articles sued for, is a question of fact to be decided upon all the evidence. *Hall v. Pike*, 100 Mass. 496; *Houser v. Tully*, 62 Pa. 92. And see *McDonald v. Edgerton*, 5 Barb. 530.

Where a man arrived at Toronto from Ireland, and drove from the railway station to defendant's hotel, having a portmanteau with him, took a room, saying he only wanted it to change his dress and go to friends; and after having occupied it for an hour went to his friends, with whom he remained, he was not a guest. *Lynar v. Mossop*, 36 U. C. Q. B. 230.

One having no fixed residence, who arranges for a prolonged stay at a hotel at reduced rates payable by the month with the idea of determining if his wife's health will be benefited, and does not place his valuables with the innkeeper, is a boarder, and not a guest. *Moore v. Long Beach Development Co. (Cal.)* Jan. 19, 1891.

#### *Guest, who is.*

Everyone who is received into an inn, and has entertainment there, for which the innkeeper has compensation or reward, is a guest; but this includes only wayfarers or travelers. *Russell v. Fagan* (Del.) 6 Cent. Rep. 885. See *note to Pullman Palace Car Co. v. Lowe* (Neb.) 6 L. R. A. 809.

A traveler who seeks and obtains stabling and provender for his beast for reward, although he himself lodges and boards elsewhere, is a guest in the legal sense, and entitled to the protection of his beast. *Russell v. Fagan, supra*.

12 L. R. A.

If one comes to an inn and leaves his goods and horse, and goes into the town and afterwards returns, and in the meantime his goods are stolen, he may recover as a guest for the loss of his property. *Geiley v. Clerk*, Cro. Jac. 188.

The absence of a few hours is not material, but when he "goeth from hence for two or three days, although he saith he will return," he is not a guest. *Dr. Sands' Case*, 1 Salk. 124; *Grinnell v. Cook*, 3 Hill, 485.

This rule obtains where the property left at the inn was luggage, but it is otherwise where he left a horse from which the host derives an advantage. *Wharton, Innkeepers*, 78.

#### *Not liable as a mere depositary.*

An innkeeper is not bound to receive the goods of a person who desires the use of the inn only as a place of deposit. *Bennet v. Mellor*, 5 T. R. 274; *Mateer v. Brown*, 1 Cal. 321.

Where his purpose is simply to deposit his money for safe keeping he is not a guest and cannot hold the proprietor liable. *Arcade Hotel Co. v. Wiatt*, 3 West. Rep. 368, 44 Ohio St. 32; *Carter v. Hobbs*, 13 Mich. 53.

An innkeeper is not liable, as such, for the loss of money deposited with him for safe keeping by a person who is not a guest of the inn at the time such deposit is made, nor at the time the loss occurs. *Ibid.*

The clerk of an innkeeper has no authority to bind the latter, either as innkeeper or special bailee, for the loss of money deposited for safe keeping with such clerk by a person who is not a guest of the inn at the time of such deposit. *Arcade Hotel Co. v. Wiatt, supra*.

To entitle a person visiting an inn to be treated as a guest, and to hold the innkeeper responsible for money deposited for safe keeping, it must appear that such visit was for the purposes which the common law recognizes as the purposes for which inns are kept. *Ibid.* See *Carter v. Hobbs, supra*.

*Calve's Case*, 8 Coke, 32a; *Wilkins v. Earle*, 44 N. Y. 172.

The evidence in the present case shows that on each several visit of the plaintiff to the hotel, he was a guest, and was entitled to all the protection of the common law. It is equally clear that this relation terminated after each stoppage. He was charged and paid the usual day rates without reduction, and no agreement was made as to future visits. When the plaintiff paid his bill and left, the relation of innkeeper and guest ceased to exist. *O'Brien v. Vasu*, 22 Fla. 627. If, when he paid his bill, he had called for his valise, and it then had been stolen or lost, there could be no doubt of the liability of the defendant, or if he had requested the defendant or his authorized clerk to take charge of his baggage until his return, agreeing to return within a short time, and the defendant or clerk had consented to do so, a liability would have been assumed by such agreement. *Story*, Bailm. § 477, and *note*. Or if the plaintiff had not paid his bill, and the defendant had undertaken to retain the baggage to secure the plaintiff's debt to him, the defendant would be liable. *Haas v. Taylor*, 80 Ala. 465. And there may be cases, according to the particular circumstances, where an innkeeper may be liable for the goods of a guest, for a reasonable time, after the departure of the guest from the inn. *Adams v. Clem*, 41 Ga. 65. See criticism on this case in 22 Fla. 627, *supra*.

If a traveler, intending to become a guest at an hotel, meets a porter of the hotel at the depot or other usual stopping places for travelers, and intrusts his baggage with the porter, sent out for the purpose of soliciting patronage and

caring for the baggage of such guests, the relation of innkeeper and guest for the protection of the baggage is thereby created; or if a guest, intending to leave the hotel, intrusts his baggage to a porter of the hotel whose duty it is to deliver the baggage at the depot, the relation is continued until the delivery at the designated place. But these principles of law afford no protection to one who intrusts his baggage to a mere servant of the hotel not authorized to receive baggage, with directions to him to check it for safe-keeping until he returns, then pays his bill to the clerk, and terminates his relation as guest, and gives no notice to the innkeeper or clerk that he expects to return, and that he has left his baggage to be taken care of until his return. "When a person came to an inn with a hamper of hats, and went away, and left them there for two days, and in his absence they were stolen, it was held that he was not to be deemed a guest, and that the innkeeper was not liable for the loss thereof." *Story*, Bailm. § 477.

It is not in the power of a bailor to force upon another the custody of his goods. It must be a duty voluntarily assumed or one imposed by law. A deposit received by a servant not in the line of his duty, and without the expressed or implied consent of his principal, and against positive instructions, cannot impose a liability upon the principal. In such case the deposit is a mere personal trust in the servant. There is nothing in the objection that the court permitted the defendant to assign other grounds of demurrer at the trial, which had not been previously assigned.

*Affirmed.*

## WASHINGTON SUPREME COURT.

William RITCHIE, *Appt.*,  
v.

J. W. GRIFFITHS *et al.*

(....Wash.....)

### 1. Mere delivery of a deed to a recording officer for record will not, unless the stat-

*NOTE.—Recording Acts: when instrument regarded as recorded; who suffers by failure of clerk to make record or by mistake in recording.*

Each State appears to have its own rule on this subject, owing partly, perhaps, to the different language of the Recording Acts. But there is not difference enough in the language of the Acts to account for all the wide difference in the decisions. There is no rule or theory by which the decisions can be harmonized, and there is no rule which can be drawn wholly from the decisions, which can be taken as a basis for future decisions, and which will cover all phases of the subject. There is much to be said on both sides, and the courts appear to decide as the one view or the other is more prominently before them when first dealing with the question. As illustrating the difficulty of the question it may be said that in very few of the leading cases were the members of the court unanimous in opinion, many strong dissenting opinions appearing in the books. Under these circumstances it would seem that more value could be derived

12 L. R. A.

ute so provided, render it constructive notice to subsequent bona fide purchasers. The responsibility of seeing that the deed is actually recorded rests upon the grantee, and he is not relieved therefrom by receiving from the recorder a certificate stating that the record has been properly made.

### 2. A recording officer who receives a

from seeing the exact decision of the respective courts, together with the particular clauses of the respective Statutes on which they are based, than could be derived from any attempt to formulate rules which must necessarily be followed many times by *contra*.

A statute making a conveyance "operative as a record" from the day of its delivery to the recording officer protects the title of the holder of a mortgage which has been so delivered although the mortgage is copied upon the record as a security for a smaller amount than it was given to secure. *Mims v. Mims*, 35 Ala. 23.

Such delivery places the legal and equitable rights of the mortgagee precisely on the same basis as if his mortgage were fully and accurately recorded without even a mistake. *Fouche v. Swain*, 80 Ala. 153. See also *McGregor v. Hall*, 3 Stew. & P. 397; *Duboe v. Young*, 10 Ala. 368; *Turner v. McFee*, 61 Ala. 468; *Heflin v. Slay*, 73 Ala. 130; *Leslie v. Hinson*, 83 Ala. 268.

Under a statute making a mortgage a lien from



deed for record from the grantee mentioned therein is, as to the recording of such deed, to be considered the agent, not of subsequent bona fide purchasers, but of such grantee, within the rule that when one of two innocent persons must suffer, the loss must fall upon the one under whose control it happened, and who had it in his power to avert it.

3. The record of a deed is not complete under *Gen. Laws 1880*, pp. 313, 314, 315, §§ 18, 19, 24, so as to constitute constructive notice of its existence, until it has been filed, recorded and entered in the index book as prescribed by those sections.

4. When a recording officer is given a certain time in which to record deeds filed for record, a provision in a statute requiring deeds to be recorded, that they shall be valid, as against bona fide purchasers, from the date of their filing or recording in the recorder's office, and, when so filed or recorded, shall be notice to all the world, makes the filing notice only during the time allowed the recorder to make the record.

(December 19, 1890.)

**A** PPEAL by defendant from a judgment of the Superior Court for Clallam County in favor of plaintiffs in an action brought to recover possession of a certain piece of real estate. *Reversed.*

Both parties traced their title to one Norman R. Smith. Smith gave a deed to a tract including the land in controversy to one Nellie Meagher, September 30, 1881. Plaintiffs claimed to have derived this title through several mesne conveyances.

the time it is filed in the recorder's office for record, which filing shall be notice to all persons, the mortgagee's rights are perfected by filing his mortgage, and he will not suffer loss by the clerk's neglect to record it, although it is subsequently withdrawn from the office unrecorded. *Oats v. Walls*, 28 Ark. 244. See also *Case v. Hargadine*, 43 Ark. 144.

Under a statute providing that every conveyance properly recorded shall from the time of filing the same for record impart notice to all persons of the contents thereof, constructive notice is given only of the facts appearing on the face of the record, and one will not be charged with notice of portions of a deed which through mistake are not entered in the record. *Chamberlain v. Bell*, 7 Cal. 394.

So one leaving notice of the location of a mining claim for record is not bound by mistakes of the recorder in copying the notice into the record book. *Myers v. Spooner*, 55 Cal. 262.

And such is the rule in Colorado. *Weese v. Barker*, 7 Colo. 181.

One who carries a deed to the town clerk to be registered is not to be prejudiced by the negligence of the clerk in permitting the deed to lie in his office unrecorded. *Franklin v. Cannon*, 1 Root, 500; *Judd v. Woodruff*, 3 Root, 298.

Under a statute that no deed shall be good against any person but the grantor unless it be recorded at length in the records of the town where the lands lie, and that the register shall, on receipt of a deed brought to him for record, note thereon the date of such receipt, and the record shall bear the same date, a deed delivered for registry secures title to the grantee from the day it was so received, without reference to the time when it was in fact recorded (*McDonald v. Leach*, Kirby, 72), and it is immaterial that the deed is surreptitiously withdrawn by a third person from the recorder's office before it is recorded. *Hine v. Robbins*, 8 Conn. 347.

12 L. R. A.

Defendant claimed under a deed given by Smith to one E. B. Mastick, July 16, 1886, and in his answer set up that at the date of his purchase the deed from Smith to Meagher was not indexed in the index to deeds in the proper recorder's office, that he had no notice that such deed had been made or filed and that he paid a valuable consideration for the property.

*Messrs. William S. Bush and George F. Noyes*, for appellant:

The court below erred in holding that the index was no part of the records of the auditor's office, and that a deed spread upon the records, but not indexed, was legal notice to all persons.

*Barney v. McCarty*, 15 Iowa, 516; *Barney v. Little*, Id. 581; *Scotles v. Wiley*, 11 Iowa, 266; *Bostwick v. Powers*, 13 Iowa, 457; *Whalley v. Small*, 25 Iowa, 188, 189; *New York L. Ins. Co. v. White*, 17 N. Y. 478; *Speer v. Evans*, 47 Pa. 141; *Wood v. Chapin*, 18 N. Y. 518; *Hoyt v. Schuyler*, 19 Neb. 652.

The mere delivery of the deed to the auditor is not the "filing" contemplated by the law.

*Tiedeman*; *Real Prop. ed.* 1887, § 289; *Rushin v. Shields*, 11 Ga. 686; *De Witt v. Moulton*, 17 Me. 418; *Prost v. Beckman*, 1 Johns. Ch. 288, 1 L. ed. 143, 18 Johns. 544; *Peck v. Mallams*, 10 N. Y. 509; *Johns v. Scott*, 5 Md. 82; *Taylor v. Holahkies*, 2 La. Ann. 917; *Purret v. Schaubhut*, 5 Minn. 828; *Terrell v. Andrews County*, 44 Mo. 809; *Farmers & M. Bank v. Bronson*, 14 Mich. 869; *Whittacre v. Fuller*, 5 Minn. 508; *Meighen v. Strong*, 6 Minn. 177; *Ross v. Worthington*, 11 Minn. 428; *New York Life Ins. Co. v. White*, 17 N. Y.

When a deed is lodged for record with the town clerk it is constructive notice to all the world. *Booth v. Barnum*, 9 Conn. 286.

Under a statute providing that upon failure to record a mortgage within three months from its date all judgments obtained before its foreclosure and subsequent duly recorded mortgages shall take precedence over it, a mortgage filed for record and recorded all except the name of the mortgagor, which is omitted by mistake of the recording officer, will be postponed to such judgments at least as are entered before the signature is added. *Shepherd v. Burkhalter*, 18 Ga. 447. See also *Burke v. Anderson*, 40 Ga. 640.

It is immaterial that the recording officer is so pressed with work that it is impossible for him to record the instrument within the proper time. If not recorded the instrument will be postponed. *Benson v. Green*, 80 Ga. 220.

Under statutes giving title papers effect from the time they are filed for record, and requiring the recorder to keep a book for indexing all papers brought into his office for record, the failure of the recording officer to keep the index will not prejudice the title of one leaving his deed for record. *Cook v. Hall*, 6 Ill. 579.

Nor will a mistake in making the record prejudice the grantee. He is protected when he has left his deed for record. *Merrick v. Wallace*, 19 Ill. 498.

When a mortgage is filed for record it in contemplation of law is recorded and becomes notice to all the world. But if it is subsequently withdrawn from the files by the mortgagee before being recorded it is ineffectual as notice until reinstated. *Kiser v. Heuston*, 38 Ill. 252; *Worcester Nat. Bank v. Cheney*, 87 Ill. 602.

Under statutes providing that title papers not recorded within forty-five days from their execution shall be void as against subsequent bona

475; *Sinclair v. Lawson*, 44 Mich. 123; 2 Pom. Eq. Jur. §§ 653, 654. See also *Hay v. Hill*, 24 Wis. 238; *Lombard v. Oubertson*, 59 Wis. 436; *Oconto County v. Jerrard*, 46 Wis. 317; *St. Croix Land & Lumber Co. v. Ritchie*, 73 Wis. 409; *Edwards v. McKernan*, 55 Mich. 527.

*Messrs. E. C. Johnson and Ralph E. Moody*, for appellees:

The index is no part of the record.

*Musgrove v. Bonser*, 5 Or. 313; *Bishop v. Schneider*, 46 Mo. 472; *Chatham v. Bradford*, 50 Ga. 327; *Curtis v. Lyman*, 24 Vt. 388; 1 Devlin, Deeds, §§ 695, 697.

A grantee who deposits his deed for record in the auditor's office, which is received by that officer, discharges his duty of notice to the public, and his title cannot be prejudiced through the fault alone of the auditor. A paper is filed when it is delivered to the proper officer, and by him received to be kept on file or recorded.

*Reed v. Acton*, 120 Mass. 130; *Oats v. Walls*, 28 Ark. 244; *Cook v. Hall*, 6 Ill. 575; *Dodge v. Potter*, 18 Barb. 193; 7 Am. & Eng. Encyclop. Law, p. 960.

When a party places his title papers in the proper custody and for the proper purpose to charge others with notice he has discharged his whole duty in the matter. The law does not impose upon him the task of following officers to see that they discharge their official duties.

*Lytle v. Arkansas*, 50 U. S. 9 How. 333, 18 L. ed. 160; *Merrick v. Wallace*, 19 Ill. 436; *Mangold v. Barlow*, 61 Miss. 593; *Lee v. Birmingham*, 80 Kan. 312; *Bedford v. Tupper*, 30

Hun, 174; *Stringer v. Young*, 28 U. S. 3 Pet. 320, 7 L. ed. 693; *Becerley v. Ellis*, 1 Rand. 106; *Wood's App.* 82 Pa. 116; *Flowers v. Wilkes*, 1 Swan, 408; *Oats v. Walls*, 28 Ark. 244; *Throckmorton v. Price*, 28 Tex. 605; *Nichols v. Reynolds*, 1 R. I. 30; *Ferris v. Smith*, 24 Vt. 27; *Gaskill v. Budge*, 3 Lea, 144; *Bank of Kentucky v. Haggis*, 1 A. K. Marsh. 306; *Polk v. Cosgrove*, 4 Biss. 437; 1 Devlin, Deeds, § 686.

#### Per Curiam:

The first question to be decided in the consideration of this case is, Does a grantee, who deposits his deed for record in the auditor's office, where it is received by that officer, discharge his duty of notice to the public, so that his title cannot be prejudiced through the fault or negligence of the auditor in not recording said deed, in accordance with the requirements of the Registry Laws? If it is concluded that he does so discharge his duty, and that constructive notice is thus given, it will be conclusive of this case; and it will not be necessary to enter into the question of whether or not the index is an essential part of the record. It will be seen that important questions arise here affecting valuable rights, and that, whichever way they are decided, a hardship will be imposed upon an innocent party. In one instance the first grantee relies on the officer, who is a creature of the law, to do his duty; and in the other, the purchaser, reposing faith and confidence in the correctness of the record, acts upon it. Shall the deed prevail, or the record of it? On the first question there is a somewhat perplexing conflict of authority; some

side purchasers, and that the recorder shall keep a book in which he shall index all instruments left for record, every deed being deemed recorded from the time so indexed, the entry in the index book will not be notice of the contents of the deed after it is spread upon the records, and the grantee will be bound by a mistake of the recorder in recording the instrument. *Gilchrist v. Gough*, 63 Ind. 533. See also *State v. Davis*, 93 Ind. 543; *Smith v. Lowry*, 12 West. Rep. 621, 113 Ind. 44.

An Act providing that an instrument shall from the time of filing the same for record impart notice to all persons of its contents will not make such filing notice after the instrument is recorded, at least if it is then withdrawn from the files, and a subsequent purchaser has a right to rely on the record even though it contains mistakes of the clerk. *Miller v. Bradford*, 12 Iowa, 19.

A mortgagee must see that his mortgage is properly recorded. *Barney v. McCarty*, 15 Iowa, 515. See also *Miller v. Ware*, 31 Iowa, 324.

Under a statute providing that when recorded in the office of the register of deeds every title paper shall from the time of filing the same for record impart notice to all persons of the contents thereof, the grantee has done his whole duty when he leaves his deed and has the same indorsed for record, and he cannot be prejudiced by the recorder's delay in actually spreading the deed upon the records. *Poplin v. Mundell*, 27 Kan. 159; *Lee v. Birmingham*, 80 Kan. 312.

Under a statute making a deed good against purchasers or creditors "when lodged with the clerk to be recorded" the grantee's title cannot be prejudiced by the clerk's permitting the deed to be taken from his possession before recording it by a third person without the grantee's knowledge. *Kentucky Bank v. Haggis*, 1 A. K. Marsh. 306.

Under an Act providing that mortgages are all

lowed to prejudice third persons only when they have been publicly inscribed on records kept for that purpose in the manner directed by law, a mortgage is valid against third persons, not as it was executed, but as it stands recorded. *Succession of Falconer*, 4 Robt. (La.) 7; *Taylor v. Hotchkies*, 2 La. Ann. 917.

But under Acts providing that deeds shall have effect from the time they are deposited in the proper office and indorsed by the proper officer for record, a deed deposited in 1872 and not recorded until 1876 will protect the grantee against subsequent judgments against his grantor. *Payne v. Pavey*, 29 La. Ann. 116.

Whether or not it is recorded in the proper book is immaterial. *Lewis v. Klatz*, 39 La. Ann. 259.

Under a statute providing that a mortgage shall be considered as recorded at the time it is left for such purpose in the clerk's office, the mortgage is notice only as recorded, although prior to the time of its being recorded the mere fact that it is filed for record may be sufficient notice of its contents. *Sawyer v. Pennell*, 19 Me. 173.

Under a statute providing that the clerk shall record mortgages in a book kept for that purpose, noting in the book and on the mortgage the time when the same was received, failure to note the time of receipt in the book will postpone the mortgage in favor of attaching creditors until the noting is made. *Handley v. Howe*, 22 Me. 522.

A mistake in recording a mortgage binds the mortgagee. *Stedman v. Perkins*, 42 Me. 151; *Jones v. McNarrin*, 63 Me. 338; *Hill v. McNichol*, 73 Me. 311.

Under a statute providing that no deed shall be valid for the purpose of passing title unless "recorded as herein directed" the grantee will be bound by mistakes of the clerk in making the record. *Brydon v. Campbell*, 40 Md. 336.

Under a statute requiring the recorder to keep a

courts holding that a deed is recorded, in contemplation of law, when it is entitled to registration, and is deposited with the recorder in his office for that purpose, and if, through any fraud or neglect or mistake of the recording officer, the proper notice is not conveyed to a subsequent purchaser or incumbrancer, that the misfortune will fall upon the subsequent purchaser; while other courts hold the opposite doctrine, that the *onus* is on the grantee, who deposits his deed with the recorder, to see that every step is taken, and every act done, that is prescribed by the Registry Laws. For collated authorities on this question, see *Mangold v. Barlow*, 61 Miss. 597; Wade, Notice, pp. 70-78.

In many of the cases, however, that are cited as holding the doctrine claimed by plaintiff, the courts, on a careful investigation, are found to have based their opinions on statutes materially different from ours, and others, on the peculiar circumstances of the case. The enunciation by the Supreme Court of the United States, in *Lytle v. State of Arkansas*, 50 U. S. 9 How. 815, 13 L. ed. 153, that "it is a well-established fact that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right, by the misconduct or neglect of a public officer, the law will protect him," has been largely relied upon by the plaintiff, and has been quoted by a majority of the cases reported, which hold to plaintiff's view, but in none of these cases, that we have seen, have the circumstances of that case, which called forth the opinion, been reported. To get the

full scope and meaning of this expression, we must not regard it as a segregated proposition, independent of the case under consideration, and applicable to all cases; for judges in rendering opinions, use expressions with reference to the application of principles involved in the case under consideration, and the language employed must be construed, and its meaning gathered, from an examination of the questions involved, the circumstances surrounding and the argument that leads up to the utterance, or, in homely phrase, it is necessary to know what the court was talking about. Of course, there are certain underlying or basic principles of law, from the true deductions of which are constructed legal maxims, which may be stated as independent propositions, and which will admit of no modification; but the examination of the case cited shows that the quoted utterance of the eminent judge has no application to the principles involved in, and the circumstances surrounding, this case. That was a case where a pre-emption claimant tried, through a succession of years, to obtain title to some fractional subdivisions of land, and was prevented, not by any negligence of the register and receiver in the land office, but on account of their construction of the law, and circular instructions from the general land office. Afterwards, by Act of Congress granting a thousand acres of land to the State of Arkansas, for the purpose of building a courthouse, the governor selected and sold the land in controversy to one Russell, under whom the defendants held. Of course, many interesting questions were raised during the trial of this

book in which he shall enter in the order received all title papers left for record, and providing that every instrument shall be considered as recorded at the time so noted, after the recording officer places upon a deed his certificate that it has been received for record, in contemplation of law the whole world has constructive notice of it just as if it had been accurately copied in full upon the records, and it is immaterial that the clerk afterwards fails in his duty by recording it inaccurately, by omitting material portions of it or even by altogether suppressing it from the records. *Gillespie v. Rogers*, 6 New Eng. Rep. 297, 146 Mass. 612, citing *Tracy v. Jenks*, 15 Pick. 463; *Ames v. Phelps*, 18 Pick. 314; *Jordan v. Farnsworth*, 15 Gray, 517; *Fuller v. Cunningham*, 105 Mass. 442; *Adams v. Pratt*, 109 Mass. 56; *Wood v. Simons*, 110 Mass. 118; *Sykes v. Keating*, 118 Mass. 517; *Getchell v. Moran*, 124 Mass. 404.

A purchaser has a right to rely on the records as showing the exact facts, notwithstanding a mistake has been made in recording. *Barnard v. Campau*, 29 Mich. 164.

Where statutes provide for the keeping of an entry book for mortgages and that as soon as a mortgage has been entered therein it shall be regarded as recorded, and also provide for the recording in full, an omission in the record of the name of the mortgagee will not prejudice his security if his name properly appears in the entry book. *Sinclair v. Blawson*, 44 Mich. 127.

Under a statute requiring a deed to be recorded to be good against subsequent purchasers the record of the deed is notice of its contents only so far as the record discloses them. *Parret v. Shaubhut*, 5 Minn. 331. See also *Thorpe v. Merrill*, 21 Minn. 336.

Under a statute declaring instruments void "as to all creditors and subsequent purchasers for valuable consideration, without notice, unless they 12 L. R. A.

shall be acknowledged or proved and lodged with the clerk of the chancery court of the proper county to be recorded, the grantee fully acquits himself of all duty imposed by law when he lodges the instrument with the proper officer for record, and he cannot suffer loss from an error of the clerk in recording it. *Mangold v. Barlow*, 61 Miss. 596. But see *Lally v. Holland*, 1 Swan, 401.

Under a statute providing that every instrument recorded in the manner prescribed shall from the time of filing the same with the recorder for record impart notice to all persons of the contents thereof, a record is notice only of the facts appearing on its face, and if a mistake occurs in recording the grantee must suffer the consequences. *Terrell v. Andrew County*, 44 Mo. 309.

Under statutes providing that deeds shall be recorded in the order and as of the time when they are delivered to the clerk for that purpose, and shall be considered as recorded from the time of such delivery, and further making it the duty of every person to have his deed entered upon the numerical index and pay the fees before it can be recorded, the grantee's duty is discharged when he deposits his deed for record and pays the fees, and he cannot be prejudiced by the recorder's failure to record the deed. *Perkins v. Strong*, 22 Neb. 726.

Under a statute providing that a designation of a school site by selectmen shall be binding when their report designating a location "shall be recorded in the books of the town," the duty of the selectmen is discharged when the report is filed for record, and the subsequent neglect of the clerk to make a due record will not affect the validity of the location. *Converse v. Porter*, 45 N. H. 369.

Under a statute providing that the registry of a mortgage must contain, among other things, "the mortgage money, and the time or times when payable," and that no mortgage shall defeat or preju-

case; but the particular circumstances of the case, which called out the quoted utterance, and the intended applications of the principles therein enunciated, can probably be gathered from the balance of the paragraph following the quotation, which is as follows: "In this case the pre-emption right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the Act of 1890, nothing more could be done by him, and nothing more could be required of him under that Act; and, subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned, he could do nothing more than to offer to enter the fractions, which the register would not permit him to do." Thus it will be seen that none of the principles involved in the case at bar were involved in that case, and it shows the misleading tendency of quoting detached sentences from the opinions of courts. In that case, the action of Cloyes was at every step a matter of public record, and of official report, and the whole circumstances of the case show that the defendants had actual notice of his claim, though some of them denied such a notice in the answer, while others admitted that they had heard of his claim, but believed it to be fraudulent; but the court spoke with reference to the acts of an officer acting in a judicial capacity, and deciding questions of law, decisions and acts over which the plaintiff could not possibly exercise any supervision or control. It will certainly not be hard to see that a very different rule might obtain, when the act required by the applicant was

purely ministerial, and which he had a right to see was done in the manner prescribed by law. It is doubtful if the judge who rendered that opinion would have concluded that the grantee "had done everything which the law required him to do," when he contented himself with simply handing his deed to the auditor, without exhibiting any further concern about it. In our judgment, the scope and meaning of this opinion have been entirely misconstrued, when applied to this character of cases.

In *Mangold v. Barlow*, 61 Miss. 598, and one of the best argued cases sustaining the doctrine that the *onus* is on the purchaser, and a case which is also largely quoted, the court bases its opinion on the peculiar language of the Mississippi Statute, which declares that certain instruments "shall be void, as to all creditors and subsequent purchasers for valuable consideration, without notice, unless they shall be acknowledged or proved, and lodged with the clerk of the chancery court of the proper county to be recorded." Here the Statute seems, by express terms, to make the lodging of the properly proved instrument with the clerk the proof of constructive notice. And thus it is with a great majority of cases cited in favor of plaintiff's theory. A close examination of them will show that the opinion is based upon some express language of the Statute, which would justify the conclusion reached; but, on the general proposition, however, the decided weight of authority seems to be in favor of the view that the record can be relied upon by subsequent purchasers, without actual

notice the title of third persons "unless the same shall have been duly registered," the registry is notice of its contents and no more;" hence a mortgage for \$3,000 recorded as for \$300 will be valid as against subsequent mortgages without notice only for the latter amount. *Frost v. Beekman*, 1 Johns. Ch. 268, 1 L. ed. 148; *Beekman v. Frost*, 18 Johns. 584. See also *Peck v. Mallama*, 10 N. Y. 519.

Under a statute directing that mortgages shall be recorded in the order in which they are delivered to the clerk for recording, the record of a mortgage upon a page which should have been devoted to a mortgage several years antecedent in execution is not notice to a subsequent mortgagee in good faith. *New York L. Ins. Co. v. White*, 17 N. Y. 474.

Where the statute requires the clerk to number mortgages given him for record, the rights of the mortgagee cannot be impaired by the clerk's failure to perform his duty. *Dodge v. Potter*, 18 Barb. 202.

In *Mutual Life Ins. Co. v. Dake*, 87 N. Y. 264, the court remarked that under a statute providing that a deed shall be considered as recorded from the time it is delivered to the clerk for record, if before the record is actually made the deed should be mislaid or lost or purloined the record would still remain complete. See also *Simonson v. Fallhee*, 25 Hun, 570; *Bedford v. Tupper*, 30 Hun, 178.

Slight and immaterial mistakes in the recording of a grant will not avoid it. *Van Pelt v. Pugh*, 1 Dev. & B. L. 210; *Hughes v. Debnam*, 8 Jones, L. 181.

Where a purchaser of land hands his deed to the recorder and the latter by mistake misstates the name of the grantor in his record, the record will not be constructive notice to subsequent purchasers. *Jennings v. Wood*, 20 Ohio, 281.

Under statutes requiring recorders to keep a 12 L. R. A.

book in which an immediate entry shall be made of every deed brought to be recorded, mentioning the date, etc., and providing that no mortgage shall be a lien until left for record, parol evidence is not admissible to contradict the entry of the date of receipt as made in the book. *Musser v. Hyde*, 2 Warr. & S. 314.

A regular mortgage entitled to record is a record the moment it is left for record and so continues for all time to come, although it may not be actually recorded for months, and a mistake in the actual record by which the mortgage is given a date earlier than that upon which it was received will not avail the mortgagee. *Brooke's App.* 64 Pa. 127.

A person who has his deed acknowledged, recorded in the proper book and certified by the recorder has done all the law requires and will be protected. *Schell v. Stein*, 76 Pa. 696.

It is not incumbent on the mortgagee to supervise the recorder and see that the mortgage is recorded and indexed. *Wood's App.* 82 Pa. 116.

The fact that an instrument is indexed in the wrong book does not invalidate its record. In contemplation of law it is recorded and takes effect from the time it is left with the recorder for the purpose of being duly recorded. *Sheble v. Bryden*, 4 Cent. Rep. 664, 114 Pa. 147, citing *Glading v. Friok*, 88 Pa. 468; *Clader v. Thomas*, 89 Pa. 343; *Paige v. Wheeler*, 92 Pa. 262; *Mark's App.* 86 Pa. 231.

The lodging of a deed with the town clerk to be recorded is equivalent to an actual entry of it upon the record and the title is made complete, and the clerk's neglect to record it cannot affect the grantee's rights under the deed. *Nichols v. Reynolds*, 1 R. I. 30.

A corrected record is notice to third persons only from the time the correction is made. *Baldwin v. Marshall*, 2 Humph. 116.

A statute making a deed valid only from the time

notice, and that constructive notice cannot be given by an attempt to comply with the Registry Laws. And this view we think is supported by right reasoning, and founded on principles of equity and justice.

As is most admirably stated by Mr. Jones, in his work on Mortgages: "Registry Laws are intended to furnish the best and most easily accessible evidence of the title to real estate, to the end that those designing to purchase may be fully informed of instruments of prior date, affecting the subject of their contemplated purchase; and also that, having availed themselves of this means of knowledge, they may rest there, and purchase in absolute security, provided that they do so without knowledge, information or such suggestion from other facts as would be gross negligence to ignore of some antecedent conveyance or equitable claim." The recorder cannot be considered the agent of the purchaser, as is asserted by some of the authorities. It is a much fairer construction of the law, and more in harmony with the law of agency generally, to consider him the agent of the party who has the business transaction with him, who gets him to do the work. And to him he should be responsible for any damage flowing from his refusal or neglect to do the work according to the contract between them; and that contract is, either express or implied, that the instrument shall be recorded according to law. That is what the grantee pays him to do, and he must see to it that his work is done right, or accept the consequences as between himself and third parties, who are misled. It cannot

be said that the purchaser is alone subject to damages from the non-recording of the instrument. The very object in having it recorded is to give constructive notice to innocent purchasers, and to protect the grantee's title against said purchasers. The law imposes upon him the duty of having his deed recorded. It is not the attempt to record a deed that the law requires; but it is the recording of the deed. It would be an empty benefit, indeed, that would accrue to the buying public if the attempt to record were held to take the place of the record. The obligation rests upon the grantee to give the notice (required by the law. He controls the deed. He can put it on record or not, as he pleases. He has the right and the opportunity to see that the work is done as he directs it to be done, in legal manner. No one else has this opportunity, and if, from any cause, he fails to give the notice required by law, the consequences must fall on him. It may be a hardship; but, where one of two innocent persons must suffer, the rule is that the misfortune must rest on the person in whose business, and under whose control, it happened, and who had it in his power to avert it. Any other rule would be abhorrent to our natural ideas of right, and would render perilous every business enterprise. The fact that the recorder gives to the grantee a certificate that the deed is properly recorded does not relieve him of the responsibility of seeing that it is actually so recorded. The certificate binds no one but the recorder, and cannot possibly, under any known rule of law or ethics, affect the rights of an innocent pur-

it is proved or acknowledged and delivered to the clerk of the proper court to be recorded, makes registration constructive notice only of what appears on the face of the deed as registered. *Lally v. Holland*, 1 Swan, 401. But see *Mangold v. Barlow*, 61 Miss. 595.

The withdrawal of a deed by the grantee after the date of filing has been noted, but before it is recorded, postpones it until it is returned to the register's office. *Hickman v. Ferrin*, 6 Coldw. 149. See *Gaskill v. Badge*, 3 Lea, 144.

Under statutes requiring the register to keep a book for the registration of trust deeds, and providing that when a deed is noted and registered it is notice to all the world from the time it is noted, the registering of a trust deed in the chattel mortgage book will not affect the grantee's rights. *Swepton v. Exchange & Dep. Bank*, 9 Lea, 723. See also *Woodward v. Boro*, 18 Lea, 678.

Under statutes making deeds good only from the time they have been properly acknowledged and delivered to the clerk for record, from which time it shall be considered as recorded, and requiring the clerk when an instrument is deposited for record to enter in a book provided for that purpose a description of the instrument, and after recording it to enter it in the index book, the grantee is not compelled to see that the recorder does his duty, and if he fails to make a record or index, the grantee will not be prejudiced thereby. *Throckmorton v. Price*, 28 Tex. 609.

But if the instrument has been defectively recorded so as to leave out material portions of it the record will be notice only of the existence of such an instrument as appears upon it. *Taylor v. Harrison*, 47 Tex. 453.

Under laws requiring a town clerk to keep books with indexes suitable for registering deeds, and to truly record deeds and conveyances when by law 12 L. R. A.

it becomes necessary, and imposing penalties upon him for refusal or neglect to make the record or to give a copy or permit inspection of a record, if the clerk records an instrument delivered to him for that purpose in a book which has long been considered filled and ceased to be used for recording purposes, and does not index it, it is not properly recorded and will not be notice to third persons. *Sawyer v. Adams*, 8 Vt. 173.

Where a deed of the east half of a lot is recorded as a deed of the west half, the record will not be constructive notice of the actual transfer which was made. *Sanger v. Craigue*, 10 Vt. 555.

When an officer left his deputation and oath with the county clerk for record, the record will be constructively deemed to exist from the time the instrument was lodged for record, although the record was not actually made until nine months later; the distinction is between those cases where the record is made essential in working a transmission of title or in creating or defeating a right—in which case nothing is effectually accomplished until the records are completed,—and those where it is required for purpose of public notice,—in which case if the deed is ultimately recorded it is deemed of record from the time it was filed for that purpose. *Ferris v. Smith*, 24 Vt. 81.

So a deed left with the clerk to be recorded will be regarded as recorded at the date when it was left, although not actually recorded until nearly two years afterwards. *Bigelow v. Topliff*, 25 Vt. 232.

A deed withdrawn from the files by the grantee before it is actually recorded will be postponed until it is returned. *Johnson v. Burden*, 40 Vt. 567.

Under an Act requiring deeds to be lodged with the clerk of court to be there recorded, when a deed is left with the clerk for that purpose, it shall be considered as recorded from that time, although

chaser, who cannot be bound by a transaction to which he is in no sense a party, of which he has no knowledge, and for which he is in no way responsible. As we before intimated, it might aid the grantee in recovering damages from the auditor, but could do no more than that. The record is the essence of the law. The recorder is only a convenient instrument for the use of those whose duty it is to make the record. If, under the law, a public record were kept, where every grantee was required to come and record his deed, he could certainly not plead his own mistakes or negligence, and the only reason why every man is not allowed to record his own instruments is simply that the record can be kept in a legible, orderly and presentable manner; and the law provides one man to do the work for the many, or, in other words, makes the one man the agent for the many, and who does the work at their instance, and under their pay and control. It is true that, in another department of his work, he may be said to be the agent of the purchaser, or searcher of the records; for the law also makes him the custodian of the record books. Every man has a right to see the records, and the law, for the purpose of preserving the records, and assisting the searcher of the records, constitutes the recorder their keeper, who, at certain hours, found by the law to be reasonable, must exhibit them to all who wish to see them, and must also certify to what the record shows, when requested so to do, and paid for said services; and if, in the exercise of either of these duties, he either misrepresented the books, by exhibiting false or blind records, or made a false certificate, whether through fraud or negligence, the person for whom the service was rendered must suffer the damage, if any flow from the negligent or fraudulent act, and his only remedy is against the recorder for damages. A employed the recorder to search the records, and the recorder certified to A that the record title to a certain tract of land stopped with, and rested in, B, upon the strength of which A purchased of B, for a valuable consideration, said land, and it afterwards

eventuated that C had a good deed on record for the same land, which the recorder overlooked. No well-regulated court would, we think, hold that the title of C would be jeopardized by the mistaken certificate of the recorder. We cannot conceive how the inconsistency or injustice would be diminished by holding that the innocent purchaser did not have a right to rely on the true record, or that the grantee would be protected by the false or mistaken certificate of the recorder.

With this view of the case, it becomes necessary to investigate the next question involved, viz.: Is the index an essential part of the record, under the Registration Laws of this State? On this proposition, also, there is conflict of authority, though the conflict in many cases is more seeming than real; for, as with the first question discussed, a great many of the decisions, which are cited as in point on the abstract principle, prove, upon close investigation, to have been decided upon statutory provisions differing materially from ours. And as constructive notice, by means of recorded instruments, depends wholly upon statutory provisions, we will first examine the Statute in force at that time. The Statutes in force at the time of the alleged constructive notice will be found in the Session Laws of 1869, on pages 818, 814 and 815, and the sections to be construed in this case are as follows: "Sec. 18. The auditor of each county in this Territory shall record, in a fair and legible handwriting, in books to be provided by him for that purpose, at the expense of the county, all deeds, mortgages and other instruments of writing required by law to be recorded, and which shall be presented to him for that purpose, and the same shall be recorded in regular succession, according to the priority of their presentation, and, if a mortgage, the precise time of the day in which the same was presented shall also be recorded. Sec. 19. Upon the presentation of any deed, or other instrument of writing, for record, the auditor shall indorse thereon the date of its presentation, . . . and, when such deed, or other instrument of writing, shall be

it may never, in fact, be recorded, but is lost by negligence of the clerk or other accident. *Beverley v. Ellis*, 1 Band. 106. See also *Horsley v. Garth*, 2 Gratt. 491.

Under statutes requiring a register to keep general indexes in which he shall make correct entries of every instrument received by him for record immediately upon the receipt of such instrument and providing that the instrument shall be considered as recorded when so noted, a mistake of the recorder in copying the instrument into his book after it is correctly indexed will not impair its effect as notice. *Shove v. Larsen*, 22 Wis. 142.

But leaving a tax deed for record and having the date of its reception indorsed thereon is not a record of it so as to prevent a redemption from the tax sale, if it has not been spread at large upon the record or entered in the general index. *International L. Ins. Co. v. Seales*, 27 Wis. 640.

A registry which would be sufficient in case of any other deed is sufficient in case of a tax deed. Where the index referred to the record of the deed for a description of the property, the record was of force from the time the deed was actually recorded in full. *Oconto County v. Jerrard*, 46 Wis. 317; *St. Croix Land & Lumber Co. v. Ritchie*, 73 Wis. 409.

12 L. R. A.

An instrument is not to be considered as recorded until the proper entries are made in the index. *Lombard v. Culbertson*, 59 Wis. 438.

A mere clerical error in transcribing an instrument not affecting the sense or obscuring the meaning cannot be held to invalidate the registry. *St. Croix Land & Lumber Co. v. Ritchie*, *supra*.

The federal judges have decided that the filing of a deed for record in the proper county is, in Illinois, all that is required of the grantee, and his rights are not affected, though the recorder fails to record it, or enter it in his minute book. *Polk v. Coogrove*, 4 Ills. 437.

And the effect is the same though only a portion of the deed is recorded. *Riggs v. Boylan*, 4 Ills. 445.

An intending purchaser has a right to rely on the public records, and a record showing a mortgage on the northeast quarter of a section of land will not be notice of a mortgage on the northwest quarter. *White v. McGarry*, 2 Flipp. 572.

Under a statute requiring deeds to be recorded within three months mere filing them for record within that time is not sufficient; they must be actually recorded in the record book. *Scott v. Doe*, *Hemp*, 275.

recorded, the recorder shall indorse thereon the time when recorded, and the number or letter and page of the book in which the same is recorded." Section 20 prescribes the penalty for failing to record when fees are tendered. Section 21 provides for keeping a seal, and making copies of records. Section 22 directs the turning over the records to successor in office. "Sec. 23. Each auditor shall, upon the written demand of any person, make out a statement in writing, certified under his hand and the seal of his office, of all mortgages, liens and incumbrances of kind of record in his office, in relation to any real or personal property, in relation to which the demand shall be made; and if said statement shall be incorrect, he, and the sureties upon his official bond, shall be liable to the person aggrieved for all damages sustained by him in consequence of such incorrect statement, to be recovered in a civil action. Sec. 24. Each county auditor shall keep a general index, direct and inverted. The index direct shall be divided into seven columns, with heads to the respective columns, as follows:

Time of reception.	Grantor.	Grantee.	Nature of instrument.	Vol. and page where recorded.	Remarks.	Description of property.
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"He shall correctly enter into such index every instrument concerning or affecting real estate, the names of the grantors being in alphabetical order. The inverted index shall be divided into seven columns precisely similar, only that the names of the grantees shall be alphabetically arranged, and occupy the second column. Sec. 25. Whenever any mortgage, bond, lien or instrument incumbering real estate has been satisfied, released or discharged from record, whether by written release across the record, or upon the margin thereof, or by the recording of an instrument of release, or acknowledgment of satisfaction, the auditor shall immediately note in both the indices, in the column headed 'Remarks,' opposite to the appropriate entry, that such instrument, lien or incumbrance has been satisfied." These different sections were not only all passed at the same session of the Legislature, but are all incorporated in one Act, and must therefore be construed together; and, construing them as a whole, we conclude that sections 18, 19 and 24 intended to provide a system for the registration of deeds and other instruments affecting real estate, the compliance with which would be constructive notice to strangers. The Act points out several successive steps to be taken by the auditor, when the instrument comes into his possession, before his duty with reference to it is accomplished: (1) he must file it for record, noting the time when it was presented for record; (2) record it in a fair, legible hand, in a book provided by the county for that purpose; (3) correctly enter it into an index book provided for that purpose, showing the time of reception, names of the grantor and grantee, nature of the instrument, volume and page where recorded and description of the property; and all three of these successive steps must be taken before the record is complete. The other sections which we have quoted are simply directory to

the auditor, or affect, simply, the auditor, and the person with whom he is dealing; but the three requirements specified above are for the direct and only purpose of giving notice to the public. They are vital provisions, essential to constitute constructive notice. The appellee's counsel cites section 4 of the Act of November 9, 1877, which is as follows: "All deeds and mortgages shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid, as against bona fide purchasers, from the date of their filing or recording in said office, and when so filed or recorded shall be notice to all the world;" and argues from that that legal notice is given simply by filing the deed with the county auditor, and that no other notice is necessary. If that view could be entertained, it would practically render the provision, in regard to recording, a nullity; for the notice would be complete when the instrument was filed, and no man would go to the unnecessary expense of recording, and the record would soon become a voluminous and unapproachable mass of loose papers. There was evidently no such contemplation by the statutes. The auditor has twenty days within which to record the deed after it is filed, and it is the evident meaning of the law that it would be notice by virtue of the filing only during the interim of twenty days, at the expiration of which time it is presumed to be recorded, and the deed can be withdrawn, when the record becomes the notice. Or, as is more elegantly stated by *Judge Dillon*, in *Barney v. McCarty*, 15 Iowa, 519, in construing a similar statute: "As the filing is but one step in a series of steps, this language presupposes, and is in fact based upon the assumption, that the other, and, in the order of time, the subsequent, requirements of the law will be observed." The Iowa Statute was substantially as ours, except that the recorder was required to keep a "fair book," in which he entered every deed, giving date, parties and description of land, in addition to an index with about the same requirements as ours. So that there was really more chance for an innocent purchaser to be put on his guard, under their Registration Laws, in the absence of the index, than under ours; and yet the supreme court of that State has uniformly held that the index was necessary to give constructive notice. We are strengthened in our opinion that the index is an essential part of the record necessary to give notice by the provisions of section 25, which require that the satisfaction of instruments affecting real estate shall be noted in the index. The Legislature, recognizing the importance of the index, and the universal custom of depending upon the index, in searching the record, required that every step taken, both as to conveying, incumbering and releasing real estate, should be made to appear briefly on the index. It is asserted by plaintiffs "that the general construction placed upon statutes similar to ours is that the index constitutes no part of the record, and that a grantee cannot suffer from any error or omission in it;" and, in defense of this proposition, cites: *Mugrove v. Bonaer*, 5 Or. 313; *Bishop v. Schneider*, 46 Mo. 472; *Chatham v. Bradford*, 50 Ga. 327; *Curtis v. Lyman*, 24 Vt. 338, and *Devlin, Deeds*, §§ 695-697.

In the first case cited (*Mugrove v. Bonser*) the court decided: *first*, that a deed, which had been acknowledged in Washington Territory by an officer, other than a commissioner of deeds for Oregon, where the deed did not have the certificate of a certifying officer of a court of record under seal that the acknowledging officer was such officer as he represented himself to be at the time of said acknowledgment, was not entitled to record under the Statute, and therefore did not give notice; *second*, that the Recording Acts of Oregon only protect persons who act in good faith; and, *third*, cited a case of *Hastings v. Cutler*, 24 N. H. 481, holding that, where a defective deed had been recorded, while it did not operate as constructive notice of the conveyance it might operate as actual notice, and the court, in the case above cited, said: "But if, by means of that registration of the defective deed, the defendants had actual notice of the plaintiff's title, they are charged with the notice. When the defendants found the copy of the plaintiff's deed on record they must have understood that the intended record was to give information that such a deed had been made, and that plaintiff claimed the land under it. This must be regarded as actual notice, such as every reasonable and honest man would feel bound to act on." There is no suggestion of an index in the case; but it is plain that on the other proposition, which we have already considered, the plaintiff's case does not fall within the reason upon which this conclusion is based. In that case, it might be urged with some degree of justice, that there was enough revealed by the record to put the purchaser on his guard, and, once being notified of the conveyance, it would be his duty to investigate; and if, from such investigation, the will of the grantor could be gathered, he would not be an innocent purchaser if he purchased contrary to such revealed will. But, in the case at bar, the very instrument by which this notice is given is wanting, and the avenues of knowledge are closed up.

In *Bishop v. Schneider*, the court holds that the index is no part of the record, asserting that the proper office of the index is what its name imports, to point out the record; "that the grantee has no control over the official acts of the recorder, and, when he delivers his deed to the officer, he has performed all the duty within his power." But the court states that this decision is based alone on the construction of the statutes of that State, and they are materially different from ours, both with regard to the definiteness of the index concerning deeds, and the absence of the requirements to note the satisfaction of mortgages, and other instruments affecting real estate, in the index. Altogether their statute does not make the index so important a part of the system of registration as ours does. Their statute also provides that, when an instrument is filed with the recorder, it shall be considered as recorded from the time it is delivered. The opinion in this case quotes approvingly the case of *Sawyer v. Adams*, 8 Vt. 172. There, the town clerk copied a deed, delivered to him for record, on a book which had ceased to be a book for recording for a number of years, and, for the purpose of concealment and fraud, did not in-

sert the names in the index or alphabet. It was held that the deed was not recorded, and was not notice to after-purchasers. This is indorsed by the Missouri case, on account of the fraud that was perpetrated. But it seems to us that it makes little difference, so far as the equities of the innocent purchaser are concerned, whether the obscurity of the record was the result of fraud or negligence on the part of the recorder. Certainly there is no logical basis for such a discrimination. The rights of the purchaser must depend upon something more tangible, and more easily ascertained, than the motive of the officer. Evidently, the idea upon which the decision in this case was based was that the searcher of title had been misled by the state of the record. But, as a practical fact, he would have been no more liable to have been misled by reason of the deed being recorded in an unused book than if it had been recorded in the proper book, and not indexed. The recording in the unused book was an unnecessary act of caution on the part of the recorder in his attempt to deceive.

In *Chatham v. Bradford*, 50 Ga. 327, while the court, to a certain extent, argues the general proposition, insisting that an index is only a means of access to the record, and that ease of access is "holly a question of degree, it says "that many of the records of that State have no index; that their Acts for the recording of deeds do not any of them require the clerk to keep an index;" and states, in conclusion, that they put their decision mainly on their own statutes, and on the condition of the records and the uniform practice of that State. They also approvingly cite *Sawyer v. Adams*.

*Curtis v. Lyman*, 24 Vt. 388, cited by plaintiff on this point, we have been unable to obtain; but, from reference to it in other cases, we conclude that their statute is different from ours in reference to indexing. Considering the difference in the statutes, we think that none of the cases cited are directly in point. While it is true that Devlin, in his work on Deeds (sec. 696), seems to imply that an index is not necessary to give constructive notice, yet he evidently bases the idea not so much on the theory that the index is not a part of the record, as from his general conclusion that the obligation of the grantee, as to notice, ceases when he has filed his deed for record. And he qualifies this general statement by saying, "Unless the language of the statute necessarily leads to a different conclusion," a qualification, it seems to us, which renders meaningless the general statement; for, as constructive notice is purely statutory, it must necessarily follow that it is the "language of the Statute" that leads to one or the other of the conclusions. He cites *Barney v. Little*, 15 Iowa, 537, but says that "the decision in that case was founded upon the express language of the Statute of that State," intimating that, in a consideration of the Statute, the conclusion of the court was correct; and, inasmuch as our Statutes make the index a more important factor in the system of registration than does the Iowa Statute, we may fairly conclude that, under a statute like ours, this learned author would consider the index an essential part of the record. Indeed, upon a painstaking investigation, not only of all the cases cited by the plaintiff (ex-



cept the Vermont case, above referred to), but of many others, we have been unable to find a case reported which decides that an index is not an essential part of the record, upon a statute substantially like the Registry Laws of 1869. It is true that in numerous cases it has been decided that, where an instrument affecting realty was not indexed, as required by law, the title of the grantees should not be disturbed. The greater part of such decisions, however, will be found, on examination, not to be based on the theory that the index is not a part of the record, but upon the broad principle that the recording officer is the agent of the subsequent purchaser, and that the grantee is acquitted, when he places his deed for record in the hands of the proper officer,—a position which, we think, is untenable for the reasons above given. It is urged by the court, in *Schell v. Stein*, 76 Pa. 398, in deciding the case adversely to the interest of the purchaser, that the provision for indexing the records is of comparatively modern origin, and that such provisions did not exist in the early Registry Laws. This, we think, is a good argument; but the application by the learned judge was in our judgment bad. The law was, no doubt, suggested by the necessity of some such provisions as the records accumulated, and, at the present day, considering the accumulations of deeds, mortgages and liens of all kinds, affecting real estate, and the rapidity with which titles are changing every day, if we give the effect of constructive notice to the record at all, the only practical way by which the public can obtain the benefit of that notice is through the medium of the index. Laws are enacted for the benefit of the citizen, not only in theory, but in practice. They are not intended as pitfalls for the feet of the unwary. The State

provides in express terms for the keeping of this index; and its mandate to the auditor is to enter in said index, in alphabetical order, the names of the grantors and grantees. This law the citizen is aware of. He has a right to presume that the law has been obeyed. If there was no such law, and he had abundance of time, and untold patience, he might devote himself to the task of examining the vast accumulations of records, page by page; but with the law in effect, and the universal custom recognized, of examining the record through the index, if the instrument is not indexed, the law, instead of aiding and protecting the citizen, becomes a delusion and a snare, and a ready vehicle for collusion and fraud. It would be a policy worthy of the consideration of the ancient tyrant, who wrote his laws in small characters, and posted them so high that his subjects could not read them, while at the same time he held them accountable for their strict observance. In this connection, we cannot refrain from quoting the language of the court, in *Barney v. McCarty*, that "a deed might as well be buried in the earth as in a mass of records, without a clue to its whereabouts."

In *Speer v. Evans*, 47 Pa. 141, the court says: "As a guide to inquirers, the index is an indispensable part of the record, and, without it, the record affects no party without notice." This, we think, is the better view of the law. In this case, there is no question of actual notice, and applying the law, as we have found it to be, to the case at bar, it follows that the judgment of the lower court must be reversed.

The case is remanded to the lower court, with instructions to reverse the judgment.

Petition for rehearing denied.

## PENNSYLVANIA SUPREME COURT.

John C. PERRY

v.

Anna M. JENSEN, Admx., etc., of Carl L. Jensen, Deceased, *Appt.*

(....Pa....)

1. One who has been in the advertising business more than twenty years and has distributed pamphlets and samples, including some of a medical nature, for various business establishments in several large cities and in different States, is competent to testify whether or not 421,000 samples of a medicine for dyspepsia was a reasonable number to be furnished to an advertising agent in one year for his distribution. So also is a witness who for several years has been manager of companies which dealt in infants' food and pepsin preparations, and which he says have distributed many samples and at least a half million circulars throughout the United States in different localities.

2. An experienced advertiser and dis-

tributor of samples is competent to testify that distribution of samples of a medicine for dyspepsia through a district telegraph company is not a proper method of distribution by an agent to whom samples are furnished and whose contract requires him to use "his best reasonable endeavors to introduce and sell the medicine."

3. To prove that a contract to distribute samples of medicine for advertising purposes was not performed, a witness may testify that he made an investigation in the city to which the contract related at the time it is alleged to have been performed and could find no samples. But evidence of his complaints to the employer is incompetent.

(May 4, 1891.)

**A** PPEAL by defendant from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County in favor of plaintiff in an action brought to recover damages for an alleged breach by defendant's testator of a con-

### NOTE.—Evidence; expert testimony.

It is difficult to lay down any rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely 12 L. R. A.

in the discretion of the trial court. *Montana R. Co. v. Warren*, 137 U. S. 848, 84 L. ed. 683; *Stillwell & B. Mfg. Co. v. Phelps*, 130 U. S. 520, 32 L. ed. 1035; *Lawrence v. Boston*, 119 Mass. 128; *Chandler v. Jamaica Pond Aqueduct Corp.* 125 Mass. 544.

tract having for its object the introduction and sale of a medicine manufactured by defendant's testator. *Reversed.*

By the contract Jensen appointed Perry his sole and exclusive agent for the sale of an article manufactured by him known as Crystal Pepsin on the condition that Perry should use his "best reasonable endeavors to introduce and sell the same," and should devote his entire time and attention to that purpose.

In consideration of Perry's services, and the payment by him of the costs of introducing and selling the article he was to have a commission of one third of 95 per cent of the gross receipts.

Jensen agreed to supply Perry with sufficient samples of the article, and printed matter in the nature of advertisements relating thereto, as the same might be called for by Perry.

Jensen reserved the right to terminate the contract in case the sales during the first year did not amount to at least 500 gross of packages, and in each subsequent year during the continuation of the contract to at least 1,000 gross of packages.

The total sales during the first year amounted to only 154 gross and Jensen terminated the contract and appointed other agents.

During the first four months of the year Jensen furnished to Perry about 481,000 samples, and then refused to furnish any more for the reason that that was enough for the year. On the other hand, there was evidence tending to show that Perry intended to use 1,300,000 samples in the first year's work.

At the trial defendant offered to prove that at the time the distribution of samples was alleged to have been made in Philadelphia witness made an investigation but could find no samples, and that he went to Dr. Jensen and complained that the work was not being done. The action of the court in overruling this offer became the subject of the second assignment of error.

The other facts sufficiently appear in the opinion.

**Mr. William F. Johnson** for appellant.  
**Mr. William S. Steuger** for appellee.

**Green, J.**, delivered the opinion of the court:

When this case was here before (126 Pa. 495), we held that it was error to reject proof that the quantity of samples furnished by Jensen, prior to the demand in August, 1886, was more than reasonably sufficient for the whole year's operations. We further said that "the agent may demand what is fairly and reasonably sufficient for the purposes of his undertaking and no more. . . . What is a reasonable quantity of samples for the purposes of the contract is, if the parties cannot agree about it, a question of fact to be settled by a jury." Of course such a question would have to be determined by testimony, and the testimony of persons acquainted with the business of distributing samples of goods of this class would be essential to the proper information of the jury. In point of fact such testimony was delivered on the trial, but some of that which was offered by the defendant was rejected, and of this complaint is made more especially in the third and fourth assignments of error. To the witness Lovey the defendant put the following

question: *Q.* Is or is not 481,000 samples of medicine like this for the cure of dyspepsia, a reasonable or unreasonable number for distribution in any one year? This was objected to, but no ground of objection stated, and objection sustained, but for what reason is not stated. If the witness was incompetent because he had not shown sufficient experience to be able to testify, his rejection was proper, but if that does not appear the question should have been admitted. Upon turning to his preliminary testimony on the subject of his competency, we find that he testified he had been in the advertising business since 1866, that he had experience in the distribution of pamphlets and medical articles for general consumption, that he had distributed pamphlets for Dr. Palen, Starkey & Palen, for the Real Estate Investment Company, and all of Mr. Goodman's publications; that his experience as a distributor had extended beyond Philadelphia, and that he had distributed samples and pamphlets in Chicago, Baltimore and in Ohio. We cannot say of such a witness that he was entirely incompetent to testify in answer to the question propounded. Possibly his experience was not as great, or his judgment as good, as that of other witnesses having a larger experience, but that would be a matter to be determined by the jury after his testimony was heard. He would not be incompetent because he did have experience in the matter of advertising medical articles, and in the distribution of samples and pamphlets relating to them. We think it was error, therefore, to reject the question altogether.

And so, also, as to the fourth assignment. The witness Herbert L. Ford testified that he had had experience in putting out articles for general and special consumption by sample, advertising and otherwise. He said, further: "About January 1, 1886, I was retained as general manager of the New York & Chicago Chemical Company. During the succeeding year the article of infants' food was brought to my attention and a copartnership formed to place it on the market. In the pepsin business we did a large amount of sampling in the trade among the druggists. In the food business we made distribution of sample packages from house to house, worked through the mail and by other methods. . . . We sent circulars and have distributed samples, attended public exhibitions and made displays of preparations, and had contests to show their efficiency. . . . We have distributed, I should suppose, at least a half million circulars throughout the United States from first to last." In reply to questions by the court the witness said he had not distributed from house to house all over the United States, but he had distributed throughout the United States, not by universal sampling but in localities, that he was interested both in the food and pepsin preparations, and that the pepsin was delivered to the druggists, and the food to the trade and in localities. The learned court below thought the witness had not sufficient knowledge to testify as an expert, in reply to the question as to the sufficiency of 481,000 samples of an article like Jensen's Pepsin Tablets, as a reasonable quantity for distribution in any one year, and rejected him as a witness. We think the witness was

competent, and that the objection of want of sufficient experience or knowledge would go to the effect of his testimony and not its competency. We sustain the third and fourth assignments.

The plaintiff had proved that he did a large part of his distribution through the American District Telegraph Company. The defendant disputed the efficiency of that mode of distribution and offered to sustain his contention by the testimony of witness Goodman, who had testified to his experience as an advertiser and distributor, and to his acquaintance with the methods pursued by the company in question. His testimony was rejected. It could hardly have been for lack of knowledge and experience, and as the offer was to prove that that method of distribution was not the best reasonable endeavor of the plaintiff to make distribution, it could not be said that the offer was irrelevant. By the terms of the contract Perry was to use his "best reasonable endeavors to introduce and sell" the Pepsin throughout the United States and to devote his entire time and attention to that purpose. His methods of distribution, therefore, were directly in issue and were liable to be impeached by the defendant if that could be done. We think the witness had sufficient knowledge and experience from which to testify on this subject, and that it was error to reject the question propounded under the first assignment.

We think the offer covered by the second assignment should have been received, as its tendency was to show that whatever methods of distribution were adopted by the plaintiff, they were not efficient so far as the City of Philadelphia was concerned. The complaint of the witness to Dr. Jensen, however, would not be competent, and that part of the offer should be rejected.

The second assignment is sustained except as to the communication to Dr. Jensen.

The fifth assignment is not sustained. The question of Brill's competency and reliability as a pepsin maker is not involved in this controversy and it is therefore irrelevant.

The sixth assignment is not sustained because the learned court below, in other parts of the charge, correctly said to the jury that if the plaintiff's demand for more samples was unreasonable and oppressive upon the defendant, he could not recover merely because the defendant refused compliance with such a demand, and the number already furnished, 400,000 and upwards, was stated in the charge. Whatever was demanded beyond that was left to the jury, as being within their province to determine, in support of the allegation that the number demanded was unreasonable.

There was some evidence in the case as to the reasonableness of a demand for 1,200,000, and the court simply said in this part of the charge, that the jury must determine whether such a number would be unreasonable. It is true it does not appear that such a number was specifically demanded by the plaintiff, but he did call for several hundred thousand more than the 481,000 already delivered, in his letter of August 3, 1886.

We are obliged to sustain the seventh assignment because, literally, the contract did require that in addition to the samples Dr. Jensen

should furnish "printed matter in the nature of advertisements relating thereto," and that was an additional expense to which he was subject.

A similar reason requires us to sustain the eighth assignment. The learned court was slightly in error in stating Jensen's testimony to the jury. His testimony as actually delivered does not show that "he said to Perry that he had machinery which could make 25,000 a week," but only that he "could construct machinery to make 25,000 samples per week."

As this discrepancy might be material with the jury in considering the quantity which the defendant was reasonably bound to furnish, we cannot say it was harmless to the defendant for the court to state Jensen's testimony on the subject incorrectly in the charge.

The ninth assignment is not sustained. We are not referred, by the appellant, to any testimony tending to show that the statement of the court in this part of the charge was incorrect, and we have not discovered any.

We see no error in the answer of the court to the defendant's fourth point and therefore dismiss the tenth assignment. It would not follow that the verdict should be for the defendant, if the plaintiff was ignorant or unskilled in the business, and refused to take advice from others having a knowledge of the business. The practical question for the jury was whether Perry performed his part of the contract, and whether he did or not was to be determined by the jury, and so the court charged in answer to this point. The same consideration is applicable to the defendant's fifth point. It was not a question whether the plaintiff told the defendant that he had a friend worth a million who would go in with him, and that no such person did go in with him, but whether or not he performed his part of the contract. The considerations which pertain to that subject were fully and correctly expressed in the answers of the court to the ninth and tenth points of the defendant and in the general charge. The eleventh assignment is not sustained.

There was no error in the answer of the court to the defendant's sixth point and the twelfth assignment is not sustained.

*Judgment reversed and new venire awarded.*

Sarah N. CANNELL

v.

Randolph A. SMITH, *Appt.*

(....Pa....)

**1. Money paid to a broker for effecting the sale of real estate in ignorance of the**

*NOTE—Agent cannot act in a double capacity.*

An agent cannot act for both parties. *Cassard v. Hinman*, 6 Bosw. 8; *Cladin v. Farmers & Citizens' Bank*, 24 How. Pr. 1; *Reed v. Norris*, 2 Myl. & C. 361; *Wright v. Dannah*, 2 Campb. 208.

It is against public policy for an agent in a private transaction to represent both parties, and without the consent of both he cannot recover. *Pennsylvania R. Co. v. Flanigan*, 8 Cent. Rep. 569, 112 Pa. 558; *Flak v. Wheeler* (Colo.), 2 Denver Legal News, 285; *Rice v. Davis* (Pa.) 26 W. N. C. 405.

fact that he is also the agent of the purchaser may be recovered back, even if the sale is an advantageous one.

**2. It is against public policy** for one to act as broker for both parties unless that fact is fully communicated to them.

(April 27, 1891.)

**APPEAL** by defendant from a judgment of the court of Common Pleas, No. 2, for Philadelphia County in favor of plaintiff in an action brought to recover back money paid defendant as commissions for selling real estate. *Affirmed.*

Plaintiff owned an estate in Philadelphia. Frank H. Massey was employed by Miss Louisa Drexel to negotiate for the purchase of such estate. Massey employed Smith to assist him in securing the property. Smith talked with Mrs. Cannell and offered to sell the place for her, he to have one half of all he could obtain over \$80,000 for it. A sale was subsequently effected for something over \$90,000, and Mrs. Cannell paid Smith \$5,000 for his services.

Subsequently a claim was made by Miss

Drexel to recover the amount of this commission on the ground that Smith had been guilty of a breach of trust in acting for the other side after having been first employed by her. This was settled by the payment to her of \$2,600.

Smith claimed to have severed his connection with the Drexels before he became agent for Mrs. Cannell, and also that he was frightened into making the payment which he did to the Drexels, in support of which he offered to show at the trial that he at no time admitted or believed that he was under any legal or moral obligation to pay anything to the Drexels, and that he at no time admitted to Massey or to anybody that he had not carried out in full the agreement he made with Massey, or that he was under any legal liability to pay money to Miss Drexel. The rejection of these offers became the subject of the second assignment of error.

Defendant also offered to show by Amos Shallcross that the property sold for from \$10,000 to \$15,000 more than it was worth. The rejection of this offer was also assigned as error.

The further facts sufficiently appear in the opinion.

An agent who is relied upon to exercise, in behalf of his principal, his skill, knowledge or influence will not be permitted, without the full knowledge and consent of his principal, to undertake to represent the other party also in the same transaction. *Mechem, Ag. § 66, citing Raisin v. Clark, 41 Md. 158; Rice v. Wood, 113 Mass. 138; Scribner v. Collar, 40 Mich. 375; Bell v. McConnell, 37 Ohio St. 386; Lynch v. Fallon, 11 R. I. 311; Hincley v. Arey, 27 Me. 532; Copeland v. Mercantile Ins. Co. 6 Pick. 197; Farnsworth v. Hemmer, 1 Allen, 494; Walker v. Osgood, 98 Mass. 348; New York Cent. Ins. Co. v. National P. Ins. Co. 14 N. Y. 86; Greenwood v. Spring, 54 Barb. 375; Pugsley v. Murray, 4 E. D. Smith, 245; Sumner v. Charlotte, C. & A. R. Co. 78 N. C. 286; Everhart v. Searle, 71 Pa. 256; Meyer v. Hanchett, 39 W. Va. 419, 43 Wis. 248; Shirland v. Monitor Iron Works Co. 41 Wis. 162; Bray v. Morse, 37 Ind. 348; Stewart v. Mather, 32 Wis. 344; Farnsworth v. Brunquest, 38 Wis. 202. See note to Wilson v. Brookshire (Ind.) 9 L. R. A. 795.*

Where a third person, by surreptitiously dealing with the agent and leading him astray from his duty, has secured from the principal contracts, obligations or rights in action, the defrauded principal, if he acts promptly and before the rights of innocent third parties have intervened, is entitled to have the contracts, obligations or rights in action rescinded and to have such other adequate relief as a court of equity may deem proper under the circumstances. *Mechem, Ag. § 797, citing in illustration the late case of Panama & S. P. Telegraph Co. v. India Rubber, G. P. & T. W. Co. L. R. 10 Ch. App. 515, 14 Eng. Rep. 759.*

Where a secret gratuity is given to an agent with intent to influence him into assenting to stipulations prejudicial to the interests of his principal the contract is voidable at the option of the principal. *Smith v. Sorby, L. R. 8 Q. B. Div. 553; Harrington v. Victoria G. D. Co. L. R. 8 Q. B. Div. 549.*

Even though the agent was not in fact influenced against the interest of his principal, the contract is corrupt. See *Bollman v. Loomis, 41 Conn. 531; Miller v. Louisville & N. R. Co. 83 Ala. 274; Hegenmeyer v. Marks, 37 Minn. 6; Potter's App. 6 New Eng. Rep. 177, 56 Conn. 1; Holcomb v. Weaver, 126 Mass. 265; Byrd v. Hughes, 84 Ill. 174.*

If the contract or transaction remains executory the principal may repudiate it, and if executed in whole or in part by acting promptly before the 12 L. R. A.

rights of third parties intervene he may rescind and recover what he has parted with under it. *Wassell v. Reardon, 11 Ark. 708; Utica Ins. Co. v. Toledo Ins. Co. 17 Barb. 132; Levy v. Loeb, 85 N. Y. 365; Fish v. Leser, 69 Ill. 334; Greenwood v. Spring, 54 Barb. 375; Harrison v. McHenry, 9 Ga. 164; Switzer v. Skiles, 8 Ill. 529; New York Cent. Ins. Co. v. National P. Ins. Co. 14 N. Y. 86; Mercantile Mut. Ins. Co. v. Hope Ins. Co. 8 Mo. App. 403; Herman v. Martineau, 1 Wis. 151.*

*Agent cannot become purchaser of the subject of his agency.*

An agent or trustee cannot directly or indirectly become the purchaser of property confided to his care. *Massey v. Watts, 10 U. S. 6 Cranch, 143, 3 L. ed. 181; Church v. Marine Ins. Co. 1 Mason, 341; Torrey v. Bank of Orleans, 9 Paige, 649, 652, 4 L. ed. 853, 859; Stewart v. Duffy, 3 West. Rep. 33, 116 Ill. 47; Dobson v. Racey, 3 Sandf. Ch. 60, 7 L. ed. 770; Baker v. Whiting, 3 Sumn. 476; Switzer v. Skiles, 8 Ill. 529.*

If an agent for the purpose of buying property for the principal buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable; it will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage and other similar features are wholly immaterial; nothing will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts. *Van Epps v. Van Epps, 9 Paige, 237, 4 L. ed. 633; Carter v. Palmer, 6 Clark & F. 657, 11 Bligh, N. R. 397; Cane v. Allen, 2 Dow. P. C. 239, 294; Reed v. Norris, 3 Myl. & C. 361; Hobday v. Peters, 23 Beav. 349; Neuendorf v. World Mut. L. Ins. Co. 69 N. Y. 339; Bain v. Brown, 56 N. Y. 235; Taussig v. Hart, 49 N. Y. 301; Bennett v. Austin, 81 N. Y. 303; Conkey v. Bond, 35 N. Y. 427, 84 Barb. 276; Gardner v. Ogden, 23 N. Y. 337; Moore v. Moore, 5 N. Y. 256; Dobson v. Racey, 3 N. Y. 216; Orleans Bank v. Torrey, 7 Hill, 200; Torrey v. Bank of Orleans, 9 Paige, 649, 652, 4 L. ed. 853, 859; Bridenbecker v. Lowell, 32 Barb. 9; Davoue v. Fanning, 3 Johns. Ch. 252, 1 L. ed. 365; Hughes v. Washington, 72 Ill. 84, cited in 3 Pom. Eq. Jur. 485.*

Persons acting in trust relation cannot purchase trust property. See notes to *Manhattan Cloak & S. Co. v. Dodge (Ind.) 6 L. R. A. 309; Tyler v. Sanborn (Ill.) 4 L. R. A. 213.*

*Messrs. Lincoln L. Eyre and B. F. Hughes* for appellant.

*Mr. C. Berkeley Taylor* for appellee.

**Per Curiam:**

The defendant was a real estate broker and attempted to serve two masters. There is high authority for saying that this cannot be done. *Matthew, 6:24*. The plaintiff paid him a commission of \$5,000 for effecting a sale of certain real estate in ignorance of the fact that he was also the broker or agent of the purchaser. When she discovered that he was acting in this dual character she brought this suit in the court below to recover back the money so paid, and succeeded. We have no doubt of the right to recover money paid under such circumstances. It is against public policy and sound morality for a man to act as broker for both parties unless that fact is fully communicated to them. The right to recover being established this judgment must stand unless some error was committed on the trial below by which the defendant was prejudiced. A careful examination of the record fails to disclose any such error. The court was not asked to direct a verdict in favor of the defendant, and could not properly have done so in view of the evidence. This disposes of the first assignment.

The second is without merit. The payment of the \$2,600 to the Drexels was a fact in the case. The defendant's belief as to his moral or legal liability to pay this money was not important. Nor was it material that he had never made any admissions "to the Masseys or anyone else" upon this subject. The testimony of the witness Shallcross was properly rejected. The plaintiff's right to recover did not depend upon the character of the sale, whether advantageous or otherwise. It rested upon the higher ground of public policy. *Eberhart v. Searls*, 71 Pa. 266.

The instructions complained of in the fourth and fifth assignments are free from error. The learned judge fairly submitted to the jury the question of plaintiff's knowledge of the defendant's dual character. There was abundant evidence of her ignorance upon this point to go to the jury. She testified distinctly that the defendant told her he was acting for her and for her alone. The defendant did not deny that he had been employed by the purchasers. His contention was that he had ceased to act for them before he entered the service of the plaintiff. This was a question of fact for the jury, and, unfortunately for the defendant, they did not take his view of it.

*Judgment affirmed.*

## GEORGIA SUPREME COURT.

Samuel FARKAS, *Ply. in Err.*,

v.

Bartow POWELL.

(...Ga....)

1. One who hires a horse to go to a certain point has no right without the consent of the owner to go with the horse beyond that point, unless forced to do so by circumstances which he cannot control.
2. Riding a hired horse a few miles beyond the point to which he was hired to go

will not make the hirer liable for loss of the horse, where, after returning from the extra trip, he fell on the homeward road and died a day or two afterwards, unless the extra ride caused or materially contributed to this result.

(March 18, 1891.)

**ERROR** to the Superior Court for Dougherty County to review a judgment in favor of defendant in an action brought to recover compensation for the loss of plaintiff's horse, which died while in defendant's possession under a contract of bailment. *Reversed.*

*NOTE.—Bailment; letting of horse for hire.*

A bailment takes place when any article of personalty is put by the owner into the hands of another for a special purpose, to be returned to the owner or to a third person when the object of the trust is accomplished. *State v. Chew Muck You* (Or.) Dec. 16, 1890, citing *Krause v. Com.* 98 Pa. 418; *Bishop, Stat. Cr.* § 423.

In every bailment of letting for hire, a price or compensation for the hire is essential. The amount may not be stipulated, but the contract must contemplate payment. *Herryford v. Davis*, 102 U. S. 235, 23 L. ed. 160.

A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence, in the care of the property bailed. *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518. See *Jones, Bailm.* p. 88; *Story, Bailm.* §§ 398, 399; *Domat, Civil Law*, lib. 1, title 4, § 3, para. 3, 4; 1 *Bell, Com.* 7th ed. pp. 481, 483.

It is the duty of one who hires a horse to another to give the latter a horse that is manageable and safe, and, if the horse has any vicious propensities, to inform the hirer of that fact; and he is liable in damages for any injuries resulting from his failure

to impart such information. *Kissam v. Jones*, 56 Hun. 432.

If he gives him no notice of any vicious propensity of the horse except to tell him, in answer to an inquiry, that the horse is all right except a little "akeery," when he knows that the horse has a vicious habit, he will be liable for any injuries sustained by reason of such vicious habit. *Ibid.*

When there was a special contract of hiring expressly limiting the use to which the team might be put, and the contract was violated and the team injured in consequence, against the protest of the driver, the hirer is liable, although the driver was agent of the plaintiff. *Fox v. Young*, 4 West. Rep. 776, 22 Mo. App. 386.

In an action against the bailee of a horse for hire, for immoderate driving and improper care, where it was shown that defendant drove a greater distance than he engaged for, and that the horse was sound when engaged, but injured when returned, there can be no recovery unless the jury find that the horse was injured by improper use, care or driving. *Malaney v. Taft*, 6 New Eng. Rep. 922, 60 Vt. 571. See *Hart v. Skinner*, 16 Vt. 138; *Towne v. Wiley*, 23 Vt. 355. See note to *Staub v. Kendrick* (Ind.) 6 L. R. A. 619.

The facts sufficiently appear in the opinion.  
**Mr. Jesse W. Walters** for plaintiff in error.

**Mr. D. H. Pope** for defendant in error.

**Simmons, J.**, delivered the opinion of the court:

Powell hired from Farkas a horse to ride from Albany to the Whitehead place, in the country, a distance of five miles, and was to return by 11 o'clock at night. When he arrived at the Whitehead place, he learned that the person he wished to see was at the Bryant place, three or four miles beyond, and he rode on to that point. He remained at the Bryant place some two hours and a half, and left there for Albany about half past 9 in the evening. On his return, and after getting between the Whitehead place and Albany, the horse fell in the road. After considerable trouble, he got the horse on his feet, and led him about three miles, and, when within about a mile of Albany, the horse again fell, and he had to obtain the assistance of two colored men, living near by, to again get the horse upon his feet. He then took the horse to the lot of one of these men, and left him there; and about daylight in the morning walked on to the town, and notified Farkas' stable-man where the horse was, and of his condition. The horse died within a day or two thereafter. Farkas brought suit against Powell, alleging, in substance, that he had ridden the horse three miles beyond the place he had hired him to go, and that by negligence or cruelty the horse had been so injured that he died. The evidence for the plaintiff tended to show that, on the afternoon when the horse was hired to Powell, it was sound and in good condition, moved off briskly down the street, and showed no signs of any disease, but that when returned the next morning it was lame, and could scarcely walk, and had a halter burn around one of its feet. The evidence for the defendant tended to show that he rode the horse moderately, never going faster than a trot; that at the Bryant place he hitched it to a post; that there was no halter or rope around its foot while in his possession; and that in returning from the Bryant place he rode the horse on a walk until it suddenly fell in the road. An expert in diseases of horses testified that, in his opinion, the horse was paralyzed, and that this may have been produced by straining. There was also evidence that, a day or two before the hiring, the horse had been used in hauling dirt. Powell also testified that about a year before he had hired another horse from Farkas to go to the same place, and rode three or four miles further than he intended to go, and that when informed of it on his return Farkas said it was all right, and did not charge him for the extra time or distance.

On this state of facts the trial judge charged the jury, in substance, that if Powell exercised ordinary care in riding the horse, and attending to it while in his possession, it did not make any difference whether he rode it beyond the Whitehead place or not; that, if Powell was not at fault in riding and in his attention to the horse, he could not be held liable because he went a greater distance than he had hired the horse to go, although it may have been injured by accident or otherwise, without his

fault, in going this extra distance. The jury found for the defendant, and the plaintiff made a motion for a new trial. We think this charge was error. When Powell hired the horse from Farkas to go five miles to the Whitehead place, he had no right, under his contract, to go beyond that point without the consent of Farkas, and when he did go beyond it was at least a technical conversion, or a violation of his contract and duty; and, if the horse had been injured while beyond the point to which he was hired to go, Powell undoubtedly would have been liable, whether the injury was caused by his own negligence or by the negligence of others, or even by accident, unless he was forced to go beyond that point by circumstances which he could not control. For example, if a bridge had been washed away, or the road was impassable, and in consequence he had to take a longer road in order to go to the Whitehead place, he would then be liable only for his own negligence. This principle seems to be sustained by the following authorities: *Story, Bailm. § 418 et seq.*, and authorities there cited; *Schouler, Bailm. § 189*, and authorities cited.

But the nice question in this case is, Would Powell, after having been guilty of a technical conversion or violation of his duty, and having returned within the limits of the original hiring, and the horse then sustained injury without other fault on his part, be liable? That would depend, in our opinion, upon whether the extra ride of six or eight miles to the Bryant place and back caused or materially contributed to the accident. If it did, we think he would be liable to the owner. The horse might have been well able to travel the five miles and return, but the six or eight miles extra may have fatigued him to such an extent as to have caused him to stumble and fall, and thus produce the injury. If, however, the extra ride did not cause or materially contribute to the injury, we do not think Powell would be liable, if guilty of no other fault. We can see no good reason to hold the hirer liable for an injury to the horse hired, which occurred, without his fault, after he had returned with it within the limits of his original contract, although he had been guilty of a technical conversion by riding it three miles beyond the point to which it was hired to go, the extra distance not causing or contributing to the injury. We have been unable to find any cause the facts of which are like the facts in this. Nearly all the cases which hold the hirer liable, when he has deviated from the terms of his contract, are cases in which he was negligent in fact, or willfully and wantonly misconducted himself, or had overdriven the horse, or destroyed or ruined the property while beyond the limit or in the course of deviation from the purpose of hiring. The cases cited in the brief of counsel for the plaintiff in error were all of this character. See *Columbus v. Howard*, 6 Ga. 213; *Gorman v. Campbell*, 14 Ga. 187; *Collins v. Hutchins*, 21 Ga. 370; *Lewis v. McAfee*, 33 Ga. 465; *Malone v. Robinson*, 77 Ga. 719. So, likewise, were nearly all the cases referred to in *Schouler* and *Story, supra*. The facts in those cases show that the property was injured or destroyed during the time it was being improperly used, or being used for a different purpose

from that for which it was hired. The question whether this extra ride did or did not cause or materially contribute to the injury was for the jury to determine under the evidence and a proper charge by the court; and,

the court by its charge having eliminated this issue from the case, we think a new trial should be granted.

*Judgment reversed.*

## KENTUCKY COURT OF APPEALS.

T. B. JONES *et al.*, Appts.,

v.

William McEWAN.

(....Ky.....)

**Acceptance, after inspection** or fair opportunity to inspect it, of wheat furnished under a contract for wheat of a certain grade, precludes the buyer from denying that the contract was satisfied.

(March 31, 1891.)

**A**PPPEAL by defendants from a judgment of the Superior Court affirming a judgment of the Court of Common Pleas for Clark County disallowing their counterclaim for alleged breach of warranty in an action brought to recover the contract price for certain wheat alleged to have been sold and delivered. *Affirmed.*

The facts sufficiently appear in the opinion.

*Mr. L. H. Jones*, for appellants:

The thing contracted for was No. 2 wheat, and not an inspection by the appellants. If the appellants could have shipped to another station, for the purpose of having an inspection, why could they not ship it to Newport News for the same purpose? The appellants were under no more obligation, by the terms of the contract, to see that the wheat delivered was No. 2 than the appellee was. If, as matter of fact, the appellants had inspected the wheat before receiving it, but for the warranty

this might be construed to be conduct from which acceptance in fulfillment of the contract might be implied. But it would be interesting to know at what particular point along the line of that railroad this conclusive legal presumption of an acceptance attached.

See *McKibben v. Bakers*, 1 B. Mon. 120.

An express warranty, in sales of personal property, is never conclusively waived by any acceptance of the goods, unless perchance in some cases of known defects. A waiver may arise as a presumption of fact, but never as a conclusive presumption of law.

Benjamin, Sales, Bennett's ed. 1888, p. 607; Smith, Mercantile Law, p. 645; 1 Parsons, Cont. p. 629.

Benjamin on Sales, 853, says that the buyer may, after receiving and accepting the goods, bring his action for damages in case the quality is inferior to that warranted by the vendor.

It is not disputed that neither of appellants knew anything about grading wheat, and never graded, or attempted to grade, a grain of wheat in their lives; and for this reason they resorted to the precaution of requiring an express warranty, and clothed their contract in language which, according to all familiar rules of interpretation, cannot be misunderstood. Why should not this simple contract to deliver No. 2 wheat be interpreted as other contracts, according to the natural meaning of the language used?

See Benjamin, Sales, p. 565.

In the case of an express warranty it is not

**NOTE.—Effect of acceptance of goods under contract of sale.**

It is the duty of a vendee of goods sold upon condition as to the kind and quality, and also that they shall be satisfactory to the vendee, to examine them promptly, and, if they do not comply with the conditions and are not satisfactory, to notify the vendor within a reasonable time that he will not accept them. *Rosenfield v. Swenson* (Minn.) Jan. 5, 1891; *Baker, Sales*, 223. See *McCormick Harvesting-Mach. Co. v. Chesrown*, 33 Minn. 32; *Lee v. Bangs*, 43 Minn. 23.

A purchaser is bound to object to receive the goods within a reasonable time; and what is a reasonable time is a question for the jury. *Gordon v. Clarke*, 10 Fla. 179; *Coleman v. Gibson*, 1 Mood. & R. 168; *Stevens v. Stewart*, 3 Cal. 140; *Chaffin v. Doub*, 14 Cal. 384; *Sawyer v. Nichols*, 40 Me. 212; *Dyer v. Libby*, 61 Me. 45; *Wartman v. Breed*, 117 Mass. 13; *Borrowdale v. Bosworth*, 99 Mass. 381; *Stone v. Browning*, 68 N. Y. 604; *Garfield v. Paris*, 96 U. S. 557, 24 L. ed. 521.

The mere delivery of goods under an executory contract by the vendor to the carrier appointed by the vendee does not necessarily bind the latter to accept them, and on arrival the purchaser has the right of inspection, and to reject if they do not conform to the contract. *Pierson v. Crooks*, 115 N. Y. 549.

It seems to be a universal rule that vendee has 12 L. R. A.

the right to inspect goods after their delivery, to see whether they are in accordance with the order; but if he sells the goods without inspection it is tantamount to their acceptance. *Hill v. McDonald*, 17 Wis. 97; *Fletcher v. Ingram*, 46 Wis. 191; *Hoffman v. King*, 58 Wis. 314.

Defects not discovered by the inspection actually made, and not discoverable by such as ought to have been made, are properly classed as latent. Hence corn, musty and "blue-eyed," packed in bulk beneath sound corn, is a latent defect in the whole lot as a carload, delivery and acceptance being made without breaking bulk or unloading the car. *Miller v. Moore*, 6 L. R. A. 374, and note, 83 Ga. 684.

A delay of six weeks, after an examination and discovery as to the kind and quality of goods sold and delivered, in notifying the vendor that they are not satisfactory and will not be kept by the vendee, is unreasonable and amounts to an acceptance of the goods. *Rosenfield v. Swenson* (Minn.) Jan. 5, 1891. See *Baylis v. Lundy*, 4 L. T. N. S. 176; *O'Brien v. Barker*, 4 New Zeal. Jur. N. S. 64, cited in *Baker, Sales*, 223.

If within a reasonable time he rejects the goods as not being according to order, the fact that he had insured them will not amount to an acceptance. *Bacon v. Eccles*, 48 Wis. 227. See notes to *Studer v. Bleistein* (N. Y.), 5 L. R. A. 702; *Campbell Print. Press Co. v. Thorp* (Mich.) 1 L. R. A. 645.

necessary for the vendee to return or even offer to return the article sold, to enable him to recover the damage he has sustained by a breach of the warranty.

*Waring v. Mason*, 18 Wend. 495; *Benjamin, Sales*, p. 852.

In *O'Bannon v. Relf*, 7 Dana, 820, and *Dana v. Boyd*, 2 J. J. Marsh. 598, there was no express warranty, but merely the warranty implied by law when an order is given for goods to be manufactured and delivered in the future.

See *Sprague v. Blake*, 20 Wend. 61; *Reed v. Randall*, 29 N. Y. 858; *Hart v. Wright*, 17 Wend. 277; *Hyatt v. Boyle*, 5 Gill & J. 110.

There is no waiver of warranty by acceptance.

*Day v. Pool*, 52 N. Y. 416.

If the description is a material part of the contract, if it was an inducement to the contract, the parties' liability is fixed, and the law of conscience and the law of the land require that the parties should comply with their contract.

*Baird v. Matthews*, 6 Dana, 184; 2 Benjamin, Sales, Corbin's ed. § 857, pp. 741, 856, note 29. 884, note 24, 799, note 32; *Kollogg v. Denlow*, 14 Conn. 411; *Brigg v. Hilton*, 1 Cent. Rep. 807, 99 N. Y. 517; *Kanans City First Nat. Bank v. Grindstaff*, 45 Ind. 158; *Ferguson v. Hosier*, 58 Ind. 438; *Ricketts v. Hays*, 18 Ind. 181; *Mann v. Evertson*, 32 Ind. 355; *Douglass Axe Mfg. Co. v. Gardner*, 10 Cush. 88; *Adam v. Richards*, 2 H. Bl. 573; *Kimball & Austin Mfg. Co. v. Vroman*, 35 Mich. 311; *Hull v. Belknap*, 87 Mich. 179; *Scott v. Raymond*, 81 Minn. 487; *Eagan Co. v. Johnson*, 82 Ala. 233; *Donns v. Dunham*, 65 Ill. 512; *Polhemus v. Heiman*, 45 Cal. 573; *Cox v. Long*, 69 N. C. 7; *Lewis v. Rountree*, 78 N. C. 823; *Rodgers v. Niles*, 11 Ohio St. 48; *Byers v. Chapin*, 28 Ohio St. 300; *Boothby v. Plaisted*, 51 N. H. 436; *Field v. Kinnear*, 4 Kan. 476; *McCarthy v. Gordon*, 16 Kan. 35; *Gill v. Kaufman*, Id. 571; *Bigger v. Bovard*, 20 Kan. 204; *Nye v. Iowa City Alcohol Works*, 51 Iowa, 129; *Morehouse v. Comstock*, 42 Wis. 626; *Owens v. Sturges*, 67 Ill. 366; *Taylor v. Cole*, 111 Mass. 368; *Youghogheny Iron & C. Co. v. Smith*, 66 Pa. 340; *Brantley v. Thomas*, 22 Tex. 270; *Gurney v. Atlantic & G. W. R. Co.* 58 N. Y. 858; *Gautier v. Douglass Mfg. Co.* 13 Hun, 514; *Marshuetz v. McGreevy*, 23 Hun, 408.

Words of description imply a warranty that the property shall answer the description.

*Wolcott v. Mount*, 36 N. J. L. 262; *Benjamin, Sales*, Bennett's ed. p. 510.

**Mr. George B. Nelson**, for appellee:

The acceptance by the purchaser, after an inspection of the articles or an opportunity to inspect them, is a waiver of any objection on account of defect in quality.

There is no question of warranty in the case. The appellee did not warrant the quality of the wheat. He agreed to deliver wheat of a certain quality and grade. When he tendered the wheat it was an offer to perform his contract, and an implied claim that the wheat was of the specified grade. The rights of the purchaser thereupon were, to accept the offer, which made an end of the matter, or to reject the offer and hold the seller liable for his failure to perform his contract.

12 L. R. A.

A warranty applies only to a sale of a specific thing, and not to a contract to sell and deliver at a future day a thing which is to be of a certain kind and quality. An agreement to sell and to warrant the quality when delivered is quite a different matter.

*O'Bannon v. Relf*, 7 Dana, 820; *Dana v. Boyd*, 2 J. J. Marsh. 598; *Kerr v. Smith*, 5 B. Mon. 558; *Sprague v. Blake*, 20 Wend. 64; *Hart v. Wright*, 17 Wend. 277; *Benjamin, Sales*, §§ 918, 1842, 1848.

A description in an executory contract of the article to be sold will not amount to a warranty,—that is, an agreement to sell with warranty,—unless such appears to have been the intention of the parties.

*Maxwell v. Lee*, 34 Minn. 511; *Norton v. Dreyfuss*, 7 Cent. Rep. 785, 106 N. Y. 90; *Studer v. Bleistein*, 48 Hun, 577; *Kent v. Friedman*, 1 Cent. Rep. 718, 101 N. Y. 610.

Acceptance with opportunity to inspect is a waiver of right to recoup for defect in quality.

*Thompson v. Libby*, 85 Minn. 443; *Maxwell v. Lee*, 34 Minn. 511; *Fairbank Canning Co. v. Metzger*, 43 Hun, 71; *Comstock v. Sanger*, 51 Mich. 497.

**Bennett, J.**, delivered the opinion of the court:

The appellants, grain and commission merchants of Winchester, purchased of the appellee, engaged in the same general business at Pine Grove and Colly stations, on the Chesapeake & Ohio Railroad, all the wheat that the appellee had engaged in the vicinity of these stations, which was to be delivered at said stations in carload lots, and to grade No. 2 wheat. The appellee delivered said wheat at said stations, and it was there received by the appellants, and they personally inspected a part of the same as it was delivered, and pronounced it all right. They caused the wheat to be shipped to Newport News,—the place of destination,—where it was inspected and pronounced—at least a part of it—not No. 2 wheat in that market. The appellee sued the appellants for a balance of the purchase money, to which they pleaded, as counterclaim and set-off, that, as by the terms of the contract the wheat was to grade No. 2 at Newport News,—the terminal point,—and as it did not grade No. 2 at said point, they were damaged in the sum of \$649. The appellee contended that by the terms of the contract the wheat was to grade No. 2 at the place of delivery; and the appellants, after inspecting, or having an opportunity to inspect, the wheat at said place, received the same in discharge of appellee's contract, which released him from all damage, etc. The question as to whether at the terminal place or that of delivery the wheat was to grade No. 2 having been passed upon by the jury, and they having decided from the evidence that the grade was to be at the place of delivery, we must regard that fact, for the purpose of this review, as settled. So the question arises, Conceding that the wheat did not grade No. 2 at the place of delivery, did the reception of it by the appellants at the place of delivery, after having inspected it, or after having had a fair opportunity to inspect it, satisfy the terms of the contract to deliver wheat of No. 2 grade?

This court in the cases of *Dana v. Doyd*, 2 J.



J. Marsh. 594; *O'Bannon v. Relf*, 7 Dana, 390, and *Kerr v. Smith*, 5 B. Mon. 553,—which have been subsequently incidentally approved by this court in a number of cases; also Benjamin on Sales (the text; see §§ 600-609, 4th ed.)—has held that where there is a contract to deliver goods or chattels of a particular description or quality at a future day, and the vendor tenders goods not of the agreed description or quality in discharge of the contract, and the vendee, after inspecting them, or after having had a fair opportunity to do so, receives them in discharge of the contract, he cannot thereafter maintain an action against the vendor to recover damages for the defects in the description or quality. The stipulation that goods of a certain description or quality are to be delivered is made an essential part of the contract, which must be complied with by the vendor as a condition preceding the obligation of the vendee to receive the goods and pay for them; and if the goods tendered in discharge of the contract do not come up to the terms of it as to description or quality, the vendee has a right to reject them, and hold the vendor responsible in damages; but if he, after having inspected them, or after having had a fair opportunity to do so, receives them in discharge of the contract, although they do not, as to description or quality, comply with its terms, he thereby waives these defects, and he cannot recover damages on account of them. For this rule, as it seems to us, the sound and equitable reason is given, to wit: When the vendor tenders the goods in discharge of the contract, and they do not come up to the stipulation, if the vendor, after having inspected them, or after having a fair opportunity to do so, would reject them, the vendor in many cases could comply with his contract by delivering other goods of the contract description or quality; or, in the absence of such right or opportunity, he would have the opportunity to take charge of them, and dispose of them himself, rather than confide the sale of them to the vendee, whose interest might be to have recourse on the vendor, and to handle the goods with that view

alone, or his business capacity might be such that the vendor would not be willing to trust him. But if the vendee, after inspecting, or having a fair opportunity to inspect, the goods, were allowed to receive them in discharge of the contract, and then hold the vendor responsible for actual or supposed defects by exposing him to actions on the warranty on account of the defects, but really to recover losses resulting from short-sighted speculation or the wayward changes in the market, after he had been led to believe that all was satisfactory, would be most inequitable. Hence to regard the stipulation as an essential part of the contract, a compliance with which precedes the vendee's obligation to receive the goods; but if he receives them in discharge of the contract, after having inspected them, or after having had a fair opportunity to inspect them, the terms of the contract are complied with, and he has no action on account of the fact that the goods are not as stipulated, serves the rights of all parties. Of course this rule supposes that there is no fraud, and that the vendee has had an opportunity to inspect the goods. It is true there are many States that hold such stipulations to be warranties, and that fact was doubtless known to members of this court at the time the decisions mentioned were rendered; but nevertheless they chose to hew out the more equitable rule, regardless of those high opposing authorities. Besides, as there is scarcely any uniformity of decision among the several States upon the same subject,—many sometimes deciding one way, and only a few the other,—if we were to undertake to overrule our repeated and long-standing decisions to make a rule to conform to what is supposed to be the rule of the majority of the States, we would find ourselves overturning many long-standing legal landmarks of this State. Besides, instead of this State having an appellate court, some other State would practically fill that position for us. Which one should it be?

*The judgment is affirmed.*

## NEW YORK COURT OF APPEALS (2d Div.).

**Re Assessment of Tax upon Collateral Inheritances in the Estate of Worthington ROMAINE, Deceased.**

(.....N. Y.....)

**Personal property of a nonresident invested or habitually kept within the State is subject to the collateral inheritance tax**

imposed by Laws 1887, chap. 712, § 1, on property of a resident which passes by will or by the Intestate Laws of the State, or, if the decedent was a nonresident, on property "within the State."

(Haight, J., *disents.*)

(June 2, 1891.)

**APPEAL** by the administrator of the Estate of Worthington Romaine, deceased, from

**NOTE.**—*Succession and collateral inheritance taxes; legislative authority to impose.*

It is a rule of law that citizens cannot be subjected to special burdens without clear warrant of law. *Re Enston's Will*, 3 L. R. A. 464, 113 N. Y. 178; *Cooley*, Tarn. 2d ed. 275; *United States v. Wigglesworth*, 2 Story, 373; *Powers v. Barney*, 5 Blatchf. 203; *United States v. Watts*, 1 Bond, 583; *Doe v. Snaith*, 8 Bing. 152; *Green v. Holway*, 101 Mass. 248.

Section 1 of the Act of 1885 imposes a tax very plainly upon two classes of property: (1) upon all 12 L. R. A.

property which "shall pass by will, or by the Intestate Laws of this State, from any person who may die seised or possessed of the same while being a resident of the State;" (2) upon all property which shall be within this State transferred, *inter vivos* to take effect at the death of the grantor or bargainor. *Re Enston's Will*, *supra*.

It is a general rule of law that stocks, bonds and choses in action attend the owner and have their *situs* at his domicile,—a fiction which must prevail unless there is something in the policy of the

an order of the General Term of the Supreme Court, First Department, affirming a decree of the Surrogate for the City and County of New York, which assessed a tax under the "Collateral Inheritance Act;" and also affirming an order of said Surrogate appointing an appraiser under said Act. *Affirmed.*

**Statement by Vann, J.:**

This was a proceeding instituted by the District Attorney of the City and County of New York to compel the administrator of the estate of one Worthington Romaine, deceased, to pay taxes upon certain collateral inheritances, pursuant to chapter 488 of the Laws of 1885, as amended by chapter 718 of the Laws of 1887. September 27, 1888, said Romaine died, unmarried and intestate, at Petersburg, Va., leaving as his only next of kin a brother and a sister, residing in this State, and two nephews and a niece, who were nonresidents. For at least ten years prior to his death he had been a resident and domiciled in the State of Virginia, but no letters of administration appeared to have been issued or applied for in that State. At the time of his death, and for about three years prior thereto, he was the lessee of a box in a safe-deposit company in the City of New York, in which he kept certain securities, consisting of stocks and bonds of different corporations, and a mortgage upon real estate in said city, as well as several pass-books showing deposits by him in various savings banks in the same place to a considerable amount. It did not appear whether said stocks and bonds were issued by foreign or do-

mestic corporations. That part of said property so invested or kept in this State to which his nephews and nieces were entitled, being one third of the whole, was appraised at the sum of \$23,742.15. October 12, 1888, letters of administration were issued upon his estate, by the surrogate of the City and County of New York, and when this proceeding was initiated the administrator had distributed the most of the assets among the next of kin. December 6, 1889, an appraiser was appointed, and upon his report a decree was made by the surrogate, imposing a tax of 5 per cent upon the shares of the nephews and niece of the decedent, and the administrator was directed to pay the same. Upon appeal to the general term the decree was affirmed, and the administrator thereupon appealed to this court.

**Mr. Robert L. Redfield, for appellant:**

The Statute expressly limits and restricts taxation on collateral inheritances (in cases of intestacy) to such as are effectuated "by the Intestate Laws of this State," and, by implication, excludes inheritances under the laws of other States.

The tax imposed upon inheritances and successions is a tax, not upon the property itself, but upon the devolution of, or succession to, the property.

*Re McPherson*, 6 Cent. Rep. 781, 104 N. Y. 306; *Re Howard*, 5 Dem. 483; *Re Tulane*, 51 Hun, 218.

The Statute provides that to make a succession taxable such succession must have occurred or been effected in one of three ways, to wit:

statute or its language which shows a different legislative intent. *Ibid.*; *People v. Tax Comrs.* 28 N. Y. 224; *People v. Smith*, 89 N. Y. 576.

So bonds of foreign corporations in the hands of the agents were, by the general policy of the State, exempted from taxation here. *Re Knston's Will*, *supra*; 1 Rev. Stat. 839, § 5, as amended by Laws 1861, chap. 176, § 2, chap. 419, § 3; *Williams v. Wayne County* Supra. 78 N. Y. 561.

**Constitutionality of laws imposing a collateral inheritance tax.**

The Laws of 1885, imposing a collateral inheritance tax, are not unconstitutional, because failing to state the object to which it is to be applied or provide for notice to parties. *Re McPherson*, 6 Cent. Rep. 781, 104 N. Y. 306.

A tax on gifts, legacies and collateral inheritances, which operates alike on all property and persons similarly situated, and which is made by a judicial officer, after notice and opportunity to be heard, does not conflict with the provisions of U. S. Const., 14th Amend. *Wallace v. Myers*, 4 L. R. A. 171, 38 Fed. Rep. 184.

A tax on property acquired by inheritance is not unconstitutional as to United States bonds included in the property of the decedent. *Ibid.* See note to *Howe's Estate* (N. Y.) 2 L. R. A. 826.

**Succession and collateral inheritance taxes under the New York statutes.**

No tax was imposed upon property passing by will or intestacy from a nonresident of New York by the Collateral-Inheritance Tax Act of 1885. *People v. Sherwood*, 3 L. R. A. 464, and note, 113 N. Y. 174; *Re Tulane*, 51 Hun, 218. And compare *Re Leavitt*, 22 N. Y. S. R. 81.

The Act of 1885 provided for the imposition of taxes upon bequests to collateral relatives and

strangers, and this tax can be imposed only when the particular interests bequeathed exceed in value the amount of the limitation provided by the Statute. *Re Cager*, 111 N. Y. 343, affirming 46 Hun, 657; *Re Hopkins*, 6 Dem. 1; *Re McCready*, Id. 228; *Re Smith*, 5 Dem. 90; *McVean v. Sheldon*, 48 Hun, 163. Compare *Re Miller*, 5 Dem. 132.

It was the intention of the Legislature to amend, and not to repeal, the Act of 1885, by the passage of the Act of 1897. *Re Arnett*, 49 Hun, 599.

It was not so far abrogated by the Amendment of 1897 as to relieve estates from liability for tax which accrued under the former Act and were not collected before the passage of the latter. *Ibid.*

The Act of 1897 is not retroactive so as to govern in the assessment and collection of a tax on interests passing under the will of the decedent dying before it took effect. *Re Brooks*, 6 Dem. 165; *Re Miller*, 110 N. Y. 216, 47 Hun, 394, 6 Dem. 119; *Ryan's Estate*, 18 N. Y. S. R. 922; *Hendrick's Estate*, 1 Connolly, 301. Compare *Kissam v. People*, 6 Dem. 171.

But the real and personal property of a nonresident dying subsequent to the passage of the Act of 1897 is subject to the tax. *Re Vinot's Estate*, 7 N. Y. Supp. 517.

As to the time intervening between the passage of the Act of 1885 and the passage of the Act of 1897 for cases arising in the intervening period, the earlier Statute continues as if the later had not been enacted. *Warriner v. People*, 6 Dem. 211; *Re Thompson*, 14 N. Y. S. R. 497. Compare *Re Chardavoyne*, 5 Dem. 460.

Hence, where a testator died at a time intervening the passage of the two Acts, the right of the State being fixed and vested, it remained unaffected by the later Act, which exempted adopted children from the "collateral inheritance tax." *Warriner v. People*, *Re Thompson* and *Ryan's Estate*, *supra*.

either (1) by will; or, (2) by the Intestate Laws of this State; or, (3) by deed, grant, etc., to take effect on death.

It follows that a succession occurring or effectuated by neither of these agencies is not within the operation of the Statute.

*Orcutt's App.* 97 Pa. 179; *Re Tulane, supra.*

In the construction of laws imposing taxes, it is always presumed that the Legislature has so shaped the law as, without ambiguity or doubt, to bring in everything it was meant should be embraced; and where ambiguity is found, the construction must be against the taxing power.

*Cooley*, Tarn. 2d ed. 267, 275; *Herron v. Keeran*, 59 Ind. 472; *Wallace v. Atty-Gen. L. R.* 1 Ch. App. 9.

Though the power of Parliament to tax the succession of foreigners to personal property in England is undoubted, yet no such intention would be presumed.

*Wallace v. Atty-Gen. supra.*

Residence or nonresidence of the decedent has nothing to do with the question of the thing sought to be taxed. It is immaterial whether the decedent was a resident or non-resident—whether the property was of one kind or another (*Re Howard, supra*); provided only that in the case of intestacy, the devolution should be by the laws of this State, and the property be "within this State."

*Re McPherson, supra.*

It cannot be presumed that it was the intention of the Legislature to impose taxation upon all the property of any and every decedent found within this State.

*Re Enston's Will*, 3 L. R. A. 464, 113 N. Y. 174.

The succession in this case was not by the Intestate Laws of this State, but by the laws of Virginia.

*Parsons v. Lyman*, 20 N. Y. 108, 112; *Re Hughes*, 95 N. Y. 55; *Despard v. Churchill*, 53 N. Y. 192; *Public Administrator v. Hughes*, 1 Bradf. 125; *Graham v. Public Administrator*, 4 Bradf. 127; *Stack v. Stack*, 6 Dem. 390; *Re Braithwaite*, 19 Abb. N. C. 113; *Müller v. Miller*, 91 N. Y. 815.

The property in question never was "within this State," within the meaning of the Statute. Being temporarily here for safe keeping, its *situs* was that of the intestate's domicile.

*Re Enston's Will, supra*; *Re Tulane*, 51 Hun, 218.

*Mr. Benjamin F. Dos Passos*, with *Mr. De Lancey Nicoll*, Dist. Atty., for respondent:

The property of decedent being, at the time of his death, actually within this State, and passing to his nephews and niece, became liable under chapter 718 of the Laws of 1887, to taxation, irrespective of the fact that his domicile was in Virginia and he died there intestate.

Under the Act of 1885 it was held that estates of nonresident testators within this State were not liable to taxation; that there was no intention disclosed in the Act to tax such estates.

*Re Enston's Will*, 3 L. R. A. 464, 113 N. Y. 174.

Prior to this it was held by the general term that estates of nonresident intestates were likewise not liable.

#### *Legacies and interests liable for the tax.*

A bequest of a specified sum to testatrix's executors, in trust, "to expend the same for masses for the repose of the said husband and myself," and naming the person whom testatrix desired should celebrate the masses, is subject to the collateral inheritance tax. *Black's Estate*, 1 Connolly, 477.

A legacy to the board of foreign missions is not exempt from the collateral inheritance tax, under the statutes of New York. *Re Board of Foreign Missions*, 38 N. Y. S. R. 789.

A legacy of \$500 is of the fair market value of its face, and subject to the collateral inheritance tax imposed by N. Y. Laws 1887, chap. 718. *Re Bird's Estate*, 32 N. Y. S. R. 899.

No portion of an inheritance or testamentary gift amounting to \$500 or more is exempt from the tax imposed by N. Y. Laws 1887, chap. 718, § 1, under the provision that "an estate which may be valued at a less sum than \$500 shall not be subject to such duty or tax." *Re Sherwell's Estate*, 35 N. Y. S. R. 403, 34 N. Y. S. R. 815.

Under a will directing executors to pay a stated sum to a certain church towards the building of a new church or the renovation of the present one, the money must be treated as personal property, and subject to collateral inheritance tax, under N. Y. Laws 1885, chap. 483, § 1. *Sherrill v. Christ Church*, 121 N. Y. 701.

A vested remainder whose value is ascertainable is subject to the tax. *Re Vinot's Estate*, 7 N. Y. Supp. 517.

A beneficial interest in possession is a "succession" conferred by will, and is subject to a succession tax. *Wright v. Blakeslee*, 18 Blatchf. 421.

Property conveyed by irrevocable deed, in trust to pay the rents, issues and profits thereof to the grantor during her lifetime, and at her death to distribute the same among certain beneficiaries, is not 12 L. R. A.

subject to the Collateral Inheritance Tax Act, where the deed was executed before the passage of the Act of 1887. *Hendrick's Estate*, 1 Connolly, 301.

Where a testator died in 1890, leaving a will making pecuniary legacies arising out of personal property, but the legatees did not become entitled to the benefit of the legacies until 1875, the executor became liable at the latter date to pay the tax, notwithstanding the intervening repealing Act. *Hellman v. United States*, 15 Blatchf. 18; *Clapp v. Mason*, 94 U. S. 589, 24 L. ed. 212.

The Act of 1890, chap. 393, providing that the personal estate of certain corporations, including religious corporations, shall be exempt from taxation, and that the Collateral Inheritance Tax Act shall not apply to them, is prospective in its operation, and does not apply to a tax which became due and payable before its passage. *Sherrill v. Christ Church*, 121 N. Y. 701.

#### *Estates and interests exempt from tax.*

Under N. Y. Laws 1887, chap. 718, all taxable estates and legacies are exempt from taxation to the extent of \$500. *Re Sherwell*, 35 N. Y. S. R. 1030.

A legacy of \$500 payable at the end of one year is not of the fair market or cash value of \$500, and is therefore not subject to the collateral inheritance tax. *Re Peck's Estate*, 30 N. Y. S. R. 209.

Property of a nonresident testator is not subject to the payment of a collateral inheritance tax. *Re Hall's Estate*, 20 N. Y. S. R. 397.

The tax is not assessable on property without the State under the devise of a resident. *Lorillard v. People*, 6 Dem. 263; *Dewey's Estate*, N. Y. L. J. Oct. 21, 1889.

A will giving a certain person the benefit and proceeds of testator's membership in an insurance association "as far as his interest may appear and be proved," the balance to go to testator's wife, is

*Re Tulane*, 51 Hun, 218.

Of the Act of 1887, chap. 718, Andrews, J., says: "The Act of 1885 was so amended as to subject to its operation the property within this State of a nonresident decedent."

*Re Enston's Will*, *supra*.

In none of the cases was any distinction made, or sought to be made, between nonresident testates and intestates, and the law has thus far been deemed to cover both classes.

See also *Re Clark*, 29 N. Y. S. R. 660; *Re Vinot's Estate*, 7 N. Y. Supp. 517. See *United States v. Rankin*, 8 Fed. Rep. 874.

The language of the Act is entitled to a "fair construction" in order to give effect to the purpose of the Legislature.

*Re Enston's Will*, *supra*.

It is the duty of the court to so interpret it as to conform to the presumed intention of its framer.

*People v. Davenport*, 91 N. Y. 585.

Decedent's whole estate having been voluntarily distributed by appellants, under the laws of this State, and not at the domicile, the property must be deemed to have passed here within the contemplation of the Statute.

*Albany v. Powell*, 2 Jones, Eq. 51; *Alexander's Estate*, 8 Clark, 87; *Re Ewin*, 1 Cromp. & J. 151; *Re Clark*, *supra*.

The fiction *mobilia sequuntur personam* has no application to taxation.

*People v. Tax Comrs.* 28 N. Y. 388, citing with approval *Catlin v. Hull*, 21 Vt. 158; *Graham v. First Nat. Bank*, 84 N. Y. 400; *People v. Gardner*, 51 Barb. 857, 858; *People v. Ogdensburgh*, 48 N. Y. 897; *People v. Smith*, 88 N. Y. 588; *People v. Coleman*, 7 L. R. A. 407, 119 N. Y. 139, 140;

*Maltby v. Reading & C. R. Co.* 52 Pa. 140. See also, under Collateral Inheritance Tax Acts, *Albany v. Powell*, *supra*; *State v. Dairymple*, 3 L. R. A. 372, 70 Md. 294; *Re Clark*, *supra*.

The fiction has only been held applicable by the English courts, under the Legacy Act, upon the express ground that there was no intention on the part of Parliament to tax nonresident decedents. All the cases which exempt the personal property of nonresidents actually within the taxing State at the time of death will be found upon examination to be distinguishable upon this express ground.

*Wallace v. Atty-Gen.* L. R. 1 Ch. App. 1; *Albany v. Powell* and *State v. Dairymple*, *supra*; *Re Enston's Will*, 3 L. R. A. 464, 113 N. Y. 138, 134.

The English decisions as construing the Legacy and Succession Duty Acts, are often irreconcilable, because, while all nonresident decedents are generally exempted under the former Act (*Thompson v. Advocate General*, 13 Clark & F. 1), they are as a rule held liable under the Succession Duty Act, there being little, if any, substantial difference between the language of the two Statutes.

*Re Lovelace*, 4 DeG. & J. 340; *Re Wallops' Trust*, 1 DeG. J. & S. 656; *Lyall v. Lyall*, L. R. 15 Eq. 1.

The authorities in Pennsylvania which hold that stocks, bonds, etc., of a nonresident, being choses in action and intangible, are not taxable under these Statutes, are in principle utterly opposed to the doctrines stated in *People v. Tax Comrs.* and *Catlin v. Hull*, *supra*.

To some extent they conflict with earlier cases in that State.

not a gift, legacy or property subject to the collateral inheritance tax, but whatever the devise may receive under the will is in payment of his debt. *Re Rogers*, 30 N. Y. S. R. 943.

A cemetery declared by Act to be exempt from all public tax so long as the same shall remain dedicated to the purposes of a cemetery is exempt. *Dewey's Estate*, *supra*.

A bequest of the income of a certain sum to be applied to the maintenance of a burial plot renders it exempt. *Re Vinot's Estate*, 7 N. Y. Supp. 517.

Property bequeathed to an executor individually in trust for the brother of the testatrix is exempt from the tax. *Re Farley*, 15 N. Y. S. R. 737.

A legacy to the husband of a daughter is not subject to the tax. *Re Woolsey*, 19 Abb. N. C. 222; *Re McGarvey*, 6 Dem. 145.

*Exemption of beneficent and charitable associations, etc.*

The societies, corporations and institutions exempted from the operation of the Act to tax gifts, legacies and collateral inheritances are those bodies only which enjoy complete immunity from taxation as to all their property; partial relief from taxation is insufficient. *Re Vassar's Will*, 84 N. Y. S. R. 328; *Church Charity Foundation v. People*, 6 Dem. 184; *Re Hunter*, 23 Abb. N. C. 24.

The Brooklyn Home for Consumptives is an almshouse, its inmates being entirely supported by charity, and is not subject to the collateral inheritance tax. *Re Herr*, 55 Hun, 187.

As the New York Association for Improving the Condition of the Poor, although it does not furnish lodgings, provides the means therefor, it is a pure charity of the almshouse class, dispensing its benefits without any charge, and is therefore exempt from the collateral inheritance tax. *Re Lenox's Estate*, 81 N. Y. S. R. 969.

12 L. R. A.

Under N. Y. Laws 1870, chap. 8, § 8, the property, both real and personal, of the Lenox Library, in the City of New York, is exempt from taxation the same as other incorporated public libraries, and a legacy to the library is therefore exempt from the collateral inheritance tax. *Ibid*.

Where a testator directs his executor, after the death of his wife, to pay to a church a certain sum "towards the building of a new church or the renovation of the present one," and the church builds a new edifice, paying for it with a loan procured in anticipation of its payment by the executor after the wife's death, the fund is not liable to the collateral inheritance tax. *Re Van Kleeck's Estate*, 121 N. Y. 701.

#### Contingent estates.

Property is not taxable until it passes in the manner described by statute, and a contingent remainder bestowed by will upon one not in the class exempted by statute is not to be taxed until the defeated contingency has been rendered forever impossible. *Re Le Fever*, 5 Dem. 185.

Where the wife upon the death of her husband takes a life interest with limited power of disposition during her life, the interest of other beneficiaries depends upon the contingency of her exercise of her power of disposition. *Re Cager*, 111 N. Y. 343, 46 Hun, 637.

Legacies bequeathed to infants, to be paid to them as they shall severally attain the age of twenty-one, with gifts over in the event of earlier demise, vested on testator's death, are not subject to the tax. *Re Cogswell*, 4 Dem. 243.

#### Children by adoption; exemption from tax.

The word "children" in the Act of 1885 did not include an adopted child, and prior to the amendatory

*Alexander's Estate, supra.*

They exempt under the fiction not only stocks and bonds of foreign corporations and United States government bonds, but also domestic and state securities actually within the State and issued under the laws of the State.

*Orcutt's App.* 97 Pa. 185, 186; *Del Busto's Estate*, 23 W. N. C. 111; *Com's App.* 11 W. N. C. 494.

At the same time the position is somewhat inconsistent as, under their own Statute, they tax transfers of stock within the State by foreign executors.

Scott, Intestate Law of Pa. 1871, 547; Law of Pa. 1887, p. 79, § 10.

And under Property Tax Laws they tax the very securities exempted under the Inheritance Act.

*Maltby v. Reading & U. R. Co. supra.*

As this is not a tax on property, an exemption from property taxation cannot be extended to relieve from the inheritance tax.

See *Miller v. Com.* 27 Gratt. 110; *Barringer v. Cowan*, 2 Jones, Eq. 433; *Com. v. Herman*, 10 W. N. C. 210, 212; *Society for Savings v. Cotte*, 78 U. S. 6 Wall. 594, 18 L. ed. 897; *Provident Sav. Inst. v. Com.* 73 U. S. 6 Wall. 611, 632, 18 L. ed. 907, 913.

*Vann, J.*, delivered the opinion of the court:

The question presented by this appeal is whether succession to the personal property of a nonresident intestate, invested or habitually kept by him in this State, is subject to taxation under the Collateral Inheritance Act. The original Act provided that after the passage thereof "all property which shall pass by will or

by the Intestate Laws of this State from any person who may die seized or possessed of the same while being a resident of the State, or which property shall be within the State," to anyone other than certain excepted persons nearly related to the decedent, should be subject to a tax of \$5 upon the hundred "of the clear market value of such property." Laws 1885, chap. 483, § 1. When this Statute came before the courts for construction it was held not to apply to property within this State, either real or personal, that passed by will or intestacy from a nonresident decedent to collateral relatives or strangers; and that it was limited in its effect to property so passing from resident decedents. *Re Elnston's Will*, 113 N. Y. 174, 5 Dem. 93, 46 Hun, 506, 3 L. R. A. 464; *Re Tulane*, 51 Hun, 218; *Re Clark*, 29 N. Y. S. R. 650.

In 1887, however, the Legislature amended the Act, so that it now provides that "all property which shall pass by will or by the Intestate Laws of this State from any person who may die seized or possessed of the same, while a resident of this State, or, if such decedent was not a resident of this State at the time of death, which property, or any part thereof, shall be within this State," etc. Laws 1887, chap. 713, § 1. The part inserted by the amendment is italicized for convenience of comparison. What did the Legislature wish to accomplish when it inserted these words? This question is not easily answered, for the section is so involved as to make the duty of discovering its meaning unusually difficult. Shortly after the original Act was passed, litigation arose over its provisions, and the courts

ry Act of 1887 a devise or bequest to such children was subject to taxation. *Re Miller*, 110 N. Y. 216, 47 Hun, 394, 6 Dem. 119.

To entitle an adopted child to exemption from the collateral inheritance tax, under N. Y. Laws 1887, chap. 713, § 1, it is sufficient that the proceedings for his adoption conform substantially to the New York statute, where they were had in another State. *Re Butler's Estate*, 34 N. Y. S. R. 189.

A legacy to a child of an adopted child is not exempt from the collateral inheritance tax imposed by N. Y. Laws 1887, chap. 713. *Re Bird's Estate*, 32 N. Y. S. R. 309.

Stepdaughters who lived with testatrix after the death of their father, testatrix looking after their education and addressing and speaking of them as her children, they in turn addressing her as mother, and the same friendly relations continuing after the marriage of such stepdaughters, are not subject to the payment of a collateral inheritance tax on estates devised by the testatrix, as the latter stood in the relation of a parent to them. *Re Capron*, 30 N. Y. S. R. 948.

A legacy to a niece, who for many years had lived with the testatrix and had been supported by her, in the apparent relation of parent and adopted child, although the parties were never addressed by each other as "mother" and "daughter," but where it is apparent that the niece was treated in all respects as if she had been an adopted child, is exempt from the tax. *Re Spencer*, 1 Connolly, 308.

In the absence of allegation or proof to the contrary it is presumed that, after making the order affirming the appraisement of the estate, the surrogate gave the notice prescribed by statute of the amount of tax to be paid by the adopted child. *Re Miller, supra*.

12 L. R. A.

*Corporations, associations, etc.; when not exempt.*

The exemption of a foreign corporation from taxation under the laws of the jurisdiction of origin does not withdraw it from the operation of the collateral inheritance tax. *Catlin v. Trinity College*, 3 L. R. A. 206, 113 N. Y. 138.

Unless the right to exemption can be shown by provision in its charter a charitable or religious corporation is subject to the tax. *Re Herr's Will*, 5 N. Y. Supp. 48.

Charitable institutions whose inmates are required to pay for any of the benefits received are not almshouses, not being appropriated wholly for the poor; and legacies to such institutions are subject to the collateral inheritance tax. *Re Lenox's Estate*, 81 N. Y. S. R. 959.

A society for charitable purposes, whose constitution prescribed certain rules of admission, including the payment of an admission fee by applicants, and that their members should make a will transferring all property of which they are or may be possessed, is not exempt from taxation. *Thompson's Estate*, N. Y. L. J. 1889.

A charitable or benevolent association which provides for the reception of boarders, who are required to give satisfactory security for the regular payment of their board, is not an almshouse so as to exempt it from the payment of the collateral inheritance tax. *Re Keech's Estate*, 32 N. Y. S. R. 227.

Legacies to religious societies and colleges not exempted from taxation by charter or special laws are liable to a collateral inheritance tax under the New York Law of 1887. *Catlin v. Trinity College*, 3 L. R. A. 206, 113 N. Y. 138.

A legacy to a board of home missions is not exempt from the collateral inheritance tax, under the

were called upon to discharge the delicate function of declaring what the confused and conflicting passages meant. The surrogate's court and the supreme court held that the Act, before it was amended, applied to the estates of nonresident decedents; and when the question reached the court of appeals two of its judges were of the same opinion, but a majority thought otherwise, and the construction of the lower courts was overturned. *Re Enston's Will, supra*.

Although the Amendment of 1887 was probably passed in view of the litigation then pending, and with the intention of removing the doubt caused thereby, candid men are still compelled to hesitate and divide in pronouncing judgment. It must be assumed that the Legislature in passing the amendment intended to make some change, and the expression, "or if such decedent was not a resident of this State at the time of death," suggests what that change was. Before it was amended, the Act, as was subsequently held, applied only to one class of persons,—resident decedents,—but by the amendment it is made applicable to another class—nonresident decedents. But does it apply to all persons belonging to these two classes? It is not denied that it applies to all resident decedents and to all nonresident testators, but it is contended that it does not apply to nonresident intestates, because property

"which shall pass . . . by the Intestate Laws of this State" is expressly mentioned, to the implied exclusion of property passing by the Intestate Laws of other States. This is the position of the appellant, whose learned counsel claims that the Act, in its present form, was designed to meet cases of succession by will, but not of succession by intestacy, unless the intestate was a resident of this State. It is difficult, however, to see why the Legislature should discriminate, simply for the purpose of taxation, between the property of a nonresident decedent who made a will and of one who did not. It is not probable that there was an intention to tax the estates of nonresident testators, and to exempt those of nonresident intestates, because there is no foundation for such a distinction. *People v. Davenport*, 91 N. Y. 574, 585. Property of the same kind, situated in the same place, receiving the same protection from the law and administered upon in the same way, would naturally be required to contribute towards the expense of government upon the same basis, regardless of whether its last owner died testate or intestate. The language of the Act, as amended, does not indicate the intention thus contended for when the entire section is read together, because nonresident decedents are mentioned, while nonresident testators are not. Although "the Intestate Laws of this State" are named as a source

statutes of New York. *Re Board of Home Missions*, 33 N. Y. S. R. 798.

A benefit association incorporated under the Act of 1843, chap. 319, for the relief of the aged and disabled and of the families of deceased officers and clerks of New York banks and savings banks, which provided for assessments to be paid to entitle to membership, and having no provision in its charter exempting it from taxation, is subject to the tax. *Re Jones*, 1 Connolly, 125.

#### Assessment of tax.

The right of the wife to whom an estate is devised for life to impair and diminish the same for any purpose whatever renders the assessment of a collateral inheritance tax, under N. Y. Laws 1885, chap. 483, premature during her life. *Re Cayuga County Surrogate*, 46 Hun, 657.

The original testator left certain property to his wife for life, and after her death part of it to his son, his heirs or assigns. The son died intestate during the life estate and his son inherited, but he also died. It was held that the parties to whom he left the property took a vested remainder or fee, with the right to enjoy the same upon the death of the life tenant, and the tax can be fixed and assessed on the legacy. *Van Beneselaer's Estate*, N. Y. L. J. May 25, 1889.

#### Authority and power of surrogate.

The surrogate is deemed the superior authority upon all questions, including that of value of the estate subject to the tax. *Re Astor*, 6 Dem. 402.

He will not take any steps, upon his own motion, until the expiration of eighteen months after the decedent's death. *Ibid.*

#### Application for appraisement.

It is the duty of an executor to apply for an appraisement of interests passing by the will of his decedent taxable under the Collateral Inheritance Tax Act. The power given to the surrogate of his own motion to cause an appraisement to be made, and to fix the tax, was not intended to relieve personal representatives of this obligation. *Frazer v. 12 L. R. A.*

*People*, 6 Dem. 174; *Re Frowe*, 20 N. Y. S. R. 355. Compare *Re Farley*, 15 N. Y. S. R. 727; *Re Astor*, 6 Dem. 413.

In the case of a contingent interest, and upon the happening of a contingency upon which it should take effect, an appraisement of such interest should be had. *Wallace's Estate*, 18 N. Y. S. R. 387.

#### Appraiser, appointment and duty of.

The order appointing an appraiser will designate the person upon whom service of notice by mail shall be made, including all interested in the estate. *Re Astor*, 6 Dem. 402.

The appointment of an appraiser is not necessary where the legacies subject to the tax are in cash. *Ibid.*; *Re Jones*, 19 Abb. N. C. 221, 5 Dem. 30.

He should be appointed only where specific legacies subject to the tax under that Act are given, or where taxable inheritances exist, or estates in fee are devised, or remainders, annuities, life estates or terms of years are created. *Re Jones, supra*.

It is the duty of the appraisers to appraise only the estates of the persons whose estates are inherited or created by will, and which are subject to the tax. *Re Robertson*, 5 Dem. 92.

Even if the property of the decedent is situated in more than one county, the appraiser appointed may appraise it all. *Keenan's Estate*, 1 Connolly, 225.

#### Valuation.

In appraisals, the value of the life estate is to be ascertained by reference to the tables of mortality adopted by the general rules of practice. *Re Robertson*, 5 Dem. 92.

Though it may be necessary to deplete the principal fund to pay life annuities, and be impossible to determine their cash value, the property should be taken at its market value at testator's death. *Re Leavitt*, 22 N. Y. S. R. 81.

Where the beneficiary of a devise is known, the property definite and the event to occur certain the present value of devisee's interest can be fixed. *Higgins' Estate*, N. Y. L. J. 1890.

Where the valuation of the estate of the remain-

of title, they are not the exclusive source, and neither necessarily nor naturally apply to the property of nonresident decedents named at a later point in the section. In this discussion it is assumed, as the appellant claims, that the personal property of such persons passes according to the laws of the State where they reside.

By comparing the original with the amended Act, and analyzing the provisions of the latter in the light thus afforded, we think that the Legislature intended by the fore part of the sentence under consideration to provide for succession to the estates of residents to which "the Intestate Laws of this State" apply; that after providing for that class a change is made, indicated by the use of the disjunctive particle "or," which suggests a transition to another subject, and introduces another class,—nonresidents,—who are also provided for; and then each class is carried forward to the taxing clause, which embraces both. As thus construed, "the Intestate Laws of this State" have no application to the second class, being separated from it by the word "or," and confined to that clause of the sentence in which they occur. They are not repeated in the second clause, either literally or by implication, although the words "all property," in the first clause, are repeated in the second in the form of "which property," but no limitation is there applied to them. "Which property," as thus

used, means the property of the nonresident decedent, and such property, if personal, would not pass by the Intestate Laws of this State. This construction is confirmed by referring to other portions of the Act, which provide that "all administrators, executors and trustees" shall be liable for the taxes until paid (§ 1); and that, "whenever any foreign executor or administrator shall assign or transfer any stocks or loans in this State, standing in the name of a decedent," the tax shall be paid to the proper officer on such transfer, or the corporation permitting it shall become liable to pay the tax, provided it had knowledge of the facts in time. Section 2. It is clear that the Act is not confined to real estate, but embraces personal property also, including evidences of debt. All administrators are made liable for the tax; and corporations can trapster stock standing upon their books in the name of a nonresident decedent only at their peril, until the tax thereon is paid. The fiction of law that personal estate has no *situs* away from the person or residence of its owner is done away with to a limited extent, and for a specified purpose, and the truth is substituted in its stead as the rule of action. That the Legislature had the power to do this can hardly be questioned. *Re McPherson*, 104 N. Y. 806, 6 Cent. Rep. 781. As was said by Judge Story, when writing upon this subject: "A nation within whose territory any personal

derman cannot be determined because the whole estate may be absorbed during the lifetime of the life tenant, the appraisal cannot be had until the death of the life tenant. *Fleming's Estate*, N. Y. L. J. Oct. 15, 1889.

Where a contingency rendered the present appraisable value incapable of any approximate valuation owing to certain executory devises there is no basis for imposition of the tax. *Re Cager*, 111 N. Y. 343, 46 Hun. 697.

#### Report of appraiser.

The appraiser should report all property as to which he is in doubt, as subject to the tax. *Hendricks' Estate*, 18 N. Y. S. R. 969.

The great age of a life tenant whose share is subject to the tax is no reason for postponing the confirmation of the report of the appraiser. *Wilkes' Estate*, N. Y. L. J. Oct. 31, 1889.

An appraiser should only report upon property subject at the time to the tax prescribed by the law, and not upon a contingent interest. *Wallace's Estate*, 18 N. Y. S. R. 387.

The appraiser should report the market value of a contingent interest at the date of the decedent's death and leave the taxation for future action. *Clark's Estate*, 1 Connolly, 434.

A gift to an infant being of a watch and chain and diamond studs not within the exempted class, to be given to him when he reached the age of twenty-one, and the income of \$15,000 till he reached that age, and at that age the sum of \$10,000 outright and the unexpended income, and in case of his death before that age, the whole bequest to become part of the residuary estate, the appraiser should report the present value of the income of the whole bequest of \$15,000. *Mathews' Estate*, N. Y. L. J. 1889.

#### Payment of tax.

The tax on a pecuniary legacy accrues on the death of the testator, though it is not payable until the legatee becomes entitled to the benefit of the legacy. *Hellman v. United States*, 15 Blatchf. 15.

The tax is payable if the property is constructive-  
12 L. R. A.

ly in the possession of the legatees so that they had sufficient control over it to order the referee in a partition suit, in whose hands the money then was, to pay certain debts out of the shares coming to them. *Welsh's Estate*, N. Y. L. J. July 28, 1888.

Under provisions of § 8 of the Act in relation to the payment of the tax to the treasurer of the "proper county," the "proper county" is the county of the surrogate first properly acquiring jurisdiction. *Keenan's Estate*, 1 Connolly, 226.

Where an estate chargeable under this Act cannot be settled at the end of one year from the death of the decedent by reason of claims made upon it, by necessary litigation, or other unavoidable cause of delay, only 6 per cent per annum is to be charged upon the tax from the expiration of the year, until the cause of such delay be removed. *People v. Prout*, 53 Hun, 541.

Where a tax is paid by an executor under an order of court which was erroneous, the remedy of the aggrieved legatee is provided for by § 12 of the Act of 1887. *Keech's Estate*, 32 N. Y. S. R. 227.

The person liable to pay a tax on a "succession" is the person beneficially interested in the property, and not the trustee or executor in whom the legal title is vested, or to whom a power in trust is given for the benefit of such person. *United States v. Tappan*, 10 Ben. 234.

#### Enforcement of payment.

Execution must first issue to all persons interested who are liable to the tax before application can be made for its collection. *Re Prout*, 19 N. Y. S. R. 318.

As to the administrators, executors and trustees, application for the order directing them to pay the tax can be made to the surrogate's court without leave. *Ibid*.

The surrogate can, on the return of an execution issued upon his decree, enforce the decree by proceedings for contempt under the Code of Civil Procedure, § 2555. *Ibid*. See note to *Howe's Estate* (N. Y.) 2 L. R. A. 825, for the law of other States.

property is actually situated has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there." Conf. L. § 550. In *People v. Tax Comrs.*, 23 N. Y. 224, 228, Judge Comstock quotes with approval the foregoing extract, and adds: "I can think of no more just and appropriate exercise of the sovereignty of a State or nation over property situated within it and protected by its laws than to compel it to contribute towards the maintenance of government and law. Accordingly there seems to be no place for the fiction of which we are speaking (*mobilia personam sequuntur*) in a well-adjusted system of taxation." See also *Guillander v. Howell*, 35 N. Y. 657; *Graham v. First Nat. Bank*, 84 N. Y. 393, 401; *Catlin v. Hull*, 21 Vt. 152; *Dos P. Col. Inheritance Taxes*, 37, 92.

*Orcutt's App.*, 97 Pa. 179, is pressed upon our attention as opposed to the views here expressed, but that case was decided under a statute differing materially from the one under consideration. 1 Purdon, Dig. 259. The main point of contention there was whether United States bonds, no matter where deposited, had a *situs* different from the domicile of their owner; and it was held that they had not, by the Act then under review, which was declared "to embrace only personal property of a tangible nature, actually situated or used for business purposes within the Commonwealth, and not to mere certificates of indebtedness, such as government bonds." It was held otherwise by the Court of Appeals of Maryland in *State v. Dairymple*, 70 Md. 394, 3 L. R. A. 392, where the words "being in this State" were declared to refer to the actual, and not to the constructive, situation of the property. In *Albany v. Powell*, 2 Jones, Eq. 51, it was held that property, whether real or personal, situate in the State of North Carolina, but belonging to one domiciled and dying intestate in Canada, was subject to the succession tax imposed by a statute of said State. When *Re Euston's Will*, *supra*, was before this court the Amendment of 1887 had been passed; but it did not apply to the facts of that case, because they arose before its passage, although the decision was made afterwards. Still the amendment was considered in the prevailing opinion, which stated (113 N. Y. 183) that "by chapter 713 of the Laws of 1887 section 1 of the Act of 1885 was so amended as to subject to its operation the property within this State of a nonresident decedent; and this amendment furnishes some evidence that prior thereto the proper construction of the section, according to the understanding of the Legislature, did not include within its operation such property." In the dissenting opinion reference was made to the same subject in this way (113 N. Y. 184): "Under either Statute [the original and the amendment] the clear intention was to bring in for taxation all property, real and personal, without regard to residence, which was within the jurisdiction of the courts of this State, and to be administered under its laws for the beneficiaries named in the Act, subject only to the exceptions named in the Act itself." All of the property in question has been administered upon in this State alone. There appeared to be no difference in the minds of the six judges

who took part in the decision as to the effect of the Amendment of 1887. Apparently they were all of the opinion, as the most of those participating in this decision are, that by the change then made the Act applied to the property within this State of any nonresident decedent. The appellant further contends that the property in question was not "within this State," according to the true meaning of the Statute; and the contention is supported by the argument that it would be unreasonable to tax the money found upon the person of a nonresident who died while traveling in this State. We should hesitate before applying the Statute to any property casually brought into the State for a temporary purpose, as by a visitor or traveler; but the record before us does not present such a case. It might well be held that such property, although literally "within this State," was not here in the sense meant by the Statute, on account of the transitory and accidental character of its presence, and the immediate custody of the owner. *Herron v. Keeran*, 59 Ind. 472, 476.

Where, however, the money of a nonresident is invested in this State, as it was by Mr. Romaine in the bond and mortgage in question, and in the deposits made by him in the savings banks, or where the property of a nonresident is habitually kept, even for safety, in this State, we think that the Statute applies both in letter and spirit. Such property is within this State in every reasonable sense, receives the protection of its laws, and has every advantage from government, for the support of which taxes are laid, that it would have if it belonged to a resident. We think that a fair construction of the Act permits no distinction as to such property, based simply upon the residence of the deceased owner. We have nothing to do with the policy of the Statute, as our duty is discharged when we declare its meaning, and apply it to the case in hand. That duty we discharge in this instance by adjudging that succession to the personal property in question, lately belonging to Worthington Romaine, a nonresident intestate, but invested or habitually kept by him in this State, is taxable under the Collateral Inheritance Act, in so far as it passed to persons not excepted from its provisions.

*The orders should be affirmed, with costs.*

**Haight, J.**, dissenting:

The question is as to whether the next of kin of a nonresident decedent intestate are liable to pay a collateral inheritance tax on the personal property of such decedent found within this State. The Statute provides that "after the passage of this Act all property which shall pass by will or by the Intestate Laws of this State from any person who may die seized or possessed of the same while a resident of this State, or, if such decedent was not a resident of this State at the time of death, which property, or any part thereof, shall be within this State, . . . shall be and is subject to a tax of \$5 on every hundred dollars of the clear market value of such property," etc. Chapter 713, Laws 1887. The taxes imposed by this Act are special, and not general; and the rule is that special tax laws are to be strictly construed against the government and favorably to the taxpayer; that a citizen cannot be subjected to



special burdens without clear warrant of law. *Re McPherson*, 104 N. Y. 306-317, 6 Cent. Rep. 781; *Dos P. Col. Inheritance Taxes*, 41.

In *Re Enston's Will*, 118 N. Y. 174-177, 8 L. R. A. 464, *Andrews, J.*, in delivering the opinion of the court, says: "The tax imposed by this Act is not a common burden upon all the property or upon the people within the State. It is not a general, but a special, tax, reaching only to special cases, and affecting only a special class of persons. . . . In such a case they [the executors] have the right, both in reason and in justice, to claim that they shall be clearly brought within the terms of the law before they shall be subjected to its burdens. It is a well-established rule that a citizen cannot be subjected to special burdens without clear warrant of law." With this rule in view, operating as our guide, let us review the Statute: "All property which shall pass by will or by the Intestate Laws of this State from any person who may die seised or possessed of the same while a resident of this State." Here we have clearly expressed the legislative intent to subject to the tax both real and personal property of a resident which shall pass by will or by the Intestate Laws of this State. The condition upon which the tax may be imposed is that the property shall pass by will or by the Intestate Laws of the State. "Or, if such decedent was not a resident of this State at the time of death, which property, or any part thereof, shall be within this State." As we have seen, the former clause of the Statute quoted refers to the residents of the State, and the latter clause to nonresidents. The two clauses are connected by the word "or." But we do not understand that by the use of this word it was intended to provide for the taxing of other property than that mentioned in the former clause, but only to provide for the taxing of such property of a nonresident decedent which shall be within this State at the time of his death; and this intention is made apparent from the use in the latter clause of the words "which property," thereby referring to the property which should pass by will or the Intestate Laws of this State. If we are correct in this interpretation of the Statute, it follows that the tax in question was improperly imposed, for the reason that the property of the decedent found in this State was personal; and, the *situs* being with the owner, it would not pass by the Intestate Laws of this State. *Redf. Surr.* 2d ed. 588. Chapter 483 of the Laws of 1885 was amended by the Act in

question by the insertion of the words, "if such decedent was not a resident of this State at the time of death." Under the former Act it was held that the tax could be imposed only upon property so passing by will or by the Intestate Laws of this State, etc. *Re Enston's Will*, *supra*. It is not contended that it was the intention in amending the former Act to bring in nonresident decedents, and subject their estates to the same burdens as residents. This was doubtless the intention as to the real estate, but as to the personal estate we cannot assume that it was the intention to impose a greater or heavier burden upon nonresidents than that which was imposed upon residents. Under the Act of 1885 the tax could not be imposed upon the real estate within this State of a nonresident. Such real estate is subject to the jurisdiction of our State, and would pass under its laws; and under the amended provision of the Act of 1887 it would clearly be assessable here, and could not be elsewhere. But it is quite different with the personal property of a nonresident. As we have already stated, the *situs* of such property is with the owner, and upon his death it is distributed according to the law of his domicile, and does not pass under our Intestate Laws. *Redf. Surr. supra*. In many of the States similar laws to the one in question have been enacted. So that, if the personal property of a nonresident decedent should be assessed in this State, and the tax imposed upon the next of kin, it would subject them to the payment of a double tax, for after the transmission of the property to the State of the domicile it would pass under the laws of that State, and they would be liable to the payment of a similar tax in that State. And the same would be true of a decedent in this State who should die having personal property in another State. After being taxed in that State, and the property transmitted to this State, it would pass under our laws, and would consequently, under the provisions of the Act, be clearly liable to the assessment of a collateral inheritance tax. Again referring to the Statute, all property which shall pass by will or the Intestate Laws of this State shall be subject to the tax. In determining the question whether the property is subject to the tax the test is, Does it pass in the manner provided by the Statute? As we have seen, the property in question does not pass by will, or under any of the laws of our State. The order should be reversed, and the proceedings dismissed.

#### NORTH CAROLINA SUPREME COURT.

J. W. BURBAGE and Wife

v.

Samuel WINDLEY *et al.*, Exrs., etc., of  
R. C. Windley, Deceased, *Appts.*

(....N. C....)

**A promise in consideration of permission to insure the life of a person to pay**

his wife a sum of money after his death is on a void consideration where the promisor has no insurable interest in the life on which the insurance is taken, and therefore cannot be enforced.

(February 16, 1891.)

**A** PPEAL by defendants from a judgment of the Superior Court for Beaufort County in

NOTE.—Insurance; wager policy void.

A policy taken upon the life of another for speculative purposes is regarded as nothing more than a wager. *Amick v. Butler*, 9 West. Rep. 843, '11 12 L. R. A.

*Ind.* 578. See *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; *Brookway v. Mutual Ben. L. Ins. Co.* 9 Fed. Rep. 249; *Bliss, L. Ins.* § 9.

The insurable interest must be of a substantial

favor of plaintiffs in an action brought to recover money alleged to be due the wife under a contract. *Action dismissed.*

**Statement by Merrimon, Ch. J.:**

The complaint alleges, in substance, that in the year 1888, R. C. Windley, now deceased, the testator of the defendants, at different times specified, applied to three several insurance companies, and obtained from each of them an insurance policy, granted and made payable to him and for his own benefit, whereby each, for the consideration specified therein, insured the life of John W. Hammond, "on the ordinary life plan," for the sum of money in each specified, the three policies aggregating the sum of \$10,000. It is not alleged, nor does it at all appear, that the said testator had any insurable or any interest in the life of the said Hammond. It is alleged: "Third. That the consideration, and the only consideration, which induced and moved the said John W. Hammond to permit Mr. Windley to have his life insured, was that the said Windley contracted and agreed with the said John W. Hammond and his wife, Sarah E. Hammond, that out of the moneys which the said Windley would collect on these policies and certificates of insurance upon the life of the said Hammond, after his (the said Hammond's) death, he (Windley) would pay to Sarah E. Hammond (now Burbage) the sum of five hundred (\$500) dollars." The said Hammond died on the 15th day of January, 1884, leaving surviving him his said wife, who afterwards, on the 6th day of February, 1884, intermarried with her co-plaintiff. The said insurance companies afterwards, in the month of April, 1884, "took up the policies and certificates of insurance" from the said testator. The plaintiffs made demand of the said testator in his lifetime that he pay to the *feme* plaintiff, who was widow of the said Hammond, the said sum of \$500, which he refused to do. The said R. C. Windley afterwards, on the 15th of December, 1886, died, leaving a last will and testament, which was proven, and the defendants qualified as executors thereof. The plaintiffs bring this action to recover the said sum of \$500. The defendants, in their answer, deny the material allegations of the complaint; allege that said contracts of insurance were without consideration and void, as wagering contracts, and against the policy of the law; and pleaded the Statute of Limitation. On the trial there were

several exceptions of the defendants to evidence received; others to instructions given to the jury; and others upon the ground that the court refused to give certain instructions specially asked for by them. It is not necessary to report these, as this court disposed of the case on another and a different, distinct ground. In this court the defendants moved to dismiss the action upon the ground that the complaint fails to state facts sufficient to constitute a cause of action.

*Messrs. W. J. Rodman, Jr., and John H. Small*, for appellants:

No consideration is alleged for Windley's promise. It is required that every promise, not under seal, must be based upon a sufficient consideration.

This consideration forming a material part of the contract must be set forth in the declaration, or else it is bad as not setting forth a cause of action.

*Burnet v. Biaco*, 4 Johns. 285; *Symmons v. Knor*, 3 T. R. 87; *Pittman v. Pittman*, 11 L. R. A. 456, 107 N. C. 159.

The consideration necessary to support a promise must be a valuable one, and while the courts will not inquire into the sufficiency of the consideration, yet it must be something of value.

*Haslam v. Sherwood*, 10 Bing. 540; *Solly v. Hinde*, 6 Car. & P. 816.

The consideration must also be one which is not immoral or unlawful, for an unlawful consideration will not support a contract.

This consideration must flow from the plaintiff to the defendant, or from someone at the instance of plaintiff.

*Morehead v. Whiston*, 78 N. C. 398; *Peacock v. Williams*, 98 N. C. 824.

If the consent of Hammond was, in law, any consideration, then it amounted to an agreement on Hammond's part to permit Windley to do an act which is *contra bonos mores* (that is, to take a wagering policy on Hammond's life), and the consideration being an agreement to do, or permit to be done, an unlawful act, fails, and the agreement is *nudum pactum*.

*Covington v. Threadgill*, 88 N. C. 186.

The complaint upon its face shows that the policy of insurance, as between Windley and the company, was a wagering one. This being true, a contract between Windley and Hammond, that Windley should take out such a policy on the life of Hammond and divide the

character, and such as, under all the circumstances, to take from the transaction all suspicion of wagering. *Amick v. Butler*, *supra*; *Connecticut Mut. L. Ins. Co. v. Luoba*, 108 U. S. 498, 27 L. ed. 800; *Corson's App.* 4 Cent. Rep. 307, 113 Pa. 438.

Where a third party, without any insurable interest in the life of another, procures a policy of insurance on the life of such person, either by having a policy issued directly to himself, or by having the person whose life is insured take out a policy to himself and then assign it, the transaction is a mere speculation on the life of another, and, as such, contrary to public policy and void. *Lamont v. Grand Lodge Iowa L. of H.* 81 Fed. Rep. 180; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 824. See *Seigrist v. Schmaltz*, 5 Cent. Rep. 230, 113 Pa. 336; *Downey v. Hoffer*, 16 W. N. C. 185.

13 L. R. A.

A life insurance policy for \$3,000 as security for a \$100 debt is a wager. *Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601; *Gilbert v. Moose*, 104 Pa. 74; *Corson's App.* *supra*; *Grant v. Kline*, 7 Cent. Rep. 628, 115 Pa. 618.

The essential point is that the transaction be bona fide, and not a device to evade the law. *Amick v. Butler*, 9 West. Rep. 843, 111 Ind. 573, citing *Provident L. Ins. & Inv. Co. v. Bacon*, 29 Ind. 236; *Olmsted v. Keyes*, 85 N. Y. 568; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 281; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Murphy v. Red*, 64 Miss. 614; *Cunningham v. Smith*, 70 Pa. 450. See *notes* to *Equitable L. Assur. Soc. v. Haslewood* (Tex.) 7 L. R. A. 219; *Roller v. Beam* (Va.) 6 L. R. A. 137.

proceeds with Hammond's wife, would also be void.

*Sharp v. Farmer*, 4 Dev. & B. L. 123; *Blythe v. Lovinggood*, 2 Ired. L. 20; *Duke v. Adee*, 11 Ired. L. 112; *Ingram v. Ingram*, 4 Jones, L. 188; *York v. Merritt*, 80 N. C. 285; *King v. Winants*, 71 N. C. 469.

*Messrs. Simmons & Whitaker* for appellees.

**Merrimon, C. J.**, delivered the opinion of the court:

In this and like actions, where the contract or promise sued upon is by parol, a sufficient consideration should be alleged in the complaint to support the contract or promise. This is essential, because otherwise no cause of action is alleged or appears in the pleadings. In some cases, such as where the cause of action is a bill of exchange or a promissory note and some other legal liabilities, the mere statement of the liability which constitutes the consideration is sufficient. In these cases the nature of the liability itself sued upon implies the consideration; but, in all other cases of simple contract, it is necessary that the complaint should disclose a sufficient, valuable consideration, whatever that may be. Moreover, the consideration alleged must be lawful, and not in its nature, because of some tainting or vitiating quality in it, void. *Moore v. Hobbs*, 79 N. C. 585; *Burnet v. Bisco*, 4 Johns. 235; 1 Chitty, Pl. 294. There are cases where a cause of action is imperfectly alleged in the complaint. This pleading may be helped by admissions in the answer, but this is not one of them. Indeed, there is no admission in the answer that, in any view of the allegations of the complaint, would help them at all. Hence it appears from the complaint itself—the allegations of the supposed cause of action—that the only consideration alleged or relied upon is, as we shall presently see, unlawful and void as such. In other words, it appears from the complaint that there is no consideration to support the promise to pay the sum of money for which the plaintiffs demand judgment. The complaint itself discloses the material facts that R. C. Windley, the testator of the defendants, in his lifetime, procured three policies of insurance, each purporting to insure the life of John W. Hammond, the former husband of the *feme* plaintiff, for a sum of money specified therein, the three sums aggregating \$10,000; Windley, in consideration of permission given him by Hammond to so insure the latter's life, agreeing to pay, of the money he might realize from such insurance, \$500 to the *feme* plaintiff. It is not alleged that Windley had any insurable interest in the life of Hammond. On the contrary, it appears by implication, if this is not expressly alleged, that he had none. It is alleged "that the consideration, and the only consideration, which induced and moved the said John W. Hammond to permit Mr. Windley to have his life insured, was that the said Windley contracted and agreed with said John W. Hammond and his wife, Sarah E. Hammond, that out of the moneys which the said Windley would collect on these policies and certificates of insurance upon the life of the said Hammond, after his (the said Hammond's) death, he (Windley) would pay to Sarah E. 12 L. R. A.

Hammond, (now Burbage), the sum of five hundred (\$500) dollars." It thus clearly appears that the purpose of Windley, with the knowledge, consent and co-operation of Hammond, was to insure the latter's life, in which he had no insurable interest, for his own benefit. He simply promised to pay the *feme* plaintiff, of the money he might realize after the death of her husband, \$500, expecting to realize \$9,500 for himself, less such premiums on the insurance as he might pay. As the assured had no insurable interest in the life of the *cestui que vie*, the contract of insurance was simply a wager; it was not founded upon any just or lawful consideration; it was a mere gambling speculation. The assured was not to be indemnified against loss, injury or disadvantage in any respect growing out of the life he insured; the insurance was not intended to serve any legitimate business purpose or end; it was purely a matter of speculation, founded upon nothing but hazard. Such contracts and speculations are wholly unnecessary. They cannot serve or promote any useful and wholesome purposes of individuals, society or government. They do not stimulate, promote or encourage industry, enterprise, legitimate business, sound morality or increase the wealth of the people, or the strength and power of the State. On the contrary, their nature and uniform experience go to show that they represent nothing substantial or valuable, or of practical advantage to persons or communities. They strongly tend to demoralize society, and embarrass industries and general business. In their very nature, they stimulate, afford incentives to and encourage those who become parties to them, to resort to sinister, oftentimes criminal, means to turn or end the hazard in their favor, and thus gain unjust and dishonest advantage. They encourage men to engage in the business of speculation in hazards, not necessary or useful in the general purposes and businesses of life, but which is positively and seriously injurious to them. Such contracts and speculations contravene the justice and policy of the law,—they are *contra bonos mores*, and are therefore void. While there is no decision of this court directly in point here, it is well settled, by a multitude of uniform decisions, that all contracts against the policy of the law, and such as contravene sound morality, are on such account void. We cite a few of many cases: *Sharp v. Farmer*, 4 Dev. & B. L. 123; *Blythe v. Lovinggood*, 2 Ired. L. 20; *Ingram v. Ingram*, 4 Jones, L. 188; *King v. Winants*, 71 N. C. 469; *Williams v. Carr*, 80 N. C. 295; *Grieffin v. Hasty*, 94 N. C. 488.

In *Shepherd v. Sawyer*, 2 Murph. 26, the court held that when "A agreed with B, for 2½ per cent premium paid down, to insure a negro slave reported to be lost in Pasquotank River, B had no interest in the negro; yet, his loss being proved, B is entitled to recover his value." This decision is placed upon the ground that it was an "innocent wager," and that such wagers were sanctioned by the common law. The opinion of the court is very brief, and no authority is cited to show that it was "innocent," nor is any reason stated why it was such a wager. If the court intended that the case should have general application to wagers in insurance, embracing cases like the present one,

we cannot hesitate to say, in the absence of reasons stated in support of it, that, in our judgment, it is not sustained by the greater weight of reason, or the greater weight of authority certainly at the present day. *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; *Lord v. Dall*, 12 Mass. 115; *Franklin L. Ins. Co. v. Hazard*, 41 Ind. 116; *Cammack v. Lewis*, 82 U. S. 15 Wall. 648, 21 L. ed. 244; *Atina L. Ins. Co. v. France*, 94 U. S. 561, 24 L. ed. 287; *Warlock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Bliss*, Ins. § 9.

The consideration of the contract or promise sued upon here, as expressly alleged, was the permission granted to the testator of the defendant by the former husband of the *feme* plaintiff, Hammond, to insure the latter's life. If such permission, in any case or connection, could be a valuable privilege or advantage, in this case it was granted with the view and for the purpose of enabling and helping Windley to make an unlawful contract—a wager—on the life of Hammond. Thus the latter became connected with and intended to share in the wagering transaction. The promise to pay \$500 to the *feme* plaintiff was expressly based upon and grew out of it; it was, as to Hammond and his wife, part of it. It partook of the wager,—the vicious nature of the contract of insurance. Such consideration was therefore void. Hence the promise founded upon it was without legal sanction, and of no binding effect, in contemplation of law. *Ex terpi causa non oritur actio*. *Duke v. Asbee*, 11 Ired. L. 112; *Bettis v. Reynolds*, 12 Ired. L. 844; *Covington v. Threadgill*, 88 N. C. 186; *Griffin v. Hasty*, 94 N. C. 438.

If, in good faith, the purpose had been to insure the life of Hammond for the benefit of his wife, the case, as to her, might be very different. But, as we have seen, this was not the purpose, or any part of it. The insurance was for the benefit of Windley; the policies were granted to and made payable to him; he promised to pay the small sum mentioned to the *feme* plaintiff for permission to insure the life.

As therefore it appears from the complaint that no cause of action is alleged, *the motion to dismiss the action must be allowed.*

STATE OF NORTH CAROLINA, *Appt.*,

*v.*  
NEIS.

(....N. C.....)

**One who furnishes drinks to members of a club as tenants in common, from intoxicating liquors which they have given him to hold for them on payment to him of the cost price, which he uses to replenish the stock, makes a sale of intoxicating liquors within the meaning of a statute requiring a license for such sales.**

(May 21, 1891.)

**APPEAL** by the State from a judgment of the Criminal Court for Buncombe County in favor of defendant, who was indicted for selling spirituous liquors without a license. *Reversed.*

Statement by **Clark, J.:**

Indictment for retailing spirituous liquors without license, tried before Moore, J., at January Term, 1891, of Buncombe Criminal Court. The jury returned a special verdict, the 19th paragraph of which is as follows: "That on April 26, 1890, the defendant, at the club house of the Cosmopolitan Club, in the City of Asheville, furnished and dealt out to the said W. E. Williamson, a small quantity, to wit, a drink, of spirituous liquor, so held by the defendant as aforesaid, the said drink being a quantity less than a quart, and being taken by said defendant from a demijohn in which some other members as aforesaid had an equal quantity of liquor with said Williamson; and at the same time and place received from said Williamson the sum of ten cents, in the legal currency of the United States, which sum was about the value of the quantity of said spirituous liquor so furnished as aforesaid; and that said defendant thereupon handed the said sum of money to the said E. J. Holmes, who afterwards expended it for the purchase of other spirituous liquors for the said Williamson, and turned the same over to the custody of the defendant for the replenishment of the stock of liquor of said Williamson." The other facts sufficiently appear in the opinion. Upon the special verdict the court held that the defendant was not guilty, and ordered his discharge. Appeal by the State.

**Mr. J. B. Batchelor** for appellant.  
**Mr. F. H. Busbee** for appellee.

**Clark, J.**, delivered the opinion of the court:

The transaction presented by the special verdict, stripped of surplusage, is this: The defendant was steward of the Cosmopolitan Club of Asheville, and was indicted for selling spirituous liquor to its members. In consequence of the decision in the analogous case of *State v. Lockyear*, 95 N. C. 633 (the state of facts being the same), he pleaded guilty. The club thereupon distributed a part of the liquors on

**NOTE.**—*Intoxicating liquors; social club; late cases.* Maryland.

The violation by an incorporated social club of a law forbidding the sale of intoxicating liquors is such an abuse and misuse of its charter powers and franchises as to furnish legal cause for the annulment of its charter. *State v. Easton Social L. & M. Club*, 10 L. R. A. 64, 76 Md. 97.

Massachusetts.

A room used by an incorporated club to procure for and dispense to its members intoxicating liquor 12 L. R. A.

is a common nuisance, under Mass. Stat. 1887, chap. 206. *Com. v. Baker* (Mass.) Oct. 4, 1890.

To convict under an indictment for maintaining such a nuisance, it is not necessary to show that the sole purpose of the club was to sell and distribute liquors to its members or others, it being sufficient if that was one of the purposes for which it was kept. *Com. v. Jacobs* (Mass.) Oct. 23, 1890.

Montana.

A social club is not subject to a license tax, by reason of keeping a bar and furnishing liquors to

hand to certain of its members, who placed them in the hands of the defendant to be held by him not for the club as a club, but for those individual members of the club as tenants in common, the shares of each not being kept separate, but mingled in the same casks, jars and demijohns. From time to time, as each of those members wished, he obtained drinks from the defendant for himself and friends, paying therefor (in money, or giving tickets afterwards redeemed in money), as near as may be, the cost price of the drinks so furnished, and with the money the defendant from time to time replenished the stock of liquors. We can see in this transaction no substantial distinction from the facts of *Lockyear's Case*. There the steward of the club, as a club, received the money for drinks furnished at cost, and with the money replenished the stock of liquors. Here the individuals of the club, treating themselves as unorganized, furnished through defendant to themselves, from a common stock, the drinks at cost, and with the money received therefor replenished the common stock. When in the present case an individual received drinks for himself and friends, he clearly did not receive the identical liquor which belonged to himself, but he received liquor which belonged mostly to others, and in which he had a minute undivided interest. For his money he received in exchange liquor which belonged to several others, as well as to himself, and converted it to his sole and separate use. Before the transaction the money was solely his, and the liquor belonged to several. By virtue of the transaction, and in exchange for the money, the liquor became his sole and separate property. This is surely a sale. It has every element of a sale. It cannot affect the transaction that subsequently the defendant would purchase the same amount of liquor in value for the party paying the money, and mingle it in the common stock. This last act is that of a member of an association keeping up his quota of contribution to the common stock; the other is the purchase by a member of an association from its common agent, and the character and purport of the act are not changed by the subsequent contribution. It could make no difference that here the defendant was the agent of the individual members of the club, acting as an unorganized body, and that in *Lockyear's Case* the salesman was agent of individuals acting as an organized club. If an agent is appointed by several tenants in common to dispose of real or personal property, and he does dispose of any part thereof in exchange for money, it is none the less a sale because the party paying the money and receiving such part to his own use hap-

pens to be one of the tenants in common. And it would still be a sale although afterwards the money so received should be invested in the purchase of similar property held by the same tenant in common. The dealing here is simply what is known as "co-operation," which is an arrangement by which a member of an association procures supplies from the association at cost. The object and the effect of co-operation are not to abolish purchases, for the member still buys from the association, but to procure supplies at cost. This transaction is necessarily either a partition in severalty to the tenant in common or a purchase. It is clearly not a partition to each tenant in common in severalty of his undivided portion in the common stock, and it is plain that such are not the purpose and intent of the parties, for money is received in exchange, and it is to be used to obtain more liquor. Besides, the person obtaining the liquor not only does not obtain the identical liquor belonging to him, but he could very rarely, if ever, obtain his exact aliquot part, unless the stock became very low. The fact specially found that the membership of the club is "composed of gentlemen of the highest social standing" does not throw any light upon the transaction, except that it may be reasonably supposed that they have no desire to evade the law, and by this proceeding wish merely to procure a construction as to the legal nature of this transaction. No set of men have any special privileges under our Constitution, and the parties interested must pay a license tax if other citizens pay it, and be prohibited altogether when others are prohibited. Nor can it make any difference that no profit was intended to be realized, but that as near as possible the drinks are to be furnished at cost. Profit is not a necessary ingredient of a sale. Indeed, many sales are made at a loss. Besides, if the defendant's contention was sound, "co-operative bar-rooms" would spring up on all sides, and the Revenue Act as to the sale of liquor, or the Prohibition Laws, where they prevail, would be a nullity. If the gentlemen composing the Cosmopolitan Club of Asheville can be exempted from the license tax by the simple device of treating themselves as unorganized tenants in common of a stock of spirituous liquors, and employing an agent to furnish drinks to any of their club and their friends, by selling at cost, the same can be done by any 500 or 5,000 patrons of a bar-room. The "dealer" would simply become an "agent," and, in lieu of profits, would receive as compensation for his services a commission on purchases or some amount out of receipts, and the money received for drinks would be invested as usual, and, as in the pres-

its members and visitors, where they are not sold at a profit and the club is not a device for evading the laws as to the sale of intoxicating liquors. *Barden v. Montana Club* (Mont.) 11 L. R. A. 598.

#### New York.

That defendant in a prosecution for selling intoxicating liquors was selling them for a social club to whom they belonged is no defense, where the club is a scheme to evade the laws prohibiting the sale of liquor. *People v. Sinell*, 34 N. Y. S. R. 898.

#### Virginia.

A social club is not guilty of selling or offering 12 L. R. A.

for sale intoxicating liquor without a license, where none but members or invited guests are entitled to club privileges, no one not a member being permitted to pay for food, drink or refreshments dispensed by the club, the moneys received for liquors going into the general fund, and no profit being made thereon. *Piedmont Club v. Com.* (Va.) 15 Va. L. J. 226.

Social club; evasion of Liquor Laws. See notes to *People v. Andrews* (N. Y.) 6 L. R. A. 128; *State v. Horacek* (Kan.) 3 L. R. A. 687; *People v. Soule* (Mich.) 2 L. R. A. 494.

ent case, to buy more liquor for the customer and his friends. Such an arrangement may be ingenious, but none the less a license tax is requisite to make it legal to furnish drinks in that mode. The case of *State v. Lockyear* has been often cited with approval in the courts of other States. *State v. Easton Social L. & M. Club*, 78 Md. 97, 10 L. R. A. 64, and other cases. These authorities, together with those

cited in *Lockyear's Case* itself, render further citations unnecessary.

Upon the facts found in the special verdict the defendant should be adjudged guilty. The case must be remanded, with directions that the judgment be so entered, and that sentence may be imposed in conformity with law. *Error.*

## RHODE ISLAND SUPREME COURT.

Herbert ALMY, Admr. *c. t. a.* of Albert J. Jones, Deceased,  
v.  
Anna G. JONES *et al.*

(....R. I....)

1. A bequest for an "art institute" is not void for indefiniteness, especially when a codicil refers to its distribution in prizes for works "of the fine arts."
2. The phrase "worthy of the city," in a will giving a fund for an art institute when citizens have contributed funds necessary to found one worthy of the city, does not make the gift void for indefiniteness.
3. A bequest is not void for remoteness where it gives a fund for an art institute, to take effect when the necessary funds to found one are contributed, and in the meanwhile directs the income to be distributed annually in prizes for the best works of art by artists belonging to or residing in the State.
4. A bequest is a lawful charity in every respect where it is given for an art institute when

established and the income is to be given in the meantime in annual prizes for works of art.

5. A gift of the residue of testator's property to children of a sister and of a deceased brother, to be equally divided, limited by a codicil "to the children of the first generation" gives nothing to the children of a nephew, who died before the will was made, under Pub. Stat., chap. 183, § 14, giving the share of a deceased devisee or legatee to his decedents.

(February 24, 1891.)

**B**ILL in equity for a construction of the will of Albert J. Jones, deceased, and instructions as to carrying out its provisions.

The facts sufficiently appear in the opinion.

Mr. Joseph C. Ely for complainant.

Mr. Clarence A. Aldrich, *Asst. Atty-Gen.*, for the State.

Mr. Amasa M. Eaton, for Eliza A., Mary K., John J. and George W. Hall, respondents.

If a gift in trust for charity is conditional upon a future and uncertain event, which may be so remote and indefinite as to transgress the

### NOTE.—Charitable uses and trusts.

A trust to be upheld must be of such a nature that the *cestui que trust* are defined and capable of enforcing its execution by proceedings in a court of chancery. *Dashiell v. Atty-Gen.*, 5 Harr. & J. 382; *Isaac v. Emory*, 4 Cent. Rep. 168, 64 Md. 383; *Wilderman v. Baltimore*, 8 Md. 556; *Needles v. Martin*, 38 Md. 600; *Church Extension of M. E. Church v. Smith*, 56 Md. 362, 367; *Maught v. Getzendanner*, 3 Cent. Rep. 364, 65 Md. 627.

So where a residuary clause in a will stated as follows: "I give and bequeath and devise unto the Reverend H. G. Bowers, of Jefferson, Maryland, all the rest and residue of my estate, and desire him to use and appropriate the same for such religious and charitable purposes and objects, and in such sums and in such manner as will, in his judgment, best promote the cause of Christ," such a trust is void, because it is too vague and indefinite to be carried into effect. *Maught v. Getzendanner*, *supra*.

### Trust for benevolent purposes.

A trust for benevolent purposes cannot be sustained unless the object of the trust is defined with clearness and precision, and a competent trustee is named to receive the title and execute the trust. *Dodge v. Pond*, 23 N. Y. 99. Also *Re Mahan*, 38 Hun, 73; *Beekman v. Bonsor*, 28 N. Y. 296.

A devise for the establishment of a benevolent institution, leaving it to the Legislature to provide the working plan if it grants a charter, is void for indefiniteness of the trust. *People v. Simonson*, 28 N. Y. S. R. 97, citing *Holland v. Alcock*, 11 Cent. Rep. 861, 108 N. Y. 312; *Cruikshank v. Home of the Friendless*, 4 L. R. A. 140, 118 N. Y. 337.

12 L. R. A.

It is the settled doctrine in England, and in many of the American States, that property, except when prohibited by statute, may be bequeathed or conveyed in trust for charitable uses and purposes, for the benefit of uncertain classes such as "the poor," "the children," etc.; and if the purposes are charitable, within the meaning given to that term, the trust falls within the jurisdiction of equity, and will be enforced. 1 Pom. Eq. Jur. 136; *Morice v. Dunham*, 9 Ves. Jr. 399, 405, 10 Ves. Jr. 522, 541; *Mitford v. Reynolds*, 1 Phill. Ch. 186; *Nash v. Morley*, 5 Beav. 177; *Kendall v. Granger*, 5 Beav. 300; *Townsend v. Carus*, 3 Hare, 257; *Nightingale v. Goulburn*, 5 Hare, 484; *Atty-Gen. v. Aspinwall*, 2 Myl. & C. 613, 622, 623; *British Museum v. White*, 2 Sim. & Stu. 594, 596; *Saltounstall v. Sanders*, 11 Allen, 446; *American Academy of A. & S. v. Harvard College*, 12 Gray, 583; *Jackson v. Phillips*, 14 Allen, 539; *Coggeshall v. Pelton*, 7 Johns. Ch. 202, 2 L. ed. 207.

A trust by will of a residuum, "to be disposed of by him for such charitable purposes as he shall think proper," was held valid. *Minot v. Baker*, 6 New Eng. Rep. 688, 147 Mass. 343.

"For such charitable institution for women in the City of Chicago, as he may select," was held valid. *Mills v. Newberry*, 112 Ill. 123, 54 Am. Rep. 218.

"The residue of my estate to be kept in reserve for further consideration in the way of charitable purposes, in a liberal way, not to any particular creed or sect of religion," was held valid. *Norcross v. Murphy*, 44 N. J. Eq. 522.

The testator's intention was to give the residue to the executors in trust for such charitable purposes as they may think proper. *Claypool v. Norcross*, 7 Cent. Rep. 917, 42 N. J. Eq. 542.

limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*.

*Chamberlayne v. Brockett*, L. R. 8 Ch. 206.

If the attempted charity be of a general, indefinite nature, or not within the scope of the Statute of Elizabeth, it will be treated as utterly void, and the property will go to the administrator or heirs, according to its nature.

2 Story, Eq. Jur. §§ 1155-1188; 2 Walt, Act. and Def. 149; *Morice v. Durham*, 9 Ves. Jr. 399, 406, affirmed, 10 Ves. Jr. 523; *Sanderson v. White*, 18 Pick. 328, 333; *Atty-Gen. v. Boule*, 28 Mich. 153. See *Perin v. Carey*, 65 U. S. 24 How. 465, 494, 16 L. ed. 701, 707; *Burr v. Smith*, 7 Vt. 241, 295; Duke, Charitable Uses, 122, 128.

*Messrs. Arnold Green, John C. Pegram, George Lewis Cooke and William C. Baker* for the other respondents.

*Durfee, Ch. J.*, delivered the opinion of the court:

This bill is brought by the administrator with will annexed of the will of the late Albert J. Jones for instruction in regard to the execution of the will in points involving its construction. The will bears date May 24, A. D. 1886. The first clause is as follows: "I give and bequeath the sum of twenty-five thousand (\$25,000) dollars as a fund for an art institute in the City of Providence. When the citizens of Providence shall have contributed the funds necessary to found an institute worthy of the city for the promotion of art, then this sum, with accumulated interest, shall be permanently invested, to be called the 'Albert Jones Art Fund,' the annual interest only to be used for the benefit of the institute for all time." The testator added a codicil to the will dated April 25, A. D. 1887. The first clause

of the codicil is as follows: "I wish the income of the fund of twenty-five thousand dollars given for the encouragement of art to become at once available after my death by its distribution in annual prizes for the best works produced during the year, in whatever department of the fine arts, by artists belonging to or residing in the State of Rhode Island."

The first question is whether these clauses are valid. It is contended that the bequest in the first clause is void for indefiniteness, it being uncertain what is meant by an "art institute," owing to the indeterminateness of the word "art," and still more uncertain what is meant by an institute for the promotion of art "worthy of the City" of Providence. It is true the word "art" is sometimes used very broadly, as, for instance, when it is used in contradistinction to nature or in the phrase "the arts of war and peace." But it is also used, especially when used without any qualifying adjective or phrase, to signify art in its higher manifestations, or art par excellence, as represented in works of art by those who are distinctively denominated "artists." In this sense the word is used to designate the groups of arts known as the "fine arts," as distinguished from the useful or mechanical and industrial arts. We think the word has this more distinctive meaning in the first clause of the will. The language of the codicil confirms this interpretation. The testator there, describing the \$25,000 bequeathed in the first clause as "a fund given for the encouragement of art," declares that he wishes the income "to become at once available," evidently meaning that he wishes it to become available for the purpose for which the fund was given, namely, "the encouragement of art," and to that end directs its distribution in

"Among such Roman Catholic charities, institutions, schools or churches in the City of New York," as a majority of the trustees should select, and in such sums as they should think proper, was held a valid bequest. *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 560.

#### *Bequests held void as to uncertainty.*

The following bequests were held void for uncertainty: A bequest to a law library which has no corporate existence, but which was established and maintained by fines, etc., to be paid to a committee appointed by the court, is a bequest to a mere inanimate thing having no capacity to receive a gift. *Craig v. Lilly (Pa.)* 7 Cent. Rep. 669.

To "distribute to such persons, societies or institutions as they shall consider most deserving," was held void. *Nichols v. Allen*, 180 Mass. 211.

"Among such incorporated societies organized under the Laws of the State of New York or the State of Maryland, having full authority to receive or hold funds upon permanent trusts for charitable or educational uses," as the trustees might select, and in such sums as they should determine, was held void. *Prichard v. Thompson*, 95 N. Y. 78.

A testator bequeathed a portion of his estate "to the poor of the City of Green Bay." There were no city paupers nor a poor fund in the City of Green Bay at the time of the testator's death. This was held void for uncertainty. *Re Hoffman's Estate*, 70 Wis. 522.

Also for testator's "next of kin who may be needy." *Fontaine v. Thompson*, 80 Va. 229.

So, too, "for any and all benevolent purposes" 12 L. R. A.

that he (the trustee) may see fit." *Adye v. Smith*, 44 Conn. 60.

Where a bequest to charitable purposes in the discretion of the two daughters and granddaughter of the testator is vague and indefinite and therefore void, the fund falls into and constitutes a part of the general residue of the estate. *Dulany v. Middleton*, 72 Md. 67.

A bequest in trust of a "sum of money sufficient to carry out [testator's] intention . . . to provide for the education of two young men," where the trustees have accepted the trust, and the young men have been appointed, and the expense of keeping them is approximately known, is not void for indefiniteness. *Field v. Drew Theological Sem.* 41 Fed. Rep. 371.

A clause in the will which seeks to establish a trust in two thirds of the residue of testator's estate, for the benefit of testator's children and their descendants "who may be destitute, and, in the opinion of said trustees, need such aid," is too remote in its contingency, and must be deemed to be invalid and without effect. *Kent v. Dunham*, 143 Mass. 216, citing *Nightingale v. Burrell*, 15 Pick. 104; *Brattle Square Church v. Grant*, 3 Gray, 142; *Sears v. Russell*, 8 Gray, 36; *Thorndike v. Loring*, 15 Gray, 391.

Charitable uses and trusts. See notes to *Finley v. Brent (Va.)* 11 L. R. A. 214; *George v. Braddock (N. J.)* 6 L. R. A. 511; *State v. Ladies of the Sacred Heart (Mo.)* 6 L. R. A. 38; *Bullard v. Chandler (Mass.)* 5 L. R. A. 105; *Stratton v. Physio-Medical Institute (Mass.)* 6 L. R. A. 33; *Cottman v. Grace (N. Y.)* 3 L. R. A. 145; *Fire Ins. Patrol v. Boyd (Pa.)* 1 L. R. A. 417.

annual prizes for the best works "of the fine arts" produced during the year by Rhode Island artists. We think there can be no doubt that what is meant by "an art institute" is an institution or establishment, resembling such as exist in Europe, for the promotion of the fine arts,—of the art whose aim is beauty rather than utility, though not necessarily to the exclusion of utility, when the two can be combined. The objection to the phrase "worthy of the city" is, in our opinion, specious, rather than sound. When a testator uses such a phrase, he knows, of course, that, as practically applied, it has different meanings for different minds, but he also knows that the meaning is capable of determination by the court, aided by proper testimony, with sufficient accuracy for the purposes of his bequest, in case it is found necessary to apply to the court for such determination. We do not think the bequest is void for indefiniteness.

The second contention is that the bequest is void for remoteness, because it may not go into final effect within the period allowed by the rule against perpetuities. A trust for charitable uses, which is to go into effect immediately, is not subject to the rule against perpetuities, because designed to be perpetual; but if it is not to go into effect until after the period allowed by said rule, it has been said that it fails *ab initio*. *Chamberlayne v. Brockett*, L. R. 8 Ch. 206. A trust for charitable uses may depend for its going into effect upon a condition to be performed by others which may or may not be performed within the period allowed. In such case the English courts do not at once disaffirm the trust, but allow a reasonable time for the condition to be performed, and, if the condition be performed within such time, sustain the trust; if it be not, and is not likely to be, they either disaffirm the trust or apply it *cy pres*, if the terms in which it is declared permit, to other charitable purposes. Tyssen, *Charitable Bequests*, 428–427, and cases there cited. *Sinnett v. Herbert*, L. R. 7 Ch. 232. The American cases are not stricter, certainly, than the English on this point. *Ingles v. Sailors' Snug Harbor*, 28 U. S. 3 Pet. 99, 7 L. ed. 617; *McDonogh v. Murdoch*, 56 U. S. 15 How. 367, 14 L. ed. 732; *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. ed. 450; *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397. In the last-named case, *Mr. Justice Gray*, citing the three cases next before mentioned, said, speaking for the Supreme Court of the United States, that they show that "a gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that may possibly not happen within a life or lives in being and twenty-one years, is valid, provided there is no gift of the property meanwhile to be for the benefit of any private corporation or person." See also *Missouri Historical Soc. v. Academy of Sciences*, 94 Mo. 459, 13 West. Rep. 206; *Sanderson v. White*, 18 Pick. 328, 336; *Odell v. Odell*, 10 Allen, 1.

Under these authorities, the bequest in the case at bar would not be instantly declared void, whatever eventually might become of it, 13 L. R. A.

even if it had remained as given in the will. It was modified by the codicil, and we must take it as modified. So taken, it is a bequest of \$25,000, to be held in trust as a permanent fund for an art institute in the City of Providence, whenever the funds necessary to establish such an institute worthy of the city shall have been contributed, the income or interest of the bequest meanwhile to be distributed by the trustees in prizes as directed; or, to put it in another way, it is a bequest of \$25,000 in trust for the trustees to use the income thereof for prizes as directed until the funds for an art institute in the City of Providence, worthy of the city, have been contributed, then to be invested as a permanent fund for the institute, the annual interest to be used for its benefit for all time. Such a bequest is not, in our opinion, invalid to any extent, if it may be regarded as a bequest for purely charitable uses. "When personal estate," said Lord Selborne in *Chamberlayne v. Brockett*, *supra*, "is once effectively given to charity, it is taken entirely out of the scope of the law of remoteness." Property so given may be limited over from one charity to another on any event happening at any time. *Society Prop. Gosp. in F. P. v. Atty-Gen.* 8 Russ. 142; *Christ's Hospital v. Grainger*, 16 Sim. 88, 1 Macn. & G. 460; *Re Conington's Will*, 8 Week. Rep. 444. In the first of these cases a testator in 1715 directed his executors as soon as two Protestant bishops should be duly appointed and consecrated, one for the islands and the other for the continent of North America, to pay £1,000 to the plaintiff society, to be applied equally to settling them in their sees, and meanwhile to invest the £1,000, and apply the income for the benefit of invalidated missionaries of the society. A decree in 1717 ordered the £1,000 to be invested, and the income to be applied as directed. In fact, a great part of the income was allowed to accumulate. The appointment of the bishops was completed in 1824, and then, at the suit of the plaintiff society, the whole sum was ordered to be paid to them. In the second case property was bequeathed in 1624 to the corporation of Reading on certain charitable trusts, with a proviso that, if the corporation should neglect for a whole year to perform them, the property should be transferred to the corporation of London for the benefit of Christ's Hospital. Two hundred years later, after the corporation of Reading had neglected for twenty years to perform the trusts, the property was allowed to go over to the second charity, on the ground that it was no more a perpetuity in one charity than in another. See also *Henshaw v. Atkinson*, 3 Madd. 306.

We do not think there can be any doubt that the bequest here, so far as given for the art institute, is a charity. *British Museum v. White*, 2 Sim. & Stu. 594; *Yates v. University College*, L. R. 8 Ch. 454, L. R. 7 H. L. 438; *Re Holburne (Coates v. Mackillop)*, 53 L. T. N. S. 212; *Oresson's App.* 80 Pa. 487. It is true the promotion of art is not specifically named as a charitable use in 43 Eliz., chap. 4; but that Statute is regarded by the courts as rather illustrative than exhaustive in its enumeration of such uses, and, when resorted to for light, is interpreted in a large way, according to its



spirit, rather than its letter. 2 Pom. Eq. Jur. § 1029; *Pell v. Mercer*, 14 R. I. 412, 444.

A nation's art is the flower of its civilization, and it is a matter of general interest that it should flourish and improve. To see and study some of the masterpieces of the fine arts, and learn to appreciate their excellences, is itself an education that refines and enriches the mind. It follows that money for an institution that affords opportunity for this, while it at the same time gives encouragement to artistic production, is a public benefit.

But it is argued that, even if the final bequest of the principal sum is charitable, the intermediate bequest of the income is not, since it has no tendency to advance education or learning, and only provides a premium for proficiency in the production of articles of luxury; that in fact its purpose is private rather than public, and consequently the entire bequest is invalidated by it. The argument does not convince us. The purpose of the prizes is not simply to give a little money every year to the successful artists, but also to arouse the ambition of Rhode Island artists everywhere, and incite their best endeavors. This would be much, if it were all. It is not all. The competing works must be brought together for judgment, and, in the careful comparison of work with work that will follow, the merits and the faults of each will come to light, instinctively, for all concerned. Further, when such works are gathered, they attract attention; people come to see and enjoy them; the competition among their authors provokes discussion and criticism; public sympathy is enlisted; public interest grows and spreads; and the minds of men more readily open for the reception of artistic truths and conceptions. Thus gradually an atmosphere is generated in which the fine arts can flourish; for it is a general law that a fine art must find favor in the popular heart before it can reach perfection in the productions of the artists. Then, too, the prizes are more than money. They bring honor and distinction and assurance of appreciation, vastly more precious to the artists than the prizes themselves. The efficiency of prizes, as an incentive to excellence, is generally recognized, and it is common knowledge that numerous trusts for the distribution of prizes or premiums exist, whose validity has never been questioned. There are cases in which such trusts for proper purposes have been sustained. *Thompson v. Thompson*, 1 Coll. 881; *American Academy of A. and S. v. Harvard College*, 12 Gray, 582.

Our conclusion is that the bequest here in

question is in every respect a lawful charity. The will of said Albert J. Jones has the following residuary clause: "The rest and residue of the property found standing in my name I bequeath to the children of my sister, Mrs. Emily A. Hall, and those of my deceased brother, John Davis Jones, to be equally divided among them." The codicil has the following: "The legacy to the children of my deceased brother John D. Jones, and my sister Emily A. Hall, is to the children of the first generation." At the date of the will Mrs. Hall had one child, a son, who still survives, and three grandchildren, children of a son previously deceased." John D. Jones had three children who survived the testator, and one grandchild, daughter of a son previously deceased. The grandchildren claim to be entitled to take under the residuary clause by virtue of Pub. Stat. R. I., chap. 182, § 14, as follows: "Whenever any child, grandchild or other person having a devise or bequest of real or personal estate shall die before the testator, leaving a lineal descendant, such descendant shall take the estate, real or personal, as devisee or legatee, in the same way and manner as such devisee or legatee would have done in case he had survived the testator." We do not think said provision is capable of a construction that will sustain the claim. It applies only where a person "having a devise or bequest" dies before the testator. The son of Mrs. Hall, who was the father of her said grandchildren, never had any devise or bequest under the will of Albert J. Jones, since he was dead, and so incapable of taking, by devise or bequest, before the will was made. For anything that appears, the testator knew that he was dead when he made the will, and consequently could not even have intended to bequeath him anything. The same may be said of the son of John D. Jones, the father of John D. Jones' said grandchild. The purpose of the Statute is obvious. At common law, where a legacy is given to a person who subsequently dies before the testator, it lapses; that is, it either falls into the residue, or, if it be residuary, becomes intestate. Under the Statute, instead of lapsing, it goes to the legatee's descendants, on the assumption that the testator would rather have it go to them than have it lapse. 4 Kent, Com. 541, note b.

Our conclusion is: first, that the legacy of \$25,000 is valid; and, second, that the three children of Mrs. Hall's deceased son, and the daughter of John D. Jones' deceased son, are not entitled to share in the residue.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

Hosea KINGMAN *et al.*, *Petitioners*.

(....Mass....)

1. The disposal of sewage from a number of cities and towns containing one sixth of the population of the State is a matter of general

public utility for which the Legislature can properly appropriate money from the state treasury.

2. Cities and towns are not exempted from the power of the Legislature to subject them to the burden of assessments for local improvements by the fact that

NOTE.—Sewage: authority of Legislature over subject.

The 14th Amendment of the United States Constitution L. R. A.

stitution is not designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace,

the improvements are of such general public utility that the Legislature might lawfully pay the expense thereof with money of the State.

3. The title to works of public improvement need not be given to cities or towns by the Legislature, in order to subject them to the expense of such works.
4. The Legislature can delegate to commissioners to be appointed by a court the power to determine the proportions of expense to be paid by different counties, towns or cities for a local improvement.
5. No rule need be laid down by the Legislature for the guidance of commissioners in making an apportionment among cities and towns subject to acceptance by a court of the expenses of a system of sewage disposal, other than to direct them to determine it as they shall deem just and equitable, where the State Constitution gives power to make "all manner of wholesome orders, laws, etc.," not repugnant thereto.
6. Benefit to property is not the only consideration to be regarded in apportioning among cities and towns the expense of a system of sewage disposal, but there are many elements to be considered, some of which are the exigencies or special need of such improvements, the area to be accommodated, the present or

probable population and wealth, the value of the land and its adaptability for homes and other uses.

(May 19, 1891.)

REPORT by the Supreme Judicial Court for Suffolk County (W. Allen, J.) for the opinion of the full court of a petition for the appointment of commissioners to determine the proportion in which the cities and towns affected by an Act providing for a system of sewage disposal for the Mystic and Charles River Valleys should contribute towards the expense of such system. *Decrees for petitioners.*

On June 7, 1889, an Act was passed for the purpose of providing means for the disposal of sewage from certain cities and towns. By the Act two systems were established, one called the North Metropolitan Sewerage System, and composed of the Cities of Boston, Cambridge, Somerville, Malden, Chelsea and Woburn, and the Towns of Stoneham, Melrose, Winchester, Arlington, Belmont, Medford, Everett and Winthrop, the other called the Charles River Valley System, and composed of the Cities of Boston, Waltham and Newton and the Towns of Watertown and Brookline.

Under this Act petitioners were duly appoint-

morals, education and good order of the people. *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923.

The general purposes of taxation are, first, the defense of the Commonwealth; second, the administration of justice; third, expense of public works and instructions, and fourth, the expense of supporting the dignity of the State. *Smith, Wealth of Nations*, 244.

The discretionary power of the Legislature in the distribution of public burdens has been for a long time recognised by this court. *Norwich v. Hampshire County Comrs.* 13 Pick. 60; *Atty-Gen. v. Cambridge*, 16 Gray, 247; *Salem Turnp. & C. B. Corp. v. Essex County*, 100 Mass. 232.

Without a public use or service especially declared in the statute providing for a public improvement, or implied from the nature of the object of the expenditure, taxation in any form cannot be justified. *Lowell v. Oliver*, 8 Allen, 247; *Freeland v. Hastings*, 10 Allen, 570; *Dorgan v. Boston*, 12 Allen, 223; *Merrick v. Amherst*, Id. 500.

It is not necessary that the entire community should directly enjoy or participate in an improvement or enterprise in order to constitute a public use, and if lands are taken for a public use and for the benefit of the community, it is of no importance that individuals may incidentally derive some advantage therefrom. *Boston & R. Mill Corp. v. Newman*, 12 Pick. 467; *Talbot v. Hudson*, 16 Gray, 417.

Although a tax be sanctioned by state statutes, if it be not for a public purpose it is an unauthorized taking of private property. *Kelly v. Pittsburgh*, 104 U. S. 51, 26 L. ed. 659; *Citizens Sav. & L. Assn. v. Topeka*, 37 U. S. 30 Wall. 655, 22 L. ed. 455; *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335.

The term "public purposes," as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need or to the extent of the public benefit which is to follow. *People v. Salem Twp. Board*, 20 Mich. 452.

Public considerations, however, must be involved to justify such legislation, as providing for drainage for private use is unauthorized. *Anderson v. Kerns Drain Co.* 14 Ind. 202; *People v. Saginaw County Suprs.* 26 Mich. 22; *Reeves v. Wood County*, 8 Ohio St. 333; *Cypress Pond Drain. Co. v. Hooper*, 2 Met. (Ky.) 850.

12 L. R. A.

The interest of the public which authorizes taxation must be a direct public interest (*Curtiss v. Whipple*, 24 Wis. 350); for when the power to tax is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation, and becomes oppression, if not plunder. *Talbot v. Hudson*, 16 Gray, 421; *Freeland v. Hastings*, 10 Allen, 575; *Hooper v. Emery*, 14 Me. 379; *People v. Salem Twp. Board*, 20 Mich. 459; *Morford v. Unger*, 8 Iowa, 92; *Allen v. Jay*, 6 Me. 139; *Grim v. Weissenberg School Dist.* 37 Pa. 433; *Brodhead v. Milwaukee*, 19 Wis. 624; *Citizens Sav. & Loan Assn. v. Topeka*, 37 U. S. 30 Wall. 655, 22 L. ed. 455.

In general the Legislature is the sole arbiter of what shall constitute a public use. *Bloomfield & R. N. Gas Light Co. v. Richardson*, 68 Barb. 437.

*Taxation for expenses of public improvements: public uses, what are.*

Among public uses and purposes, taxation for which may be authorised by the Legislature, may be stated the following:

The draining of low lands for the preservation of the public health is a public purpose. *New Orleans Draining Co.* 11 La. Ann. 333; *Anderson v. Kerns Drain. Co.* 14 Ind. 202; *Woodruff v. Fisher*, 17 Barb. 224; *Hartwell v. Armstrong*, 19 Barb. 166; *Sessions v. Crunkilton*, 20 Ohio St. 349.

So the reclaiming of swamp and overflowed and marsh lands is a public purpose, and a scheme of improvement of this character is of such public utility as to justify the Legislature in the exercise of its discretionary powers in promoting the improvement. *Alcorn v. Hamer*, 38 Miss. 663; *Dally v. Swope*, 47 Miss. 387; *Egyptian Levee Co. v. Hardin*, 37 Mo. 426; *Tidewater Co. v. Coster*, 18 N. J. Eq. 521; *People v. Nearing*, 37 N. Y. 303.

The removal of dams to facilitate the flow of offensive stagnant water to promote the health of a district is a public purpose. *Talbot v. Hudson*, 16 Gray, 417; *Dingley v. Boston*, 100 Mass. 544; *Miller v. Craig*, 11 N. J. Eq. 175.

Railroads are for public purposes, and subscription to the stock of a railroad company may be authorized (*Hanson v. Vernon*, 27 Iowa, 49); for it is the right and duty of the State to advance the commerce and promote the welfare of the people. *Sharpless v. Philadelphia*, 21 Pa. 147.

ed a board of Metropolitan Sewerage Commissioners, and were given charge of the work. After commencing operations they filed this petition for the appointment of the commissioners provided for by § 18 of the Act to determine the proportion in which the respective cities and towns should contribute towards the expense of the improvement.

Further facts appear in the opinion.

**Mr. A. E. Pillsbury, Atty-Gen.**, for the Commonwealth, and **William D. Turner** for the petitioners.

**Messrs. Samuel J. Elder**, for Winchester, **George E. Smith**, for Everett, **Selwyn Z. Bowman**, for Somerville, **Jesse F. Wheeler**, for Watertown, **William B. Stevens**, for Stoneham, **J. O. Telle**, for Winthrop, **Frank E. Fitz**, for Chelsea, respondents:

The funds of the Commonwealth, contributed by taxation by the people from all over the State, for the public uses of the Commonwealth, cannot be used for constructing and maintaining local improvements for special towns or cities.

Const. pt. 2, chap. 1, § 4; Const. art. 11, chap. 2; *Freeland v. Hastings*, 10 Allen, 579.

That the tax is not levied as a special tax, or that the amount required is borrowed by the State upon an issue of its bonds, which bonds

may or may not have to be paid by the State in the future, makes no difference in principle.

*Lowell v. Boston*, 111 Mass. 454.

This right of appropriation of taxes paid into the treasury of the Commonwealth must clearly appear to exist; it cannot be established by any doubtful or uncertain interpretation of the Constitution.

*Lowell v. Oliver*, 8 Allen, 252; *Freeland v. Hastings*, 10 Allen, 575.

In those cases where it has been held that the Legislature could authorize the expenditure of the money of the Commonwealth, it has been so held on the ground that the money was to be expended either for the benefit of the people of the State, as a whole, or in pursuance of a duty incumbent upon the Commonwealth as such.

*Freeland v. Hastings*, 10 Allen, 570; *Lowell v. Oliver*, 8 Allen, 247; *Agawam v. Hampden County*, 180 Mass. 584; *Fowler v. Danvers*, 8 Allen, 80; *Grover v. Pembroke*, 11 Allen, 88.

In *Freeland v. Hastings*, *supra*, the court laid stress upon the question whether the charge was of such a public nature that the Legislature could distribute the burden "by taxation among the whole people of the Commonwealth."

See also *Com. v. Plaisted*, 2 L. R. A. 142, 148 Mass. 875; *Dorgan v. Boston*, 12 Allen, 235;

So, the purchase of land for railroads is a public purpose. *Bennington v. Park*, 50 Vt. 178; *First Nat. Bank of St. Johnsbury v. Concord*, Id. 237.

The renting of buildings for the use of the State is a public purpose for which the Legislature may provide by taxation within constitutional limits. *Harris v. Dubuclet*, 30 La. Ann. 662.

Educational purposes are public purposes. So the maintaining the common-school system, whereby one man is taxed to pay for the education of children of other parents, is within the discretionary power of the Legislature (*Felty v. Uhler*, 10 Phila. 512; *Com. v. Hartman*, 17 Pa. 118); and the Legislature may assess a general tax for distribution under an Act to establish the school fund for the support of such schools. Opinion of Justices, 68 Me. 582.

#### *Construction of sewers; late Massachusetts decisions.*

In Massachusetts the construction of sewers may be justified under the police power in making regulations for the preservation of the public health. *Boston v. Shaw*, 1 Met. 180.

A statute authorizing a city council to lay down sewers through streets and private lands, on payment to the owners of damages they may sustain, is constitutional and valid. *Hildreth v. Lowell*, 11 Gray, 345.

The board may pass an order for a single structure to serve both as a conduit for a stream and as a common sewer, and may assess upon those benefited their proportional part of the expense of the structure as a sewer. *Gray v. Boston*, 139 Mass. 328. See *Bennett v. New Bedford*, 110 Mass. 433.

An order of the city council directing a main drain to be laid upon petition alleging convenience of the city is a sufficient adjudication of the necessity therefor. *Wright v. Boston*, 9 Cush. 223.

Sewer assessments may, as a mode of equitable adjustment, be divided by the mayor and aldermen of a city into three classes,—direct benefit, remote benefit and more remote benefit. *Collins v. Holyoke*, 5 New Eng. Rep. 909, 146 Mass. 307.

The validity of their assessment is not affected by the fact that they called in another person to as-

sist in making it. *Taber v. New Bedford*, 135 Mass. 162.

The failure of the superintendent of sewers to keep an account of the cost of construction and to report to the board a list of persons benefited did not invalidate the assessment. *Dickinson v. Worcester*, 128 Mass. 565.

Nor is it an objection to the validity of an assessment that the town had not adopted any system of sewerage, although authorized to do so. *Leominster v. Conant*, 139 Mass. 384.

In determining the amount of the assessment the relative benefit which each estate on the line of the sewer may receive is immaterial. *Snow v. Fitchburg*, 136 Mass. 183; *Workman v. Worcester*, 118 Mass. 161; *Keith v. Boston*, 120 Mass. 108; *French v. Lowell*, 117 Mass. 363, explained in *Snow v. Fitchburg*, *supra*.

The assessment should be made according to the value of the land exclusive of buildings. *Snow v. Fitchburg*, 136 Mass. 183; *Boston v. Shaw*, 1 Met. 180; *Downer v. Boston*, 7 Cush. 277; *Wright v. Boston*, 9 Cush. 223; *Springfield v. Gay*, 19 Allen, 612; *Brewer v. Springfield*, 97 Mass. 152.

Under a statute apportioning the expense according to the value of the land, an apportionment according to the value of the land and buildings was held void. *Patton v. Springfield*, 99 Mass. 627; *Wright v. Boston*, *Downer v. Boston* and *Springfield v. Gay*, *supra*.

In estimating the benefits, the fact that the land is released from the servitude of an old drain is not to be considered. *French v. Lowell*, 117 Mass. 363. See *State v. Jersey City*, 20 N. J. L. 441.

The time within which the assessment of benefits may be made is within the discretion of the board whose duty it is to make the assessments. *Fairbanks v. Fitchburg*, 132 Mass. 42.

Where a common sewer is intended not only to serve as an outlet or means of discharge for other common sewers, but also to benefit the lands abutting upon it, no part of the cost need be assessed upon the owners of lands along the line of the tributary sewers. *Ayer v. Somerville*, 3 New Eng. Rep. 735, 145 Mass. 586; *Fairbanks v. Fitchburg*, 132 Mass. 42.

*Moore v. Sanford*, 7 L. R. A. 151, 151 Mass. 285.

The theory of the Betterment Laws is that assessments shall only be made for any special benefit and advantage "beyond the general advantages to all real estate."

Pub. Stat. chap. 51, § 1.

Upon this doctrine, the State having no right to pay the money at all, except upon the theory that it is paid for the general advantage, how can it afterwards collect that same money from towns, upon the theory that it was paid for the particular advantage of those towns?

See Cooley, Const. 6th ed. 233, 284; *Hastbrouck v. Milwaukee*, 18 Wis. 87; *Mills v. Charleston*, 29 Wis. 400; *People v. Chicago*, 51 Ill. 17; *People v. Detroit*, 28 Mich. 228.

If the improvement was a public improvement, the assessment could not be made upon those more particularly interested.

*Graham v. Conger*, 85 Ky. 582; *Conger v. Bergman* (Ky.) March 9, 1889.

If the tax provided for in this Act is in the nature of a betterment assessment, for benefits to be conferred by the works to be built upon the inhabitants' estates or municipalities in this district, then the tax will not, under the Act, be laid, as betterments always have been laid, nor as the Constitution specifies.

Assessments for local public improvements must be proportional and reasonable.

*Gleason v. McKay*, 134 Mass. 419; *Cheshire v. Berkshire County Comrs.* 118 Mass. 886; *Com. v. Hamilton Mfg. Co.* 12 Allen, 800; *Merrick v. Amherst*, 12 Allen, 501; *Jones v. Boston*, 104 Mass. 467; *Boylston Market Assn. v. Boston*, 113 Mass. 580.

Property can only be assessed for public improvements on the principle that benefits are received by the property from the construction of the work, and the assessment should never exceed the benefit conferred; and it is essential that it shall appear from the proceedings themselves that such was the principle on which the assessment was made.

*Crausford v. People*, 82 Ill. 557; *New Orleans Draining Co.* 11 La. Ann. 388; *Creighton v. Manson*, 27 Cal. 613; *Re Fourth Ave.* 8 Wend. 452; *Nichols v. Bridgeport*, 28 Conn. 204; *Tide-Water Co. v. Coaler*, 18 N. J. Eq. 518.

An Act of the Legislature authorizing commissioners to apportion the expense among the different cities and towns of the district, as they may deem just and equitable, without distributing the burden, or prescribing the standard by which such distribution shall be made, is unconstitutional.

*State v. New Brunswick Comrs.* 38 N. J. L. 190; *State v. Hudson County Assn. Comrs.* 37 N. J. L. 19; *Barnes v. Dyer*, 56 Vt. 469; Cooley, Taxn. 2d ed. p. 248.

C. Allen, J., delivered the opinion of the court:

The constitutionality of the Statute of 1889, chap. 439, is attacked by the different respondents on several grounds.

The first objection is, that the object in view, which is to provide for the disposal of sewage from a number of cities and towns, is not of such a character that the Legislature can properly appropriate money in furtherance of it from the treasury of the Commonwealth. It 12 L. R. A.

is admitted that public money of the Commonwealth may properly be expended in aid of the construction of roads, bridges, canals and railroads, to increase facilities for communication, and this has occasionally been done, from early times. By Prov. Stat. 1698, 1694, chap. 22, 1 Prov. Stat. 158, a grant of £150 from the treasury of the Province was made towards rebuilding and repairing the bridge over Charles River; and by Prov. Stat. 1699, 1700, chap. 11, 1 Prov. Stat. 388, a grant of £153 was made for the same purpose. In recent years, the statutes granting state aid to railroads are freshly in mind; for example, to the Western, Stat. 1836, chap. 181; to the Troy & Greenfield, Stat. 1854, chap. 226; to the Boston, Hartford & Erie, Stat. 1866, chap. 142; to the Willamaburg & North Adams, Stat. 1867, chap. 321; to the Lee & New Haven, Stat. 1868, chap. 313. It is contended, however, that a statute for providing a system for the disposal of sewage does not fall within the same reason, and cannot be considered as providing for an object of general public utility, but that the benefits to be derived from it are essentially local in their operation, and do not in any sense include the whole people, and therefore that the public money of the Commonwealth ought not to be expended for it.

Assuming that the respondents may so far represent the general public as to be entitled to raise this question, it is plain that the objection can hardly be considered as of great weight, since the decision in *Talbot v. Hudson*, 16 Gray, 417. It was there held, on the greatest consideration, that the Legislature might provide for the removal of a dam, by means of which a large tract of land situated in different towns, and owned by a large number of persons, was overflowed, and might provide for compensation out of the treasury of the Commonwealth, to persons whose property was thereby injured. —the court saying: "It has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words, as used in the Constitution," p. 425. The improvement which the Statute of 1889 is designed to effect stands far stronger, as an object of general public utility, than that which was the subject of consideration in *Talbot v. Hudson*. It has for its purpose to promote the public health, to avert disease and prevent nuisances. The territory to be benefited according to the report of the state board of health, to which we are referred, includes an area of 180 square miles, and contains one sixth of the population of the State.

The Legislature has declared that a system of sewerage to accommodate this territory and this portion of the people of the State is an object of public utility, such as warrants the expenditure or the advancement for the time being of money from the treasury of the Commonwealth. It is impossible for us to say to the contrary. The argument is made to us that, if such an expenditure of public money is warranted, the Legislature might authorize an appropriation for the benefit of a single town, and construct and maintain forever a local improvement for such town. But in determining the power of the Legislature in a case like this,

little assistance is obtained by imagining extreme instances of possible abuse of the power. *Norwich v. Hampshire County Comrs.* 18 Pick. 60, 62. Nor need we undertake to define how far the Legislature might properly go, in a special emergency, in giving direct assistance to a particular town. Those curious in prosecuting such an inquiry may find examples of what has been done in the past, in Stat. 1874, chap. 326, providing for the payment of \$100,000 towards the expenses of rebuilding roads and bridges in the Town of Williamsburg, which had been destroyed by a flood; and in earlier times in the grants to Boston of £800 in 1752 for the relief of the poor, on account of the small pox, and of £1100 in 1760, on account of losses by fire. 3 Prov. Stat. 606; 4 Prov. Stat. 440. See also *Moore v. Sanford*, 151 Mass. 285, 7 L. R. A. 151; *Lowell v. Oliver*, 8 Allen, 247, 256. It is enough for us to say that no valid objection lies to the Statute of 1889, on this ground.

It is further objected, that if the object contemplated by the Statute is one of such general public utility that the public money of the Commonwealth may properly be expended or advanced for it, then the expense ought to be borne by the Commonwealth, and cannot properly be assessed upon certain particular cities and towns. But this objection rests upon too narrow a view of the powers of the Legislature, in respect to the proper distribution of the public burdens. The provision of the Constitution conferring these powers is as follows: "Full power and authority are hereby given and granted to the said general court from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." It was said in *Bingham & Q. B. & Turnp. Corp. v. Norfolk County*, 6 Allen, 353, 358, that "among the purposes for which it [this power] is to be exerted, none is more essential than a wise and careful distribution of certain public burdens or duties. Of these, a leading one is the construction, support and maintenance of roads and bridges." The construction and support of a system for the disposal of sewage, like that provided for by Stat. 1889, fall within the same reason. *Dingley v. Boston*, 100 Mass. 544, 557. And in reference to these and other like burdens, it may be said in general that it is within the proper province of the Legislature to determine where they shall rest, either in the first instance or finally. The Legislature may properly determine that the whole or a part of the cost shall be borne by the Commonwealth, or it may impose it wholly upon counties, or wholly upon towns, or a part upon each. And in doing so it is not necessarily limited by county or town lines. Indeed, as has often been declared, the Legislature may change county or town lines at will, and may provide how their respective properties and debts shall be shared and adjusted. *Opinion of Justices*, 6 Cush. 578; *Stone v. Charlestown*, 114 Mass. 214; *Coolidge v. Brookline*, Id. 592; *Weymouth & B.* 12 L. R. A.

*F. Dist. v. Norfolk County Comrs.* 108 Mass. 142; *Com. v. Plaisted*, 148 Mass. 375, 386, 2 L. R. A. 142. Instead of changing lines, the Legislature may apportion the burdens in such a manner as will tend to secure fairness and equality. Absolute equality in the distribution of burdens of course is not to be hoped for. But with a view to the nearest approach to it that is possible, the Constitution wisely vests a large and general power in the Legislature. And if at any time it is found either from a change of circumstances or otherwise that the burden presses too hardly upon a particular town or county, the Legislature may change it. Nor does the fact that the money has been advanced in the first instance from the treasury of the Commonwealth prevent the Legislature from providing for a reimbursement from counties, cities or towns. It may often be more convenient, and is conspicuously so in the case before us, to have the money thus advanced in the first instance, and afterwards apportioned upon those cities and towns which are finally to pay it, and this course has sometimes been followed in requiring a county to pay in the first instance from the county treasury for an improvement the cost of which was ultimately to be borne wholly or in part by towns. In such cases it is virtually a lending of money, like the grants of state aid to railroads.

The statutes and decisions which illustrate and establish the validity of such a distribution of the burden of local improvements are too numerous to be described separately, but examples may be cited. In some instances, a fixed sum or a definite prescribed proportion of the cost, and of the expense of the future maintenance, has been imposed upon the general public treasury and upon counties and towns, or merely upon counties and towns. Prov. Stat. 1698, 1694, chap. 5, 1 Prov. Stat. 185; 1698, 1694, chap. 22, 1 Prov. Stat. 158; 1699, 1700, chap. 11, 1 Prov. Stat. 383; Resolve of June 18, 1700, 1 Prov. Stat. 419; Stat. 1795, Feb. 10; 2 Mass. Spec. Laws, 3; 1831, chap. 41, considered in *Norwich v. Hampshire County Comrs.* 18 Pick. 60; 1860, chap. 140; 1876, chap. 51. In some instances, the whole burden has been put upon counties. Prov. Stat. 1770, 1771, chap. 31, 5 Prov. Stat. 188; Stat. 1798, March 15; 1 Mass. Spec. Laws, 421; 1835, chap. 38. In some, the burden has been upon the county in the first instance, with a provision for reimbursement. Stat. 1782, May 7; 1 Mass. Spec. Laws, 27; 1875, chap. 193. In some instances, it has been put solely upon cities or towns, either one or more. Prov. Stat. 1699, 1700, chap. 25, 1 Prov. Stat. 405; 1736, 1737, chap. 5, 2 Prov. Stat. 795; Stat. 1832, chap. 116; 1840, chap. 52; 1854, chap. 283; 1862, chap. 65; 1868, chap. 294; 1874, chap. 139, 240, § 8, 259; 1880, chap. 159. In some instances, counties and towns have been required or authorized to contribute for improvements beyond their own borders; Stat. 1838, chap. 169; 1850, chap. 215; 1870, chap. 231; 1871, chap. 275; *Carter v. Cambridge & B. B. Proprs.* 104 Mass. 236; *Com. v. Newburyport*, 108 Mass. 129. In some instances, changes have been made by later statutes, varying the burden. Stat. 1860, chap. 95, considered in *Atty-Gen. v. Cambridge*, 16 Gray, 247; Stat.

1870, chap. 265, considered in *Scituate v. Weymouth*, 108 Mass. 128; Stat. 1880, chap. 288, considered in *Agawam v. Hampden County*, 180 Mass. 528. See also *Cambridge v. Lexington*, 17 Pick. 222; *Boston S. F. Soc. v. Boston*, 116 Mass. 181.

It is urged by the respondents, as an objection to the view taken above, that the various cities and towns are to have no ownership in the property of the sewers and works which they are required to pay for, and no right to use the same except under rules prescribed by the Legislature. No express authority is cited in support of this objection, and we see no valid ground upon which it can rest. A town is required by law to build highways, and to keep them in repair, but it has no separate ownership nor exclusive use of them. The highway surveyors, through whose agency the roads are kept in repair, are held to be public officers, and not agents of the town. *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570. No doubt the Legislature might provide for the appointment of public road masters, entirely independently of the towns, and still require the towns to pay the expenses of keeping the roads in repair. It is indeed in one respect more beneficial to the cities and towns not to have the ownership or care of the sewers, because otherwise they might be held responsible for negligence in the care of them. *Child v. Boston*, 4 Allen, 41. The supposition is not to be entertained that the Commonwealth will shut off any one of the cities and towns, which are required to contribute, from the use of the sewers under reasonable rules and regulations. From the extent of the system of sewerage, and the number of towns involved, harmonious and effective management may well have been thought to be the best secured through officers of the State. It cannot for a moment be supposed that the Legislature would consciously do injustice to a particular city or town. There is no valid ground or reason on which the Legislature is bound to vest in a city or town the technical title to the works which constitute a public improvement, to which the city or town has been required to contribute. *Stone v. Charlestown*, 114 Mass. 214, 223, 224.

The respondents further contend that the Statute of 1889 is unconstitutional, because no standard or rule is prescribed for the commissioners who are to determine the proportions to be paid by the several cities and towns, according to which they shall fix the same; that is to say, the respondents object that the Act is invalid, because it does not provide that the assessment shall be made upon the different cities and towns according to the benefits received by each, or according to any other prescribed standard.

The provision of the Statute is, that this court shall appoint three commissioners, who shall, after due notice and hearing, and in such manner as they shall deem just and equitable, determine the proportion in which each of the cities and towns named therein shall annually pay money into the treasury of the Commonwealth for the term of five years, and shall return their award into said court; and when said award shall have been accepted by said court, the same shall be a final and conclusive adjudication, etc. Before the expiration of the 12 L. R. A.

five years, a new board of commissioners is to be appointed to make a similar award for the next five years.

It is not contended in distinct terms, and at this day it could not be successfully maintained, as a bald proposition, that the Legislature cannot delegate to commissioners, to be appointed by this court, the determination of the proportion of expense which each county, city or town shall be required to pay for a local improvement. There has been, indeed, a long-continued course of practice from very early times, shown by numerous statutes, and sanctioned by many decisions, in which such authority has been delegated. Sometimes this power has been intrusted to the county commissioners (Stat. 1884, chap. 15; 1885, chap. 56; 2841, chap. 108; 1050, chap. 215; 1854, chap. 188; 1868, chap. 88; 1864, chap. 188; 1866, chap. 265; 1867, chap. 296; 1868, chap. 80; 1869, chap. 809, § 8, considered in *Haverhill Bridge Proprs. v. Essex County Comrs.* 103 Mass. 120; 1869, chaps. 266, 378; 1870, chap. 219; 1871, chaps. 88, 199; 1872, chap. 129; 1874, chaps. 265, 289, 325; 1875, chap. 198); sometimes to the court of quarter-sessions, or to some other court (3 Prov. Stat. 1716, 1717, chap. 5, Prov. Stat. 44; 1759, 1760, chap. 21, vol. 4, Prov. Stat. 285; 1764, 1765, chap. 23, vol. 4, Prov. Stat. 740; 1768, chap. 12, vol. 4, Prov. Stat. 1023; Stat. 1782, May 7, vol. 1, Mass. Spec. Laws, 27); sometimes to the city council, or to the mayor and aldermen of a city (Stat. 1863, chap. 107, considered in *Springfield v. Gay*, 12 Allen, 612; 1863, chap. 191, considered in *Hove v. Cambridge*, 114 Mass. 889); in one statute, at least, to the board of railroad commissioners (1869, chap. 408, § 5, considered in *New London N. R. Co. v. Boston & A. R. Co.* 102 Mass. 886); sometimes to commissioners to be specially appointed by the governor and council (Prov. Stat. 1702, chap. 11, 1 Prov. Stat. 506; Stat. 1870, chap. 265, considered in *Scituate v. Weymouth*, 106 Mass. 128), and sometimes to commissioners to be appointed by this or some other court. Stat. 1820, chap. 59; 1862, chap. 177, considered in *Hingham & Q. B. & Turnp. Corp. v. Norfolk County*, 6 Allen, 353; 1866, chap. 309, considered in *Salem Turnp. & C. B. Corp. v. Essex County*, 100 Mass. 282; 1868, chap. 322 and 1869, chap. 372, considered in *Dow v. Wakefield*, 108 Mass. 267; 1869, chaps. 142, 244, 273; 1869, chap. 161, considered in *Carter v. Cambridge & B. B. Proprs.* 104 Mass. 286; 1870, chaps. 182, 287, 302, 303; 1871, chap. 177, considered in *Northampton Bridge Case*, 116 Mass. 442; 1872, chap. 295, considered in *Brayton v. Fall River*, 124 Mass. 96; 1872, chaps. 180, 181; 1873, chap. 200, and 1880, chap. 286, considered in *Agawam v. Hampden County*, 180 Mass. 528; 1875, chap. 175; 1875, chap. 200, considered in *Hampshire County Comrs. Petitioners*, 143 Mass. 424, 8 New Eng. Rep. 488, and 140 Mass. 181, 1 New Eng. Rep. 201.

This ample, but by no means exhaustive, citation of precedents has been made for the purpose of showing how thoroughly the method has been adopted in Massachusetts of apportioning the cost of local improvements by delegated authority.

Assuming, therefore, that this method is within the proper scope of legislative power, it

remains to inquire, in the case of a public improvement like that now under consideration, where the Legislature itself has designated the cities and towns upon which the burden is to rest, how far the Legislature must go in prescribing a rule or standard for making such apportionment upon and among the cities and towns so designated; or, to be more precise, whether a statute providing that the determination shall be made in such manner as the commissioners shall deem just and equitable; and subject to acceptance by this court, must be held to be insufficient and invalid.

In approaching this question, it is well to bear in mind the peculiar character of the public improvement which is provided for in the Statute. In nearly all of the Statutes allowing or requiring assessments either upon property, persons or municipal corporations, for local improvements, the object primarily in view has been the benefit to land. Even in such cases Legislatures and courts have not usually found it expedient to lay down any definite rule, according to which the assessment or apportionment of the cost should be made; but in a case like the present peculiar difficulties arise, growing out of the nature of the improvement and of the objects sought to be accomplished. No doubt the Legislature might have dealt with the matter directly, and itself have fixed the proportion of the cost which each city or town should pay; and might change this proportion from time to time. No valid ground of complaint would be open to any city or town, if this course had been pursued. But apparently it was thought by the Legislature that a more careful and detailed consideration was expedient, of the various elements which ought to enter into the determination of the question, with the aid of arguments, and with more deliberation than it is practicable for the Legislature itself to give. But whether the apportionment of cost is to be made by the Legislature or by some tribunal or commission specially authorized, it is difficult to see how anything like an exact rule or standard of apportionment can be fixed. In an action at law to recover damages for an actual sickness or injury to person or property or reputation, from the tort of an individual or a corporation, it can only be said that the damages should be such as will be compensatory, but there is no rule except the estimation of a jury of the loss which the plaintiff has suffered, and this must necessarily depend somewhat upon the feelings or temperament of the jurors. But in a case like this which is now before us, that which is to be paid for by the cities and towns is the probability of better health and greater personal comfort for the people at large from the carrying out of the proposed improvement. It is very plain that there is, and in the nature of the case can be, no means of an accurate measurement, no matter what tribunal has to deal with the subject. All that could be done by any tribunal would be to take into view all the various elements and considerations that might appear to have a just bearing upon the question, and determine as fairly as possible what is just and equitable under all the circumstances. Absolute accuracy or equality being out of the question, as impracticable, shall it be declared that the Legislature must lay down some arti-

ficial rule for the guidance of the commissioners, when it is plain that no artificial rule can define or include all the elements which it might be proper to consider? When the rule is laid down that an assessment shall be made in proportion to the benefits received, this usually has reference to a benefit to property, which is appreciable, and may to some extent be ascertained by inquiring as to the value of property in the market. A town may no doubt in a certain sense be said to be benefited by anything which improves the health or comfort of its inhabitants, and indirectly the value of property may also be increased. But if, as will presently be shown by a reference to decided cases, such a rule is not necessarily to be applied in cases where the improvement is chiefly for the advantage of property, by a still stronger reason it must be deemed insufficient and unsuitable in a case like the present. Where a great public work of establishing an extensive system of sewerage is entered upon, for the use of many different cities and towns, there are many elements which ought to be taken into consideration in apportioning the cost; for instance, the exigency or special need of such an improvement in particular localities, the area which can be accommodated, the present or probable population or wealth of the different cities or towns, the value of the land and its adaptability for homes, factories or other places of business; and other elements which cannot be fully enumerated in advance. It cannot be laid down as a rule that in the distribution and apportionment of this public burden it is necessary to aim at exact equality or proportion, according to any rule or standard which is to be laid down and defined beforehand. The apportionment should be just and equitable, under all the circumstances which may be found to exist. In the determination, there must necessarily be a large discretion as to the weight which is to be given to particular considerations. It should not, however, be understood that the discretion is wholly arbitrary. It is limited and defined by the requirement that the proportion shall be determined in such manner as the commissioners shall deem just and equitable; and this discretion is to be exercised under the supervision and subject to the sanction of this court. No doubt an award which should be found to be extravagant and unreasonable would be rejected. The commissioners are made, in a sense, officers of the court. The provision that their award shall take effect only when it shall have been accepted by the court implies a right of the parties to be heard upon the question of acceptance. Even without an express provision to that effect, it has been held repeatedly that when commissioners are appointed by this court, their award must be returned into court for acceptance. *Hingham & Q. B. & Turnp. Corp. v. Norfolk County*, 6 Allen, 853; *Brayton v. Fall River*, 124 Mass. 95; *Wyman v. Eastern R. Co.* 128 Mass. 346. It is therefore to be assumed that in the exercise of the discretion confided to the commissioners no rule of law or equity will be violated, and that the cities and towns will have all the protection to which they are entitled. It is conceded in the argument that they are not entitled, as a matter of constitutional right, to appeal to a jury; as,

indeed, individuals are not, in similar cases. *Sunderland Bridge Case*, 122 Mass. 450; *Northampton Bridge Case*, 116 Mass. 442; *Hove v. Cambridge*, 114 Mass. 888. In other respects relating to the obligations imposed upon them, their rights are not the same as the rights of individuals of other corporations. *Agawam v. Hampden County*, 180 Mass. 526, 530, and cases cited.

It is not necessary at present to go into this question further than to hold that in order to ascertain the proper proportions to be paid by several different cities and towns, for a public improvement, consisting of an extensive system of sewerage available to be used by them all, the Legislature, if it sees fit to do so, may properly provide that this court shall appoint disinterested commissioners, who, after due notice and a hearing, shall determine such proportions in such manner as they shall deem just and equitable, and return their award into court; and that when accepted by the court the award shall be binding. Even after the acceptance by this court of such an award, the Legislature, if it does not like it, may still provide by new legislation for a new scheme for the future distribution of the burden. *Scituate v. Weymouth*, 106 Mass. 128; *Agawam v. Hampden County*, 180 Mass. 528. The final authority still rests with the Legislature; and no doubt if it saw fit to do so, it might itself appoint the commissioners, with directions to make their report directly to the Legislature.

This conclusion is well supported by the practice which has prevailed, and the course of judicial decisions in this Commonwealth. As already observed, these have chiefly related to improvements designed primarily to increase the value of land, and not adopted with special view to the health of the people. In a few instances the benefit to property has been prescribed as the basis of assessment. Examples of this are found in Prov. Stat. 1702, chap. 11, vol. 1, Prov. Stat. 506; Stat. 1869, chap. 142.

More often, however, the assessment is to be laid upon persons, estates, cities or towns which are found to be benefited without any rule being prescribed that the assessments shall be in proportion to the benefits. In such cases, the selection of the cities and towns by the court or commissioners is a substitute for the designation by the Legislature itself, and it is often added in the statutes that, upon the cities and towns selected, the assessment shall be just and equal, or equitable, or reasonable. Stat. 1820, chap. 59; 1862, chap. 177; 1868, chap. 107; 1868, chap. 309, §§ 8, 8; 1868, chap. 322; 1869, chaps. 161, 244, 266, 278; 1870, chaps. 182, 219, 237, 265; 1871, chaps. 177, 199; 1872, chaps. 129-131, 295; 1873, chap. 200; 1874, chap. 239; 1875, chaps. 175, 198, 200; 1878, chap. 110.

In other instances the statutes have made no reference at all to benefits, but have simply required that the assessments should be in proportion to value, or should be just and equitable, or something like that. Stat. 1863, chap. 191; 1865, chap. 159; 1867, chap. 296; 1870, chaps. 302, 303; 1871, chap. 38; 1874, chap. 265. See also Stat. 1863, chap. 88.

In still other instances, assessments for local improvements have been authorized or directed, with no rule or suggestion whatever to show

on what principle they should be made. Prov. Stat. 1716, 1717, chap. 5 vol. 2, Prov. Stat. 44; Prov. Stat. 1764-65, chap. 23, vol. 4, Prov. Stat. 740; Prov. Stat. 1768, chap. 12, vol. 4, Prov. Stat. 1023; Stat. 1863, chap. 177, the provision as to counties; 1865, chap. 88; 1866, chap. 265; 1868, chap. 80; 1869, chap. 378.

By Stat. 1884, chap. 15, and 1885, chap. 56, the county commissioners were authorized to lay a portion of the expense upon the county without other limits than that in one case it was to be not more, and in the other case not less, than one half. In all such cases it must have been assumed by the Legislature that the determination should be just and equitable, or reasonable, and it would probably be no strained construction to hold that such a provision was implied, just as the law implies reasonable time in the construction of contracts where no time is specified.

The omission to prescribe a fixed rule for the assessment of the cost of local improvements has been vindicated in numerous decisions of this court. The case of *Hingham & Q. B. & Turnp. Corp. v. Norfolk County*, 6 Allen, 358, arose under Stat. 1862, chap. 177, by which a turnpike and bridges were made a public highway; and commissioners to be appointed by this court were to award the damages, and also "to determine and decree in what proportions said amount shall be paid by the Counties of Norfolk and Plymouth respectively." No rule was given to guide the assessment as to the counties. An award was made that the County of Norfolk should pay three quarters of the amount that was fixed upon as damages; and that county objected to the acceptance of the award, assigning, amongst other grounds, that the Legislature had exceeded its constitutional powers, in delegating legislative and judicial powers to the commissioners, and in imposing unequal and unjust burdens upon counties and towns. The argument is not fully reported, but a reference to the original brief shows that it was contended, amongst other things, on behalf of the county, that the Statute was unconstitutional, because no rule of apportionment was adopted as to the share of the counties; that as to the towns, reference was had to the doctrine of benefits, but in reference to the counties the decision was entirely arbitrary; that the property of the county was subjected to the decree of the commissioners, with no right of appeal and that the power of determining what counties or towns shall bear burdens, or the distribution of benefits, could not be delegated, being reposed in the Legislature. But it was held that the statute was valid, under the clause of the Constitution before cited, authorizing the Legislature to make all manner of wholesome and reasonable laws.

The case of *Dorgan v. Boston*, 12 Allen, 223, arose under Stat. 1865, chap. 159, providing that the expense of widening a street should be assessed upon the abutting estates in proportion to their value, as they should be appraised by the mayor and aldermen of the city when the improvements have been made. The whole principle of assessing the cost of local improvements upon abutters was attacked in the argument. The court, in the course of the elaborate judgment, sustaining the validity of the



statute, said: 'Nor can it be contended that the Constitution, in regard to this species of taxation, furnishes any fixed rules of proportion, or gives any absolute standard by which to determine whether a particular tax is within the limits of the legitimate exercise of the power granted. Undoubtedly a very wide discretion was intended to be left to the Legislature as to the subjects and method of executing the authority conferred on them of imposing taxes for purposes other than those of a general nature; and yet the power is not wholly without limit." p. 287. The requirement that taxes should be proportional does not apply to such a case. pp. 240, 241. See also *Merrick v. Amherst*, 12 Allen, 500.

The case of *Springfield v. Gay*, 19 Allen, 612, arose under Stat. 1868, chap. 107, authorizing the city council of Springfield to construct certain drains, and with the assistance of a competent engineer to determine what portion of the expense should be borne by the city and what portion by the owners of real estate; the latter portion to be equitably and ratably assessed upon the owners. §§ 3, 4. No other rule for the assessment was given. An owner of land objected to the tax assessed upon him. The court, in sustaining its validity, said: "The Statute does not require that the assessments imposed on estates to defray the expense of building sewers should be assessed accordingly to the benefits which each estate might receive from their construction. It prescribes no fixed rule or standard by which such assessments should be laid. The only limitation on the power of the assessors is, that they should be equitably and ratably assessed. The rule or basis of the assessment is left entirely to the judgment and discretion of the assessors." p. 615. "We can readily see that it would be difficult, if not impracticable, to make an assessment which would operate fairly and equally, based on an estimate of the benefits which each estate might derive from the construction of the sewer. These benefits would necessarily be conjectural and difficult of estimation." p. 616.

Without further quotation from the language of decisions, it was also held that the assessment need not be in proportion to the benefits received, in *Workman v. Worcester*, 118 Mass. 168, 177; *Keith v. Boston*, 120 Mass. 108, 112, and *Snow v. Fitchburg*, 136 Mass. 183. Other elements which might be considered are mentioned in *Com. v. Newburyport*, 103 Mass. 129, 184; *Boston S. F. Soc. v. Boston*, 116 Mass. 181, 183, and *Snow v. Fitchburg*, *supra*. The power

to delegate the determination to commissioners, and the general character of their investigation, are stated in *Salem Turnp. & C. B. Corp. v. Essex County*, 100 Mass. 282; *Dow v. Wakefield*, 108 Mass. 267, 273; *Scituate v. Weymouth*, 108 Mass. 128; *Brayton v. Fall River*, 124 Mass. 95; *Agawam v. Hampden County*, 180 Mass. 538.

The authorities cited by the respondents from Vermont, New Jersey and Michigan show that different views of the legislative power prevail in those States. If the question were entirely new, these decisions would be entitled to and would have great weight with us; but they are not consistent with the views which we entertain of the powers vested in the Legislature by our own Constitution.

It is further contended that the assessment provided for by the Statute cannot be upheld, because it is to be levied and collected before the ascertainment of the cost, by the actual completion of the work. But we are at a loss to see how a public work can be carried on unless the means are raised for current expenses before its completion; and there can be "no valid distinction in principle between a right to raise money for a specific object yet to be accomplished, and a right to raise it to defray the expense of the same object after it has been attained." *Lowell v. Oliver*, 8 Allen, 247, 257; *Carier v. Cambridge & B. B. Proprs.* 104 Mass. 236, 239.

It is urged in behalf of the Town of Stoneham that it has no local sewers, except a main drain, and that the system for the disposal of sewage will be of no benefit to the town. The town may, nevertheless, be in need of a system of local sewers, and may have one before the general system provided for by the Statute of 1869 is completed. The weight of this objection is not for us, at this stage of the proceedings.

The special considerations urged in behalf of the Town of Winthrop, growing out of the fact that it already has an established and satisfactory system of local sewers, discharging into the ocean, are also proper to be laid before the commissioners, but cannot be taken into account by us in the present hearing.

None of the objections taken to the validity of the Statute being found to be valid, the petitioners are entitled to maintain their petition for the appointment of commissioners to determine the proportions which the several cities and towns are to pay as provided in the Statute.

*Ordered accordingly.*

## MARYLAND COURT OF APPEALS.

Calvin LONG, *Plff. in Err.*,  
v.

STATE OF MARYLAND.

(.....Md.....)

### A gift enterprise which does not involve

NOTE.—Gift enterprise; what constitutes a violation of law. See note to *Long v. State* (Md.) 12 L. R. A. 90. And see *Lohman v. State*, 81 Ind. 17; Act 12 L. R. A.

the element of chance cannot be prohibited by the Legislature even though it is carried on by a merchant to induce customers to buy his goods.

(June 13, 1891.)

ERROR to the Criminal Court of Baltimore, to review a judgment convicting defend-

of Congress July 18, 1866, 14 Stat. at L. 120, in relation to such enterprises when characterized by the element of chance, which renders them unlawful.

ant of violating the Statute prohibiting gift enterprises. *Reversed.*

Argued before Alvey, *Ch. J.*, and Robinson, McSherry, Briscoe and Fowler, *JJ.*

The facts are stated in the opinion.

*Mr. Benjamin Kurts*, for appellant:

The making of gifts, as an inducement to the sale of goods, by a scheme or device not contrary to the Lottery Law, is a harmless act, and cannot be made an offense by legislation.

*Toledo, W. & W. R. Co. v. Jacksonville*, 87 Ill. 37, 40.

If the distribution is a pure gift or bounty, and not in name or pretense merely, which is designed to evade the law—if it be entirely unsupported by any valuable consideration moving from the taker—there is nothing in this mode of conferring it which is in violation of the policy of any statute condemning lotteries or gaming.

*Yellowstone Kit v. State*, 7 L. R. A. 599, 88 Ala. 196; *People v. Gillson*, 12 Cent. Rep. 616, 109 N. Y. 889; *Re Jacobs*, 98 N. Y. 96; *Cooley*, Const. Lim. 5th ed. 446.

In *Singer v. State*, 8 L. R. A. 551, 73 Md. 466, Judge Robinson uses this language: "As to the common and ordinary occupations of life, little or no legislation may be necessary," and the Act of 1886, chapter 489, is sustained, because decided to be a valid exercise of the police powers of the State to regulate the trade and business of a plumber, which required special study, training and experience. This reasoning can hardly apply to the Act assailed in this case.

See also *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 768, 23 L. ed. 589; *Re Jacobs*, 98 N. Y. 96; *Lies Stock D. & B. Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. U. S. 398; *Slaughter House Cases*, 88 U. S. 16 Wall. 86, 106, 21 L. ed. 894, 418.

This Act is unequal and partial in its operation.

See *Shaffer v. Union Min. Co.* 55 Md. 74, 81; *Cooley*, Const. Lim. p. 492; *Baltimore v. Radecke*, 49 Md. 217.

It is an unreasonable law in restraint of trade. *Ibid.*; *Re Jacobs*, *supra*; *Wynhamer v. People*, 18 N. Y. 896; *Ex parte Westerfield*, 55 Cal. 550; *Pumpelly v. Green Bay & M. O. Co.* 80 U. S. 18 Wall. 177, 20 L. ed. 560; *Cooley*, Const. Lim. 6th ed. 241-246; *Munn v. Illinois*, 94 U. S. 141, 24 L. ed. 89.

*Messrs. William Pinkney Whyte, Atty. Gen.*, and *Charles G. Kerr, State's Atty.*, for appellee.

*Fowler, J.*, delivered the opinion of the court:

The plaintiff in error, Calvin Long, was indicted in the Criminal Court of Baltimore City for violating the Act of Assembly of 1886, chapter 480, which has been codified as section 186, article 27, of the Code of Pub. Gen. Laws, and which reads as follows: "No person or body corporate shall be permitted, either directly or indirectly, by agent or otherwise, to barter, sell, trade, or to offer for barter, sale or trade, by any publication, or in any way, any wares, goods or merchandise of any description, in package or bulk, holding out as an inducement for any such

barter, sale or trade, or the offer of the same, any scheme or device by way of gift enterprises of any kind or character whatsoever."

The indictment contained two counts, the first charging that the said Long unlawfully sold certain merchandise, holding out as an inducement for such sale a certain scheme and device, by way of gift enterprise; and the second that he kept a certain place or house for the purpose of selling lottery tickets. At the trial, the State abandoned the second count relating to the sale of lottery tickets and elected to stand upon the first count. The plaintiff in error then demurred to the indictment upon the ground that the Act of Assembly of 1886, chapter 480, codified as above mentioned, upon which the first count is based, is void. This demurrer was overruled, and having been duly tried and convicted, said Long appealed to this court from the rulings of the criminal court as to the admissibility of certain testimony. *Long v. State* (Md.) *ante*, p. 89. We approved the rulings of the lower court and remanded the case for further proceedings. A final judgment having been entered, a writ of error was sued out assigning a number of errors. All of them, however, present the same question, namely, whether the Act referred to is a valid exercise of legislative power.

This is the only question here presented. It was not before us on the former appeal, for we then assumed that the Act was valid. The legislation we are considering is one of a class of laws which have been enacted in almost all the States, in order, if possible, to prevent lotteries and gambling from entering into the ordinary transactions of life. We find many cases, some of them being referred to by the attorney-general in his brief, illustrating the necessity of such laws to restrain the introduction into mercantile transactions of lottery schemes and gambling devices like the one the plaintiff in error used in his business. We said on the former appeal that such a device had not even the merit of originality, and it undoubtedly violates the provisions of our Code prohibiting lotteries "and all devices and contrivances designed to evade" the said provisions. The ingenuity and fertility of invention which has been exercised in efforts to evade such laws would no doubt win success in legitimate lines of business.

It would unduly prolong this opinion to review the many cases referred to in the briefs. All of those relied upon by the State are cases in which there was an indictment under the laws prohibiting lotteries, and in which it was held the several devices or contrivances adopted involved chance. The case of *People v. Gillson*, 109 N. Y. 889, 12 Cent. Rep. 616, is the one chiefly relied upon by the plaintiff in error. We will consider it presently. In *Hull v. Ruggles*, 56 N. Y. 424, the exigency of the case required the court to determine and define what is a lottery, and it laid down this definition: "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery." Worcester's definition is, "A game of hazard, in which small sums are ventured for the chance of obtaining greater value." And the definition

adopted by the State in this case is not materially different from the above—"Any scheme for the distribution of prizes by lot or by which one on paying money to another obtains a token, which entitles him to receive a larger value or nothing, as some formula of chance may determine, is a lottery."

In one respect we think all these definitions are too narrow to cover some of the modern devices resorted to in order to evade the Lottery Laws, and that whether the consideration paid or given for the token or chance to win something generally called a prize consists of money or any other thing of value, makes no difference.

An examination of the many cases on this subject will show that it is very difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of a gratuitous distribution of property, which has not been held by the courts of this country to be in violation of the Lottery or Gaming Laws in force in the various States of the Union.

In the case of *Yellow Stone Kit v. State*, 88 Ala. 196, 7 L. R. A. 599, the court uses this language: "If the distribution is a pure gift or bounty and not in name or pretense merely which is designed to evade the law—if it be entirely unsupported by any valuable consideration moving from the taker, there is nothing in this mode of conferring it violative of the policy of our statutes condemning lotteries or gaming." It is apparent, however, that the giving away of property without consideration, whether by lot or otherwise, is not in itself an evil, and certainly not such an evil as requires prohibition by law at the present day.

The case referred to—that of *People v. Gilson*, decided by the Court of Appeals of New York in 1888—arose upon the question of the validity of an Act of the Legislature of that State, which provided that "no person shall sell, exchange or dispose of any article of food, or offer or attempt to do so, upon any representation, advertisement, notice or inducement than anything other than what is specifically stated to be the subject of the sale or exchange is or is to be delivered or received as a gift, prize, premium or reward to the purchaser." It was held that, "by the provisions of this Act, a man owning articles of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful pursuit, and in a manner not injurious to the community, is certainly infringed, limited, perhaps weakened or destroyed, by such legislation."

"The law," says the New York court, "interferes with the free sale of food, for the condition is imposed that no one shall sell food, and at the same time, and as part of the transaction, give away any other thing."

These remarks apply with great force to our own Act, which prohibits, as we have seen, in connection with any sale of goods, wares or merchandise, "any scheme or device by way of gift enterprises of any kind or character whatsoever."

12 L. R. A.

This broad and sweeping language would seem to include not only a lottery in which a valuable consideration is given for the chance to win a prize, but also a gratuitous distribution not involving the element of chance. The words "gift enterprise," so far as we have ascertained, have never been judicially defined.

The Century Dictionary gives the only definition of the words we have been able to discover, as follows: "A business, as the selling of books or works of art, the publication of a newspaper, etc., in which presents are given to purchasers as an inducement."

It was contended on the part of the State that the Act of 1886 comes within the legitimate exercise of the police power, and that "gift enterprise" is a species of lottery, because the distribution in all gift enterprises is dependent on some formula of chance. But we do not think the words "gift enterprise" necessarily imply a scheme involving chance. In so far as the object of an Act is to protect the morals and advance the welfare of the people by prohibiting every scheme and device bearing any semblance to lottery or gambling, it undoubtedly would be a valid exercise of power, and the citation of authorities is not necessary to sustain a proposition so well settled.

But the Act in question goes further, and in effect, as we construe it, declares as did the New York Statute, which was held invalid in the case referred to, that no person shall give away anything to a purchaser of goods, wares or merchandise, as an inducement to make the purchase.

Such regulation of trade is, in our opinion, not only unwise but unlawful, and unlawful because it is necessary neither for the benefit, safety nor welfare of the people, and which in its operation would be oppressive and burdensome. *People v. Gilson*, 109 N. Y. 889, 12 Cent. Rep. 616; *Re Jacobs*, 98 N. Y. 98; *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 87.

It must always be conceded, of course, that the State can, through its Legislature, by the legitimate exercise of its police powers, pass "laws and regulations necessary for the protection of the health, morals and safety of society" (*Singer v. State*, 72 Md. 466, 8 L. R. A. 551); yet such regulations must be reasonable, and "what are reasonable regulations, and what are subjects of the police power, must be necessarily judicial questions." *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 40.

It follows that the Act of 1886, chapter 480, by reason of its general terms, including as it does all gift enterprises, those involving the element of chance as well as those that do not, is invalid, so far as it relates to gift enterprises not involving chance, and that the judgment of the Criminal Court of Baltimore must be reversed.

*Judgment reversed and cause remanded.*

## IOWA SUPREME COURT.

D. CHAPLIN *et al.*, *Appls.*,

v.

BROWN *et al.*

(....Iowa....)

1. An agreement by grocers not to buy any butter from the makers for two years if a firm shall open a butter store in the place is void for lack of consideration where such firm neither pays anything therefor nor buys any established plant, place of business or good will.

2. The agreement is void as tending to create a monopoly where all the grocers in a town agree to give up dealing in butter if a new firm shall establish a butter store in the place and pay as much for butter as dealers in neighboring towns would pay.

(June 1, 1891.)

**A**PPPEAL by plaintiffs from a judgment of the District Court for Buena Vista County in favor of defendants in an action brought to recover damages for defendants' breach of their agreement not to engage in the business of buying butter in a certain place, and to enjoin the further breach of such agreement. *Affirmed.*

The facts are stated in the opinion.

*Messrs. T. H. Chapman and C. A. Irwin* for appellants.

*Mr. T. D. Higgs* for appellees.

**Rothrock, J.** delivered the opinion of the court.

It appears from the petition that in the month of March, 1890, the plaintiffs entered into a written agreement with the defendants and other parties. The following is a copy of said agreement:

"We, the undersigned grocermen of Storm Lake, finding the business of purchasing butter of farmers and handling the same very burdensome, and of material loss to us, and believing the same could be handled as advantageously by persons who would make butter buying and handling an exclusive business, and whereas, the firm of D. & E. Chaplin, through their agent, assures us of their ability to handle butter to the best advantage, and that they will engage in the business extensively in our town, we make a solemn engagement and pledge ourselves to each other and to the said firm of D. & E. Chaplin that we will buy no more butter or take no more in trade, except for our family use, and all butter so bought shall be delivered by the seller to the buyer's place of residence. This, however, shall not prevent any merchant from buying butter to retail from any regular butter buyer who buys all the butter he handles in this town for cash. It is further provided that the said firm of D. & E. Chaplin, in whose favor we abandon the business, shall open rooms conveniently located for buying butter; that they shall keep a man in attendance during all business days and

hours in the year from as early in the morning and until as late in the evening as the season of the year and state of the weather might deem to require. They shall accept all the butter offered, and shall pay for the same as high price in cash, or by giving check against a suitable deposit in some bank in this town, as merchants or butter buyers in the Town of Newell, this county, are at the time paying in cash for a similar grade of butter, except in extreme cases, where they may be paying materially more than the markets will warrant. It is also provided that the said D. & E. Chaplin shall not direct their checks or persons taking the same to any particular store for payment. That they shall not buy in connection with any dry goods or grocery store. Whenever a majority of the merchants signing this article of agreement are convinced that the engagements herein entered into are not being complied with, or whenever they are dissatisfied with this arrangement or the manner in which it is being carried out, any merchant whose name is hereto appended may appoint a meeting by notifying each grocery firm in town of the time and place for the purpose of considering who may be guilty of a breach of faith in carrying out these engagements, or whether it is advisable to continue the same; and if, at such meeting, a majority of the subscribers hereto shall certify in writing that they think it advisable for the interest of the town to withdraw from this engagement, this contract shall become null and void. This engagement shall take effect and be in force from and after such time as when it shall have been subscribed to by each grocery house in this town, and when the firm of D. & E. Chaplin shall designate, provided they are then prepared to handle the butter, and shall continue two (2) years unless sooner dissolved, as herein provided. We also agree not to pay a higher price for eggs than shall be fixed by the said firm of D. & E. Chaplin, provided said firm shall fix as high price as eggs are at the time worth to ship. W. C. Kinne & Co. Fred. Scholler. Brown Bros. J. O. Douglas. W. A. Jones. Geo. E. Ford & Bro. W. Lowmsberry. Libby & Rae. D. & E. Chaplin."

It is averred in the petition that the plaintiffs, in pursuance of said written contract, came and located at Storm Lake, and engaged in the business of buying butter at that place, and were at the commencement of the suit still so engaged, and have made arrangements to continue the business for the said period of two years, and that they have thus far fully complied with said written agreement, but that the defendants, in violation thereof, have opened a butter store in said town, and have engaged in the business of buying butter generally, and have thereby interfered with plaintiffs' business, and alienated their trade to the extent of 5,000 pounds of butter, upon which plaintiffs would have realized a profit of three cents a

NOTE.—As to validity of contracts tending to restrain trade, see *notes* to *Herreshoff v. Boutineau* (R. L.) 8 L. R. A. 466; *Richardson v. Buhl* (Mich.) 6 L. R. A. 457; *Carroll v. Giles* (S. C.) 4 L. R. A. 154; 12 L. R. A.

*People v. North River Sugar Ref. Co.* (N. Y.) 2 L. R. A. 33; *Gulf, C. & S. F. R. Co. v. Texas* (Tex.) 1 L. R. A. 849; *Leslie v. Lorillard* (N. Y.) 1 L. R. A. 456.

pound, making in all \$150 damages suffered by plaintiffs. Judgment is demanded for said sum, and an injunction is prayed restraining the defendants from continuing in said business.

Among the several grounds of objection to the granting of an injunction we regard two of them as material. They are as follows: "*first*, that the agreement in writing is void for want of consideration, as there is no money value inuring to the benefit of the defendants herein; and, *second*, that said contract by its terms is for the purpose of creating a monopoly in purchasing and selling butter at Storm Lake, and is therefore in restraint of trade, to the detriment of the producers and consumers of butter at that place and in that vicinity."

The history of the law upon the question of contracts in restraint of trade is an interesting subject of investigation. The books abound in cases upon the subject. Anciently all contracts were void which in any degree tended to the restraint of trade, even in a particular locality, and for a limited time. This ancient rule has been so far modified that, although agreements in general restraint of trade are invalid, because they deprive the public of the services of the citizen in the occupation or calling in which he is most useful to the community, and expose the people to the evils of monopoly, and prevent competition in trade, yet an agreement in partial restraint of trade will be upheld where the restriction does not go beyond some particular locality, is founded upon a sufficient consideration, and is limited as to time, place and person. It is accordingly everywhere now held that when one engaged in any business or occupation sells out his stock in trade and goodwill he may make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a time named, and he may be enjoined and restrained from violating his contract. This is about as far as contracts in restraint of trade have been upheld by the courts in this country or in England. The general principles above announced will be found in all text-books upon contracts, and find support in many adjudged cases. We have not thought it necessary to set out or cite the cases. They will be found collected in 8 Am. & Eng. Encyclop. Law, p. 882, and 10 Am. & Eng. Encyclop. Law, p. 948; 2 Parsons, Cont. p. 747.

Applying these rules to the contract under

consideration, we are to inquire first whether there is a sufficient consideration for the promise of the defendants and the other parties who executed the instrument not to engage in dealing in butter at Storm Lake. It is very plain that there was no money paid to them as a consideration. The plaintiffs did not purchase any stock of butter which the defendants had on hand. They paid nothing for an established plant or place of doing business, nor for the good-will of any business. So far as appears, they went into the Town of Storm Lake, and proposed to go into the butter business if the other persons then engaged in that business would agree to quit that line of trade for two years. In all the search we have made for authority upon this branch of the controversy we have found no warrant in any precedent for holding that this is a sufficient consideration. There are cases which hold, and the law is well settled, that where a party proposes to expend money in erecting a manufactory or other plant which may be a public benefit, subscriptions in aid of the enterprise are valid obligations. But such contracts are widely different in principle from the agreement under consideration. Suppose the plaintiffs had made a proposition to the dry-goods merchants of Storm Lake that if they would all quit the business for two years, without any consideration being paid to them for so doing, the plaintiffs would establish a dry-goods store at that place, and the proposition had been accepted; it would be a marvelous decision if any court would hold that there was any consideration for such a contract.

2. But it appears to us that the decision of the district court is manifestly right upon the question that the agreement is against public policy. It plainly tends to monopolize the butter trade of Storm Lake, and destroy competition in that business. It is not necessary that the enforcement of the agreement would actually create a monopoly in order to render it invalid, and surely, where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality. Such contracts cannot be enforced.

*Affirmed.*

## NEW YORK COURT OF APPEALS.

Delora M. HUNTER *et al.*, Admsrs., etc., of  
Henry Hunter, Deceased, *Repts.*,  
v.

COOPERSTOWN & SUSQUEHANNA  
VALLEY R. CO., *Appt.*

(....N. Y.....)

**An attempt to board a moving train is**

**NOTES.**—As to negligence in getting on and off moving train, see *notes* to New York, P. & N. R. Co. v. Coulbourn (Md.) 1 L. R. A. 541; Hunter v. Cooperstown & S. V. R. Co. (N. Y.) 2 L. R. A. 832.  
12 L. R. A.

**negligence as matter of law**, if made by one in a safe position and acting under no coercion, obligation or special right, when in such proximity to a known and prominent obstruction—such as a freight platform—as to render the possible consequences of a misstep serious; and questions as to the speed of the train, his own convenience or inconvenience and whether or not he acted by direction of the railroad employes are immaterial.

(Ruger, Ch. J., and O'Brien and Andrews, JJ.,  
dissent.)

(March 10, 1891.)

**A** PPEAL by defendant from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Otsego Circuit in favor of plaintiffs in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion. *Mr. E. M. Harris*, for appellant:

The plaintiffs' intestate was guilty of negligence which caused or contributed to the injury he received.

He was in a safe place, at a familiar station, in full rigor of life, in good health, of good judgment, with nothing to disturb his judgment, when he attempted to board this moving train.

*Burrows v. Erie R. Co.* 68 N. Y. 556; *Gavett v. Manchester & L. R. Co.* 16 Gray, 501; *Harvey v. Eastern R. Co.* 116 Mass. 289; *Lucas v. New Bedford & T. R. Co.* 6 Gray, 64; *Solomon v. Manhattan R. Co.* 4 Cent. Rep. 775, 103 N. Y. 437.

The boarding a moving train is presumably a negligent act.

The deceased knew the train was in motion when he attempted to board it, and he took the risk of the attempt.

*Solomon v. Manhattan R. Co. supra*; *Shannon v. Boston & A. R. Co.* 1 New Eng. Rep. 681, 78 Me. 59.

If he was in fact guilty of contributory negligence, although the Company was also negligent, no recovery can be had.

2 Wood, Railway Law, 1155; *Paulitsch v. New York Cent. & H. R. R. Co.* 3 Cent. Rep. 886, 102 N. Y. 280.

Where the facts are uncontroverted, the question of negligence is a question of law for the court.

*Deyo v. New York Cent. R. Co.* 84 N. Y. 9; *Morrison v. Erie R. Co.* 56 N. Y. 306; *Wilds v. Hudson River R. Co.* 24 N. Y. 480; *Owen v. Hudson River R. Co.* 35 N. Y. 516; *Gonzales v. New York & H. R. Co.* 88 N. Y. 440; *Dwight v. Germania L. Ins. Co.* 4 Cent. Rep. 529, 108 N. Y. 841; *Crafts v. Boston*, 109 Mass. 519; *Reynolds v. New York Cent. & H. R. R. Co.* 58 N. Y. 248.

A passenger must not do that which is obviously dangerous, although he is advised to do it by the company's agents.

*Chicago, B. & Q. R. Co. v. Hazard*, 28 Ill. 378; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; 2 Wood, Railway Law, p. 1152; *Ginnon v. New York & H. R. Co.* 3 Robt. 25.

It cannot be said that a person of ordinary prudence and care, standing on the platform as described in the evidence, would have attempted to jump into the narrow space between the cars when there was no danger to be avoided if he remained on the platform, and no incentive to the act other than the invitation of the conductor, which he knew he was not required to obey, and with a full apprehension of the danger he was about to run.

*Morrison v. Erie R. Co. supra*; *Tolman v. Syracuse, B. & N. Y. R. Co.* 98 N. Y. 198; *Davenport v. Brooklyn City R. Co.* 1 Cent. Rep. 506, 100 N. Y. 682; *Hazard v. Chicago, B. & Q. R. Co.* 1 Biss. 503, 12 L. R. A.

*Mr. Carlton B. Pierce*, for respondents: There may undoubtedly be circumstances under which an attempt to get on or off a moving train would not be regarded as negligence as a matter of law, and where the question of negligence under all the circumstances of the case should be submitted to the jury.

*Evler v. New York Cent. R. Co.* 49 N. Y. 47. The direction or invitation or assurance of safety given by a servant of the Company may so qualify a plaintiff's act as to relieve it of the quality of negligence which it would otherwise have.

*Pierce, Railroads*, 829; *Shearm. & Redf. Neg.* § 282.

Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ.

*Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99. See *Glushing v. Sharp*, 96 N. Y. 876.

There may be occasions where it is proper to board a moving train.

See *Johnson v. Westchester & P. R. Co.* 70 Pa. 857; *Lambeth v. N. O. R. Co.* 66 N. C. 494; *Cumberland Valley R. Co. v. Mangano*, 61 Md. 58; *Lent v. New York Cent. & H. R. R. Co.* 120 N. Y. 497.

*Gray, J.*, delivered the opinion of the court:

Upon a previous occasion we reversed a judgment recovered by these plaintiffs, and ordered a new trial, upon the ground that the act of the deceased in attempting to board the moving train was reckless and dangerous, and contributed to the resulting injury. 112 N. Y. 371, 2 L. R. A. 882. As the case was then presented, the fact was established by the evidence for the plaintiffs that the speed of the train was from four to six miles an hour at the time the deceased jumped on, and, though it was substantially admitted that the attempt was negligence on his part, it was argued that the act was justified because requested or directed by the conductor of the train. That direction was in these words: "If you are going, jump on." But we held that that circumstance constituted no excuse for the dangerous act, inasmuch as it created no emergency calling for the immediate exercise of judgment in the choice between two dangers, and that it amounted to nothing more than a notification that the train would not stop or go slower. Upon this appeal the plaintiffs endeavor to sustain another judgment recovered against the Company upon the new trial. They say that the case, though "practically the same," differs from the previous case in a vital feature, namely, with respect to the speed of the train. Upon the new trial evidence was given by three witnesses that the speed of the train was between one and two miles an hour. Of these witnesses, two had previously testified to a speed of four to six miles an hour, and the other had not testified upon that subject. In view of the doubt justly resting upon the character and correctness of this evidence, we might very properly say that it was open to the court to take as the fact concerning the speed of the train the evidence given by the other witnesses in the case, for both parties, which placed it at about six miles an hour. But we shall, for the purposes of the case, as-

sume that the evidence as now given left it a question of fact as to how fast the train was moving past the station. We will accept that rate of speed deemed by the plaintiffs as most favorable to their contention, and still we must hold that the plaintiffs were not entitled to a recovery on their case. The conclusion was irresistible from the facts that the conduct of the plaintiffs' intestate was negligent, and that his act contributed to his injuries and death. He was described as a quick, active man, thirty-six years of age, and in good health. He had lived several years in sight of the station, and had frequently taken the train there. On the morning in question, accompanied by a friend, he went to the station, and stood with him upon the freight platform of the station until the train came in sight. The deceased then descended the steps leading to the lower or passenger platform, and waited there, at a point some four or five feet away from the steps. The train slackened its motion, but did not stop, and, as the passenger-car approached, the conductor, standing at the forward end, said to them, "If you are going, jump on." The deceased made an effort to do so, but in some way, not exactly described, was caught and rolled between the moving train and the freight platform, near to which he was standing. Very probably, in the attempt to get upon the moving car, the deceased, not reckoning upon the nearness of the higher and projecting freight platform, struck against it, was thrown down, and was forced between it and the train. Upon the facts, in what respect was the defendant guilty of negligence, and how was it responsible for the injury which resulted to the deceased? That the train did not stop at a particular or at the usual place, and ran beyond the station, would not charge the defendant with negligence, in the sense that it thereby caused the unfortunate result complained of. The deceased was under no obligation to board the train. In fact, he had no especial right to be carried by it. He had no ticket; but, even if he had one, that would not have placed the Company under any contract to carry him upon that train. If its servants disregarded the time-table notice as to that station upon the morning in question, that fact did not entitle the deceased to disregard the usual prudential considerations which should govern human action, nor did it subject the defendant to a liability for the consequences of an attempt to get upon a train in motion. The invitation, request or command of the conductor, however his words may be regarded, in no respect compelled the deceased to leave the place of safety upon the platform or to change his position. He was a free agent, and had the opportunity of choice between staying where he was and complying with the conductor's request. He could have waited for the train to come to a full stop, or for another train. The question of his convenience or inconvenience is of no consequence, and cannot enter as an element of the case. If a person, when in a safe position and under no stress of circumstances, attempts to get upon a train moving past him, at no matter what rate of speed, while in such a proximity to a known and prominent obstruction, such as was this freight platform, as to render the consequences of a false or misstep

possibly, if not certainly, serious, we think that but one inference and opinion can be entertained. The act would be hazardous, and however slight the chances of injury might have seemed to him, and whatever the motive or influence which induced the act, the individual would alone be responsible for the injury which might result to him. Sufficient responsibility is imposed upon these corporations in the operation of their roads already, without adding to it a further responsibility for the consequences of rash and unnecessary acts. The railroad and the trains upon it charge all persons, having anything to do with or about them, with the knowledge of possible dangers, and their presence imposes the duty of being vigilant and prudent, if responsibility for an occurring injury is to be escaped. It is unnecessary to refer to authorities bearing upon the question before us. That has been done by *Judge Peckham* in his opinion when this case was formerly before us. The only difference now is that the respondents claim the speed of the train as testified to was so very moderate as to take this case out of the effect of our previous decision, and to make it one for the jury to pass upon, with respect to the question of whether the act of the deceased was negligent. It is true that upon the previous appeal we laid stress upon the fact that the rate of speed was so rapid as to compel the judgment to pronounce it a reckless act to attempt to board the train. But we did not hold that, if a train was moving much more slowly, the attempt, under the circumstances disclosed here, might be warrantable, or would raise a question for the jury to consider. It was said that there may be cases in which an attempt to get on or off a moving train would not be regarded as negligence as matter of law; and so there may be, but this is not one of those cases, inasmuch as the deceased was under no coercion nor obligation, and had no especial right to be carried by that train. He was so placed that, while safe if he remained quiet and where he was bound to know, and must have known, that if he endeavored to get upon the moving train, and should fail to accomplish it upon the second, or should take a misstep, he incurred the risk of being thrown against the neighboring freight platform and injured. The case of a passenger who alights from a train moving past his destination, in compliance with the direction of a servant of the corporation, as in *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, cannot be altogether likened to the present case. In such a case there may be a stress of circumstances, in the passenger being obliged to choose between being carried away from the place where his duties or ties compelled his presence, and of endeavoring to alight, upon the direction or suggestion of the railroad employé. The question then might very properly be left to the jury for them to pronounce upon the character of the act; but even then, as it was held in the *Filer Case*, if the cars were moving at such a rapid rate as to charge the person with knowledge of the danger in the attempt, the act would be reckless, and no recovery could be had. To alight from or to board a train in motion is a negligent and hazardous act, which can only be made to appear

excusable when, in the situation of the person, he is under such a coercion of circumstances as to raise a fair question as to whether he was really in the free possession and use of his faculties and judgment. *Solomon v. Manhattan R. Co.* 103 N. Y. 487, 4 Cent. Rep. 775. Judge Andrews, in the case cited, held substantially as I have just stated. In his view there is less excuse in boarding a moving train than in alighting from it, and the distinction is obvious. The option, in the former case, is between an unnecessary and possibly dangerous act and the mere inconvenience of being left to take a later train.

These views lead to the conclusion that *the judgment below should be reversed*, and a new trial ordered, with costs to abide the event.

**Earl, Finch and Peckham, JJ., concur.**

**O'Brien, J., dissenting:**

When this case was here on a former appeal (112 N. Y. 371, 2 L. R. A. 832), it was held that the plaintiffs' intestate was guilty of negligence contributing to his death, because he attempted to board the train when running by the station at the rate of at least six miles per hour. As the case was then presented, the testimony conclusively established the fact that at the time when the train was passing the platform on which the deceased stood, it was running at that rate of speed at least, if not even more. Now the case is here upon a very different state of facts. Upon the last trial, resulting in the judgment now under review, three witnesses called by the plaintiff testified that the train was running, at the time the deceased attempted to get on, at the rate of speed not to exceed from one to two miles per hour. One of these witnesses was the engineer who had charge of this very train when the accident happened, and another was the fireman. The defendant on the first trial gave no evidence in regard to the speed of the train, but on the last trial it called two witnesses who testified that it was six or seven miles per hour. There were some facts and circumstances proven, bearing on the question of speed, which could also have been considered by the jury, not the least important of which was the undisputed fact that, though the train was running upon a slippery track and a down grade, it was brought to a full stop within 100 feet of the point where the deceased attempted to get on. In this conflict of testimony the case went to the jury, and the verdict for the plaintiff must be taken by us as conclusively establishing the fact that the train was running at the rate of from one to two miles per hour. It is said that two of the plaintiffs' witnesses testified on the first trial to a greater rate of speed than upon the last trial. That, if true, was a circumstance for the consideration of the jury in determining what weight the testimony was entitled to, but it has no place in the consideration of this appeal. The only question that we have to deal with is whether the deceased, in attempting to board the train when going by the station platform at the rate of from one to two miles per hour, and having been invited by the conductor in charge of the train to "jump on," was guilty of negligence as matter of law. It was a regular station on

defendant's road where its trains stopped, and where passengers got on and off. On this morning, however, it failed to stop. The plaintiffs' intestate was on the platform waiting for the train, which he intended to take as a passenger, and while so waiting for it to stop it proceeded slowly past the platform, and when the rear car, which was the only passenger car on the train, had nearly reached the point where he was, the conductor, not intending to stop, invited him to get on, and he attempted to do so, and was killed. It is not the province of this court to examine the evidence in order to form some theory as to the particular manner in which the deceased was killed. That was for the jury. We can only know from the findings below that the platform on which he stood was separated from the car into which he was invited by a space not more than six inches wide; that the iron railing on the part of the car through which he must pass was two feet and six inches wide; and the platform of the car which he attempted to reach was but two feet higher than the place where he stood. The attempt of a passenger to board a train going at a very low rate of speed in this manner, and under such circumstances, is not, in my opinion, such a reckless and dangerous act as to warrant any court in pronouncing it negligence *per se*. It is an act in regard to which reasonable and prudent men may differ, and therefore it is for the jury to determine its true character as a question of fact, under all the circumstances of the case. The true rule was stated by Peckham, J., in his opinion in this very case, on the former appeal, in this language: "There may undoubtedly be circumstances under which an attempt to get on or off a moving train would not be regarded as negligence, as a matter of law, and where the question of negligence, under all the circumstances of the case, should be submitted to the jury." If this rule cannot properly be applied to a case like this, where the train, upon the finding of the jury, was barely in motion, it cannot have any practical application to any case whatever. If it is correct to say that a passenger, in attempting to board a train moving at the rate of from one to two miles per hour, under the conditions and circumstances appearing in this case, is guilty of negligence as a matter of law, then the same result must follow in every case where the train is in motion at all. The act of alighting from a moving train is quite as dangerous as an attempt to board it while going at the same speed. The only difference is that there exists a stress of circumstances in the former case that does not exist in the latter. But the fact that there may be reasons for risking the danger in one case which do not exist in the other is not alone enough to change the question from one of fact to one of law. This court has held that a passenger who attempts to get off a slowly moving train by the invitation of a servant of the company is not, as a matter of law, guilty of negligence. *Filer v. New York Cent. R. Co.* 49 N. Y. 47. In that case the danger of getting off was as great and even greater than would be an attempt to get on while the motion of the train was the same. The passenger could have remained in the train, and suf-



ferred the inconvenience of being carried past her home, and in the case at bar the deceased could have waited for another train; but surely this difference in the circumstances cannot change what was held to be a question of fact in the former case into a question of law in this. The highest court in at least three of our sister States has passed upon this question and in each case it has been held to be one of fact.

In *Johnson v. Westchester & P. R. Co.*, 70 Pa. 357, a passenger attempted to board a train moving at from three to four miles an hour. There was no invitation to enter the car. It was held that it was for the jury to say whether the danger of boarding the train when in motion was so apparent as to make it the duty of the passenger to desist from the attempt. Where the conductor failed to stop the train at the platform where passengers landed, and when the train was moving at from two to four miles an hour, he told a passenger to get off, who obeyed his direction, and was killed, it was held that this act was not in law negligence, but was a question for the jury. *Lambeth v. North Carolina R. Co.* 66 N. C. 494.

In another case a young, vigorous man stepped down from a moving train. He had a valise in one hand and a basket in the other. There was no direction from any servant of the company. In an action to recover for injuries received, it was held that it was a question for the jury whether he exercised due care. *Cumberlaid Valle R. Co. v. Maugans*, 61 Md. 58.

I think that the act of the deceased in attempting to board the train upon the invitation of the conductor, and under all the circumstances disclosed in this case, presented a question of fact for the jury, and not a question of law. The judgment in this case cannot be disturbed unless we are prepared to decide that the deceased was in law guilty of negligence in attempting to board the train in the manner and under the circumstances stated. The evidence of negligence on the part of the defendant is precisely the same now as when the case was here before. On that appeal Judge Peck-

ham said: "It was the duty of the railroad company (having advertised so to do) to stop its trains at the station in question, and to give ample time to all persons desirous of getting on or leaving at that station to do so." And again, referring to the invitation of the conductor to get on the train, he said: "It may be assumed that this direction implied a notice to the deceased that the train would not stop at that station, and that unless he attempted to get on while the car was thus in motion he would be left at the station and compelled to take another and a later train. It may be assumed that in giving this direction and in failing to stop the train, the Company was chargeable with negligence." The point that the trial judge submitted nothing to the jury except the evidence as to whether the conductor did or did not invite the deceased to get on the train is utterly untenable. The jury were expressly charged to inquire upon the evidence whether the defendant failed to perform its duty to the deceased in not bringing the train to a stop, and, upon the question whether a safe opportunity was afforded to the defendant to get upon the train, they were to consider the evidence in regard to the invitation of the conductor. At the end of the charge the defendant's counsel requested the court to instruct the jury that, in case they found that the conductor did not invite the deceased to get aboard the train, their verdict must be for the defendant, as that ended the case, and this request was allowed. This did not withdraw from the jury the evidence bearing upon the failure of the defendant to stop, or any other question previously submitted, but was, in effect, an instruction that, although the defendant failed in its duty to stop the train at the station, yet there could be no recovery unless the conductor invited the deceased to get on. If there was any error in this part of the charge it was in favor of the defendant, and cannot now be used for the purpose of reversing the judgment. The judgment should be affirmed.

Ruger, Ch. J., and Andrews, J., concur  
Motion for rehearing denied April 28, 1891.

## GEORGIA SUPREME COURT.

GILL, *Plff. in Err.*,  
v.  
STATE OF GEORGIA.  
(...Ga....)

\*Written authority from the parent or guardian for selling or furnishing intoxicat-

\*Head note by BLOOMLEY, Ch. J.

ing liquors to a minor must be special for each occasion. A general permit or license for the minor to drink beer and whiskey in a specified bar-room without limitation as to time or quantity is void.

(March 4, 1891.)

**E**RROR to the Superior Court for Muscogee County to review a judgment convicting

NOTE.—Sale of liquor to minor.

The fact that an adult pays for the liquor drunk by himself and a companion who is known to be a minor does not relieve the seller from liability to indictment for selling to a minor. *State v. Scoggins* (N. C.) 10 L. R. A. 542, and note, 107 N. C. 959.

Where one partner of a firm of liquor dealers is present when the other partner sells drink to a minor, an indictment will lie against both or either. *Ibid.*

12 L. R. A.

On a prosecution of a master for a sale of liquors to a minor, by his servant, evidence that the minor was often seen going into the bar-room, and that defendant himself attended upon him, is admissible, as tending to show that, if any such sale was actually made by the bar-tender, it was made with the defendant's consent. *Com. v. Rooks*, 150 Mass. 59.

Sale of liquor to minor, decisions under various state statutes. See notes to *State v. Scoggins* (N. C. 10 L. R. A. 542; *Fletcher v. Forier* (Mich.) Id. 80. See *Com. v. Stevens* (Mass.) 11 L. R. A. 397.

28

defendant for unlawfully selling intoxicating liquors to a minor. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Martin & Worrill* for plaintiff in error.

*Mr. A. A. Carson, Sol. Gen.,* for the State.

*Blackley, Ch. J.,* delivered the opinion of the court:

The indictment was under section 4540a of the Code, which reads as follows: "No person or persons, by himself or another, shall sell, or cause to be sold, or furnished, or permit any other person or persons, in his, her or their employ, to sell or furnish any minor or minors spirituous or intoxicating or malt liquors of any kind, without first obtaining written authority from the parent or guardian of such minor or minors, and such person or persons so offending shall, on conviction, be punished as prescribed in section 4810 of the Code." This Statute is a police regulation, and has regard, not alone to the will and wishes of parents and guardians over the conduct of children, but chiefly to the wholesome restraint and discipline of minors as immature members of society. It relies upon parental discretion, and intends that that discretion shall be exercised by the parent or guardian, and not delegated to the child. It has no thought of empowering the parent to make the child the judge of its own needs for intoxicating liquors, without limitation as to time or quantity. On the contrary, the foundation principle of the law is that the minor's discretion is not to be trusted. Hence it requires a decision of the parent or guardian, evidenced by writing. A parental decision not founded on the circumstances of any particular occasion, but applicable alike to all occasions, and measuring the supply of liquors to be furnished by nothing but the desires and appetites of the child, is simply an effort to repeal the law *pro tanto*. To give it effect would be in direct conflict with the principle announced by this court, during the prevalence of slavery, in the case of *Reinhardt v. State*, 29

Ga. 529, in which it was held that the master's discretion to determine the quantity of spirituous liquors necessary for the health of a slave could not be delegated. Consistently with the policy of the law, there can be no general authority by the parent conferred upon anyone to furnish liquors at his own pleasure or the pleasure of the child. The parent must hold control of the supply, both as to time and quantity, and the written authority must be special, as contradistinguished from general. It must be applicable to one occasion only, and must be repeated separately for each subsequent occasion. Once acted on, it is exhausted, and is no more authority for subsequent supplies than if it had never existed. Parental license to run indefinitely would, if granted by a sufficient number of rash and inconsiderate fathers, enable one or more drinking saloons in large cities to flourish on the patronage of minors alone. We think such a license shows on its face an attempted evasion of the law. It treats the parent alone as interested in the conduct of the child, and ignores the wider and more important policy of the Statute, which is to rear good citizens and conserve the public order and general welfare of the State. If we are correct in what has been said, the instrument relied upon as a defense in this case was void upon its face. It was no authority for selling or furnishing, even in a single instance, for it had no limitation as to time or quantity, and was obviously intended as a general license rather than as a particular authority. It was an unlimited permit to drink whiskey and beer in the bar-room of which the defendant was one of the proprietors. We have not overlooked the case of *Maschwitz v. State*, 49 Ark. 170, but, notwithstanding our high respect for the court which decided it, we cannot accept it as a precedent. It refers to no authority, and to our minds its reasoning confounds the just distinction between police and civil liability. There was no error in excluding the evidence, nor in refusing to grant a new trial on other grounds.

*Judgment affirmed.*

## UTAH SUPREME COURT.

Daniel HAMER, *Recept.,*

*v.*

C. E. BRAINARD *et al., Appts.*

(.....Utah.....)

**An indorser of a forged bill is liable to the indorsee on its dishonor without proof of demand or notice.**

**NOTE.**—Commercial paper; indorser cannot question maker's signature.

An indorser of a promissory note impliedly warrants that the instrument is not forged, and cannot question the signature of the maker or the previous indorser, or take advantage of the fact that their signatures were forged. *Armson v. Abrahamson*, 30 N. Y. S. R. 657.

Where a note is void as between maker and payee, the indorser may be held without any proof of demand and notice. 1 Bayley, Bills and Notes, 205; 1 Parsons, Notes and Bills, 444; Chandler v. Mason, 2 Vt. 132.

12 L. R. A.

(April 2, 1891.)

**A** PPEAL by defendants from a judgment of the District Court for the First District in favor of plaintiff in an action by the indorsee of a draft to recover from his indorsers the amount which he had paid them for it. *Affirmed.*

The facts are stated in the opinion.

Every indorser warrants the instrument to be valid, and exactly what it seems to be, whether he knows the contrary or not, and is absolutely bound without demand or notice. 1 Parsons, Notes and Bills, 580.

An absolute guaranty may be written over his indorsement, upon which a recovery may be had against him. *Seymour v. Van Slyck*, 8 Wend. 423; *Herriek v. Carman*, 13 Johns. 159; *Tillman v. Wheeler*, 17 Johns. 323.

Or he may be held liable as maker. *Griswold v. Slocum*, 10 Barb. 402; *Wilson v. Ralph*, 3 Iowa. 450. See *Seabury v. Hungerford*, 2 Hill, 84.

**Messrs. Smith & Smith**, for appellants:

In the case of innocent indorsers of forged paper it is necessary that notice of the forgery should be speedily given to the innocent indorsers as soon as it may be discovered and as soon as it might with ordinary diligence have been discovered.

*Price v. Neale*, 8 Burr. 1854; *Smith v. Mercer*, 6 Taunt. 76; *Davies v. Watson*, 2 Nev. & M. 709; *Ellis v. Ohio L. Ins. & T. Co.*, 1 Handy, 97, 4 Ohio St. 628; *Gloucester Bank v. Salem Bank*, 17 Mass. 88; *Cocks v. Masterman*, 9 Barn. & C. 902; *Bank of Commerce v. Union Bank*, 8 N. Y. 380; *Goddard v. Merchants Bank*, 4 N. Y. 147; 2 Parsons, Notes and Bills, p. 599; *Redington v. Woods*, 45 Cal. 425; *Bank of the United States v. Bank of Georgia*, 28 U. S. 10 Wheat. 838, 6 L. ed. 884; *Thomas v. Todd*, 6 Hill. 841; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 109, 29 L. ed. 817; *Cooke v. United States*, 91 U. S. 896, 28 L. ed. 242; *Tiedeman, Com. Paper*, § 400; 1 Edwards, Bills and Notes, § 276.

**Mr. Jacob S. Boreman**, with **Messrs. Evans & Rogers**, for respondent:

Demand and notice are unnecessary to hold an indorser liable when the instrument on which the indorsee seeks to recover is a forgery.

*Cochran v. Atchison*, 27 Kan. 728; 2 Dan. Neg. Inst. § 1118; 2 Bayley, Bills and Notes, chap. 7, § 905; 1 Parsons, Notes and Bills, 444, 445; *Perkins v. White*, 36 Ohio St. 580; *Turnbull v. Bowyer*, 40 N. Y. 458; *Copp v. McDuggall*, 9 Mass. 1; *Canal Bank v. Bank of Albany*, 1 Hill. 291; 1 Dan. Neg. Inst. § 669.

**Zane, Ch. J.**, delivered the opinion of the court:

It appears from the evidence in this record that Zion's Savings Bank & Trust Company, by its cashier, drew a bill of exchange for the sum of \$6.50 on C. B. Richards & Co., of New York, payable to the order of one J. S. Field; that the latter indorsed it to Brainard & Roberson, and that they assigned it to the plaintiff for the consideration of \$500 in cash and \$100 due on a real-estate transaction. It also appears that the draft had been raised to \$600 before the assignment to the plaintiff. The plaintiff also assigned the bill; and when the forgery was discovered, and the maker refused to pay, the plaintiff refunded the \$500 to his assignee, and brought this suit against the defendants to recover the amount so paid by him to the defendants. Upon the trial the jury found a verdict for the plaintiff for that amount and interest, and a motion for a new trial having been denied by the court, a judgment was by it entered upon the verdict. From this judgment the defendants have appealed, and insist that it was erroneous, because the evidence was insufficient to authorize the verdict, in the absence of proof of demand and notice.

This is not an action based upon the assignment. It is an action to recover the amount paid by the plaintiff to the defendants without any consideration and under a mistake. To permit them to retain such consideration would, in effect, give them so much of plaintiff's money, obtained under a mistake, and without any consideration to plaintiff, and without fault on his part. There is a conflict in the

authorities as to the necessity of demand and notice when the indorser does not receive the consideration for the transfer of title, as when he is a mere accommodation indorser. The drawee of a bill is presumed to know the signature of the drawer, and he must determine as to its genuineness and refuse payment; if not, he pays at his peril. Not so, however, as to the other signatures on it, or the writing in the body of it. As to those and such writing he must use reasonable care to prevent being imposed upon; and so, as to the drawer, he is presumed to know his own signature, and to be able to determine whether the amount named in it has been raised, and the law requires him to give prompt notice to the drawee of such forgeries. Some cases hold that demand and notice should be averred and proven when the action is upon the assignment to recover back the consideration paid; but when the action is to recover on the ground of want of consideration and mistake they hold no such demand or notice necessary to be averred or proven. The law applicable to the facts of this case is stated, as we hold, in sections 669 *a* and *b*, Daniel, Neg. Inst.: "The indorser engages (1) that the bill or note will be accepted or paid, as the case may be, according to its purport; but this engagement is conditional upon due presentment or demand and notice; he also engages (2) that it is in every respect genuine; (3) that it is the valid instrument it purports to be; (4) that the ostensible parties are competent; (5) and that he has lawful title to it and the right to indorse it. And if it turns out that any of these engagements but that first named are not fulfilled, the indorser may be sued for a recovery of the original consideration which has failed, or be held liable as a party without proof of demand and notice. The doctrine of the text that in such cases the indorser is bound without demand or notice undoubtedly applies when he indorses with knowledge of the infirmity that renders the instrument void; and such knowledge is necessary to make him so liable, according to some authorities. But the better opinion is, we think, that he is at least bound to refund the consideration paid him upon the transfer if the instrument is void, for it is not then the thing which it purported to be, and which he impliedly represented it to be. If he be a mere accommodation indorser, receiving no part of the consideration, it has been cogently argued and has been held that he is not responsible for any alteration which may have avoided the instrument, unless there were due demand and notice. But the consideration paid the party accommodated is in such case attributable to him, and he would seem to us to stand as a surety, bound to refund it; and the rule exacting notice to hold an indorser liable seems to us to apply to cases in which he warrants payment at maturity, and not to those cases in which he passes an instrument affected by some vice, which renders it in fact not the bill or note it purports to be." Under the facts of this case we hold that an offer to return the bill or a demand and notice was not necessary to be averred and proven. We find no error in the record.

*Judgment of the court below affirmed.*

**Anderson and Blackburn, JJ.**, concur.

## IOWA SUPREME COURT.

BURLINGTON, CEDAR RAPIDS &  
NORTHERN R. CO.

v.

Peter A. DEY *et al.*, *Appls.*

(....Iowa....)

1. The power to establish joint "through rates" for connecting carriers is included within the power of the State to regulate rates of charges for transportation of freight by railroads.
2. A railroad company is not compelled to enter involuntarily into contract relations with other companies, by a statute requiring the adoption of joint rates, or in default thereof the fixing of such rates by railroad commissioners, as in the latter case the obligation of the company as to the rates is one imposed by law and not by contract.
3. Judicial notice will be taken of the course of business of railroad companies to transfer cars over more than one railroad without breaking bulk.
4. A statute requiring freight in carload lots to be transferred without unloading unless the unloading is done without charge, and that smaller quantities shall be transferred into the cars of the connecting carrier at cost, which shall be made a part of the joint rate, does not interfere with the constitutional guaranties for the protection of the rights and property of the carriers.
5. Special proceedings applicable to specified subject matter, and conformable

to the rules requiring notice and the acquisition of jurisdiction, and which affect all persons alike whose property or rights come within the lawful scope of the proceedings, are prosecuted with "due process of law."

6. The provision of a statute that rates fixed by railroad commissioners shall be regarded as prima facie reasonable is within the power of the State as to prescribing rules of evidence in all proceedings under the laws of the State.
7. Permitting the recovery of attorneys' fees on recovery against a railroad company for violation of a statute regulating rates does not violate the constitutional provision as to equality.
8. A provision allowing attorneys' fees on recovery by the plaintiff for the violation by a railroad company of the statutory schedule of rates does not impose a "penalty for exercising the right of defense."
9. There is no uncertainty in a statute prescribing the penalty for unreasonable railroad charges and declaring that rates fixed by railroad commissioners as the maximum shall be prima facie reasonable, as the State is precluded from denying that the commissioners' rates are reasonable.
10. Penalties imposed upon railroad corporations for violation of statutes are not excessive if no greater than is necessary to enforce obedience to the statute, although they might appear excessive if imposed upon individuals.
11. A statute giving railroad commissioners authority to fix joint rates for a

NOTE.—*Railroads as carriers; rates of freight; long and short hauls; interstate commerce regulations.*

The method of testing freight rates by the rate per ton per mile cannot be considered a controlling rule in determining the reasonableness of rates. *Business Men's Assn. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 41.

Comparison of rates under dissimilar circumstances and conditions cannot be adopted as standards in arriving at their reasonableness. *Ibid.*

When the reasonableness of rates is in question, charges on long through lines cannot offer just basis for comparison with local rates for relatively short distances. *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 703.

In through rates on long hauls, but not always in local rates, the rate per ton per mile grows less in proportion to the greater distance; while the aggregate of the rate increases in proportion to such greater distance. *Business Men's Assn. v. Chicago, St. P. M. & O. R. Co.* *supra*.

The Act to Regulate Commerce aids the rule making aggregate charge of transportation of freight less in proportion every hundred miles after the first. *Farrar v. East Tennessee, V. & G. R. Co.* 1 Inters. Com. Rep. 784.

The right to make greater charges for a short than for a long haul depends upon peculiar circumstances and conditions of each case. *Boston & A. R. Co. v. Boston & L. R. Co.* 1 Inters. Com. Rep. 571. See *Re Louisville & N. R. Co.* 1 Inters. Com. Rep. 278.

Joint rates on long hauls usually are, and should be, proportionately lower than local rates on short hauls. *Farrar v. East Tennessee, V. & G. R. Co.* *supra*. See notes to *Cleveland, C. C. & I. R. Co. v. Closser (Ind.)* 9 L. R. A. 754; *Pensacola & A. R. Co. v. State (Fla.)* 8 L. R. A. 661; *United States v. Tozer (Mo.)* 2 L. R. A. 444.  
13 L. R. A.

*Duty owed to the public.*

The time and manner in which a railroad company will carry persons and property, and the price to be paid therefor, are subject to legislative regulation; but in the absence of such regulation it owes only such duties to the public as the common law or custom has established. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 29 L. ed. 201.

A railroad company is prohibited from discriminating unreasonably in favor of or against another company seeking to do business on its road. But that does not necessarily imply that it must stop at the junction of one and interchange business, because it has established joint depot accommodations with another company at another place. *Ibid.*

*Local traffic rates must be reasonable.*

A railroad company is under special obligation to give reasonable rates for its local business; but there are many influences which may affect through rates while not bearing upon local rates at all, or, if at all, in less degree. *Lippman v. Illinois Cent. R. Co.* 3 Inters. Com. Rep. 414. See, as bearing on this point, *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754, 1 Inters. Com. Rep. 438; *Detroit Board of Trade v. Grand Trunk R. Co. of Canada*, 2 Inters. Com. Rep. 199, 2 Inters. Com. Rep. 515; *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 289, 3 Inters. Com. Rep. 375.

The doctrine that an estimated proportion of the through rate must not be less according to distance than the local rate from an intermediate point to another point named in the line covered by the through rate is untenable. *Poughkeepsie Iron Co. v. New York C. & H. R. R. Co.* 3 Inters. Com. Rep. 243, citing *Detroit Board of Trade v. Grand Trunk*

railroad makes the rates thus fixed only prima facie evidence of their reasonableness, although not expressly limiting them to that effect where the only penalties are for charging unjust and unreasonable rates, and a former statute, which did not extend to joint rates, and of which this was an amendment, expressly limited the effect of the commissioners' order as to rates to prima facie evidence.

12. Where a statute is susceptible of conflicting and doubtful construction, that construction should be adopted which supports it in all its parts.
13. Courts must uphold a statute unless it is so plainly and palpably in conflict with the Constitution as to leave no doubt or hesitation in the judicial mind as to its invalidity.
14. Allegations of a petition for an injunction that the right and liberty of contracting with reference to its business is denied to the petitioner, and that its property is therefore taken from it without its consent, and that it is compelled to enter into involuntary, unreasonable and unprofitable contracts, do not amount to allegations of facts, but to mere statements of conclusions, and are not therefore admitted by a motion to dissolve the injunction.
15. The rule that the dissolving of an injunction is discretionary, and that the refusal of the court below to dissolve it will not be disturbed unless the discretion is abused, does not apply to cases involving questions of law arising upon the face of the pleadings.
16. An injunction may be dissolved on motion, although the facts alleged in the petition are not denied, if the issues involved simply the validity of statutes which, if valid, will render the injunction improper notwithstanding the allegations of fact.

R. Co. of Canada, 2 Intern. Com. Rep. 202, 2 Intern. Com. Com. Rep. 320; New Orleans Cotton Exch. v. Illinois Cent. R. Co. 2 Intern. Com. Rep. 777, 3 Intern. Com. Com. Rep. 584.

An intermediate local rate should never exceed a through rate to the terminus of the line, plus the local rate back to the intermediate point. *Martin v. Southern Pac. Co.* 2 Intern. Com. Rep. 1.

In absence of competition from Canadian railways, conditions of traffic from San Francisco to Denver are not so different from those from San Francisco to the Missouri River as to justify the greater charge for the shorter distance. *Ibid.*

#### *Through traffic arrangements.*

Neither at common law nor under the Act of Congress of June 15, 1866 (U. S. Bev. Stat. § 5368), or the Interstate Commerce Act of Feb. 4, 1887, can a common carrier be compelled to make through traffic arrangement with connecting lines. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Intern. Com. Rep. 351, 87 Fed. Rep. 587.

The Act to Regulate Commerce does not empower the commission to compel railroad companies to enter into joint arrangements with carriers by water for through carriage at through rates. *Re Joint Water & Rail Lines*, 2 Intern. Com. Rep. 486; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* supra; *Capehart v. Louisville & N. R. Co.* 3 Intern. Com. Rep. 278.

The Act of Congress in its present form is inadequate to satisfactorily establish a through route with through rates without the co-operation of carriers in arranging for the division of rates and other necessary agreements. *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 3 Intern. Com. Rep. 454; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* supra.

12 L. R. A.

17. The justice and policy of statutes are not matters for the consideration of courts.

(*Rothrock and Robinson, JJ., dissent from propositions 2, 4 and 11.*)

(February 9, 1891.)

**A**PPEAL by defendants from a judgment of the District Court for Johnson County overruling their motion to dissolve a preliminary injunction restraining them, in their capacity as railroad commissioners, from establishing and promulgating joint rates of charges for the transportation of freight and cars over plaintiff's railroad and the roads connected with it. *Reversed.*

The facts are stated in the opinion.

*Mr. John Y. Stone, Atty-Gen., for appellants.*

*Messrs. S. K. Tracy, John C. Bills, A. E. Swisher, T. S. Wright and J. W. Blythe for appellee.*

*Beck, Ch. J.,* delivered the opinion of the court:

1. In view of the facts that the motion to dissolve the injunction operates as a demurrer to the petition, and the decision thereon is for review in this case, it becomes necessary to set out fully the pleadings upon which the decision was made. They are as follows:

"Petition in Equity. Your petitioner, the Burlington, Cedar Rapids & Northern Railway Company of Iowa, a corporation duly organized and existing under and by virtue of the laws of Iowa, complains, and says: That defendants, Peter A. Dey, Spencer Smith and

Where several rail carriers engaged in interstate commerce each cross or touch a navigable river, leaving a large space of territory along and near the river and between their lines that can be served only by steamboats, they may make through rates with only one line of steamboats, and refuse to make such through rates with other steamboats, on the river; and this is not unjust discrimination or unlawful preference. *Capehart v. Louisville & N. R. Co.* supra.

#### *Through rates, legality of.*

Through rates are not necessarily illegal, which, when divided between carriers, give them less than their local rates, provided the through rate itself is not less than some one of the locals, or unjustly discriminating against individuals or localities, or so low as to burden other business with part of the cost of the business upon which it is imposed. *Lippman v. Illinois Cent. R. Co.* 2 Intern. Com. Rep. 414.

Such a situation only becomes illegal when it can be shown that illegal results follow from it. *La Crosse Mfrs. & Jobbers Union v. Chicago, M. & St. P. R. Co.* 2 Intern. Com. Rep. 9, 1 Intern. Com. Com. Rep. 29; *Business Men's Assn. v. Chicago, St. P. M. & O. R. Co.* 2 Intern. Com. Rep. 41, 2 Intern. Com. Com. Rep. 52.

A rate is none the less a through rate when freight is shipped upon a through bill of lading from the point of origin to destination, accompanied by a way-bill showing the route over which it is to pass, with the percentages of all the other lines set forth, because the initial carrier charges its local rate as part of the total rate, and the remaining lines charge an agreed rate made by percentages. *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co.* 2 Intern. Com. Rep. 393.

F. T. Campbell compose the board of railroad commissioners of the State of Iowa. That under and by virtue of chapter 28 of the Acts of the 22d General Assembly authority is given to said board to fix, establish and publish reasonable maximum rates of charges for the transportation of freight upon railroads within said State. That a schedule of rates has been adopted by said board for petitioner, which was by it duly accepted and adopted as reasonable and just. Your petitioner would now further show that by the Act of the 23d General Assembly entitled 'An Act to Amend Chapter 28 of the Acts of the 22d General Assembly, Giving Authority for the Making of Rates for Transportation of Freight and Cars over Two or More Lines of Railroad within this State, and Enlarging the Powers and further Defining the Duties of the Board of Railroad Commissioners,' a copy of which Act is attached hereto and made part hereof, it is provided that all railway companies doing business in this State, upon the demand of any person, shall establish joint rates for the transportation of freight between points on their respective lines, and shall receive and transport freight and cars over such routes as the shipper shall direct. It is further provided by said chapter 28 of the Acts of the 22d General Assembly that, when the rates for transportation charges are fixed by the board of railroad commissioners, such rates shall, in all suits brought against any railroad company, wherein are in any way involved the charges of such railroad for the transportation of freight, be deemed and taken in all courts of this State as prima facie evidence that the rate thus fixed is a reasonable and just charge for the transportation

of freight and cars upon such roads, and that any greater charge shall be deemed extortion. And it is further provided in said chapter 28 of the Acts of the 22d General Assembly that, for violating the charges or rates thus fixed by the board, the penalty therefor is to forfeit and pay to the State of Iowa not less than one thousand (\$1,000) dollars nor more than five thousand (\$5,000) dollars for the first offense, and not less than five thousand (\$5,000) dollars nor more than ten thousand (\$10,000) dollars for every subsequent offense, to be recovered in a civil action, by ordinary proceedings, in the name of the State of Iowa. Your petitioner would now further inform your honor that several demands have been sent to it under the last Act, or Joint Rate Law, demanding that it shall make joint rates with other railroads, as is in said Act contemplated. That your petitioner has refused to make such joint rates upon such requests, and still does refuse to make such joint rates with other and distinct railroads. That by said last Act of the Legislature (known as the 'Joint Rate Act') it then becomes the duty of the board of railroad commissioners, upon such refusal, and upon application of any person, to establish joint rates between different and connecting roads. That said board has been so requested by interested parties to establish joint rates between petitioner and other railroads, and is about to so do and promulgate the same, and such joint rates will be established and promulgated, unless restrained by order of this court; thus subjecting your petitioner to the heavy penalties referred to in the event of non-complying with the joint rates thus to be established and promulgated. Your petitioner now avers that the

A through rate does not unjustly discriminate against an intermediate point because less proportionally than the rate from such point to the common destination. *Ibid.*

#### *Contracts for through rates on railroads.*

Contracts with other companies for the establishment of through routes and through rates for the continuous carriage of interstate traffic do not violate § 7 of the Act to Regulate Commerce, prohibiting a combination to prevent the carriage of freights from being continuous. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 220, 2 Intern. Com. Rep. 351, 37 Fed. Rep. 557.

The fact that a railroad company makes such arrangement for one of its branch roads will not charge it with unjust discrimination for refusing to make identical arrangements on other parts of its system. *Re Joint Water & Rail Lines*, 2 Intern. Com. Rep. 436.

#### *Connection with bridge company.*

A bridge company which is not, either in law or in fact, a common carrier of interstate traffic, cannot invoke the provisions of the Act to Regulate Commerce to compel railway companies to transact business with or through such bridge company. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 220, 2 Intern. Com. Rep. 351, 37 Fed. Rep. 557.

Its franchise does not constitute it a common carrier, nor confer on it authority "to equip its road, and to transport goods and passengers thereon, and charge compensation therefor." *Ibid.*

Where a railroad company, by contract with a bridge company, acquires the right to use a bridge, with its approaches, for its engines, cars and trains, 12 L. R. A.

it is regarded, under the Act to Regulate Commerce, § 1, as the owner or operator of the bridge and approaches, for the time being, as to all freight transported by it over the bridge. *Ibid.*

#### *On through contract initial company bound to perform.*

A railroad company whose line extends from Atlanta to West Point, Georgia, having received at Atlanta goods for shipment, consigned to Dallas, Texas, and having fixed by contract with the consignor the rate of freight for the whole distance, apportioning a part of the same among the carriers, itself included, is bound for performance to the place of consignment. *Atlanta & W. P. R. Co. v. Texas Grate Co.* 81 Ga. 302. See *Falvey v. Georgia R.* 76 Ga. 597.

#### *Through export rates.*

The only practicable mode yet devised for making through export rates, as appears by past experience, is to add to the established inland rates from the interior to the seaboard the current ocean rates. *New York Produce Exch. v. New York Cent. & H. R. R. Co.* 2 Intern. Com. Rep. 552.

#### *Refusal to furnish coal cars; unjust discrimination.*

A New York railroad extending to Dayton, Ohio, by agreement being considered with an Ohio railroad extending from Dayton to Cincinnati, an initial road at Cincinnati, with right to make rates to that place, Cincinnati must be treated as a point upon the line for the purpose of proceeding against the company for unjust discrimination in refusing to furnish coal cars. *Riddle v. New York, L. E. W. R. Co.* 1 Intern. Com. Rep. 757.

Act of the Legislature of Iowa known as the 'Joint Rate Bill,' a copy of which is attached, marked 'Exhibit A,' is unconstitutional and void, and said commissioners have no right or authority thereunder to fix a joint rate, or promulgate the same. That said Act deprives your petitioner of its rights guaranteed by section 9, art. 1, of the Constitution of Iowa, in that it deprives your petitioner of its property, and the right to contract, and deprives it of liberty, without due process of law, and prevents its acquiring, possessing and protecting its property as guaranteed by section 1 of article 1 of the Constitution of Iowa, and by like powers of the Constitution of the United States. That if defendants are allowed and permitted to establish and promulgate such joint rates, although the same will be void for the reasons stated, yet thereunder your petitioner will be subjected to a multiplicity of suits, by many different persons, to recover the penalties referred to, and otherwise harassed by vexatious litigation. To the end, therefore, that your petitioner may obtain the relief to which it is justly entitled in the premises, and being remediless at law, it now prays the court to grant it a temporary writ of injunction, restraining defendants and each of them, and as the board of railroad commissioners, from establishing and promulgating joint rates with it in connection with other railroads, for the shipment of freight and cars over such different railroads, and that upon a final hearing it be ordered and decreed that defendants be permanently enjoined from establishing such joint rates. And further, your petitioner prays for such other and further relief as may be just and equitable."

(EXHIBIT A.)

"An Act to amend chapter 28 of the Acts of the Twenty-Second General Assembly, giving authority for the making of rates for the transportation of freight and cars over two or more lines of railroad within this State, and enlarging the powers and further defining the duties of the board of railroad commissioners. Be it enacted by the General Assembly of the State of Iowa:

"Section 1. That chapter 28 of the Acts of the Twenty-Second General Assembly be, and the same is hereby, amended as follows: That said chapter 28 of the Twenty-Second General Assembly shall not be construed to prohibit the making of rates by two or more railroad companies for the transportation of property over two or more of their respective lines of railroad within this State, and a less charge by each of said railroad companies for its portion of such joint shipment than it charges for a shipment for the same distance wholly over its own line within the State shall not be considered a violation of said chapter 28 of the Acts of the Twenty-Second General Assembly, and shall not render such Railroad Company liable to any of the penalties of said Act. But the provision of this section shall not be construed to permit railway companies establishing joint rates to make, by such joint rates, any unjust discrimination between the different shipping points or stations upon the respective lines between which joint rates are established. Any such unjust discrimination shall be punished in the manner and by the same penalties provided

in chapter 28 of the Acts of the Twenty-Second General Assembly.

"Sec. 2. All railway companies doing business in this State shall, upon the demand of any person or persons interested, establish reasonable joint through rates for the transportation of freight between points on their respective lines within this State, and shall receive and transport freight and cars over such route or routes as the shipper shall direct. Carload lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading in other cars shall be done without charge therefor to the shipper or receiver of such carload lots, and such transfer be made without unreasonable delay; and less than carload lots shall be transferred into the connecting railway's cars at cost, which shall be included in and made a part of the joint rate adopted by such railway companies, or established as provided by this Act. When shipments of freight to be transported between different points within this State are required to be carried by two or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodation to local or state traffic as they give to interstate traffic over their lines of road.

"Sec. 3. In the event that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, it shall be the duty of the board of railroad commissioners, and they are hereby directed, upon the application of any person or persons interested, to establish joint rates for the shipment of freight and cars over the two or more connecting lines of railroad in this State; and in the making of such rates, and in changing or revising the same, they shall be governed, as near as may be, by all the provisions of chapter 28 of the Acts of the Twenty-Second General Assembly, and shall take into consideration the average of rates charged by said railway companies for shipment within this State for like distances over their respective lines, and rates charged by the railway companies operating such connecting lines for joint interstate shipments for like distances. The rates established by the board of railroad commissioners shall go into effect within ten days after the same are promulgated by said board, and from and after that time the schedule of such rates shall be prima facie evidence in all of the courts of this State of the joint transportation of freight and cars upon the railroads for which such schedules have been fixed.

"Sec. 4. Before the promulgation of such rates, as provided in section 3 of this Act, the board of railroad commissioners shall notify the railroad companies interested in the schedule of joint rates fixed by them, and they shall give said railroad companies a reasonable time thereafter to agree upon a division of the charges provided for in such schedule; and, in the event of the failure of said railroad companies to agree upon such a division, and to notify the board of such agreement, the board of railroad commissioners shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal

facilities, and all the circumstances of the haul; and the division so determined by the board shall, in all controversies of suits between railroad companies interested, be prima facie evidence of a just and reasonable division of such charges.

"Sec. 5. Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this State is hereby prohibited, and declared to be unlawful, and each and every one of the companies making such unreasonable and unlawful charges, or otherwise violating the provisions of this Act, shall be punished as provided in chapter 28 of the Acts of the Twenty-Second General Assembly for the making of unreasonable charges for the transportation of freight and cars over a single line of railroad by a single railroad company.

"Sec. 6. This Act, being deemed of immediate importance, shall take effect and be in force from and after its publication in the Iowa State Register and the Des Moines Leader, newspapers published in the City of Des Moines, Iowa."

Upon the presentation of the motion to dissolve the injunction, plaintiff filed the following: "Amendment to the Petition. Your petitioner, by way of amendment to the original bill filed in this cause, further avers: *First.* That said Act known and referred to as the 'Joint Rate Bill,' and the Act of which it is amendatory, are unconstitutional and void, in this: that under said Acts your petitioner is denied the right of a jury trial, and denied due process of law, in the protection and preservation of its property, as guaranteed by the ninth section of article 1 of the Constitution of the State of Iowa; that its property, or the use thereof, is taken without its consent, and without just compensation, for private and public purposes, and that its right of appeal is so tampered with as to make that right ineffectual; that in the enforcement of any order promulgated by said railroad commissioners all distinction between law and equitable actions is abolished by said Acts, all of which is in direct violation of the 8th section of article 5 of the Constitution of the State of Iowa, and which deprives petitioner of that due process of law therein guaranteed. *Second.* That said Acts are violative of section 8, art. 1, of the Constitution of the United States, in that it is a regulation of commerce among the several States. *Third.* That said Acts are void and unconstitutional, because they violate section 17 of article 1 of the Constitution of Iowa, by imposing excessive fines and unusual punishment. *Fourth.* That said Acts are void and inoperative, because they fail to describe or define the offenses for which the extraordinary penalties are imposed, and impose penalties, by way of attorney's fees, upon railroad companies for making any defense to actions brought under said Acts. *Fifth.* That said Joint Rate Act is violative of the 14th Amendment of the Constitution of the United States, in that it abridges the privileges or immunities of your petitioner as a citizen, denies it equal protection of the laws and deprives it of its property, and the use thereof, without just compensation or due process of law; that by said Acts your petitioner is denied the right

12 L. R. A.

and liberty of contracting with reference to its business, and thus is its property taken from it without its consent, and it is compelled to enter into involuntary, unreasonable and unprofitable contracts with other railroad companies, at the instance of third parties, compelling the operation of its road at a loss; that, in the matter of fixing the joint rates contemplated in said Statute, your petitioner is not notified of the time or place when the same are to be fixed by defendants, nor given any opportunity to object to the making of such rates, or to show the unreasonableness of the same; that, under said Statute, the joint rates, as thus fixed by defendants, are final and absolute, and thus is your petitioner deprived of its property, and the use thereof, without due process of law, and deprived of making reasonable and lawful contracts and profits as other citizens are permitted to do, and hence it is denied that equal protection of the law guaranteed by the Constitution of the United States. Wherefore your petitioner prays that the temporary writ of injunction issued herein may be continued until the final hearing of this cause, and that upon such final hearing said injunction may be made perpetual; and your petitioner prays for such other and further relief as may be deemed equitable in the premises."

The motion to dissolve the injunction is based upon the ground that the Statutes assailed are in harmony with the Constitution; that the petition does not show that plaintiff is entitled to the relief prayed for in the petition and that the district court has no jurisdiction in the cause for the reason that it is, in fact, an action against the State, and it is not shown that the State had authorized or consented to the bringing of the suit. Chapter 28, Acts 22d Gen. Assem., which is amended by chapter 17, Acts 28d Gen. Assem., contains many sections. They need not be set out, except such as are brought in question or assailed in the argument of counsel. They will be cited or quoted in the discussions of the questions raised thereon.

2. The original Act, authorizing rates of charges to be fixed by the railroad commissioners (chap. 28, Acts 22d Gen. Assem.) contains this provision: "Sec. 17. The board of railroad commissioners of this State are hereby empowered and directed to make, for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads, and said power to make schedules shall include the power of classification of all such freights; and it shall be the duty of said commissioners to make such classifications: provided, that the said rates of charges to be so fixed by said commissioners shall not, in any case, exceed the rates which are or may hereafter be established by law; and said schedules so made by said commissioners shall, in all suits brought against any such railroad corporations, wherein is in any way involved the charges of any such railroad corporation for the transportation of any freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as prima facie evidence



that the rates therein fixed are reasonable and just maximum rates of charges for the transportation of freight and cars upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules, subject to the same provision that the rates fixed are not to be higher than now or hereafter established by law. When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to cause notice thereof to be published for two successive weeks in some public newspaper published in the City of Des Moines, in this State, which notice shall state the date of the taking effect of said schedule, and said schedule shall take effect at the time so stated in such notice, and a printed copy of said revised schedule shall be conspicuously posted by such common carrier in each freight office and passenger depot upon its line or lines. All such schedules, so made, shall be received and held in all such suits as prima facie the schedule of said commissioners, without further proof than the production of the schedule desired to be used as evidence, with a certificate of said railroad commissioners that the same is a true copy of the schedule prepared by them for the railroad company or corporation therein named, and that notice of making the same has been published as required by law: provided that, before finally fixing and deciding what the original maximum rates and classification shall be, it shall be the duty of the railroad commissioners to publish ten days' notice in two daily papers published in Des Moines, setting forth in such notice that, at a certain time and place, they will proceed to fix and determine such maximum rates and classification; and they shall at such time and place, and as soon as practicable, afford to any person, firm, corporation or common carrier who may desire it, an opportunity to make an explanation or showing, or to furnish information to said commissioners, on the subject of determining and fixing such maximum rates and classification; and, in any event, the original schedule of rates and classification of freights, on all lines of railroads in Iowa, shall be fixed and shall go into effect within sixty days from the taking effect of this Act."

It will be observed, upon consideration of the plaintiff's petition, that the threatened injury which it seeks to avert by the injunction in this case is the establishing, promulgating and enforcing what in the petition are called "joint rates between petitioner and other railroads." It is important that we determine, at the door of this discussion, what are these "joint rates" the fear of which is the ground of plaintiff's action. The Statute above quoted (sec. 2) provides that "all railroad companies doing business in this State shall, upon demand of any person or persons interested, establish reasonable joint through rates for the transportation of freight between points upon their respective lines within the State." Section 3 provides that, "in the event said railway companies fail to establish through joint rates, or fail to establish reasonable rates for such through shipments, it shall be the duty

of the board of railroad commissioners, and they are hereby directed, upon application of any person or persons interested, to establish joint rates for the shipment of freight and cars over two or more lines of railroads in this State." This Statute requires the railroad companies to establish "through joint rates," and in default thereof the railroad commissioners are directed to establish such rates. It is plain that the rates required are joint rates of charges for the transportation of freight and cars. See sec. 17, chap. 28, Acts 22d Gen. Assem., above quoted. And it is equally plain that the joint rates of charges cover all the charges for the transportation over two or more roads, as though they constituted one road, the rate fixed determining the whole charges. It is also plain that these joint rates consist of the separate rates of each separate road. As their services in the transportation of the freight or cars are not always equal, because of differences in the distances of transportation and for other reasons, the reasonable charges which each ought to make cannot be equal. It will be seen at once that the railroad companies, or the railroad commissioners, when establishing joint through rates, must establish a rate for each road which, when united, will be "the joint through rates." This is an obvious construction of the Statute demanded by its language, "through joint rates" (plural) which the railroad companies and the railroad commissioners are required to establish.

3. The establishing of "through joint rates" is the only duty to be exercised in the discharge of the power conferred upon the railroad commissioners by the sections of the Statute just cited, which are the occasion of plaintiff's fears of interference with its rights, whereon this action is founded. The plaintiff does not allege any other ground of action than the threatened establishing of "through joint rates." No other objections to the Statutes in question, pertaining to railroads and rates and joint rates, are made in the petition; none other are before us for consideration. It will be here seen that the Statutes under consideration in no way affect the duty, obligation or rights of the plaintiff as a common carrier, further than is done by the regulation of rates of charges. The law relating to the receipts and delivery of freight to connecting lines, and the obligations and rights of consignors and consignees and of the railroads, growing out of the relations arising when such connecting lines exist, are not modified, restricted nor in any way affected by these Statutes. In short, the duty of the railroad companies, as to rates and joint rates, is alone affected and regulated by these Statutes. These conclusions will be again brought to mind in the further consideration of the case.

4. The considerations just expressed lead to the conclusion that the power and authority vested in the State, under which rates of charges for the transportation of freight by railroads are regulated, may be exercised to establish what are called "joint through rates." That the State may fix the maximum charges for the transportation of freight by railroads, which shall not be unreasonable, is not disputed in this case. It has been so decided by the Unit-

ed States Supreme Court, and the doctrine has been recognized by this court. See *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94. In our opinion, no facts or distinction in principle exist which deprive the State of authority and power to establish "joint through rates," while it may, in the exercise of its constitutional authority, fix rates of freight charges for each separate railroad. When rates, not joint, are fixed, the maximum charges for specified distances, or per mile, are determined for each separate railroad, as shown by this illustration: Freight is shipped from Cedar Rapids to Davenport by the Burlington, Cedar Rapids & Northern and the Chicago, Rock Island & Pacific Railroads. The rate of freight charges is fixed by the State from Cedar Rapids to West Liberty, and a separate rate from West Liberty to Davenport. Now, here are two separate rates,—a rate for each road. It is not doubted that the State may fix these rates; and when that is done the charges for through shipments from Cedar Rapids to Davenport is the sum of the separate rates. The State, in the exercise of its authority, in accord with legislative wisdom, may discover that these separate rates, when united, are too small to compensate the carrier, or too large to do justice to the shipper; that justice demands such modification of these separate charges that the sum thereof will be reasonable and just, both as to the railroad companies and the shippers. Thereupon the State, for "through shipments" over the two roads, fixes rates of charges for each road. The sum thereof, united, constitutes the lawful charge for freight between Cedar Rapids and Davenport. It clearly appears that the thing done in the one case is the same as in the other. It is simply the fixing of the rate to be charged by each road. No reason can be given why the State should not fix separate rates, which should apply to the through shipments between stations of different roads. The authority which will authorize the fixing of rates for each road may be exercised, when there shall be through shipments over separate roads, to enlarge or restrict such separate rates, in order to attain the ends of justice. It will clearly be seen that the words "through joint rates" simply mean rates which shall be just and reasonable charges for the transportation over the united route. As we have said, these united charges must be so apportioned to the separate roads that each shall receive a just and reasonable part of the joint charge. If the joint rate is fixed by the railroad companies, they will determine the part each shall receive. This will be done by the railroad commissioners, in case the railroad companies fail to fix joint rates; and the commissioners will consider matters and circumstances which should affect the division. Acts 23d Gen. Assem. chap. 17, § 4.

5. The arranging of what is called "joint through rates" is not a thing that is new in the business of railroad transportation. The current history of the country discloses the existence of the practice among railroads to make through shipments of freight without change of cars. Nor is this practice of recent origin. It has existed whenever the business of the roads demanded it. Expedition and economy in transportation induced contracts and arrange-

ments for through shipments between points on connecting roads. It may be that in some cases the managers of the roads refused or failed to enter into such arrangements or contracts, and it may be that in other cases the business of the roads has not been managed wholly in accord with the best interests of the corporations owning them, and with the requirements of the law. But such failure of duty does not establish the right to be exempt therefrom. Surely, the course of business which has been found, by experience of railroad management, to be promotive of economical transportation and increase of business, thereby promoting the interest of the owners of the railroads and the shippers, ought to be pursued; and, if the railroad management fail or refuse to pursue it, the State, as it has done in the Statutes under consideration, ought to require it to be pursued. This the State can do under the authority it possesses to regulate and control carriers, and provide maximum freight charges.

It will be observed that section 3 of the Statute above quoted, providing for joint through rates, contemplates the practice of through shipments, so long existing, and requires the railroad commissioners to consider the charges made for joint interstate shipments and the rates charged by the railroad companies for shipments within the State. The purpose of the Statute is to secure just and reasonable rates for the shippers of this State, and it directs that the practice and course of business of the railroads shall be considered in fixing such rates. It cannot be that the Statute in question will operate to the denial of just compensation to the railroad corporations for the transportation of property. It provides that joint rates fixed under the Statutes shall be reasonable. The railroad commissioners, it will be presumed, will rightly discharge their duties, and will fix reasonable and just "joint through rates." If these officers fail in their duty, from errors of judgment or from other causes, the railroads may cause their action to be reviewed and corrected.

6. Objections to the Statutes are urged in the following language: "We contend, therefore, that the law seeks to compel: *first*, that two or more companies shall enter involuntarily into contract relations with each other at the demand of a third person; *second*, that one company shall surrender its cars to the possession of another, or unload the contents without compensation; *third*, that, at the demand of a third person, companies shall not only part with the possession of their cars, with no provision in the law as to their return or compensation for their use, but shall accept cars of other companies, and carry the same over its lines, without any provision for compensation." The statement of facts in this position is not wholly correct. It is not correct that railroad companies are, under the Statute, compelled to enter involuntarily into contract relations with each other. It is true that the Statute requires them to enter into the contract for joint rates, thus imposing upon them the duty so to do; but the Statute does not provide for enforcing the duty by proceedings recognizing a contract between the parties, if that, indeed, could be done; nor does it provide for penalties or for-

feitures for failure to discharge the duty. It simply provides that, in case of failure to adopt joint rates by the companies, the railroad commissioners shall prescribe them, and the companies shall not be permitted to charge more. In that case, the charges are not made by the companies under a contract, but pursuant to a duty and obligation imposed by law. It is not necessary, in order to support an action against a railroad company for failure to fix joint rates, to hold that it is bound by an obligation as of a contract. Its liability arises by reason of its failure to perform a duty imposed by law. The Statute, in its principle and its effect in this regard, is not different from other rules of the law applicable to common carriers, which hold them liable for failure to receive property for transportation. In both cases the carrier is liable for the non-performance of duty.

7. The course of business of railroad companies, originating in the wants and demands of commerce, requires the cars of one company to be delivered to another for transportation. It is presumed that rules relating to compensation for the cars transported are settled by agreement, or under rules recognized and prevailing in the business of transportation by railroads. At all events, the law provides rules under which this matter of compensation may be settled. It is competent for the railroad commissioners, if it be necessary, to impose rules touching this matter, in order to aid the railroad companies to perform the duty imposed by the Statute to provide for joint rates, or to require or enforce the performance of that duty. The fact that the transfer of cars from one company to another, for the transportation of property over more than one railroad, without breaking bulk, has been practiced so long as to be recognized as of the course of business, of which we will take judicial notice (*Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.* 109 Ill. 185), is a complete answer to the complaints made in the objections under consideration. Surely, a course of business so long pursued, and so extensively prevailing, and demanded by the commerce of this country, cannot, when recognized and required by statute, become so objectionable in principle, so oppressive in operation, as to require the Statute to be declared unconstitutional. A railroad company, as a common carrier, is required to receive and transport freight offered to it for transportation. The reasons upon which this rule is founded impose upon it the obligation to haul cars of other companies brought to it for the transportation over its own road. *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co. supra.*

As the course of business of the railroad companies and the rules of law require them to transport the cars of other companies, surely a statute prescribing and enforcing the duty thus imposed cannot be regarded as interfering with the constitutional guaranties for the protection of the rights and property of such companies. The Statute under consideration provides that freight in carload quantities may be transferred, instead of going through to destination without change of cars, the cost of unloading being paid by the company making it. Acts 23d Gen. Assem. chap. 17, § 2. This provision is intended to excuse the duty to

transfer cars upon payment of costs of unloading, and is enacted in the exercise of legislative authority, to regulate the performance of duty by carriers, and prescribe reasonable charges for the transportation of freight.

8. Counsel for plaintiff maintain, upon many grounds, that the Statutes in question are in conflict with both the State and Federal Constitutions. It is first urged that they impair the obligation of the contract arising under plaintiff's charter. It has been held by the United States Supreme Court that railroad corporations are "subject to legislative control as to the rates of fare and freight, unless protected by their charters." *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94. This doctrine is recognized by this court. The authority of the State to control rates of freight charges made by railroad companies is not restricted so that it cannot be exercised in fixing the rates to be charged by connecting roads, which are called in the Statute "joint through rates." Joint rates, as explained heretofore in this opinion, are simply the sum of separate rates of the respective roads. The railroad commissioners in fixing joint rates, under authority of the State, may make just and reasonable orders for the return of cars and for compensation for their use, or for hauling them, and they will consider these matters in fixing the separate rates which together make the joint rate. The constitutional objection in this point demands no further consideration.

9. It is urged by plaintiff's counsel that the Statute is in conflict with the 14th Amendment of the Constitution of the United States, "in that, without due process of law, and without just compensation, it takes away from the corporations funds invested by them upon certain specified trusts, and applies these funds to uses to which the owners never consented." We understand this objection, in effect, to be this: That by the Statute plaintiff or its stockholders are deprived of property without due process of law. The power of the State is exercised through designated officers, the railroad commissioners, by proceedings specially provided to enforce the authority of the State. They are designated by the Code special proceedings, in which rights may be established and remedies enforced, and are pursued in many cases. Code, § 2504. Railroad corporations acquire lands to be occupied by their roads by special proceedings. Surely, the same character of proceedings may be invoked to enforce the performance by them of lawfully imposed duty. The proceedings provide for notice to the railroad companies, and that they shall be heard in regard to the questions of joint rates. Acts 23d Gen. Assem. chap. 17, § 4. It is a mistake to suppose that "due process of law" is found only in law or chancery actions. Special proceedings, applicable to specified subject-matter, and conformable to the rules requiring notice and the acquisition of jurisdiction, and which affect all persons alike, whose property or rights come within the lawful scope of the proceedings, are prosecuted with "due process of law." 6 Am. & Eng. Encyclop. Law, title *Due Process of Law*. The Statutes are designed to prevent railroad corporations from charging unreasonable rates for the transportation of property. Surely, it cannot be claimed that they

are deprived of property and property rights by restrictions against unreasonable charges. In this connection counsel repeat objections founded upon what they term "enforced contractual relations" between the railroad companies. We have shown that these joint through rates are often agreed upon by the railroad companies. They determine, in the common course of business, the division of charges, and where and to whom they shall be paid. Under the Statute in question, it is made the duty of the railroad companies to establish joint through rates. If they fail to perform the duty, the railroad commissioners will establish the rates as they should have done, and will do just as they should have done and could have done,—prescribe as to the time and place of payment, and division of charges. There will be no more difficulty in obeying the requirements of the railroad commission than in performing their own agreements for joint through rates, entered into in the course of their business. It is plain that the rights of plaintiff will not be invaded under this Statute, and it will suffer no oppression.

10. It is argued that the Statutes are void for the reason the railroad commissioners are not a judicial body, and ought not to be permitted to fix rates which shall be regarded as *prima facie* reasonable. The question of the reasonableness of the rates, it is argued, ought to be judicially determined; and so it can be if the action of the commission is not satisfactory to the Railroad Company. The provision of the Statute that the rates fixed by the commissioners shall be regarded as *prima facie* reasonable is not of an unusual character, and was enacted in the exercise of the undoubted power of the State to prescribe rules of evidence in all proceedings under the laws of the State. The law presumes the acts of officers of the State to be rightly done, and gives them faith accordingly. This rule is not unlike the provision of the Statute complained of by plaintiff. The courts of law and chancery are open to the railroad corporations, for proceedings to review the acts of the commissioners in fixing rates of charges.

11. It is urged that the Statutes are in conflict with article 1, § 8, of the Constitution of the United States, in that it is an attempt to regulate commerce between the States. The position is based upon these alleged facts. The plaintiff's road, in its route between Burlington and Rock Rapids, passes through a part of Minnesota. Trains running between these cities would pass through another State, and therefore counsel conclude shipments between these cities, on these trains, is interstate commerce. We need not determine whether traffic between cities of the same State in merchandise, which, pursuant to the traffic, is transferred from one city of the State to another, by a route partly in another State, by a railway company organized under the laws of the State, which carries the merchandise within the jurisdiction of the other State, is interstate commerce. See, on this question, *Com. v. Lehigh Valley R. Co.* (Pa.), 17 Atl. Rep. 179, and *State v. Chicago, St. P. M. & O. R. Co.*, 40 Minn. 267, recognizing adverse rules, the first maintaining that such a transaction is not interstate commerce. The petition does not allege that

defendants are about to fix joint rates between Burlington and Rock Rapids. If it be not lawful for them to do so, we will presume, when called on to act, they will not fix such a joint through rate. We would not annul a statute on the ground of a fear of its erroneous execution in one particular. Upon the question of law presented by counsel we intimate no opinion.

12. Chapter 28, Acts 22d Gen. Assem., provides that, when recovery is had for its violation, attorney's fees are adjudged against the defendant. It is insisted that a privilege is here granted to a suitor which is withheld from other citizens. All citizens having litigation of the character indicated, have equal rights to recover attorney's fees. The Legislature may prescribe rules permitting recovery of double damages or attorney's fees in one class of cases, and deny it in all others. There is no inequality therein forbidden by the Constitution and laws.

13. It is insisted that the provision imposes a "penalty for exercising the right of defense." It will be seen that, if the defense is established, there can be no penalty; if it be not, it will be rightly imposed.

14. It is urged that the Statute is void for uncertainty, in that it does not define the offense for which the penalties provided may be imposed. These offenses are explicitly defined in chapter 28, Acts 22d Gen. Assem. §§ 11, 23. It is said the Statute is uncertain, because it does not prescribe what shall constitute a reasonable rate. It declares that the rate fixed by the commission shall be *prima facie* evidence that it is reasonable. But it permits the accused to show in defense that it is not reasonable. The law requires reasonable rates to be charged. What constitutes such rates is a question of fact to be determined under the rules of the law. But it is said that the commissioners' rate would not secure the accused from conviction if it be shown that the charges fixed by the commissioners are excessive,—greater than is reasonable. But the purpose of the provision authorizing the commission to fix rates is to determine a maximum rate, beyond which the railroad company may not charge. It may charge the rate fixed, but no more. In prosecutions to recover penalties for the violation of the Statute, the State is precluded from denying that the commissioners' rates are reasonable.

15. It is urged that the fines imposed by the Statute for its violation are excessive, and forbidden by the State Constitution. Art. 1, § 17. The fines are intended to enforce obedience to the law by corporations having great incomes and controlling vast properties. The Legislature, in exercise of its wisdom, fixed penalties which, if imposed upon individuals, might appear excessive, but when imposed upon the corporations would be esteemed no greater than is necessary to enforce obedience to the Statute. The railroad companies have a ready and efficient way of avoiding these severe penalties, namely, by obeying truly the laws of the State. If they do this, they are in no danger of the penalties; if they do not, they are in no condition to complain of the laws.

16. It is insisted that the rates established under authority conferred by chapter 17, Acts

23d Gen. Assem., are absolute, and, upon the questions of their justice and reasonableness, are final and conclusive. The third section confers such authority upon the railroad commissioners. It is insisted that this section fails to provide that the rates shall be only prima facie evidence that they are just and reasonable. It is claimed by counsel that the last sentence is unintelligible,—at least so uncertain as to be incapable of construction. It may be assumed, for the purpose of the argument, that this position is correct. It is evident that this section is not wholly in the language used in its enactment by the General Assembly; the history of the law supports this conclusion. The Act containing the provision is amendatory to chapter 28, Acts 23d Gen. Assem., and confers authority to fix joint through rates, which was not done in the prior Statute. That Statute provides that the rates fixed by the railroad commissioners shall be prima facie evidence that they are just and reasonable. The amendatory Statute provides that in making joint rates, and in changing and revising the same, the railroad commissioners shall be governed, as nearly as may be, by all the provisions of the Act to which it is amendatory, and that the punishments and penalties provided in the prior Act shall be inflicted for the violation of the amendatory Act. See sections 1, 5. No other punishments and penalties are prescribed. It will be observed that section 5, in express language, declares that the punishments and penalties contemplated by the Act shall be inflicted for unjust and unreasonable charges. The charges fixed by the railroad commissioners are, under the Statute, prima facie evidence of their reasonableness. For the violation of the law in charging more than reasonable joint rates, as determined by law, punishments and penalties are alone provided. We conclude that, according to the obvious construction of the two Statutes, read together, the joint rates are not absolute, but are prima facie evidence only of their reasonableness and justice. The construction of the Statutes we have adopted gives it effect; that insisted upon by plaintiff would defeat it. We are required, under the familiar rules of the law, the Statute being susceptible of conflicting and doubtful construction, to adopt that one which supports the Statute in all its parts, and if the Statute in some of its provisions be so indefinite, uncertain or unintelligible as to be incapable of enforcement, or be void because of conflict with the Constitution, or for any other reason, we must sustain the Statute in all its parts which are not subject to such objections.

17. Another familiar rule of the law requires courts to uphold statutes unless they are so plainly and palpably in conflict with the Constitution as to leave no doubt or hesitation in the judicial mind of their invalidity. *Stewart v. Polk County Suprs.* 80 Iowa, 9; *Central Iowa R. Co. v. Wright County Suprs.* 67 Iowa, 199; *Gates v. Brooks*, 59 Iowa, 510; *Morrison v. Springer*, 15 Iowa, 805. It cannot be fairly claimed that the Statutes in question are plainly and without a doubt unconstitutional.

18. Counsel for plaintiff insist that the order of the district court in overruling the motion to dissolve the injunction, must be affirmed on this ground: The motion to dissolve

admits the allegations of the petition. It is claimed one of these allegations is "that joint rates, as contemplated by the Statute, would so reduce plaintiff's income as to render its business unremunerative." It is insisted that, upon this admission, it must be held that the Statutes in question would have the effect to deprive plaintiff of its property. Without inquiry whether the effect of the Statute upon plaintiff's business, as claimed, would be ground of holding it invalid, and enjoining its enforcement, we think the loss of plaintiff's property is not shown in plaintiff's petition. The language of the petition upon which counsel base the position under consideration is this: "That by said Acts your petitioner is denied the right and liberty of contracting with reference to its business, and therefore is its property taken from it without consent, and it is compelled to enter into involuntary, unreasonable and unprofitable contracts with other railroad companies, at the instance of third parties, compelling the operation of its road at a loss." What is averred here as to the deprivation of property, and the future operations of the road at a loss, are mere conclusions as to supposed effects. It does not amount to an allegation of facts. It is the mere statement of a conclusion that the road would be operated at a loss because plaintiff would be compelled by the Statute to enter into involuntary, unreasonable and unprofitable contracts. The allegation in question is indeed a conclusion based upon another conclusion as to the supposed operations of the Statute.

19. It is also insisted that, as the dissolving of an injunction is a matter resting largely in the discretion of the court, the refusal of the court below will not be disturbed unless it appears such discretion has been abused. But this rule does not apply to cases involving questions of law arising upon the face of the petition itself. If it appear upon the face of the pleadings that, as a matter of law, the injunction ought not to have been granted, it will be dissolved. Surely, the operations of a Statute of a State will not be suspended by injunction for conflict with the Constitution, under this doctrine of discretion, when the petition therefor, upon its face, shows that it is constitutional, or that it is not clearly and without doubt unconstitutional. The failure to dissolve the injunction, upon proper motion, was not done in the exercise of judicial discretion. The enforcement and obedience to the rules of law are not left to the discretion of the court.

20. The views just expressed, and the rules upon which they are based, dispose of another position of counsel, namely, that the injunction will not be dissolved on motion, because the facts alleged in the petition are not denied by answer, and that the relief sought will not be effectual if the injunction be not maintained. But there are no issues of fact raised by this motion,—they are all of law. The issues involve the validity of the Statutes in question. If they be held valid, no facts are alleged in the petition which will defeat them.

21. Much is said in argument attacking the justice and policy of the Statutes. With these things we have nothing to do. They are for the consideration of the legislative department of the government alone.

These views dispose of all questions arising in the case, and lead us to the conclusion that the judgment of the District Court ought to be reversed.

**Rothrock, J., dissenting:**

It appears to me that the foregoing opinion is unsound in its reasoning, and wrong in its conclusions, upon two questions involved in the record in the case. These questions involve the validity of certain provisions found in chapter 17, Laws 28d Gen. Assem. I believe that parts of that Act are plainly invalid, and ought not to be upheld by this court; and it is proper to say here that the question as to the power of the Legislature to authorize the railroad commissioners to establish and promulgate joint rates for the transportation of freight over connecting lines of railroads is not necessary to be determined in this case. The question is, Does the said Act, by reason of its plain language, violate the Constitution of the United States and of this State, in so far as it compels a common carrier to perform service without compensation, or to surrender its property to another carrier, and thus deprive it of its property, without due process of law? The first question arises upon the second section of the Act. It is therein provided that "carload lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading in other cars shall be done without charge therefor to the shipper or receiver of such carload lots, and such transfer be made without unreasonable delay." This provision of the law is absolute. It seeks to compel the initial carrier to deliver its loaded cars to the connecting carrier without any rule or regulation for its return, and without its consent, or to unload the contents of the car into other cars without compensation. It is apparent that the initial carrier is compelled by the Act to name to the shipper a joint through rate over all the lines of road which the shipper may designate. The law attempts to compel the initial carrier, if the freight be paid in advance, to account to all other carriers for their proportion of the charges, or, if the freight be paid to the last carrier, it becomes the agent or collector for all the others. This enforces contractual relations against the will of the parties, and it is no answer to say that it is not in the nature of a contract, but that it is a rule or regulation prescribed by law. It partakes of the nature of a contract, by whatever name it may be called; and the fact that carriers over connect-

ing lines do, by contract, make through shipments, is no reason why they should not be allowed to make their own contracts, at least so far as to protect themselves in the collection of their freight charges, and in the control of their cars. They should have this power, or the law should provide for such regulations as would protect them in their undoubted rights.

The second question is whether, by the Act under consideration, the joint rates fixed by the commissioners are to be regarded as absolute. The last part of section 8 of the Act is unintelligible. What is intended thereby cannot be determined without the interpolation of words, so as to give meaning to that which is absolutely unmeaning. I am not aware that any court has ever, under the guise of construction, entered upon the field of legislation to the extent required to hold that the Act provides that the schedule of rates shall be prima facie evidence that the same are reasonable and just; and the attempt to find ground upon which to hold the Act valid, by reference to the Act of which it purported to be amendatory, it seems to me is equally unwarranted. Without elaborating these questions, I conclude that no court ought to be called upon to uphold an Act like this, which attempts to control the most important rights without the semblance of an effort to protect the parties affected thereby. In addition to the failure to make the third section intelligible, the second section requires that, if the initial carrier does not deem it prudent to deliver its car to the connecting line for any reason, such as that the car is required to transact its own business, or that it may have to institute legal proceedings to procure its return, the contents shall be unloaded "in other cars" without unreasonable delay. It is to be supposed that this means other cars, the property of the connecting line. It cannot discharge its obligation by unloading in a warehouse, if the connecting carrier neglects to furnish other cars. It appears to me that it will be time enough to authorize the establishment of through rates when a law shall be passed making provision for the protection of the rights of property which are everywhere and at all times regarded as sacred, and of which the owner cannot be deprived, even by legislative authority, without due process of law. In my opinion, the order and judgment of the district court should be affirmed.

**Robinson, J., concurs in the dissent.**

MICHIGAN SUPREME COURT.

James W. TUFTS, *Appt.*,  
v.  
Epaphroditus R. D'ARCAMBAL.  
(.....Mich.....)

**On a sale reserving title until all payments are made, retaking possession under**

express provision of the contract for default in payment of installments does not rescind the contract or excuse performance by the purchaser, or entitle him to a return, either of the installments already paid or of his unpaid purchase-money notes.

(April 21, 1891.)

**NOTE.—Sale of personal property on installment plan.**

Contracts for the sale of personal property to be  
12 L. R. A.

paid for periodically in sums as rent, the property to pass to the purchaser on payment of the last installment, have uniformly been held to be sales.

**ERROR** to the Circuit Court for Kalamazoo County to review a judgment allowing the amount of defendant's counterclaim in an action brought to recover possession of a soda-water apparatus. *Reversed.*

The facts are stated in the opinion.

*Messrs. Osborn & Mills*, for appellant:

It was not necessary that the outstanding notes should be tendered back and defendant be put *in statu quo* before the right to retake possession might be exercised, for such a course will not leave the plaintiff *in statu quo*.

*Fleck v. Warner*, 25 Kan. 492.

*Messrs. Irish & Knappen*, for appellee:

Defendant claimed a money judgment in his favor, according to the well-known rule in Michigan where payments have been made on such contracts.

*Preston v. Whitney*, 23 Mich. 260; *Johnston v. Whittemore*, 27 Mich. 463; *New Home Sewing Mach. Co. v. Botham*, 70 Mich. 443.

The notes should have been tendered back in order to place the defendant *in statu quo*, as plaintiff could not take back the fountain without rescinding the contract, and he could not rescind the contract and still hold the notes against the defendant.

*Johnston v. Whittemore*, 27 Mich. 463; *Giddey v. Altman*, Id. 206; *Von Baalen v. Dean*, Id. 108.

**McGrath, J.**, delivered the opinion of the court:

This is an action of replevin. In March, 1888, plaintiff's agent took of defendant an order for certain soda-water apparatus replevined herein, which order was as follows:

"Kalamazoo, Mich., March 7, 1888.

"James W. Tufts, Boston Mass.: Forward the following described soda-water apparatus, and on receipt of bill of lading I will honor sight draft for \$——. The balance I promise to pay in monthly sums, as follows: May 10, \$25, and \$25 per month, with interest at 4 per cent from date of shipment with each payment; and for such balance and interest will execute and deliver contract notes of like tenor and form as the one printed on the back of this order, and maturing as above set forth. The delivery of said apparatus," etc., to be conditioned upon compliance with the above terms and conditions, and said apparatus to remain the property of James W. Tufts till paid for. [Then follows a description of apparatus.] "E. R. D'Arcambal."

and not lessee. *Murch v. Wright*, 46 Ill. 497; *Lucas v. Campbell*, 68 Ill. 447; *Greer v. Church*, 13 Bush, 480; *Price v. McCallister*, 3 Grant, Cas. 248; *Singer Mfg. Co. v. Cole*, 4 Lea, 489; *Cole v. Berry*, 43 N. J. L. 308; *Domestic S. Mach. Co. v. Anderson*, 23 Minn. 57; *Hegler v. Eddy*, 53 Cal. 597; *Singer Mach. Co. v. Holcomb*, 40 Iowa, 38; *Meyer v. Western Car Co.* 102 U. S. 1, 26 L. ed. 59; *Herryford v. Davis*, 102 U. S. 235, 26 L. ed. 160. See *Stadtfeld v. Huntsman*, 22 Pa. 53.

In determining the real character of a contract courts will always look to its purpose, rather than to the name given to it by the parties. *Hervy v. Rhode Island L. Works*, 98 U. S. 604, 23 L. ed. 1008.

But where the contract contains an express stipulation that the title shall not pass until the last payment, the transaction is held to be a conditional sale, and the condition a precedent. *Tiedeman, Sales*, § 9, citing *Sargent v. Gile*, 8 N. H. 325; *Kohler v. Hayes*, 41 Cal. 466; *Singer Mfg. Co. v. Graham*, 8 Or. 17; *Crist v. Kleber*, 79 Pa. 200; *Enlow v. Klein*, Id. 488; *Goodell v. Fairbrother*, 12 R. I. 233; *Carpenter v. Scott*, 13 R. I. 474; *Hine v. Roberts*, 48 Conn. 207; *Loomis v. Bragg*, 50 Conn. 222; *Whitcomb v. Woodworth*, 54 Vt. 544; *Colender Co. v. Marshall*, 57 Vt. 232. *Gibbons v. Luke*, 37 Hun, 577; *Appleton v. Norwalk Library Corp.* 3 New Eng. Rep. 644, 53 Conn. 4.

#### *Late decisions of various courts.*

In the absence of fraud a conditional sale is valid against third persons, as well as against the parties, and the bailee of personal property on a conditional sale cannot convey the title or subject it to execution for his own debts, until the condition of the sale has been performed. *Harkness v. Russell*, 118 U. S. 653, 30 L. ed. 285.

Where the buyer of goods is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled. *Beardale v. Beardale*, 138 U. S. 262, 34 L. ed. 923. See *Elgee Cotton Cases*, 30 U. S. 22 Wall. 180, 183, 23 L. ed. 363, 368.

Where plaintiff agreed to sell a set of books to defendant for a specified sum to be paid in installments, the title not to pass until that sum was paid, an offer to return the books was no defense to an 12 L. R. A.

action for the unpaid installments. *Appleton v. Norwalk Library Corp.* 3 New Eng. Rep. 644, 53 Conn. 4.

In the absence of fraud, an agreement for a conditional sale is good and valid as against third persons and as to the parties to the transaction, notwithstanding the fact that the delivery is accompanied by a permission to sell. *Wheeler v. New Haven Wire Co.* 5 L. R. A. 300, 37 Conn. 353.

The delivery of a piano, taking therefor the notes of the lessee so called, "for value received for the rent," the lessors to retain title until payment of all notes, on payment of which notes "given for the use of this piano" title to pass to the lessee, but in default of payment the piano to be returned, — is not a lease, but a conditional sale. *Hays v. Jordan*, 9 L. R. A. 373, and note, 85 Ga. 741.

Under Ga. Code, § 1955, the written contract of a conditional sale must be recorded in the county where the vendee resides. *Oohen v. Chandler*, 70 Ga. 437.

Where the contract is not recorded the claim of the vendor is postponed to that of a landlord, who, without notice of the reservation of title, gives credit to the purchaser for rent on the faith of the goods. *Gartrell v. Clay*, 81 Ga. 327.

A statute which makes it unlawful for one who sells property to be paid for in installments to retake possession of it without tendering or refunding to the purchaser the sum paid by him, after deducting a reasonable amount for the use of the property, is not invalid on the ground that the amount of such compensation is uncertain and no method is provided for determining it. *Well v. State*, 46 Ohio St. 450.

A receipt for a note saying, "Said note is given me for the purchase of 373¼ shares of stock now held by me, and to be delivered upon payment of his note to said D," is a conditional sale. *Davison v. Davis*, 125 U. S. 90, 31 L. ed. 655.

An action cannot be maintained against the purchaser in a conditional sale of personal property on a note given for the purchase price, after the property, which was the expressed consideration for the instrument, has been taken from him by the vendor. *C. Aultman & Co. v. Olson*, 43 Minn. 409; *Minneapolis Harvester Works v. Hally*, 27 Minn. 495. See note to *Hineman v. Matthews* (Pa.) 10 L. R. A. 323.

On the back of which appears the following:

"§—. 188—. For value received, — after date, — promise to pay to the order of James W. Tufts — dollars, with interest —. The consideration of this and other notes is the following described soda-water apparatus, —, which — have received of said James W. Tufts. Nevertheless it is understood and agreed by and between — and the said James W. Tufts that the title to the above-mentioned property does not pass to —, and that until all said notes are paid the title to the aforesaid property shall remain in the said James W. Tufts, who shall have the right, in case of nonpayment at maturity of either of said notes, without process of law, to enter and retake, and may enter and retake, immediate possession of said property, wherever it may be, and remove the same. Payable at the — Bank. —. Due —."

The apparatus was shipped to and accepted by defendant. It was agreed between the parties that defendant should ship to and that the plaintiff should receive, to apply upon the purchase price of the apparatus, a second-hand Puffer soda-water fountain, for which he was to be allowed \$500 upon the purchase price of the new fountain, and that for the balance of \$1,100 he should give his notes similar in form to that upon the back of said order; that on the 21st of March, 1888, the defendant executed at Kalamazoo and forwarded to the plaintiff 44 notes, for \$25 each, due at the rate of \$25 per month, all being in form as follows:

"\$25.00. Kalamazoo, Mich., Mch. 21, 1888.

"For value received, November 10, 1888, after date, I promise to pay to the order of James W. Tufts, twenty-five dollars, with interest 4 per cent. The consideration of this and other notes is the following described soda-water apparatus: One 24-10 R. Form and fancy Siberian Missouri, No. 687, with water attached. Three 10-gal. seamless cop. founts, which I have received of said James W. Tufts. Nevertheless, it is understood by and between me and the said James W. Tufts that the title to the above-mentioned property does not pass to me, and that until all said notes are paid the title to the aforesaid property shall remain in the said James W. Tufts, who shall have the right, in case of nonpayment at maturity of either of said notes, without process of law, to enter and retake, and may enter and retake, immediate possession of the said property, wherever it may be, and remove the same. Payable at First Nat'l Bank, Kalamazoo, Mich., 151 So. Burdick St. E. R. D'Arcambal. Due Nov. 10, 1888."

The old apparatus was shipped to plaintiff, and credited as agreed. Ten of the notes were afterwards paid. Nine others had become due, and were unpaid, and, after demand made, plaintiff took out his writ of replevin, and obtained possession of the property. All of the unpaid notes were in possession of plaintiff, and were not tendered back to defendant before the commencement of suit. The defendant, under objection and exception, introduced evidence tending to establish the condition and value of the apparatus replevied by the plaintiff of defendant at the time thereof, and tending to prove that it had not substantially depreciated in value; and also testimony tend-

ing to show the amount of such depreciation, and the rental value of such apparatus for the time it was used by defendant. Counsel for plaintiff requested the court to charge the jury that the plaintiff was entitled to a verdict, and that the defendant had no lien upon the property in controversy, and was not entitled to any allowance or verdict on account of the money paid by him towards the purchase price of the property over and above the depreciation of it, and a fair rental for its use during the time it was in defendant's possession, or on account of the Puffer soda-water fountain received by plaintiff from him. The court declined to charge the jury as so requested, and to such refusal counsel for plaintiff excepted; and thereupon the court, at the request of the defendant, instructed the jury that defendant had a lien upon the property, and was entitled to recover as against the plaintiff such a sum as they found from the evidence would be just between the parties, after deducting a fair amount for the rental value of the property during the time that it was in the possession of the defendant, and for any depreciation in value it had sustained during that period; to which instruction and ruling plaintiff by his counsel excepted. The jury rendered the following verdict: "That the said defendant did unlawfully detain the goods and chattels mentioned in manner and form as the said plaintiff has in his declaration in this cause complained against him, and that they assess the damages of the said plaintiff by reason thereof at the sum of six cents. And they further find that the said defendant has a lien upon or special property in said goods and chattels to the amount of two hundred and fifty dollars (\$250)." Upon this verdict the following judgment was entered: "The jury by whom the issue in this cause was tried, having found by their verdict that the said defendant did unlawfully detain the goods and chattels in said plaintiff's declaration, as herein alleged, and having assessed the damages of plaintiff by reason of the unlawful detention of said goods and chattels at the sum of six cents over and above the costs and charges by him about the suit in this behalf expended, and the said jurors having further found that said defendant hath a lien upon or special property in said goods and chattels to the amount of \$250, and is not the general owner thereof, but that said plaintiff is the general owner of the said goods and chattels, subject to the lien aforesaid of said defendant: Therefore it is further considered that said defendant do recover against the said plaintiff the said sum of two hundred and fifty dollars, being the amount of his special property in said goods and chattels so by the jurors in form aforesaid found, and that said defendant have execution thereof; and it is further considered that the said plaintiff do recover against the said defendant his costs and charges by him about his suit in this behalf expended to be taxed, and that he have execution thereof."

Plaintiff appeals, alleging the following errors: "First. The court erred in allowing the defendant to introduce evidence tending to establish the condition and value of the apparatus replevied by the plaintiff from the defendant at the time thereof, and tending to



prove that it had not substantially depreciated in value, and also in permitting the defendant to introduce evidence tending to show the amount of such depreciation, and the rental value of such an apparatus for the time it was used by the defendant, and in overruling the objections thereto made in behalf of the plaintiff. *Second.* The court erred in refusing to instruct the jury that the plaintiff was entitled to a verdict, and that the defendant had no lien upon the property in controversy, and was not entitled to any allowance or verdict on account of the money paid by him towards the purchase price of the property over and above the depreciation of it, and a fair rental for its use during the time it was in defendant's possession, or on account of the Puffer soda-water fountain received by plaintiff from him. *Third.* The court erred in instructing the jury that the defendant had a lien upon the property, and was entitled to recover as against the plaintiff such a sum as they found from the evidence would be just between the parties, after deducting a fair amount for the rental value of the property during the time that it was in the possession of the defendant, and for any depreciation in value it had sustained during that period. *Fourth.* The court erred in rendering the judgment entered in said cause, in manner and form as it was rendered and entered therein."

It will be observed that the contract here does not provide for a rescission thereof before plaintiff should have the right to reduce the property to his possession, nor does it provide

that the taking of possession should rescind the contract or work a forfeiture of the amount paid upon the apparatus, but the plaintiff treats the contract as still existing and executory. The contract provides expressly that the title to the property shall continue to remain in plaintiff until the apparatus is paid for, and that, in case of the nonpayment of either of the notes at maturity, the plaintiff should have the right to take possession of the property; but it contains no provision that such act shall operate as a rescission of the contract, or a forfeiture of the payments thereon. The reduction of the property to possession by plaintiff does not excuse performance by defendant, as defendant has the right, upon payment of the amount due, to a return of the property. Plaintiff had the right, under the express conditions of the contract, to secure himself by taking possession, and the exercise of this right under the contract did not entitle the defendant to rescind the contract, or to a recovery of the amount paid, or to a delivery to him of the unpaid notes; neither did it give him any lien upon the property for the amount paid by him. The court erred, therefore, in refusing to direct a verdict for plaintiff, and in instructing the jury that defendant had a lien upon the property for any amount.

Plaintiff was entitled to judgment, and to his damages for the unlawful detention of his property as fixed by the jury, and to that extent the judgment below is affirmed and reversed as to the residue, with costs of both courts to plaintiff.

The other Justices concurred.

## GEORGIA SUPREME COURT.

BENNETT, *Piff. in Err.*,

v.

STATE OF GEORGIA.

(...Ga....)

1. Allowing the State's counsel to argue before the jury after objection by the prisoner's counsel that the defendant's character is bad because he had a right to prove his good character and has not done so, is an error which will require a reversal of a conviction.
2. Improper argument by defendant's counsel by making statements outside the evidence as to his client's good character will not justify the State's counsel in arguing, against defendant's objection, that his failure to offer proof of good character raises an inference that his character was not good.

**NOTE.**—*Criminal practice, comments of prosecuting counsel on absence of witnesses, and testimony.*

In exercising the right of summing up evidence it is not proper for counsel for the prosecution to comment on the absence of witnesses for the defense. *Reg. v. Rudland*, 4 *Fost. & F.* 495; *Reg. v. Puddick*, 4 *Fost. & F.* 497.

Where counsel commented on a prisoner not giving evidence in his own behalf it was held error for the court to allow it, and a new trial was granted. *Crandall v. People*, 2 *Lans.* 300; *Ruloff v. People*, 45 *N. Y.* 222.

So when a defendant in a criminal case has not produced any evidence to sustain his general rep-

(December 23, 1890.)

**ERROR** to the Superior Court for Hart County to review a conviction of defendant for burglary. *Reversed.*

The facts are stated in the opinion.

*Messrs. McCurry & Proffitt* for plaintiff in error.

*Messrs. Harrison & Peeples*, with *Mr. W. M. Howard, Sol. Gen.*, for the State.

*Simmons, J.*, delivered the opinion of the court:

Bennett was tried for the offense of burglary, and was convicted. He made a motion for a new trial, which was refused, and he excepted. One of the grounds of the motion is that the prosecuting attorney, in the closing argument, ar-

gumentation and moral character it is improper for counsel to argue to the jury that his failure to do so may be considered against him. *Fletcher v. State*, 49 *Ind.* 124.

The law not only presumes that every person is innocent until he is proven to be guilty, but it also presumes that a person has a good character and reputation until the contrary is shown by evidence, and the jury has no right to consider the omission on the part of defendant to introduce evidence of his good character. 1 *Wharton, Cr. L.* § 637; *State v. Tozier*, 49 *Me.* 404; *People v. Bodine*, 1 *Denio*, 281; *Sackett, Inst. Jur.* 651. See note to *Com. v. Cleary (Pa.)* 8 *L. R. A.* 302.

gued that the defendant had a bad character; that he had a right to prove his good character, and had not done so. The defendant objected to this, and requested the court not to allow it. The court stated that the argument was proper, and he would allow it to proceed. Following is a note which the court attaches to this ground: "The first ground of the motion for new trial is true, with the following additional statement in connection with what occurred and in explanation thereof: In his argument before the jury defendant's counsel had stated and reiterated repeatedly (1) his personal conviction that the defendant was an honest man, and a man of good character, and that nothing criminal had ever before been charged against him; (2) that the defendant was a man of as good a character as Bowers, one of the State's witnesses, and stood as well in the community as Bowers did; (3) that Duncan, a witness for the State, was a man of good character, and had employed defendant for six years, and that Duncan would not have done so if defendant was a thief; and (4) that defendant stood well among his neighbors, and was regarded where he lived as an honest man, and one of good character, so far as the evidence in this case disclosed. In replying to these arguments the solicitor general said that in doubtful cases—in cases where the State had proved many suspicious facts and circumstances against a defendant—the law allowed him to prove his good character; and that, if this defendant was a man of such good character and reputation as his counsel had insisted he was, why had he not called some of his neighbors to prove his good character, and that his failure to do so must be because he had no such good reputation. When the point was made that this argument was improper the court refused to interrupt the solicitor general because of the fact that defendant's counsel had made the statements above mentioned." We think the court erred in allowing the State's counsel to argue before the jury, after objection by the prisoner's counsel that the defendant's character was bad because he had a right to prove his good character and had not done so. The accused is not bound to put his character in issue. If he omits to do so no inference of his guilt can be drawn therefrom by the jury. The general rule is that the omission to show good character does not justify a presumption that the character is bad, from which an inference of guilt can be drawn. *People v. Bodine*, 1 Deno. 281; *Ackley v. People*, 9 Barb. 609; *State v. Docketader*, 42 Iowa, 436; *State v. O'Neal*, 7 Ired. L. 251; *State v. Upham*, 38 Me. 261; *Stephens v. State*, 20 Tex. App. 255; *People v. White*, 24 Wend. 520; *Donoghos v. People*, 6 Park. Cr. Rep. 120; *Cluck v. State*, 40 Ind. 270; *Fletcher v. State*, 49 Ind. 184; 1 Bishop, Crim. Proc. § 1119.

The State is bound to prove the guilt of a defendant beyond a reasonable doubt, whether his character has been good or bad. It does not follow because an accused person may have a bad character that he is guilty of the particular offense for which he is being tried. Counsel both for the State and the accused should be compelled by the court to confine themselves in their arguments to the evidence in the case. In this State the defendant has a right to make a statement of his defense to the jury; 12 L. R. A.

and it has been held in several cases that the State's counsel, where the defendant omitted to make such statement, had no right to argue that fact to the jury. Nor can the jury infer guilt from the defendant's omission to make the statement. If the State's counsel is not allowed to argue this fact to the jury, why should he be permitted to argue that the omission to prove good character is evidence of bad character? Why should the jury be permitted to infer that his character is bad because he has omitted to prove good character? The trial judge, however, certifies that he permitted the State's counsel to make this argument because the prisoner's counsel had argued to the jury that the prisoner had a good character, etc.; meaning thereby that, as the prisoner's counsel had argued to the jury a fact which was not in evidence, it was proper to allow the State's counsel to reply to that argument, and to say that the prisoner's character was bad because he had a right to prove good character and had failed to do so.

In *State v. Upham*, *supra*, the indictment charged the accused with having in his possession counterfeit bank-bills. He offered no evidence of his general good character, but his counsel argued to the jury that from his position in society as postmaster his character ought to avail him in aid of the common presumption of innocence. Counsel for the government argued that the want of such testimony authorized the jury to infer that his character was bad. Refusal of the court to instruct the jury, upon request, that this failure to offer such proof afforded no inference of guilt, or that the character was not good, was held error.

There are many authorities which hold that the law presumes that a defendant has a good character. This was held in the case of *Stephens v. State*, 20 Tex. App. 269; and in the case of *Cluck v. State*, *supra*, the Supreme Court of Indiana held that the law presumes that every man has a good character, and that it would have been competent for counsel to have commented on such presumption. This rule is also laid down in Sackett on Instructions to Juries, p. 500.

In the case of *Goggans v. Monroe*, 31 Ga. 381, the defendant's counsel, in his argument, insisted that the plaintiff's character was bad, whereupon counsel for the plaintiff requested the court to charge the jury that the law presumed the plaintiff to be of good character until the contrary was shown by proof. The trial judge refused to charge as requested, and this court held that "it was error in the court to refuse to charge, on request, that the law presumes the character of the party to be good until the contrary is proven." Jenkins, J., in delivering the opinion, said: "Defendant's counsel having argued that plaintiff's character was bad, and this argument being likely to prejudice his case before the jury, he was entitled to the legal presumption that in the absence of evidence proving the contrary, his character was good; and it was error in the court to refuse to charge, on request, that the law did so presume." But, whether this be true or not, we hold that the court erred in allowing the State's counsel, over the objection of the prisoner's counsel, to make this argu-

ment to the jury, although the latter had first violated the rules of court by going outside of the evidence. The fact that the prisoner's counsel had violated the rule would not authorize the State's counsel to do likewise. To hold that because counsel on one side violates a rule of court in his address to the jury by making statements outside of the evidence the opposing counsel has the right to violate the rule in like manner, over objections of opposing counsel, would be to turn a court, where justice should be administered according to the rules of evidence and of law, into a town meeting. We could as well hold that, if the prisoner's counsel introduces illegal evidence, the State's counsel can reply by introducing other illegal evidence; and this, we have held, cannot be done. *Woolfolk v. State*, 81 Ga. 551.

In the case of *Mitchum v. State*, 11 Ga. 615, one of the grounds of the motion for a new trial was that the court erred in allowing the solicitor general, in the concluding argument, although objected to by counsel for the accused, to support the testimony of Eilands by stating that he was an unwilling witness for the State, that he had refused to come under subpoena, and was brought by arrest under attachment, none of which was in evidence before the jury; the court remarking that it was allowable because B. K. Harrison, one of the defendant's counsel, in his argument to the jury, had stated that Eilands was locked up on the Sabbath before the trial with the father-in-law of the deceased and the prosecutor, drinking with them, none of which was in evidence, Mr. Harrison contending that Eilands was a willing and a bribed witness. In the opinion (p. 628), Nisbet, J., in dealing with this ground, said: "The seventh exception is founded on the refusal of the court to restrain the solicitor general, although requested so to do by counsel for the prisoner, from commenting on facts not in evidence in his concluding speech to the jury. This, we think, was an error. We have had occasion to consider the habit of counsel in addressing the jury of commenting upon matters not proven and not growing out of the pleadings before, and have been content with visiting it with a decided and emphatic disapproval. *Berry v. State*, 10 Ga. 522, 523. We entertain no shadow of doubt as to the necessity of pronouncing it, as we now do, illegal, and highly prejudicial to a fair and just administration of the rights of parties, either on the criminal or civil side of the court. It is the duty of the court to prevent such comments; and in all cases where this is not done, provided the court is requested to prevent them, we shall hold, as we rule in this case, that it is good ground for a new trial. There was, it is true,

12 L. R. A.

some excuse for the license conceded to the solicitor general in this case in the fact that counsel for the prisoner had already taken the same liberty in his argument to the jury. The solicitor general no doubt felt called upon by the obligations of his office to remove any wrong impression which the argument of counsel for the prisoner had made as to the credibility of the witness. Disregarding, however, these things, we have no option but to make this case the occasion of establishing a rule upon this subject. In doing this, I am sure that it is scarcely necessary to say that we disclaim any purpose of inflicting a personal censure upon the able and upright judge who presided in the cause, or upon the counsel and the prosecuting officer. If no other reason existed for this disclaimer (and there are many) sufficient reason would be found in the usage of our courts, which has gone very far to sanction the habit referred to. Its practical tendency is bad upon the court, the bar and the jury. If this were all, perhaps our duty would stop with the expression of such an opinion; but this is not all, for in our judgment it is violative of the rights of the citizen litigant in the course of justice; and, if so, we are not at liberty to stop short of making it cause for a new trial." See also, upon the same line, *Trucker v. Henniker*, 41 N. H. 817; *State v. Upham*, 88 Me. 281; *Hennies v. Vogel*, 87 Ill. 242; *Fox v. People*, 95 Ill. 71; *Rochester v. Shaw*, 100 Ind. 268; *Forryth v. Cothran*, 61 Ga. 278; *Johnson v. Slappay*, 85 Ga. 576; *Augusta & S. R. Co. v. Randall*, 85 Ga. 297; *Com. v. Scott*, 128 Mass. 289; *McDonald v. People*, 126 Ill. 150, 9 Am. St. Rep. 547, and note.

The proper practice, according to the majority of the cases above cited, would have been for the prisoner's counsel to have requested the court to charge the law contrary to that as asserted by the solicitor general in his address to the jury. The record shows, however, that he did object to the remarks of the solicitor general, and requested the court to stop him; but that the court refused to do so, holding that the remarks were proper, and thereby giving the jury to understand that the rule of law laid down by the solicitor general was the correct one, and that they might make the inferences claimed by the prosecuting officer. Under this state of facts it was scarcely necessary for the prisoner's counsel to request the court to charge a contrary view of the law.

This being a very close case on the facts, and the language of the State's counsel being calculated to prejudice the jury against the defendant, we reverse the judgment of the court below in refusing to grant a new trial upon this ground.

## NEW YORK COURT OF APPEALS (2d Div.)

*Re Probate of the Paper Writing Propounded as the Last WILL and Testament OF Cecelia L. BOOTH, Deceased.*

Geraldine Josephine TIMONEY, *Appt.*,

v.

Joseph A. BOOTH, *Respt.*

(.....N. Y.....)

**That the maker's name, which appears only in the beginning of an instrument written by himself and purporting to be a will was intended to have effect as his signature in final execution of the will is not shown by his handing the instrument to another with the statement "This is my will; take and sign it."**

(June 2, 1891.)

**A** PPEAL by proponent from a judgment of the General Term of the Supreme Court, First Department, revoking the probate of a will which had been granted by the Surrogate of New York County and also from orders denying proponent's motions for judgment probating the will or for new trial and granting contestant's motion to reject the will. *Affirmed.*

**Statement by Follett, Ch. J.:**

On the 16th of June, 1884, Cecelia L. Booth, a resident of the State of New Jersey, and the wife of the contestant, wrote in her own hand a paper, which was signed by two witnesses, of which the following is a copy: "If I, Cecelia L. Booth, should die within the year 1884, I leave to my sister, Geraldine Josephine Timoney, all money due me from my late deceased father's will; also my wearing apparel and furniture; and I also leave to my little nephew, Albert Philip Timoney, all money deposited in the Emigrant Savings Bank in my maiden name, Cecelia L. Hatfield. Witnessed by Amelia Kurru, Mamie Clifford. June 16, 1884." August 10, 1884, Mrs. Booth, then a citizen of the State of New Jersey, died in that State, leaving personal property in the City and County of New York. Geraldine Josephine Timoney presented the instrument to the Surrogate's Court of the City and County of New York as the last will and testament of Cecelia L. Booth, and asked to have it admitted to probate as such, which was contested by the husband of Mrs. Booth. The surrogate held that the instrument was well executed under the laws of New Jersey, and admitted it to probate. 8 Dem. Sur. 414. On an appeal to the general term the decision of the surrogate was reversed, and a new trial directed by a jury. 38 Hun, 644. The following questions were submitted to the jury, all of which were found in the affirmative, except the eighth, which

was answered in the negative. "(1) Was the paper propounded as the last will and testament of Cecelia L. Booth, deceased, written by her? (2) If such paper was written by said Cecelia L. Booth, where was it written? (3) Was the name 'Cecelia L. Booth,' appearing on the first line of said paper, written or made by Cecelia L. Booth, the deceased wife of the contestant? (4) If said name, 'Cecelia L. Booth,' was written by Cecelia L. Booth, deceased, was it written by her in the presence of two witnesses who were present at the same time, and who subscribed their names to said paper as witnesses in the presence of said Cecelia L. Booth? (5) If the name 'Cecelia L. Booth,' was written by Cecelia L. Booth, deceased, did she acknowledge the writing or making thereof in the presence of two witnesses, who were present at the same time, and who subscribed their names to said paper as witnesses in the presence of said Cecelia L. Booth? (6) If said paper and said name of 'Cecelia L. Booth' was written or made by said Cecelia L. Booth, deceased, did she declare the same to be her last will in the presence of two witnesses, present at the same time, who subscribed their names thereto as witnesses in the presence of said Cecelia L. Booth? (7) Was said Cecelia L. Booth, at the time of making or executing said paper, mentally competent to make or execute a last will and testament? (8) If Cecelia L. Booth, at the time of making or executing said paper, was mentally competent to execute a last will and testament, was such paper procured under undue or improper influence or fraud?"

The proponent applied for a judgment at the general term, which was denied, and the contestant for a new trial, which was granted, on the ground that the answer to the fifth question was not sustained by the evidence. 18 N. Y. S. R. 844.

Upon the second trial by jury all of the issues were again found in favor of the proponent, but the general term again denied proponent's motion for judgment, and denied the contestant's motion for a new trial on all of the questions, but held that the answer of the jury to the fifth question was unsupported by the evidence, and directed a new trial of that question only.

Upon the third trial by jury they were directed to answer the fifth question in the negative. Upon appeal to the general term the direction was sustained, and it was held that the will was not entitled to be probated, from which judgment an appeal was taken to the court of appeals.

**Mr. J. Stewart Ross, with Mr. Alfred T. Ackert, for appellant:**

The will offered for probate having been wholly written by the testatrix, her name, written by her at the beginning thereof, was a sufficient signing of the same under the Statute of New Jersey.

See *Lemayne v. Stanley*, 8 Lev. 1; *Selden v. Coalter*, 2 Va. Cas. 558; *Re Miles*, 4 Dana, 1; *Adams v. Field*, 21 Vt. 256; *Allen v. Everett*, 12 B. Mon. 371; *Armstrong v. Armstrong*, 29 Ala.

**NOTE.**—Will; sufficiency of signature. See note to *Knox's App.* (Pa.) 6 L. R. A. 367.

As to signature and sufficiency of acknowledgment of signature, see note to *Cook v. Winchester* (Mich.) 8 L. R. A. 322.

As to execution of holographic will, see *Warwick v. Warwick* (Va.) 6 L. R. A. 775, and note. 12 L. R. A.

538; *Watts v. Public Administrator*, 4 Wend. 168; *Fritz v. Turner*, 46 N. J. Eq. 516.

The facts proven show a good acknowledgment of the will. There could have been no acknowledgment of the will without an acknowledgment of the signature.

*Re Higgins*, 94 N. Y. 554; *Re Phillips*, 98 N. Y. 267; *Buckhout v. Fisher*, 4 Dem. 277; *Re Hunt*, 43 Hun. 436, affirmed in 110 N. Y. 278; *Adams v. Field*, 21 Vt. 256; *Re Beckett*, 4 Cent. Rep. 881, 103 N. Y. 167; *Re Austin*, 45 Hun. 1; *Willis v. Mott*, 86 N. Y. 486; *Re Lantry's Will*, 5 N. Y. Supp. 501; *Re Look*, 7 N. Y. Supp. 298.

The signature being made by the testatrix herself, all that the law of New Jersey then requires to make the writing so signed a valid will is that "such writing be declared to be his last will" in the presence of two witnesses, etc.

See *Errickson v. Fields*, 80 N. J. Eq. 635; *Cowley v. Knapp*, 42 N. J. L. 297; *Ayres v. Ayres*, 11 Cent. Rep. 280, 43 N. J. Eq. 566.

*Mr. B. F. Watson*, for respondent:

The evidence before the surrogate does not show due execution according to the law and practice of the State of New Jersey; on the contrary it was proved affirmatively that there was no such due execution, and the evidence was not controverted.

See *Howland v. Taylor*, 53 N. Y. 628; *Ramsey v. Ramsey*, 13 Gratt. 664; *Roy v. Roy*, 16 Gratt. 418.

The equivocal act of placing the name at the beginning of the will cannot be aided by a declaration of the decedent that this was her will. The signature, not the will, must be acknowledged in the presence of the witnesses.

*Lemayne v. Stanley*, 3 Lev. 1; *Re Miles*, 4 Dana, 1; *Adams v. Field*, 21 Vt. 256; *Callett v. Callett*, 55 Mo. 340; *Waller v. Waller*, 1 Gratt. 454; *Den v. Milton*, 12 N. J. L. 81; *Den v. Maitlack*, 17 N. J. L. 88; *Ludlow v. Ludlow*, 35 N. J. Eq. 480; *Mundy v. Mundy*, 15 N. J. Eq. 290.

Under the circumstances of this case, some distinct recognition by the decedent, in the presence of the subscribing witnesses, of the name, "Cecilia L. Booth," in the top line of the alleged will, as and for her signature intended to authenticate the instrument, must be affirmatively proved.

*Follett, Ch. J.*, delivered the opinion of the court:

At common law, if a person wrote his name in the body of a will or contract with intent to execute it in that manner, the signature so written was as valid as though subscribed at the end of the instrument. *Merritt v. Clason*, 12 Johns. 102; *S. C. sub nom. Clason v. Bailey*, 14 Johns. 484; *People v. Murray*, 5 Hill, 468; *Caton v. Caton*, L. R. 2 H. L. 127; 2 Kent, Com. 511; 1 Dart, Vend. 6th ed. 270; 1 Jarman, Wills, Bigelow's ed. 79.

We shall assume, without deciding, that under the laws of New Jersey a will may be legally executed if the name of the testator is written by him in the body of the instrument with intent to so execute it. The Statute of that State which prescribes the mode in which wills shall be executed provides: "All wills and testaments . . . shall be in writing, and shall be signed by the testator, which signature

shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in the presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator." Under this Statute it was held (*Re McElwaine*, 18 N. J. Eq. 499) that "four things are required: *first*, that the will shall be in writing; *secondly*, that it shall be signed by the testator; *thirdly*, that such signature shall be made by the testator, or the making thereof acknowledged by him, in the presence of two witnesses; *fourthly*, that it shall be declared to be his last will in the presence of these witnesses. Each and every one of these requisites must exist. They are not in the alternative. The third requisite contains an alternative, but one of these alternatives must exist. The second requisite, the signing by the testator, must exist. The second alternative of the third, to wit, that he acknowledge 'making of the signature,' will not supply the want of the second. Where there is no proof as to the making of the signature, such acknowledgment is sufficient evidence that he made it, and would prove compliance with the requisite of signing by him. But when it is clear that the testator did not sign the will, this acknowledgment is not sufficient. The words of the Act are clear; and the object is equally clear, and requires this construction to the words." This language was used in respect to a will to which the name of the testatrix was subscribed by one of the subscribing witnesses at her request in her presence, and in the presence of both subscribing witnesses. After this was done the testatrix said "that was her name and seal," but did not acknowledge it to be her signature, nor did she then declare that the instrument was her will; and it was held not to have been executed in accordance with the Statute. Wherever the name of a testator appears, whether in the body or at the end of a will, it must have been written with intent to execute it; otherwise it is without force. When a testator or the maker of a contract subscribes it at the end, and in the manner in which legal instruments are usually authenticated, a presumption arises that the signature was affixed for the purpose of creating a valid instrument. But when the name is written near the beginning of the document, where, as a rule, names are inserted by way of description of the person who is to execute it, and rarely as signatures, it must, before it can be held to have been inserted for the purpose of validating the instrument, be proved to have been written with that intent. The record contains no evidence tending to show that Mrs. Booth, directly or indirectly, by word or gesture, referred to her name in the first line of the paper as her signature, nor is there evidence of any act on her part from which it might be inferred that the name there written was intended to be in execution of a completed will; and her simple declaration to Mamie Clifford, one of the subscribing witnesses, "This is my will; take it and sign it," standing alone, is insufficient to sustain a finding or verdict that the name "Cecilia L. Booth," written by her in the first line of the document, was there written with intent that it should have effect as her signature in final execution of a will. We are referred by

the learned counsel for the appellant to *Re Higgins*, 94 N. Y. 554; *Re Phillips*, 98 N. Y. 267; *Re Hunt*, 110 N. Y. 278,—in which it was held that when a testator subscribes a will at the end, and exhibits it and the signature to the subscribing witnesses, declares it to be his last will and testament, and requests them to sign it as witnesses, it is a sufficient acknowledgment of the signature. Those cases are quite different from the one at bar, in this: The signatures having been subscribed at the end, in the usual way in which instruments are finally authenticated, the legal presumption arose that the signatures were written for the purpose of finally executing the documents. But, as we have before shown, there is no legal presumption arising from the face of this instrument that the name was written as a signature, nor is there evidence outside of the paper from which such an inference can be safely drawn. It has been the object of the statutes of the various States prescribing the mode in which wills must be executed to throw such safeguards around those transactions as will prevent fraud and imposition; and it is wiser to construe these statutes closely, rather than loosely, and so open a door for the perpetration of the mischiefs which the statutes were designed to prevent.

*The judgment and orders appealed from should be affirmed*, with costs, payable out of the estate.

All concur, **Brown, J.**, not sitting.

Emily FORD, Admx. etc., of George Ford,  
Deceased, *Resp.*,

v.

LAKE SHORE & MICHIGAN SOUTH-  
ERN R. CO., *Appl.*

(....N. Y....)

**1. A failure to make proper rules or establish a proper method for the conduct of his business** will make the master liable for injuries to his servant caused by improper or negligent conduct of the work by co-employees, which the observation of a proper and sufficient rule would have prevented.

**2. A general rule that freight is to be safely loaded** so that it cannot fall off the cars is not sufficient as a rule for loading timber above the sides of the car so as to relieve the railroad company from liability for injury to a servant by the fall of timber from a gondola car on which it is piled above the sides without stakes to hold it, although stakes were furnished by the company to be used in the discretion of its servants.

(*Follett, Ch. J., dissents.*)

(March 17, 1891.)

**A** PPEAL by defendant from a judgment of the General Term of the Superior Court of Buffalo affirming a judgment of the Trial Term in favor of plaintiff, and also affirming an order denying a motion for new trial in an

**NOTE.**—As to master's duty to promulgate rules for the safety of his servant, see note to *Georgia Pac. R. Co. v. Dooley* (Ga.) 12 L. R. A. 344.  
12 L. R. A.

action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

**Statement by Brown, J.:**

Appeal from a judgment of the General Term of the Superior Court of Buffalo, entered upon an order dated December 31, 1890, affirming a judgment directed to be entered upon special findings of fact, and also affirming an order denying a motion for a new trial. This action was to recover damages for negligently causing the death of the plaintiff's husband, a switchman in the employ of the defendant. On the night of May 29, 1887, while at his post of duty, he was struck by heavy timbers, which fell from a passing car, and received injuries from which he soon after died. The case has been once before in this court (117 N. Y. 688), and the material facts are very fully stated in the opinion of Judge Earl there delivered. Other facts are stated in the opinion.

**Mr. James Fraser Gluck**, for appellant: It was vital error on the part of the court to submit any question regarding the sufficiency of the rules as one of fact to the jury.

*Wright v. New York Cent. R. Co.* 25 N. Y. 562; *Ross v. Boston & A. R. Co.* 58 N. Y. 217, 221; *Slater v. Jewett*, 85 N. Y. 61; *Sheehan v. New York Cent. & H. R. Co.* 91 N. Y. 832; *Abel v. Delaware & H. O. Co.* 5 Cent. Rep. 615, 103 N. Y. 581. See also *Avery v. New York Cent. & H. R. Co.* 121 N. Y. 44, 45; *Groat v. Gile*, 51 N. Y. 481.

There was a general custom among all railroads that the "safe stowing" of timber so that it "should not fall off the cars," was by stakes and cross-pieces. This custom may be regarded in determining the sufficiency of the rule.

2 Parsons, Cont. § 53; *Dawson v. Kittle*, 4 Hill, 107; *Ripley v. Aetna F. Ins. Co.* 30 N. Y. 160.

Having made this rule, it was not part of the master's duty to attend to the obedience of those regulations.

*Slater v. Jewett*, 85 N. Y. 72; *Ross v. Boston & A. R. Co.* 58 N. Y. 217.

The master is not bound to furnish machinery that will prove adequate to every occasion or emergency.

*Bajus v. Syracuse, B. & N. Y. R. Co.* 4 Cent. Rep. 618, 103 N. Y. 812.

He is not bound to adopt the best means and instrumentalities nor to discard old machinery for new of an improved pattern.

*Burke v. Withers*, 98 N. Y. 562; *Marsh v. Chickering*, 2 Cent. Rep. 419, 101 N. Y. 896.

The mere fact that methods, appliances, instrumentalities and machinery which have been used with safety upon scores of occasions prove insufficient at last upon a single occasion does not provide a basis upon which a master's liability can be predicated.

*Loftus v. Brooklyn Union Ferry Co.* 84 N. Y. 455; *Dobbins v. Brown*, 119 N. Y. 193.

Was it "manifest" to Ford that there was danger in thus loading the timber, and upon inspection pronouncing it safe? If the danger was "manifest" then he assumed the risk and cannot recover.

*Williams v. Delaware, L. & W. R. Co.* 116 N. Y. 628.

The happening of the accident itself does not justify an inference that in any respect either in the use of machinery, or the hiring of servants, or the making of rules, the master was lacking in reasonable care.

*Dobbins v. Brown*, 110 N. Y. 198.

Where experience has not shown by the occurrence of some misadventure or disaster that the instrumentalities employed or the methods in use render necessary the establishment of a different or safer method, the master is not chargeable with negligence, because, upon a single occasion, a casualty has occurred.

*Burke v. Witherbee*, 98 N. Y. 562; *Loftus v. Brooklyn Union Ferry Co.* 84 N. Y. 455; *Lafjin v. Buffalo & S. W. R. Co.* 7 Cent. Rep. 798, 106 N. Y. 136.

*Mr. Tracy C. Becker*, for respondent:

Conceding that defendant's evidence as to its rules and usage was sufficient to raise a question as to whether or not it had not made some rule on this subject, the question still remained one of fact for the jury whether that rule was sufficient for the purpose for which it was designed.

*Shiner v. Russell*, 6 N. Y. S. R. 78, 25 N. Y. Week. Dig. 261; *Bushby v. New York, L. E. & W. R. Co.* 10 Cent. Rep. 288, 107 N. Y. 388, citing *Abel v. Delaware & H. O. Co.* 5 Cent. Rep. 615, 108 N. Y. 581; *Anthony v. Leeret*, 7 Cent. Rep. 698, 105 N. Y. 591; *McGovern v. Central Vermont R. Co.* 128 N. Y. 381.

Defendant's attempt to show a usage, and indeed its attempt to show that it had a written rule which requires all freight to be stowed, was not enough to limit its liability.

See *Wright v. Boller*, 20 N. Y. S. R. 874.

*Brown, J.*, delivered the opinion of the court:

Upon the first appeal of this case the judgment which the plaintiff had recovered was reversed by this court, on the ground that the cause of the accident was attributable solely to the negligence of the fellow servants of the deceased in improperly loading the lumber upon the cars. There was then no question whether the defendant was guilty of negligence in failing to establish a proper rule or method for the loading of lumber. The court on the first trial charged the jury that there was no evidence that the defendant was called upon to establish any system of rules which should provide for any different or safer method in the loading of the lumber than that described by the witnesses, and, as the plaintiff had a verdict, no question was or could be raised on appeal as to the correctness of that charge. Upon the last trial it appeared that the only written rule that the defendant had established which it was claimed had reference to the loading of lumber was one known as No. 82, and which required its employes "to attend to the loading of all freight, whether loaded by station-men or by shippers, to see that it is safely stored, and so that it cannot fall off the cars." It appeared that the defendant had also furnished to its employes stakes to be used in making secure freight placed upon flat or gondola cars, and the witnesses for the defendant, who had

loaded or inspected the cars in question, testified that they knew that stakes were necessary in making the lumber secure, and that when there were no brackets on the side of the cars, as in this case, the stakes could be placed inside the box, between the side of the car and the lumber, and fastened by being nailed or spiked to the side. But that course was not pursued in this case, for the reason that on account of the short distance the lumber was to be carried it was not deemed necessary. The plaintiff also gave proof tending to show that on other roads a verbal rule existed that in loading lumber it should be secured by stakes on the sides, and stays across the top of the load, whenever it was loaded above the side of a car, and that the rule applied in all cases, no matter what the distance was over which the lumber was to be carried; that no verbal rule of this character prevailed on defendant's road, and no instruction to that effect was ever given to its employes. This testimony was not given upon the first trial. At the close of the evidence the trial court submitted eight special questions to the jury, stating that upon the answers to those questions it would determine which party would be entitled to judgment. Upon the special findings thus made judgment was directed for the plaintiff. This mode of submitting the case to the jury was acquiesced in by both parties, but the defendant claimed, and now claims, that there was not evidence sufficient to justify a verdict for the plaintiff, and that the complaint should have been dismissed, and by appropriate exceptions the question is presented here whether the findings of the jury have support in the evidence.

That the car in question was improperly loaded, and that such was the cause of the intestate's death, and that he was free from any negligence contributing to the injury, are facts found by the answers to the first three questions, and are not disputed on this appeal. The seventh and eighth findings related to the question of plaintiff's damages, and the amount. The fifth question was as follows: "Did the defendant provide, make and promulgate a proper and sufficient rule with respect to the loading of the cars with lumber, including the car from which the lumber fell, which, if faithfully observed, would have given reasonable protection to its employes?" which question the jury answered in the negative. We are of the opinion that the answer to this question supports the judgment rendered. The intestate, upon entering the defendant's employ, assumed and assented to the ordinary risks incident to the service. But employers cannot avail themselves of this assent unless they take reasonable precautions to insure the servant's safety while in the performance of his duties, and there can be no exemption from liability for injuries sustained by a servant when such injuries are traced to the employer's failure to take such precautions. Within the operation of this principle a corporation is bound to carry on its business under a proper system, and under reasonable rules and regulations, and if, through a failure to establish such, a servant is injured, the corporation is liable. The master is responsible for his own negligence and want of care, and this may appear from his failure to furnish proper machinery

and materials for the work, or from the employment of incompetent and unfit servants and agents, or from a failure to make proper rules or establish a proper method for the conduct of his business. These are the master's duties, and responsibility cannot be evaded by their delegation to agents. As to such acts, the agent occupies the master's place, and the latter is deemed present and liable for the manner in which they are performed. *Fluke v. Boston & A. R. Co.* 58 N. Y. 549; *Fuller v. Jewett*, 80 N. Y. 46.

In the case before us it was clearly the duty of the defendant to adopt some system for the loading of lumber upon open cars that would have regard for the safety, not only of its servants and those traveling over its road, but to the safety of all persons who should be in the vicinity of its cars. The importance and extent of the business, and the manifest danger from the falling of heavy sticks of timber from the cars, required this. But there was no rule on the subject. The only rule shown to exist had no particular reference to lumber more than any other freight, and it expressed nothing more than the obligation which the law put upon the corporation, viz., to take due care that freight was safely loaded, and should not fall from the car. But method or system as to loading lumber there was none. Having furnished a good car, and stakes that might be used, the manner of loading lumber was left to the judgment and discretion of its agents and servants. It was not sufficient for the defendant to show that its employes knew that the rule I have quoted applied to lumber, and also knew that the general usage required it to be staked, and that stakes were furnished and available to the men in the particular case before us. All this may be assumed to be true, and yet the fact exists that the use of the stakes was not enjoined upon the servants by any rule of the defendant or by any instruction ever given them. Having furnished the car and the stakes, it was left to the judgment and discretion of the foreman whether to use the stakes or not, and in this particular instance they were not used, for the reason that they supposed the lumber would stay on the car over the short distance it was to be carried; and it is because of the failure of the defendant to require the use of the stakes in all cases that the neglect of its servants in this case is imputed to it. There was no rule, and the only method or system was such as the foreman in each particular case should deem the safe and proper one to pursue. Under such a state of facts, the employer must be deemed constructively present during the loading of the cars, and the acts of his agents are in law deemed to be his acts. The improper and negligent loading of the cars is thus traced directly to the defendant, and its negligence established. Thus far I have treated the construction of Rule 82 as a question of law, but in the question submitted to the jury there was opportunity for a finding of fact that the making of that rule was a sufficient performance on the part of defendant of its duties towards its servants, and it is unnecessary to say more upon the exception of the defendant to the submission of that question, as one of fact to the jury, than that it was a ruling as favora-

ble towards it as the facts of the case warranted. The view of the case herein expressed renders unnecessary any reference to the other findings of the jury which the respondent claims establish the negligence of the defendant.

We find no error in the record, and the judgment must be affirmed.

All concur, except Follett, *Ch. J.*, dissenting.

John H. DRESLER, *Respt.*,

v.

George M. HARD *et al.*, *Appts.*

(....N. Y....)

The opinion of an expert may be given on the question whether the word in the date of a written instrument is "Jany" or "July."

(June 2, 1891.)

**A**PPEAL by defendants from a judgment of the General Term of the Superior Court for

*NOTE.—Of expert and opinion testimony as to handwriting.*

An exhaustive review of the authorities will disclose the fact that the earliest reported case bearing any affinities with the one under review is that of *Norman v. Morrell*, decided by the English Court of Chancery in 1798 and reported in 4 *Ves. Jr.* 708. The contention arose over the amount of a legacy, and the solicitor for the plaintiff admitted that the original figure was "three," but he contended that it had been altered to "eight" by drawing the pen over it again and extending the upper and lower parts of the figure towards the center. To sustain this contention the Master of the Rolls admitted the testimony of an engraver who was examined as an expert upon the subject, and the lines written by the testatrix, who was of an advanced age at the time of the transaction, were proved in order to show how she made her figures. The ruling by which this testimony was admitted was sustained by the Lord Chancellor.

The law is well settled that when the characters in which a paper is written are obscure and difficult to be deciphered the evidence of persons whom practice and experience in examining writing have made skilful is competent for the purpose of aiding the court or jury in arriving at a true reading of the document. *Stone v. Hubbard*, 7 *Cush.* 505; *Wigram, Wills*, 3d ed. 12, 138, 139, 143; *Masters v. Masters*, 1 *P. Wms.* 426; *Norman v. Morrell*, 4 *Ves. Jr.* 709; *Sheldon v. Benham*, 4 *Hill*, 129.

#### *Claims of the experts.*

Caligraphic experts have for years asserted the possibility of investigating handwriting upon scientific principles, and the courts have consequently admitted such person to testify in cases of disputed handwriting. It is claimed that experiments and observation have disclosed the fact that there are certain general principles which may be relied upon in questions pertaining to the genuineness of handwriting. *Rogers, Expert Testimony*, 2d ed. § 124.

It is further claimed that no two autograph signatures written in a natural hand were perfect *fac similes*. In the famous *Howland Will Case* (*Mass.*) 4 *Am. Law Rev.* 628, 649, Professor Pierce, a very distinguished mathematician, at that time professor of mathematics in Harvard University, testified that the odds were exactly 2,896,000,000,000,000,000, that an individual could not with a pen write his name three times exactly alike.

Men of business acquire a mechanical style of



the City of New York affirming a judgment of the Trial Term in favor of plaintiff in an action brought to recover damages for defendants' alleged failure to deliver certain stock which they had contracted to sell and deliver to plaintiff. *Reversed.*

The facts are stated in the opinion.

**Mr. Daniel P. Hays**, for appellant:

The court erred in refusing to allow the expert to examine the receipt offered in evidence and testify as to whether the date was January or July.

See *Van Wycklen v. Brooklyn*, 118 N. Y. 429; *Rogers*, Expert Testimony, § 128; *Miles v. Loomis*, 75 N. Y. 288; *Sheldon v. Benham*, 4 Hill, 181; *Stone v. Hubbard*, 7 Cush. 595; *Masters v. Masters*, 1 P. Wms. 425; *Norman v. Morrell*, 4 Ves. Jr. 770; *Vinton v. Peck*, 14 Mich. 290.

**Mr. Isaac L. Egbert**, for respondent:

The opinion of the expert was properly excluded by the trial judge. This was not a case of disputed writing, and there is no rule

of law under which the proposed testimony would be permissible. The acts confine the authority for such comparisons to cases of "disputed writing."

Laws 1888, chap. 555; *Peck v. Callaghan*, 95 N. Y. 73; *Miles v. Loomis*, 75 N. Y. 288.

**Potter, J.**, delivered the opinion of the court:

A statement of the facts which, it seems to me, must control the decision of this appeal in this case, may be very brief. The action was brought by plaintiff to recover of defendants the moneys paid by him to them from time to time towards the purchase price of 1,000 shares of the stock of the Manhattan Refining Company, but which the defendants refused or failed to deliver pursuant to their obligations. The contract to purchase the particular block of stock in question was made about the 1st of November, 1890. It was not questioned upon the trial but that the plaintiff had contracted to purchase of defendants two other

writing which obliterates all natural characteristics, unless in instances where the character is so strongly individual as not to be modified into the general mass. See the able article *Autography* in *Chambers Edinb. Journal*, July 26, 1845.

#### *Treacherous nature of this species of evidence.*

The treacherous nature of this species of evidence as to handwriting is fully recognized and is frequently referred to. Mr. Best observes, section 247, *Principles of the Law of Evidence*, whatever may be the relative values of the several modes of proving handwriting, it is certain that all such proof is even in its best form precarious and often extremely dangerous. The handwriting of the same person varies at different periods of life; it is affected by age, by infirmity and by habit. "Many persons, it has been well remarked, write alike having the same teacher, writing in the same office, being of the same family; all these produce similitude in handwriting which in common cases and by common observers is not liable to be distinguished." *Rex v. Johnson*, 29 How. St. Tr. 475. See also *per Sir J. Nicholl* in *Constable v. Steibel*, 1 Hagg. Eccl. 61.

#### *Infirmities of this evidence.*

Of all kinds of testimony admitted in a court of justice, expert and opinion evidence as to handwriting is the most unsatisfactory; it is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence. *Cowan v. Beall*, 1 McArthur, 270. A distinguished jurist, commenting upon this grade of evidence, says, in confirmation of the above: "Everyone knows how unsafe it is to rely upon anyone's opinion concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief instead of palliating it, and the results of litigation have shown that these are often the merest pretenders to knowledge whose notions are pure speculations. Opinions are necessarily received and may be valuable, but at best this kind of testimony is a necessary evil. Those who have personal acquaintance with the handwriting of a person are not always reliable in their views, and single signatures apart from some known surroundings are not always recognized by the one who made them. Every degree of removal beyond personal knowledge into the domain of what is sometimes called with great liberality scientific opinion is a step towards greater uncertainty and the science which is generally diffused is of 12 L. R. A.

very moderate value." *Campbell, J.*, in *Foster's Will Case*, 34 Mich. 21.

#### *Harmony of the decisions as to qualification of experts.*

A series of decisions sustains with substantial unanimity the proposition that to render the witness an expert, competent to testify as to the genuineness of the person's signature or handwriting, he must have seen such person write or have been the recipient of social or business letters from him, which letters have been assumed to be genuine by both parties, or is shown to be competent by virtue of close study of comparison where the spurious and genuine handwriting were the subject of contrast. *Strong v. Brewer*, 17 Ala. 708; *Keth v. Lothrop*, 10 Cush. 448; *Burnham v. Ayer*, 36 N. H. 182; *Pepper v. Barnett*, 22 Gratt. 406; *Hopkins v. Meguire*, 85 Me. 78; *West v. State*, 23 N. J. L. 212; *Woodford v. McClenahan*, 9 Ill. 85; *Edelen v. Gough*, 8 Gill, 87; *Garrell v. Alexander*, 4 Esp. 87; *Hammond v. Varian*, 54 N. Y. 308; *Board of Trustees v. Misenheimer*, 73 Ill. 22; *Bowman v. Sanborn*, 25 N. H. 87; *State v. Ward*, 39 Vt. 225; *Medway's Case*, 6 Ct. Cl. 421; *Com. v. Eastman*, 1 Cush. 189; *Com. v. Coe*, 115 Mass. 481; *Sill v. Reese*, 47 Cal. 294; *Oddy v. Conly*, 27 Gratt. 313; *State v. Spence*, 2 Harr. (Del.) 848; *Pearson v. McDaniel*, 62 Ga. 100; *Gordon v. Price*, 10 Ired. L. 385; *South. Exp. Co. v. Thornton*, 41 Miss. 216; *Reyburn v. Bellotti*, 10 Mo. 597; *Empire Mfg. Co. v. Stuart*, 46 Mich. 438; *Rogers v. Ritter*, 79 U. S. 12 Wall. 317, 20 L. ed. 417; *Willson v. Betts*, 4 Denio, 201.

It is universally conceded that evidence of handwriting may be opinion merely, and it is as universally conceded that a witness who has either seen the party write, or who not having seen him write has received letters from him which have been acted upon by him as genuine, is competent to give an opinion as to his handwriting, and this competency is not affected by the lack of frequency of observation, the length of time which has elapsed since the writing was sent or the slightness of the correspondence, although the weight of the opinion will of course depend much upon these circumstances. *Miles v. Loomis*, 75 N. Y. 288.

There is no rule of law that requires that a witness called to prove the handwriting of a party should have seen the party write a large number of times. Handwriting, like the countenance, form, gait and gesture of a party, is recognized by some witnesses more readily than by others, and is in some persons marked by more decisive and ob-

similar blocks of stock; one in September, 1880, and before, and one in March, 1881, and after, the purchase in question. The practical contention of the plaintiff was that while the stocks purchased in September and March had been delivered, the stock purchased in November had not been delivered. The contention of the defendants was that the stock purchased in November had been delivered. Upon the trial the plaintiff introduced his own and other evidence tending to establish the contention upon his behalf. The defendants, in support of their contention, introduced a receipt, of which the following is a copy: "New York Agency, Jay 22d, 1881. I have this day received from Jas. H. Blauvelt stock certificate No. 122 & 121 of the Manhattan Refining Company, which I have paid part cash and notes, John H. Dresler." A dispute thereupon arose whether the date of the receipt was January or July, 1881. The force and pertinency of the date of the receipt was clearly recognized in the charge of the learned trial judge and in

the opinion of the general term. The receipt proves the delivery of two blocks of stock. The plaintiff, in his testimony, proves the delivery of two blocks of stock, but says the two blocks delivered were the purchases made in September and March. The defendants contend that the two blocks, the delivery of which are evidenced by the receipt, were the blocks purchased in September and November. If, therefore, the date of the receipt is January, it must refer to the purchases made in September and November, for the third purchase was not made till March succeeding January, 1881. Various papers relating to the transactions between plaintiff and the defendant Blauvelt, in the handwriting of the latter, were put in evidence, and, among others, a note bearing the date or the word "Jany," 1886. It was conceded that the receipt in question was in the handwriting of the defendant Blauvelt. The defendant called an expert to show that the date of the receipt was "January," and not "July." For that purpose the defendant asked

various peculiarities than in others. All that is requisite is to ascertain whether the witness has seen handwriting which by an infallible test he knows to be that of the party; and then he must upon his oath declare if the writing exhibited appears to him to be that of the same party. The weight to be attached to such testimony must depend upon the ordinary tests of knowledge, the capacity of a witness, his disposition to tell the truth and the means which have been afforded him, whether from the intrinsic nature of the subject itself, or the familiarity of the witness with it, to acquire the information he assumes to have. *Hideout v. Newton*, 17 N. H. 71.

#### *Latitude of the present rule.*

It is pertinent, in this connection, to add that the weight of authority, as evidenced in the modern adjudication, renders the witness competent if he has seen the party write at all. *Pope v. Askew*, 1 *Ired. L.* 16; *Woodford v. McClenahan*, 9 *Ill.* 85; *McNair v. Com.* 26 *Pa.* 386; *Haynie v. State*, 2 *Tex. App.* 173.

#### *Further review of the sustaining authorities.*

The principles sought to be established by the authorities here collated are fully sustained by the case of *Woodman v. Dana*, 53 *Me.* 13, where the court in an exhaustive and carefully considered opinion by Rice, J., reviewed the authorities and stated as a principle well established that the handwriting of a person may be proved by any person who has acquired a knowledge of it, as by having seen him write, from having carried on a correspondence with him, or, as was decided in *Hammond's Case*, 2 *Me.* 33, 11 *Am. Dec.* 39, from an acquaintance gained from having seen handwriting acknowledged or proved by him. *Page v. Romans*, 14 *Me.* 481; 1 *Greenl. Ev.* § 577; *Wharton, Ev.* § 707, 708.

#### *Theory of the Vermont and Massachusetts courts.*

The same question has very recently been before the Supreme Court of Vermont in the case of *Rowell v. Fuller*, 59 *Vt.* 683, where the court announced the rule that where a writing is disputed and another is offered in proof as a standard the court should first find as a fact that the latter is genuine and then submit it to the jury in comparison with that in controversy. This doctrine has been re-affirmed in *Costello v. Crowell*, 133 *Mass.* 352, and again in the same case as reported in 139 *Mass.* 560. The present English rule is in entire accord

and harmony with that now in vogue in Massachusetts and Vermont. This, however, has been peremptorily in contra-distinction of the juridical position above outlined. The courts of high standing and marked ability for whose decisions we have great respect have adopted a different rule and held that the jury should ultimately pass upon the question. *State v. Hastings*, 53 *N. H.* 461, opinion by Sargent, Ch. J.

#### *The standard of comparison.*

As to the standard of comparison, it may be remarked that even in those States where the common-law rule has been relaxed by statutory innovation, it is nevertheless held that the standard of comparison sought to be introduced must be either admitted to be genuine or proved so to be by undoubted evidence. *McKeone v. Barnes*, 108 *Mass.* 344; *Pavey v. Pavey*, 30 *Ohio St.* 600; *Van Sickle v. People*, 29 *Mich.* 61; *State v. Hastings*, 53 *N. H.* 455; *Travis v. Brown*, 43 *Pa.* 9; *Baker v. Mygatt*, 14 *Iowa*, 131; *Heard v. State*, 9 *Tex. App.* 1.

It is reversible error to allow a document to go to the jury as a standard where the only proof of its genuineness consists in comparison by experts with some other writing admitted to be genuine. The court says: It appears to us that the genuineness of the writing made the basis of comparison, sometimes called the standard writing, should be proved by direct or positive evidence, and in an early Iowa case it was held that such proof should be by the testimony of a witness who saw it written or by the testimony of a person or by some other positive proof. *Winch v. Norman*, 65 *Iowa*, 136.

As to the comparison of the writing to be proved with other writings at common law, this could only be by documents or writings already in evidence. But this rule is disputed in many States. *Henderson v. Hackney*, 16 *Ga.* 531; *Hanley v. Gandy*, 28 *Tex.* 211; *Clay v. Alderson*, 10 *W. Va.* 49; *State v. Givens*, 5 *Ala.* 747; *Tome v. Parkersburg Branch R. Co.* 39 *Md.* 39, 17 *Am. Rep.* 540; *Kannon v. Gallo-way*, 2 *Bart.* 230; *Row v. Kile*, 1 *Leigh*, 215; *West v. State*, 23 *N. J. L.* 212; *Board of Trustees v. Misenheimer*, 78 *Ill.* 22; *Clark v. Rhodes*, 2 *Helak.* 206; *Otey v. Hoy*, 3 *Jones*, L. 407; *Van Sickle v. People*, 29 *Mich.* 61; *McAllister v. McAllister*, 7 *B. Mon.* 269.

The genuineness of a signature to a lost instrument may be testified to by an expert who has examined the signature and who testifies to his recollection as compared with the genuine signature in evidence. *Abbott v. Coleman*, 22 *Kan.* 250, 31 *Am. Rep.* 133.

this question: "Will you state from the examination which you have made of Exhibit B, and of the comparison you have made between the handwriting on that and the handwriting on these other exhibits in Mr. Blauvelt's handwriting, what your opinion is with reference to the date on that paper?" This question was objected to by the plaintiff, but not upon any specific ground. The court excluded the question, manifestly upon the ground that the question calls for the opinion of the witness as to what the word or characters mean. To make the point of the proposed evidence and ruling more precise, the defendants' counsel asked this question: "I ask you to compare it with the exhibit you have in your hand, and then I desire to ask the question again whether, in your opinion, the word written at the heading of defendants' Exhibit B, in the place of the date, is January or July;" which, upon plaintiff's objection, was also excluded. The defendants' counsel excepted to the rulings. We think the learned trial judge erred in ex-

cluding the evidence. We will assume, as stated in the language of the court, that the object of the proof was to show by the witness what the words and characters indicating the date of the receipt were. The principle involved is whether it may be shown what the word in a written instrument is. To a person or a juror (if we may suppose the latter case) who can neither read nor write it is indispensable that someone who can should be allowed to testify what the words are. This course would be necessary in such case, however plainly written or printed the word might be. Upon the same principle it is allowable for the jurymen, who are perhaps only moderately skilled in letters and words, to determine what the letters and characters are, and what word they make. The jurors may do this from the knowledge they already possess and such as they gain during the trial by the reading and comparison they make with other writings already introduced in evidence. Indeed, the court held in the opinion in this case

#### *The rule in North Carolina and New York.*

A North Carolina case has held that testimony as to handwriting founded on what is properly termed "comparison of hands" seems to be now generally exploded. *Pope v. Askew*, 1 Ired. L. 17; *Yates v. Yates*, 76 N. C. 143.

A comparison of the handwriting of papers introduced and relevant is permitted to ascertain the genuineness of the one in controversy. This rule was distinctly laid down in *Doe v. Newton*, 5 Ad. & El. 514, and approved by the New York Court of Appeals in *Van Wyck v. McIntosh*, 14 N. Y. 442; and in a later case *Mr. Commissioner Leonard*, writing for affirmance, says: "The comparison of handwriting is permitted where different instruments relevant as to the controversy have been introduced for other purposes." *Randolph v. Loughlin*, 48 N. Y. 456.

The fluctuation in judicial opinion regarding this topic has been violent and contradictory and is several degrees removed from unanimity at this time.

#### *The Maryland rule.*

Maryland has adopted the English rule, which holds signatures to be proved under the common-law methods except in cases of comparison, by which is meant the collation of two papers in juxtaposition for the purpose of ascertaining by inspection if they were written by the same person. This rule was re-affirmed in 1876 in *Tome v. Parkersburg Branch R. Co.* 30 Md. 93, which case is supposed to announce the prevailing view in that jurisdiction.

#### *The Texas rule.*

In Texas we find the usual aberrations from standard authorities. The judiciary of that State gave the matter the most exhaustive and discriminating review, and, after elaborate discussion of every apparent phase of the question, decided in favor of the old common-law rule, which prohibits proof of handwriting by comparison. *Hanley v. Gandy*, 28 Tex. 211.

Another case reported in the same volume sustains the same view. These decisions were received with such dissatisfaction as to place the court in serious embarrassment, and rather than recede from a position so deliberately assumed the Legislature was importuned and relief afforded by statutory enactment, which provides *inter alia* that it is competent in every case to give evidence of handwriting by comparison made by experts or by the jury. *Paschall*, Dig. art. 3122.

12 L. R. A.

#### *The rule as sanctioned by the Nebraska courts.*

In Nebraska, it has been held that a witness not an expert cannot be permitted to give his opinion formed by a comparison of the disputed signature with the signatures of the party attached to pleadings filed in the case. In *Missouri* the case of *Dow v. Spenny*, 29 Mo. 337, is still regarded as controlling. The case appeared on appeal after the court below, in an action on a promissory note alleged to have been forged, had refused to allow a paper not in evidence to be used for the purposes of comparison in an appellate court. This ruling was affirmed. *Scott, J.*, in writing for affirmance, says the evidence in relation to the comparison of handwriting was properly executed, as the fact did not bring the case within the rule as stated by Greenleaf.

#### *The South Carolina rule.*

In South Carolina the courts adhere with substantial unanimity to the decision announced in 1838 in the case of *Boman v. Plunkett*, 2 McCord, L. 518. That decision admits the principle of the English rule to be correct and comparison by juxtaposition, not as original but as confirmatory evidence, is indulged.

#### *Theory of the Iowa and Indiana courts.*

The cases of *Clark v. Wyatt*, 15 Ind. 271, and *Shank v. Butsch*, 28 Ind. 20, are supposed to embody and typify the English rule above referred to, although these decisions were subsequently repudiated. In *Chance v. Indianapolis & W. G. R. Co.* 32 Ind. 473, which was the controlling decision on the subject until 1877, when *Chief Justice Biddell*, ignoring all previous decisions relevant to the topic, announced the rule in *Jones v. State* that Mr. Lawson, in his work on Expert and Opinion Evidence, pronounces to be among the curiosities of legal literature.

An interesting résumé of the cases bearing upon this topic will be found in the opinion of the Indiana Supreme Court, reported in *Forgey v. Cambridge First Nat. Bank*, 66 Ind. 126.

The rule regulating this important topic has assumed a statutory form in the State of Iowa, and section 3655 of its present Code enacts that "evidence respecting handwriting may be given by comparison made by experts or by the jury of handwritings of the same person which are proved to be genuine." See also *Baker v. Mygatt*, 14 Iowa, 181.

#### *The California code provisions on the subject.*

The California Code of Civil Procedure, while

at general term that the jury might compare the receipt in question with the dates and letters in the note and the other writings to determine the date of the receipt. If such comparison may be made by unskilled jurymen, why should they not be aided and enlightened, as they may be in analogous cases of the genuineness of handwriting, alterations and assimilations, by men who have made the subject of handwriting a study, and have obtained skill and proficiency in that branch of knowledge. As no objection was made that the witness was incompetent, it must be assumed that he was qualified as an expert to give his opinion, and the grounds of it, in aid of the jury. *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 430, and the cases there cited; *Masters v. Masters*, 1 P. Wms. 425; Rogers, *Expert Testimony*, § 128.

If we analyze the practical processes which have to be gone through with in order to elicit and apply this kind of evidence, whether from experts or lay witnesses, we shall find that the

witness is required to examine and determine what the letters and characters or even the hieroglyphics are, and what word they form in combination. The word thus formed may be in a native or foreign language; and, if it is foreign, then another process still is to be gone through with before it can reach the comprehension of the lay mind, and that is, to interpret its meaning into the native language of the juror. The testimony of expert witnesses frequently exemplifies one or both of these processes, and is of common use in the investigations carried on in courts of justice, and in other avocations. It often becomes necessary and pertinent in judicial proceedings to introduce foreign laws, and to interpret their meaning to the comprehension of the juror not familiar with the foreign language. We think these views are abundantly supported by adjudicated cases. In *Sheldon v. Benham*, 4 Hill, 129-131, a skilled bookkeeper was allowed to show the words indicated, and the meaning of

adopting a variant phraseology, is in essence and spirit a substantial re-enactment of the above. Various provisions are enacted by which evidence may be introduced upon the trial, and among the facts to be proved and the evidentiary matter that may be introduced (subd. 9, § 1870) we find the following, *inter alia*: "The opinion of a witness respecting the identity of handwriting of a person where he has knowledge of the person or handwriting." The subdivision above quoted is a legislative enactment of a well-settled rule of common law. See also *Estate of Toomes*, 54 Cal. 549.

#### *The New York Act of 1880.*

The New York rule is clear, concise and well authenticated. For fifty years the matter underwent a state of gestation and was subject to various vacillating rules which finally compelled legislative interference, and, in 1881, the matter crystallized into statutory form, which is believed to express and typify the ripest conclusions and ablest judicial judgments that have yet been given on this vexed and much controverted subject. The substance of the legislative enactment referred to will be found in chap. 36, Laws 1880, and under judicial constructions it has been held that the Act evidently was intended to enlarge the rules of evidence and extend the facilities of testing of handwriting of a party, the genuineness of whose signature was disputed beyond the opportunities afforded by the then existing rules. *Peck v. Callaghan*, 95 N. Y. 73.

#### *The New York adjudications on the subject of comparison.*

In this jurisdiction, the manifest tendency of the later decisions is toward a relaxation of the rigors of the early rule. These decisions concede that while documents could not be put in evidence for the purpose of comparison, yet, as in the English courts, those which were in for other purposes might be compared with the disputed signature by the jury (*Van Wyck v. McIntosh*, 14 N. Y. 439; *Randolph v. Loughlin*, 48 N. Y. 456); and in a comparatively recent case *Mr. Justice Davies*, in the course of a singularly well-considered opinion, says: "A comparison of the handwriting of papers introduced and relevant is permitted to ascertain the genuineness of the one in controversy."

#### *Attitude of the text-writers on the subject.*

The contention sought to be established by the text have the support and authorization of the most approved writers on the Law of Evidence. "It cannot be denied," says Mr. Starkie (2 Starkie, 13 L. R. A.

Ev. p. 375), "that abstractly a witness is more likely to form a correct judgment as to the identity of handwriting by comparing it critically and minutely with a fair and genuine specimen of the party's handwriting than he would be able to make by comparing what he sees, with the faint impression made by having seen the party write but once, and then, perhaps, under circumstances which did not awaken his attention." "When other writings," says Prof. Greenleaf (*Greenl. Ev.* § 578), "admitted to be genuine, are already in the case here, comparison may be made by the jury with or without the aid of experts." See also 1 Phillips, *Ev.* 6th ed. 472; Evans' note of Pothier, *Cont.* 2 Evans' Pothier, p. 185.

#### *The rule in the federal courts.*

The law in the federal courts may be briefly stated. Comparison of hands has always been considered a legitimate mode of determining as to the authenticity of a signature. Judge Loring speaks of it as a method sanctioned in *Medway's Case*, 6 Ct. Cl. 421, and regards it as the law of the court. It would be more accurate to say it was adopted because found on examination to be the law of the land. See pp. 429, 432; also *Henderson v. Hackney*, 16 Ga. 521; *McCorle v. Binns*, 5 Binn. 349; *Lyon v. Byman*, 9 Conn. 55; *Adams v. Field*, 21 Vt. 256; *Homer v. Wallis*, 11 Mass. 309; *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 Pick. 315; *Chandler v. Le Barron*, 45 Me. 534.

Returning to a consideration of the rule in the federal courts, the case of *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346, in which this question was under review, furnishes some cautionary suggestions. Mr. Justice Bradley, who delivered the prevailing opinion, evidently intended to limit his remarks in their applicability to the case at bar, which involved the question, What rules of evidence should govern the action of the court of claims? The great majority of contracts and transactions which come before that court for adjudication are permeated, and are to be adjudged, by the principles of the common law. Where Congress has not provided, and no special reason demands, a different rule, the rules of evidence ought to govern the actions of the court of claims. If a more liberal rule is desirable, it is for Congress to declare it by proper enactment, but the general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is, if a paper admitted to be the handwriting of a party or to have been subscribed by him, is in evi-

certain characters and abbreviations of entries made by a deceased officer of the bank. In the opinion in that case *Judge Bronson* says: "I see no objection to the testimony of the bookkeeper in relation to these memoranda. He was not called to give a construction or to declare the legal effect of a written instrument; but, as a person skilled in such matters, to tell the jury what words these short entries stood for. It is not unlike the case of an instrument written in a foreign tongue, where a translator may be called in to tell the jury how the instrument reads." "Where the difficulty arises from the obscurity of the writing itself, —e. g., if it be illegible from lapse of time, accident, etc.,—one skilled in deciphering may be called; as, for instance, a clerk from the postoffice. *Gresley, Eq. Ev. 198, 199 (Phill. Ev. Cow. & H. notes) 1419.*" "The very point arose in *Armstrong v. Burrows, 6 Watts, 266.* There the parties on a trial in the common pleas differed about the date of a receipt which

had been rendered illegible, the one contending that it was dated 1823, and the other that the date was 1824." In *Vinton v. Peck, 14 Mich. 287-290*, the question was whether the note was altered from "eight" to "eighty." An expert engraver was allowed to testify from comparison with the genuine writing whether an "8" was altered from a "3." In that case the court said: "It is very true that the jury may examine the paper for themselves, and that opinions are not usually admissible where the jury can form their own conclusions unaided. But we do not think it would be safe in this country to adopt a rule which assumes such a degree of knowledge and skill among jurors. Even reasonably expert writers may obtain valuable aid from opinions on such questions, and as neither law nor custom requires our jurors to meet any standard of education, we think that to exclude such aid would lead to absurd results. The most enlightened courts have

dence for some other purpose in the cause, the signature may be compared with it by the jury. *Moore v. United States, 91 U. S. 270, 23 L. ed. 346.*

It is well settled that a witness who only knows a person's handwriting from seeing it in papers produced on the trial and proved or admitted to be his, will not be allowed from such knowledge to testify to that person's handwriting, unless the witness be an expert and the writing in question is of such antiquity that witnesses acquainted with the person's handwriting cannot be had. It is also the result of the weight of authority, that papers cannot be introduced in a cause for the mere purpose of enabling the jury to institute a comparison of handwriting, said papers not being competent for any other purpose. *Greenl. Ev. § 5-9.*

But where other writings admitted or proved to be genuine are properly in evidence for other purposes the handwriting of such instruments may be compared by the jury with that of the instrument or signature in question and its genuineness inferred from such comparison. *Griffith v. Williams, 1 Cramp. & J. 47; Doe v. Newton, 5 Ad. & El. 514; Van Wyck v. McIntosh, 14 N. Y. 439; Miles v. Loomis, 75 N. Y. 238; Medway v. United States, 6 Ct. Cl. 421; McAllister v. McAllister, 7 B. Mon. 269; 1 Phill. Ev. 4th Am. ed. 615; Greenl. Ev. § 578.*

The history of this last rule is well stated in *Medway v. United States, supra.*

In *Griffith v. Williams, supra*, it was stated by the court that, "where two documents are in evidence, it is competent for the court or jury to compare them. The rule as to the comparison of handwriting applies to witnesses who can only compare a writing to which they are examined with the character of the handwriting, impressed upon their own mind; but that rule does not apply to the court or jury, who may compare the two documents when they are properly in evidence. An authoritative statement of the rule is given by *Justice Johnson* in *Van Wyck v. McIntosh, 14 N. Y. 439*, decided in 1853. And from an extract in the opinion it appears, that in the French Code Napoleon, §§ 1223, 1224, there is an exclusion of all private writing not admitted to be genuine in the cause as a standard of comparison.

#### *Of the change effected by the Texas Criminal Code.*

The rule as above formulated is not contravened by the decisions of the Supreme Court of Texas, although it appears that the English rule does not obtain in that jurisdiction having been changed by the Code of Criminal Procedure (§ 67) but not in 12 L. R. A.

civil cases. *Eborn v. Zimpelman, 47 Tex. 518.* The leading case, however, applicable to this discussion is that of *Hanley v. Gandy, 23 Tex. 211* (previously cited), which decided that other papers not connected with the cause cannot be introduced for the mere purpose of instituting a comparison of handwriting. No case decided that a signature to be proven cannot be compared by the jury with other papers or signatures of a party properly in evidence in the cause.

*Strother v. Lucas, 31 U. S. 6 Pet. 763, 8 L. ed. 573*, the leading case in the United States Supreme Court, relates to the competency of a witness to testify as to the genuineness of a signature with any knowledge of the party's handwriting, and the court held that such evidence is not admissible.

#### *Brief review of the English cases at nisi prius.*

The *nisi prius* decisions of the English courts, although not in entire harmony (*Allesbrook v. Roach, 1 Esp. 351*), and much criticised by the text-writers, were generally hostile to the admission of comparison by experts, until by the Act of Parliament in 1854 such evidence was declared legitimate. *Stanger v. Searle, 1 Esp. 14; Clermont v. Tullidge, 4 Car. & P. 1; Rex v. Cator, 4 Esp. 117.*

Even, however, before the passage of that Act a jury were allowed themselves to institute the comparison, but only with documents in evidence before them and relevant to the issue. *Doe v. Newton, 5 Ad. & El. 514; Solita v. Yarrow, 1 Moody & R. 183; Griffith v. Williams, 1 Cramp. & J. 47; Bromage v. Rice, 7 Car. & P. 543.*

In *Doe v. Suckermore, 5 Ad. & El. 703*, the whole subject received very great consideration, four judges of the king's bench delivering elaborate opinions, reviewing the cases very fully, and discussing very thoroughly the principles upon which evidence of this character should be received or excluded. The rule seems to be conceded in that case by all the judges, that as to any but ancient writings, an opinion formed upon a mere comparison of hands at the trial, *eo instanti*, was not admissible, but they were equally divided upon the question whether a knowledge of the handwriting might be obtained by a skilled person, sufficient to render him a witness competent to speak as to the genuineness of the signature merely by a previous examination of other signatures shown to be genuine. *Lord Chief Justice Denmon, Doe v. Webber, 1 Ad. & El. 737; Williams, J., Sadler v. Paefreyman, Id. 718.*

This distinction is admitted to be subtle; but

availed themselves of such assistance, and we deem it wise to use it in all cases where it is at hand. It can do no harm, and at all events must often be indispensable to justice." In the case of *Stone v. Hubbard*, 7 Cush. 595, it was held that in a case where the date of a note was doubtful, it being uncertain as to whether the last figure was a 4 or a 2, the plaintiff was entitled to call experts, and ask their opinion, "for the purpose of aiding the court or jury in arriving at a true reading of the document." Expert testimony upon the

same subject as in this case, as to whether the figure was an 8 or a 3, was admitted in the case of *Norman v. Morrell*, 4 Ves. Jr. 770.

Having reached the conclusion that a new trial must be granted for the error in excluding the testimony of the expert, we do not express any opinion upon the other questions raised upon the appeal.

*Judgment should be reversed*, and a new trial granted, with costs to abide the event.

All concur.

seems to have prevented the concurrence of these two judges with Coleridge and Patterson, JJ., in refusing the rule for a new trial.

#### *Parliamentary legislation on the subject.*

Str James Stephen has summarized the English rule relating to this topic with admirable preciseness, and article 52 of his celebrated Digest provides that comparison of the disputed handwriting or any writing proved to the satisfaction of the judge to be genuine is permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. Mr. Chace in his valuable annotation of Stephen's Digest appends an exhaustive note at page 110, from which the want of harmony in the various jurisdictions of this country is quite apparent. The English rule, *supra*, has the ascendancy in all the New England States, New York, New Jersey, Mississippi, Texas, Ohio, Iowa and Kansas. In many States collateral and relevant writings cannot be introduced for comparison. *Williams v. State*, 61 Ala. 38; *Houghton First Nat. Bank v. Roberts*, 41 Mich. 709; *Hasleton v. Columbus Union Bank*, 32 Wis. 84; *State v. Clinton*, 67 Mo. 380; *Brobston v. Cahill*, 64 Ill. 354; *Berres's Case*, 27 Gratt. 946; *Herriock v. Swomey*, 56 Md. 439; *Hawkins v. Grimes*, 13 B. Mon. 260; *Yates v. Yates*, 76 N. C. 143.

#### *Summary of the adjudications.*

Summarizing the conclusions of authority, it may be affirmed that the rule forbidding proof of handwriting by comparison is gradually being abandoned by the States of this Union that once recognized it, until it is now retained in only sixteen States and in some of these is very much qualified by its exceptions. 1 Wharton, Ev. 717, and *note*; 1 Best, Ev. 459; 7 Starkie, Ev. 7th Am. ed. 716.

The practice, however, on this point, as the foregoing review will demonstrate, is hopelessly divergent. *Homer v. Wallis*, 11 Mass. 309.

But the better reason seems in favor of allowing the jury to compare. *Travis v. Brown*, 43 Pa. 9, 23 Am. Dec. 540.

Comparison of hands may be made where other writings, admitted or clearly proved to be genuine, are already in evidence for some other purpose. *United States v. Darnaud*, 3 Wall. Jr. 181; *Bragg v. Colwell*, 19 Ohio St. 412; *Shannon v. Fox*, 1 Oranch. C. C. 133; *Martin v. Maguire*, 7 Gray, 177; *Depue v. Place*, 7 Pa. 423; *Reed v. Spaulding*, 42 N. H. 122; *Eborn v. Zimpelman*, 47 Tex. 518; *Tyler v. Todd*, 36 Conn. 218; *Jones v. State*, 60 Ind. 241; *Bowman v. Sanborn*, 25 N. H. 96; *Miles v. Loomis*, 75 N. Y. 238; *Hynes v. McDermott*, 82 N. Y. 41, 22 Alb. L. J. 367; *Outlaw v. Hurdle*, 1 Jones, L. 150; *Williams v. Drexel*, 14 Md. 573; *Allport v. Moeck*, 4 Car. & P. 267; *Goodyear v. Vosburgh*, 63 Barb. 154; *Hasleton v. Columbus Union Bank*, 32 Wis. 43; *State v. Miller*, 12 L. R. A.

47 Wis. 533; *Com. v. Eastman*, 1 Cush. 139; *State v. Givena*, 5 Ala. 737; *Kirksey v. Kirksey*, 41 Ala. 639.

Experts may make comparison of a genuine signature with ancient writing in dispute when living witnesses cannot be had and such writing is not old enough to prove itself. *Williams v. Drexel, supra*; *State v. Scott*, 45 Mo. 303; *State v. Hastings*, 53 N. H. 460; *Hicks v. Person*, 19 Ohio, 439; *Yates v. Yates*, 76 N. C. 143; *Van Sickle v. People*, 29 Mich. 61; *McAllister v. McAllister*, 7 B. Mon. 270.

#### *Genuineness of the standard must conclusively appear.*

It remains to add that the standard must be proved clearly beyond a reasonable doubt in addition to what is necessary to admit the standard in evidence (*Bragg v. Colwell*, 10 Ohio St. 412; *Outlaw v. Hurdle*, 1 Jones, L. 150); and if there is any controversy as to the genuineness of the specimens they are excluded. *Bowman v. Sanborn*, 25 N. H. 96; *Reed v. Spaulding*, 43 N. H. 122; *Com. v. Coe*, 115 Mass. 431; *Tyler v. Todd*, 36 Conn. 218; *State v. Ward*, 39 Vt. 225.

#### *A distinction noted.*

An important distinction must be observed in all cases, where comparison of handwriting becomes desirable. The rule does not apply and never did when a prima facie case has been made without it, or when the evidence is conflicting. It is only when comparison is relied on alone and by itself; but when comparison is resorted to in aid and corroboration of other competent evidence, or of doubtful proof, or when the evidence is conflicting, the rule is not violated. *Benedict v. Flanigan*, 13 S. C. 606, 44 Am. Rep. 533; *Boman v. Plunkett*, 2 McCord, L. 513; *Travis v. Brown, supra*; *Baker v. Haines*, 6 Whart. 234, 36 Am. Dec. 235; *Myers v. Toscan*, 3 N. H. 43; *Gore v. Stevens*, 1 Dana, 201, 25 Am. Dec. 141; *Woodard v. Spiller*, 1 Dana, 180; *Smith v. Fenner*, 1 Gall. 175; *Moody v. Rowell*, 17 Pick. 490.

Returning to the contentions sought to be established in the principal case, it may be well to remind the practitioner that the trial court will, without proof, determine the meaning of the customary abbreviation of Christian names (*Gordon v. Holliday*, 1 Wash. C. C. 239; *Weaver v. McElhenon*, 13 Mo. 90; *Stephen v. State*, 11 Ga. 241); the names of offices (*Moseley v. Martin*, 37 Ala. 221); names of places (*Ellis v. Park*, 8 Tex. 206; *Russell v. Martin*, 15 Tex. 238); and common words. *Jagua v. Witham & A. Co.* 4 West. Rep. 715, 106 Ind. 547; 2 Wharton, Ev. 1003; *Best, Ev.* 232, 232.

The implications of the above paragraph favor the familiar doctrine that courts will take judicial notice of such well-recognized abbreviations as custom and usage have for a long period sanctioned; and for the authorities sustaining the general proposition as to judicial notice, reference is made to a note appended to the case of *Olive v. State*, 4 L. R. A. 33, 36 Ala. 33.

Louisa W. HAMER, *App't.*,

v.

Franklin SIDWAY, *Exr.*, etc., of William  
E. Story, Deceased, *Resp't.*

(..... N. Y. ....)

1. A minor's abstinence from intoxicating liquors and tobacco, and from swearing or playing cards or billiards for money, is a good consideration for a promise by his uncle to pay him a sum of money.

2. A trust is created by a letter from an uncle to a nephew who had written to claim a sum of money, acknowledging that the nephew had earned it, and saying, "I had the money in the bank the day you were twenty-one years old that I intended for you," and, "I don't intend to interfere with the money in any way until I think you are capable of taking care of it,"—then adding in a postscript, "You can consider the money on interest."

(April 14, 1891.)

**A**PPEAL by plaintiff from an order of the General Term of the Supreme Court, Fourth Department, reversing a judgment of the Chemung Special Term in favor of plaintiff in an action brought to enforce payment of a claim against the estate of William D. Story, deceased. *Reversed.*

Statement by Parker, J.:

Appeal from an order of the General Term of the Supreme Court in the Fourth Judicial

Department, reversing a judgment entered on the decision of the court at special term in the county clerk's office of Chemung County on the 1st day of October, 1889. The plaintiff presented a claim to the executor of William E. Story, Sr., for \$5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests, he promised his nephew that if he would refrain from drinking, using tobacco, swearing and playing cards or billiards for money until he became twenty-one years of age, he would pay him the sum of \$5,000. The nephew assented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of twenty-one years, and on the 31st day of January, 1875, he wrote to his uncle, informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of \$5,000. The uncle received the letter, and a few days later, and on the 6th day of February, he wrote and mailed to his nephew the following letter:

"Buffalo, Feb. 6, 1875.

"W. E. Story, Jr.

"Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had

**NOTE.—Contract valid; consideration essential.**

Neither the motive, nor the expectation of result that induces one to enter into a contract, constitutes its consideration. *Philpot v. Gruninger*, 81 U. S. 14 Wall. 570, 20 L. ed. 743.

An agreement by a judgment creditor to allow a new trial is not binding unless made on some consideration. *Plunkett v. Black*, 117 Ind. 14.

An equitable consideration will support a contract. *Wright v. Jones*, 2 West. Rep. 355, 105 Ind. 17; *Condon v. Barr*, 4 Cent. Rep. 557, 49 N. J. L. 53; *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279; *Elston v. Castor*, 101 Ind. 425. See 15 Cent. L. J. 383.

**Contract imports mutuality.**

A contract imports mutuality, and there must be the concurrence of the minds of all parties in reference to the thing to be done. *Jolsen's T. R. & B. v. Thurber*, 118 N. Y. 684; *Shaw v. Woodbury Glass Works*, 52 N. J. L. 7; *Wallingford v. Columbia & G. R. Co.* 26 S. C. 256; *Dorsey v. Pike*, 50 Hun, 534.

If anything is left open or undetermined so that the minds of the parties have not met, no contract exists. *Mattison Mfg. Co. v. Oshkoosh Mut. F. Ins. Co.* 69 Wis. 564.

There must be a meeting of minds, and there can be no meeting of minds if one party has no mind which can meet the mind of the other. *Dickerson v. Davis*, 9 West. Rep. 680, 111 Ind. 433; 1 *Parsons, Notes and Bills*, 149.

A contract not mutually binding is void for want of mutuality. *Cartwright v. McGown*, 10 West. Rep. 594, 121 Ill. 393.

**Mutual and concurrent promises.**

Concurrent promises, creating a reciprocity of obligation, constitute a good consideration for each other. *Buckingham v. Ludlum*, 2 Cent. Rep. 197, 40 N. J. Eq. 422.

12 L. R. A.

This was a contract to prevent further litigation respecting real estate. For a history of the case, see *Ludlum v. Buckingham*, 35 N. J. Eq. 71, on appeal 39 N. J. Eq. 563.

A promise is a good consideration for a promise, but they must be mutual and concurrent, so that they create a reciprocity of obligation, and when that is the case they constitute as perfect a consideration as a contract can have. 1 *Chitty, Cont.* 11th Am. ed. 50; 1 *Parsons, Cont.* 477; *Buckingham v. Ludlum*, *supra*.

A written agreement not showing upon its face mutuality of obligation or other considerations may be supported as a contract by another written contract made at the same time, and shown to have been a consideration for the former agreement. *Bolles v. Sachs*, 37 Minn. 315.

An exchange of notes of an equal amount is based on a mutual and adequate consideration. *Cohn v. Husson*, 119 N. Y. 609.

Promises to sell goods and to pay therefor are mutual and concurrent. *Pope v. Terre Haute Car & Mfg. Co.* 9 Cent. Rep. 421, 107 N. Y. 61.

A conveyance of property made to a firm is an adequate consideration for a note on the firm made by one of the firm. *Philpot v. Gruninger*, 81 U. S. 14 Wall. 570, 20 L. ed. 743.

Where several mutually agree to pay money to be expended for a lawful object of common interest to the parties, the promise of each is considered as made in consideration of the promise of the others. *Osborn v. Crosby*, 1 New Eng. Rep. 845, 63 N. H. 582, citing *George v. Harris*, 4 N. H. 533; *Moore v. Chesley*, 17 N. H. 151.

**A mere voluntary promise is not enforceable.**

A mere voluntary promise without consideration is not enforceable. *Bramblet v. Lumsden*, 80 Ga. 707; *Nelson v. Pickwick Associated Co.* 30 Ill. App. 333.

lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars, as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. You would hardly believe me when I tell you that to obtain this I shoved a jack-plane many a day, butchered three or four years, then came to this city, and, after three months' perseverance, I obtained a situation in a grocery store. I opened this store early, closed late, slept in the fourth story of the building in a room thirty by forty feet, and not a human being in the building but myself. All this I done to live as cheap as I could to save something. I don't want you to take up with this kind of fare. I was here in the cholera season of '49 and '52, and the deaths averaged 80 to 125 daily, and plenty of small-pox. I wanted to go home, but Mr. Fisk, the gentleman I was working for, told me, if I left them, after it got healthy he probably would not want me. I stayed. All the money I have saved I know just how I got it. It did not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he

finds it. Willie, you are twenty-one, and you have many a thing to learn yet. This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop. One thing more. Twenty-one years ago I bought you fifteen sheep. These sheep were put out to double every four years. I kept track of them the first eight years. I have not heard much about them since. Your father and grandfather promised me that they would look after them till you were of age. Have they done so? I hope they have. By this time you have between five and six hundred sheep, worth a nice little income this spring. Willie, I have said much more than I expected to. Hope you can make out what I have written. To day is the seventeenth day that I have not been out of my room, and have had the doctor as many days. Am a little better to day. Think I will get out next week. You need not mention to father, as he always worries about small matters.

"Truly yours,

"W. E. Story."

"P. S. You can consider this money on interest."

The nephew received the letter, and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letter. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said \$5,000 and interest.

A naked promise, after a contract has been entered into, is without consideration and cannot be enforced. *Little v. Rees*, 34 Minn. 277.

No action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. *First Presby. Church v. Cooper*, 3 L. R. A. 468, 112 N. Y. 517; *Plunkett v. Black*, 117 Ind. 14; *Pfeiffer v. Campbell*, 111 N. Y. 681; *Clark v. Jones*, 85 Ala. 127.

A promise to pay a niece for services in one's family, made after she had married and left the family, is void for want of consideration. *Robinson v. McAfee*, 59 Mich. 375.

A promise by a husband to his wife on her deathbed that their son should have certain property, does not constitute a valuable consideration for a conveyance by him to the son. *Peek v. Peek*, 1 L. R. A. 185, 77 Cal. 106.

#### *Past act a sufficient consideration.*

A past act, if done at the request of the promisor, furnishes sufficient consideration for a present promise. *Trine v. Williamson* (Pa.) 12 Cent. Rep. 667.

A by-gone act or service rendered pursuant to a previous request of the promisor is sufficient to sustain an action on a promise. 1 Chitty, Cont. 66; *Dyer*, 272, note b; *Carman v. Noble*, 9 Pa. 371.

#### *But a mere voluntary act will not support an action.*

Voluntary service or labor done without the privity or consent of the defendant, however beneficial to him, in saving his property from destruction by fire, will not support a promise. *Bartolomew v. Jackson*, 20 Johns. 23.

Any act done for the benefit of another, without his request, is to be deemed a voluntary act, for which no action can be sustained, unless after 12 L. R. A.

knowing of the service the person benefited promises to pay for it. *Glenn v. Savage*, 14 Or. 567.

#### *Marriage a good consideration.*

Marriage is a good consideration to sustain a contract. *Harrison v. Trader*, 27 Ark. 200; *McCaw v. Burk*, 31 Ind. 62; *Richardson v. Schultz*, 98 Ind. 425; *Frank's App.*, 59 Pa. 194; *Butterfield v. Stanton*, 44 Miss. 28; *Wright v. Wright*, 54 N. Y. 440; *Herring v. Wickham*, 29 Gratt. 623, 25 Am. Rep. 410.

It is a good consideration for a deed. *Gibson v. Bennett*, 4 New Eng. Rep. 412, 79 Me. 302.

It is a consideration of the highest value. *Magniac v. Thompson*, 23 U. S. 7 Pet. 348, 8 L. ed. 709; *Prewitt v. Wilson*, 108 U. S. 22, 23 L. ed. 360; *De Barante v. Gott*, 6 Barb. 497; *Wood v. Jackson*, 8 Wend. 23; *Dugan v. Gittings*, 3 Gill, 128, 48 Am. Dec. 312; *Wright v. Wright*, *supra*.

An agreement by a father with the future husband of his illegitimate daughter, to settle, at his, the father's, death, his "whole estate" upon the husband, in consideration of the marriage, is valid, and will bind the property belonging to the father at the time of his death. *Wall v. Scales*, 1 Dev. Eq. 472.

A verbal promise made by a father to the husband of his daughter before his marriage, to convey certain land to him, is a sufficient consideration for a written agreement for that purpose after the marriage. *Argenbright v. Campbell*, 3 Hen. & M. 144.

If a father promises A that if he will marry his daughter, he will give a certain amount as a marriage portion, and A afterwards marries the daughter, the father will be bound by the promise. *Ogden v. Ogden*, 1 Bland. Ch. 284.

If A promise B that if he and A's daughter marry, "he will endeavor to do her equal justice



**Mr. H. J. Swift**, for appellant:

A sufficient consideration to support a promise is found where there is "any advantage to the person promising, or any damage, inconvenience, liability or charge to the person to whom the promise is made."

9 Alb. L. J. 828.

Also where there is "the waiver of any legal right at the request of another."

1 Parsons, Cont. 6th ed. 448.

Also where there is "anything that may be detrimental to the promisor or beneficial to the promisee."

*Freeman v. Freeman*, 48 N. Y. 84.

Also where there is a benefit to one or harm to another.

*Haden v. Buddenstok*, 4 Hun. 649.

In short, where you have mutual and concurrent promises, each is a good consideration for the other if any benefit may be received by the promisor or any inconvenience suffered on the part of the promisee because of the promises or either of them.

9 Alb. L. J. 228; *Miller v. Drake*, 1 Cal. 45; *Shadwell v. Shadwell*, 9 C. B. N. S. 159; *Chitty*, Cont. 6th ed. 52; *Orosbie v. McDoual*, 13 Ves. Jr. 148; *Hartley v. Ponsonby*, 7 El. & Bl. 872; *Livingston v. Rogers*, Col. & C. (N. Y.) 831; *Nixon v. Porter*, 1 Hilt. 818; *White v. Baxter*, 71 N. Y. 254.

It was beneficial for the uncle in the case at bar to have his nephew refrain from drinking and smoking until he should arrive at the age of twenty-one years, to the end that he might form proper habits and reflect credit upon the name of the uncle, which he bore, as well as

give satisfaction, sense of pride and feelings of pleasure to that uncle. This being so, the benefit to the uncle furnishes a sufficient consideration to uphold his promise.

*Lakota v. Newton* (Mass.) an unreported case; *Talbot v. Stemmons* (Ky.) 5 L. R. A. 856.

The deprivation on the part of the promisee need not be a thing of substance.

*Johnson v. Titus*, 2 Hill, 606.

The consideration for the promise in the letter is sufficient in law, because it was but the performance of the original promise which the uncle made, which was a sufficient consideration to support the promise in the letter, and a moral obligation is a sufficient consideration to support a promise if founded on a prior equitable claim.

*Bentley v. Moree*, 14 Johns. 468; *Scouton v. Bistord*, 7 Johns. 86; *Cameron v. Fowler*, 5 Hill, 806; *Goulding v. Davidson*, 26 N. H. 604; *Sternbergh v. Provoost*, 18 Barb. 865; *Proseus v. McIntyre*, 5 Barb. 424; *Comstock v. Smith*, 7 Johns. 86.

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

1 Addison, Cont. \* 2, 5, 6.

A valuable consideration is one that is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made. Any damage or suspension or forbearance of a right will be sufficient to sustain a promise. A mutual promise amounts to a

with the rest of his daughters, as fast as it is in his power with convenience," and the marriage be afterwards had with his consent, the promise is sufficiently certain and obligatory. *Chichester v. Vass*, 1 Munf. 98.

Such promise is to the husband and wife jointly, not to be satisfied by a conveyance of land to the wife alone; but the husband may elect to consider it a personal contract, and, if he survives his wife, sue thereon in his own name. *Ibid.*

A promised B if he would get himself a wife and have a child, he would give him \$500. In an action by B to recover this sum from the executor of A, the promise was held to be supported by a good consideration. *Gurvin v. Cromartie*, 11 Ired. L. 174.

#### Good consideration, instances.

Natural affection is a good consideration. *King v. Thompson*, 84 U. S. 9 Pet. 204, 9 L. ed. 102.

A compromise for a doubtful claim is a good consideration for a promise. *Chamberlain v. Winn* (Wash. Terr.) Jan. 20, 1890.

A contract made in a compromise of differences in regard to the rights of the parties under a former contract, with regard to the construction of which they were not agreed, was held to be founded upon a good consideration. *Richardson v. Independent Dist. of Hampton*, 70 Iowa, 573.

A settlement and discontinuance of a prosecution for bastardy and fornication is a good and legal consideration for a judgment note given by the reputed father to the mother of the child. *Stumpf's App.* 8 Cent. Rep. 113, 116 Pa. 33.

Where a man having a legal wife deceives another woman by a void marriage, and has children by her, the facts furnish a good consideration for the assignment to her of a mortgage security. *Gay v. Parpart*, 108 U. S. 679, 27 L. ed. 256, 13 L. R. A.

An agreement, in a conveyance, to perform certain services for the grantors, during the life of themselves and their survivor, and an executed life lease of lands to the grantors, constitute a good consideration for a conveyance. *Gardner v. Lightfoot*, 71 Iowa, 577.

A promissory note given by a defaulting outgoing county treasurer, to his successor, upon condition that action should not be brought on his official bond, is supported by a good consideration. *Sac County v. Hobbs*, 72 Iowa, 66. See note to *First Presby. Church v. Cooper* (N. Y.) 3 L. R. A. 468.

#### Benefit to promisor and detriment to promisee is sufficient.

A consideration sufficient to support a contract may be defined to be either a benefit accruing to the promisor, or a loss or disadvantage sustained by the promisee. *Day v. Gardner*, 5 Cent. Rep. 631, 42 N. J. Eq. 199.

Any benefit to defendant or detriment to plaintiff is a sufficient consideration. *Given v. Corae*, 3 West. Rep. 580, 20 Mo. App. 132; *Waterman v. Barrett*, 4 Harr. (Del.) 811; *Harrington v. Wells*, 12 Vt. 508; *Columbus v. Columbus St. R. Co.* 10 West. Rep. 440, 45 Ohio St. 98; *Story*, Cont. § 548; 1 Parsons Cont. 7th ed. 473; *Hitchcock v. Coker*, 6 Ad. & El. 428; *Southall v. Rigg*, 11 C. B. 481; *Haigh v. Brooks*, 10 Ad. & El. 309; *Shortrade v. Cheek*, 1 Ad. & El. 57.

A consideration to support a promise need not enure to the promisor; it is sufficient if it consists in a detriment to the person to whom the promise is made. *New Hanover Bank v. Bridgers*, 98 N. C. 67; *Churchill v. Bradley*, 2 New Eng. Rep. 491, 33 Vt. 408.

It is not essential that a person to whom the consideration of a promise moves should be benefited

sufficient consideration, provided the mutual promises be concurrent in point of time, and, in that case, the one promise is a good consideration for the other.

2 Kent, Com. Holmes' 12th ed. 485; *Haigh v. Brooks*, 4 Per. & D. 288; *Smith v. Smith*, 13 C. B. N. S. 439; *Westlake v. Adams*, 5 C. B. N. S. 247; *Wilkinson v. Oliveira*, 1 Scott, 461; *Farmer v. Stewart*, 2 N. H. 97; *Harlan v. Harlan*, 20 Pa. 808; *Perry v. Buckman*, 83 Vt. 7.

The letter interpreted by surrounding circumstances established a trust and made the uncle the self-appointed trustee of the \$5,000.

*Gray v. Barton*, 55 N. Y. 68; *Day v. Roth*, 18 N. Y. 448; *Fulton v. Fulton*, 48 Barb. 581; *Taylor v. Kelly*, 5 Hun, 115; *White v. Hoyt*, 73 N. Y. 505; *Re Collyer*, 4 Dem. 24; *Martin v. Funk*, 75 N. Y. 134; *Mabie v. Bailey*, 95 N. Y. 206.

If the uncle did not constitute himself a trustee by the letter he certainly made himself a depository of the money which belonged to the nephew, and if this is so the plaintiff is just as much entitled to recover as though the uncle had made himself a trustee, for the only bearing which the trusteeship has upon the question is as to whether the Statute of Limitations applies or not. This money was not so due as to fall within the rule established in *Wenman v. Mohawk Ins. Co.* 18 Wend. 268.

In cases where the instrument is silent as to the time of payment, the court will refer to extrinsic facts to ascertain whether it was the intention of the parties to make the money payable on demand or after demand, presently or by-and-bye.

*Payne v. Gardiner*, 29 N. Y. 146; *Re Wal-*

*dron*, 28 Hun, 481; *Bank of British North America v. Merchants Nat. Bank*, 91 N. Y. 106; *Sweet v. Irish*, 86 Barb. 467; *Merritt v. Todd*, 23 N. Y. 28; *Boughton v. Flint*, 74 N. Y. 476; *Howell v. Adams*, 68 N. Y. 814; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580; *Smiley v. Fry*, 1 Cent. Rep. 510, 100 N. Y. 262, 17 Jones & S. 154.

*Mr. Adelbert Moot*, for respondent:

There is no consideration to support the promise to pay the nephew \$5,000. If the nephew was required to do something that would injure him, or something that would benefit the uncle, and did so with the assent of his father, then there would be a consideration for the payment of the \$5,000. Simply failing to play cards or billiards for money, or drink liquor, or use tobacco, would not benefit the uncle, would not, and did not, injure the nephew.

The Statute has long made it a crime to sell liquor to such boys, or to provide gambling places for them; and the law now goes further and makes it a crime to furnish tobacco in any of its forms to any child under sixteen.

Laws 1889, chap. 170, p. 201.

A promise of a boy not to commit murder would not sustain an agreement to pay money, nor would the promise of a boy to refrain from immoral habits, as keeping a mistress, sustain an uncle's promise to pay him money. Otherwise, notes given by men to recompense a mistress for past or future cohabitation would be valid, while the law is well settled that they are invalid.

*Beaumont v. Reese*, 8 Q. B. 488; *Shirley, Lead. Cas. 7.*

provided the person from whom it moves is in a legal sense injured; and the injury may consist of a compromise of a disputed claim or forbearance to exercise a legal right, the alteration in position being regarded as a detriment forming a consideration independent of the actual value of the right forborne. *St. Mark's Church v. Teed*, 120 N. Y. 533; *Woodburn v. Woodburn*, 23 Ill. App. 239, reversed on other grounds in 11 West. Rep. 739, 13 West. Rep. 505, 123 Ill. 606; *Martin v. Stubbings*, 27 Ill. App. 121, affirmed in 123 Ill. 387; *Murtaugh v. Colligan*, 23 Ill. App. 438; *Piper v. Foster*, 121 Ind. 407; *Allen v. Platt*, 79 Iowa, 113; *Vogel v. Meyer*, 23 Mo. App. 427; *Fuller v. Olafin*, 51 Hun, 609; *Oregon Pac. R. Co. v. De Forest*, 33 N. Y. S. R. 173.

Damage to the promisee constitutes as good a consideration as benefit to the promisor. *Townley v. Sumrall*, 27 U. S. 2 Pet. 170, 7 L. ed. 386; *Violet v. Patton*, 9 U. S. 5 Cranch, 142, 3 L. ed. 61; *United States v. Linn*, 40 U. S. 15 Pet. 290, 10 L. ed. 742; *Hendrick v. Lindsey*, 98 U. S. 143, 23 L. ed. 855; *Stillwell v. Aaron*, 66 Mo. 545.

A slight advantage to one party constitutes a sufficient consideration to support a contract, in the absence of fraud or mistake. *Traphagen v. Voorhees*, 11 Cent. Rep. 370, 44 N. J. Eq. 21; *Harlan v. Harlan*, 20 Pa. 808; 2 Co. Litt. 342, 344; *Kellogg v. Richards*, 14 Wend. 116; *Brooks v. White*, 2 Met. 283.

It is held in *Burr v. Wilcox*, 13 Allen, 273, that "any act done at the defendant's request and for his convenience or to the inconvenience of the plaintiff would be sufficient" to support a promise by the defendant, citing *Train v. Gold*, 5 Pick. 380; *Amherst Academy v. Cowle*, 6 Pick. 427; *Hubbard v. Coolidge*, 1 Met. 84. And see *Conover v. Stillwell*, 84 N. J. L. 54, 13 L. R. A.

*Waiver of a legal right a sufficient consideration.*

A waiver of a legal right, at the request of another party, is a sufficient consideration for a promise. Given v. Coorse, 3 West. Rep. 379, 30 Mo. App. 132, citing 1 Parsons, Cont. 7th ed. 473.

Forbearance of legal or equitable rights forms a good consideration for a contract, and will make it binding, although no benefit accrues to the party contracting. *Bowen v. Tipton*, 1 Cent. Rep. 494, 64 Md. 275; *Harris v. Cassaday*, 5 West. Rep. 266, 107 Ind. 133, citing *Wray v. Chandler*, 64 Ind. 146; *Sanford v. Freeman*, 5 Ind. 123; *Suark v. Malone*, 34 Ind. 444; *Nicewanger v. Bevard*, 17 Ind. 631.

Forbearance of suit is a good consideration for a promise to pay money. *Rue v. Mairs*, 10 Cent. Rep. 662, 48 N. J. Eq. 377.

A suspension of an existing demand is a sufficient and valid consideration. *Goodman v. Simonds*, 61 U. S. 20 How. 343, 15 L. ed. 684; *Wills v. Ross*, 77 Ind. 1; *Elting v. Vanderlyn*, 4 Johns. 237; *Morton v. Burns*, 7 Ad. & El. 19; *Baker v. Walker*, 14 Mees. & W. 466; *Jennison v. Stafford*, 1 Cush. 166; *Walton v. Mascall*, 13 Mees & W. 468; *Wheeler v. Slocumb*, 16 Pick. 63; *Story, Prom. Notes*, § 138.

The surrender of other instruments, although held as collateral security, is also a good consideration. *Goodman v. Simonds*, *supra*, citing *Depeau v. Waddington*, 6 Whart. 220; *Hornblower v. Proud*, 2 Barn. & Ald. 327; *Ridout v. Bristow*, 1 Crompt. & J. 281; *Bank of Salina v. Babcock*, 21 Wend. 499; *Youngs v. Lee*, 12 N. Y. 551.

The relinquishment of a defense at the time considered valid is a good consideration for a promissory note, although the defense is subsequently shown by a judicial decision to have been invalid.

No case will be found like the case at bar, or deciding it, but the following cases are in point upon principle:

*Nash v. Russell*, 5 Barb. 556; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 829; *Duvoll v. Wilson*, 9 Barb. 487; *Vanderbilt v. Schreyer*, 91 N. Y. 892; *Whitaker v. Whitaker*, 52 N. Y. 868, 11 Am. Rep. 711; *Coleman v. Burr*, 25 Hun, 289, 98 N. Y. 17; *Wilbur v. Warren*, 6 Cent. Rep. 214, 104 N. Y. 192; *Mallory v. Gillett*, 21 N. Y. 412; *Belknap v. Bender*, 75 N. Y. 446; *Berry v. Brown*, 9 Cent. Rep. 896, 107 N. Y. 659.

If the plaintiff has established an apparent contract, it is one in the nature of a contract for services, a contract for services to be performed by a boy fifteen years of age, which the boy could not complete until he became twenty-one,—one which, by its very terms, could not be performed within a year, and, therefore, one void within the Statute of Frauds.

*Oddy v. James*, 48 N. Y. 675.

Leaving out of question the infancy of William E. Story, 2d, and treating him as an adult, clearly his agreement to abstain was one which the courts could not enforce,—was an agreement which he could break with impunity, because no court would fix damages for the breach thereof.

Of course, nominal damages might be fixed for the breach thereof, but it has long been settled that nominal damages are not enough.

Pollock, Cont. p. 674; Doctor and Student, Dial. 2, chap. 24.

A promise which is to be a good consideration for a reciprocal promise must be such as

can be enforced; it must therefore be not only lawful and in itself possible, but reasonably definite.

Pollock, Cont. pp. 176, 177.

A promise by a son to his father to leave off making complaints of the father's conduct in family affairs is no good consideration to support an accord and satisfaction, for it is too vague to be enforced.

*White v. Bluett*, 28 L. J. Exch. 86.

The contract or the promise in question is not one that will be enforced unless it is supported by a valuable consideration.

*Robinson v. Jewett*, 116 N. Y. 40.

Neither William E. Story, Sr., nor any other person, ever held this \$5,000, in trust for William E. Story, 2d.; therefore, plaintiff cannot recover in this action.

When the uncle wrote his letter he in law clearly refused to pay according to the terms of his arrangement.

If the nephew demanded the money and the uncle refused to pay it, then the Statute of Limitations began to run at once as in an ordinary case of a breach of contract.

Code, § 382, subd. 1; *Miller v. Wood*, 116 N. Y. 854.

The letter of the uncle written February 6, 1875, did not turn him into a trustee for William E. Story, 2d. It is absolutely essential that the letter itself should show an intention on the part of the uncle to become a trustee before he will be held to have become a trustee, and this it fails to do.

See *Harris v. Clark*, 8 N. Y. 93.

Had the nephew sued for the money, sup-

*Union Bank of Georgetown v. Geary*, 30 U. S. 5 Pet. 99, 8 L. ed. 60.

Release of the right to a percentage of royalties on coal from certain lands is a sufficient consideration for a judgment note for a specific sum in lieu thereof. *Trine's App. (Pa.)* 12 Cent. Rep. 667.

An agreement by which a vendor releases a valuable right in consideration of the vendee's agreement to let judgment go against him by default for the price of the land is based upon a sufficient consideration. *McDaniel v. Evans (Ky.)* 12 Ky. L. Rep. 497.

If any release is deemed requisite to confirm the title of lands with which one has been connected, such release will be a good consideration for a promise, or for the payment of money. *Sykes v. Chadwick*, 35 U. S. 18 Wall. 141, 21 L. ed. 324.

#### *Sufficient consideration, instances.*

A consideration expressed in an agreement is sufficient to support it in the absence of evidence to prove a lack of consideration. *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 8 Wall. 107, 18 L. ed. 170.

The withdrawal of a caveat by an heir-at-law is a sufficient consideration for a promise by devisees to pay the heir a specific sum. *Grandin v. Grandin*, 8 Cent. Rep. 588, 49 N. J. L. 508.

Expenditure of one's own money for his own benefit, induced by the promise of another to repay the same, is a sufficient consideration for the promise. *Devecon v. Shaw*, 12 Cent. Rep. 886, 69 Md. 190.

The surrender of a note given by the defendant's son, although not enforceable at law, is a sufficient consideration for a new note by the defendant. *Whitney v. Clary*, 5 New Eng. Rep. 152, 145 Mass. 156; *Wilton v. Eaton*, 127 Mass. 174.

A promise to pay for goods furnished a third party prior to their delivery, upon the faith of

which a sale and delivery have been made, is upon a sufficient consideration. *Lindsay v. Heaton*, 27 Neb. 682.

A promise conditioned upon the conveyance to the promisor of a possible interest which he believes the promisee has, but which the latter does not claim, is supported by a sufficient consideration. *Valle v. Picton*, 8 West. Rep. 734, 91 Mo. 207.

Extension of time of payment, under a conditional sale of engines and use of the engines during such time by the vendee, is a sufficient consideration for a note and mortgage by him. *Smker v. Green*, 12 West. Rep. 912, 118 Ind. 254; *Hutchings v. Munger*, 41 N. Y. 155.

The maker's assent to the compromise of his claim against a third person is sufficient consideration of a promise by the holder of notes to accept in full payment such percentage as was received in the settlement of such claim. *Hunt v. Brown*, 5 New Eng. Rep. 310, 146 Mass. 258.

Where land was about to be sold to create a fund to pay an annuity to a widow, an agreement by which she reduced her claim, with one honestly claiming an interest which created a cloud upon title, the removal of which would enhance the price, was upon a sufficient consideration. *Woodburn v. Woodburn*, 11 West. Rep. 799, 123 Ill. 608.

A promise made while sober by a habitual drunkard to his physician, that he would pay him \$100, in consideration of which the physician undertook and promised to cure him of his appetite for ardent spirits, is binding. *Flak v. Townsend*, 7 Yerg. 146.

S, lord of the manor, had the power of appointment of steward of the manor, and G, the then steward, resigned his office in consideration that S would pay him an annuity for life; and K, in consideration of S permitting him to hold the office at the will of S as lord, promised S to pay, out of the fees of the office, such annuity to G during G's life

posing it to be collectible, the uncle could not have defended on the mere strength of this letter, on the ground that he had excluded the promise by constituting himself a trustee of this money, by this letter.

*Steere v. Steere*, 5 Johns. Ch. 1, 1 L. ed. 987; *Adams*, Eq. 7th Am. ed. pp. 28, 29.

A consideration is necessary to support a trust.

*Young v. Young*, 80 N. Y. 423; *Brunn v. Schuett*, 59 Wis. 261, 48 Am. Rep. 499; *Hons v. De Peyster*, 8 How. Pr. N. S. 423, 4 Cent. Rep. 550, 108 N. Y. 632, 44 Hun. 487, 9 Cent. Rep. 475, 106 N. Y. 645; *Re Crawford*, 118 N. Y. 560; *Beaver v. Beaver*, 6 L. R. A. 403, 117 N. Y. 421.

A court which treats the nephew's promise in this case, and his adherence to good habits until he was twenty-one, as a sufficient consideration to bind the uncle to pay him \$5,000, ignores the trend of thought of the law-writers and the courts of to-day upon this subject.

*Vanderbilt v. Schreyer*, 91 N. Y. 892; *Wilbur v. Warren*, 6 Cent. Rep. 314, 104 N. Y. 192; *First Presby. Church v. Cooper*, 8 L. R. A. 488; 112 N. Y. 517; *Robinson v. Jewett*, 116 N. Y. 40; *Embrey v. Jemison*, 181 U. S. 836, 840, 88 L. ed. 172, 175, Alb. L. J. 32; *Smith v. Hightower*, 76 Ga. 629; *Sluder v. Newby*, 85 Tenn. 348; *Head v. Baldwin*, 88 Ala. 182.

This being a constructive trust and not an express trust, the six years' Statute of Limitations runs against the cause of action therefor.

*Wood v. Monroe County Suprs.* 50 Hun. 1; *Strough v. Jefferson County Suprs.* 50 Hun. 54, affirmed in 119 N. Y. 212.

so long as K should execute the said office. S appointed K to such office for K's life and died. It was held that the consideration of the promise was sufficient, and that K was liable to pay the annuity to G after the death of S, so long as K held such office. *Mattock v. Southwood*, 8 Ad. & El. 795, 1 Per. & D. 45, 1 W. W. & H. 667. See note to *Talbott v. Stemmons* (Ky.) 5 L. R. A. 356.

#### *Inufficient consideration, instances.*

The surrender of letters and telegrams of the maker of a note, and of a protested check given in payment of a gambling debt, constitutes an insufficient consideration for a note. *Hollingsworth v. Moulton*, 58 Hun. 91.

A verbal promise three or four years old, made by a father to his son, to give the latter land of a certain value, in excess of the share which will fall to his other children, if he will not leave home as another son has done, it not being shown that the son abandoned an intended removal in consequence of such promise, is not a sufficient consideration for a promissory note for an amount equal to the value of the land mentioned. *Head v. Baldwin*, 88 Ala. 182.

#### *Valuable consideration, instances.*

Money expended on the faith of a contract constitutes a valuable consideration. *King v. Thompson*, 34 U. S. 9 Pet. 204, 9 L. ed. 102.

Expenditures made upon permanent improvement upon land, with the knowledge of the owner, induced by his promise, made to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise. *Freeman v. Freeman*, 43 N. Y. 84, affirming 51 Barb. 306.

Where, in pursuance of a verbal agreement between father and son that the latter should have a

#### *On petition for reargument.*

The Statute of Limitations is a just bar to this unfounded demand, because there is no trust.

*Re Neilley*, 95 N. Y. 392; *Budd v. Walker*, 118 N. Y. 638; *Strough v. Jefferson County Suprs.* 119 N. Y. 212; *Beaver v. Beaver*, 6 L. R. A. 403, 117 N. Y. 421; *Steere v. Steere*, 5 Johns. Ch. 1, 1 L. ed. 987; *Young v. Young*, 80 N. Y. 423.

The nephew had no right to do what he agreed not to do for this \$5,000.

Swearing was forbidden, and was a penal offense until 1862.

1 Rev. Stat. 674; Old Penal Code, § 255.

The public billiard table where the loser pays for the games was deemed a gaming table, in other words a gambling table, within the Statutes.

Laws 1851, chap. 504; 2 Rev. Stat. 6th ed. 917-919; Penal Code, §§ 336-352; *People v. Harrison*, 28 How. Pr. 247.

We have here, then, a boy forbidden by law to play billiards or cards for money or to swear. He promises his uncle not to do these things, or to drink or to use tobacco, if the uncle will pay him \$5,000 when he becomes of age.

An illegal consideration renders void the whole contract.

*Arnot v. Pittston & H. Coal Co.* 68 N. Y. 558; *Leonard v. Poole*, 114 N. Y. 371.

A contract to pay a man for doing what the law requires him to do is void as against public policy.

certain farm of the father, the son took possession of the premises and expended money and labor upon them, such acts and expenditures constitute a valuable consideration for the contract. *Haines v. Haines*, 6 Md. 435.

A valuable consideration, however small, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract, or contract of guaranty. *Lawrence v. McCalmont*, 43 U. S. 2 How. 423, 11 L. ed. 822; *Austyn v. McLure*, 4 U. S. 4 Dall. 237, 1 L. ed. 311, citing *Dutchman v. Tooth*, 5 Bing. N. C. 577.

The surrender of an overdue note, enforceable as against one of the indorsers, is a valuable consideration for a new note between the same parties, with an additional indorser. *Bromley v. Hawley*, 5 New Eng. Rep. 660, 60 Vt. 46; *Churchill v. Bradley*, 58 Vt. 403; *Rob. Dig.* p. 100, § 127.

The payment of a doubtful claim in full, to prevent litigation, will constitute a valuable consideration, but it is otherwise when the amount simply is in dispute, and no more was paid than was actually due. *Emmitsburg R. Co. v. Donoghue*, 9 Cent. Rep. 66, 67 Md. 383; 1 Parsons, Cont. 466; 1 Addison, Cont. 11.

An agreement, on part payment of a judgment, to pay the balance in a few days, upon an agreement of the other party to refrain from enforcing an execution, is founded upon a valuable consideration. *Smith v. O'Brien*, 5 New Eng. Rep. 643, 146 Mass. 204.

An agreement to credit a transferred debt upon a precedent debt is a valuable consideration. *Throop Grain Cleaner Co. v. Smith*, 12 Cent. Rep. 918, 110 N. Y. 83.

#### *Performance of consideration renders contract binding.*

The performance of the consideration renders the contract binding, and gives a right of action

Greenhood, Pub. Pol. See *Embrey v. Jenison*, 181 U. S. 840, 88 L. ed. 175; Wall's Pollock, Cont. new ed. 1885, pp. 262, 321; *Saratoga County Bank v. King*, 44 N. Y. 87; *Knowlton v. Congress & Empire Spring Co.* 57 N. Y. 519.

The performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract.

*Robinson v. Jewett*, 116 N. Y. 40; *Whitaker v. Whitaker*, 52 N. Y. 868; *Nash v. Russell*, 5 Barb. 556; *Duvoll v. Wilson*, 9 Barb. 487; *Vanderbilt v. Schreyer*, 91 N. Y. 892; *Wilbur v. Warren*, 6 Cent. Rep. 214, 104 N. Y. 192; *Belknap v. Bender*, 75 N. Y. 446; *First Presby. Church v. Cooper*, 3 L. R. A. 468, 112 N. Y. 517; *Langdell*, Lead. Cases on Cont. § 54, pp. 1015, 1016.

**Parker, J.**, delivered the opinion of the court:

The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether, by virtue of a contract, defendant's testator, William E. Story, became indebted to his nephew, William E. Story, 2d, on his twenty-first birthday in the sum of \$5,000. The trial court found as a fact that "on the 20th day of March, 1869,

William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would at

that time pay him, the said William E. Story, 2d, the sum of \$5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement." The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise,—and insists that it follows that, unless the promisor was benefited, the contract was without consideration,—a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law.

The exchequer chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forbore or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson, Cont.

upon it. *Wellington v. Athorp*, 4 New Eng. Rep. 883, 145 Mass. 69, citing *Train v. Gold*, 5 Pick. 390; *Gardner v. Webber*, 17 Pick. 407; *Bornstein v. Lens*, 104 Mass. 214; *Goward v. Waters*, 98 Mass. 596; *Cottage St. M. E. Church v. Kendall*, 121 Mass. 523.

A promise to pay upon the performance of an act, by which the party is injured, becomes binding when the act is performed. *Hilton v. Southwick*, 17 Me. 308.

Where a proposal by an uncle, in a letter to his niece, that if her daughter would take care of him and his wife he would devise to the niece one half of his estate, was accepted and fulfilled, it will be enforced against his estate. *Roehl v. Haumesser*, 12 West. Rep. 899, 114 Ind. 811.

A valid oral agreement may be made to leave a sum of money by will to a particular person, in consideration of services thereafter to be rendered by the promisee to the promisor, provided such services are in fact thereafter rendered and accepted in pursuance of such contract. *Wellington v. Athorp*, 4 New Eng. Rep. 883, 145 Mass. 69.

An agreement resting in parol, to devise real estate in consideration of services in caring for the testator, is binding and enforceable when the promisee has performed the consideration. *Pflugar v. Pultz*, 9 Cent. Rep. 488, 43 N. J. Eq. 440.

A father-in-law promised his son-in-law that, if he would purchase a certain tract of land, he would assist him in paying for it by letting him have the amount of a certain bond, when collected. The son-in-law thereupon made the purchase, and it was held that the promise of the father-in-law was founded upon a sufficient consideration, and was valid and binding upon him. *Scott v. Osborne*, 2 Munf. 418.

Where B agrees to pay A, or in the event of the death of A before the fulfillment of the contract to the wife of A, a certain sum of money for one year's 12 L. R. A.

services, a part performance of the services by A before his death is a sufficient consideration to enable the wife of A to recover the entire sum promised. *Jones v. McCallum*, 21 Fla. 362.

A father drove from his home his wife with a child three months old, and made no provision for their support. When the child had attained the age of sixteen years, the father wrote to her, requesting her to make her residence with him, and promising to leave her his heir; and she accordingly lived with him until he drove her from his house. It was held that he was not entitled, as her father, to her services during her minority, and that the letter constituted a valid contract to leave the property to her. *Gary v. James*, 4 Desaus. Eq. 185.

#### Contract without consideration void, instances.

An agreement, without consideration, to wait for money then due, is of no validity. *Pfeiffer v. Campbell*, 111 N. Y. 681.

A promise to pay a note, by a surety, without knowledge of an extension whereby he is discharged, is without consideration and not enforceable. *Rochester Sav. Bank v. Chick*, 6 New Eng. Rep. 383, 64 N. H. 410; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; *Edwards v. Tandy*, 36 N. H. 540; *Norris v. Ward*, 59 N. H. 487.

A promise by a creditor to forgive or relinquish part of his debt on the payment of the other part in money, is without consideration and void. *Day v. Gardner*, 5 Cent. Rep. 630, 42 N. J. Eq. 199, citing *Boyd v. Hitchcock*, 20 Johns. 76; *Le Page v. McCrea*, 1 Wend. 164; *Booth v. Smith*, 3 Wend. 66; *Parkins v. Lockwood*, 130 Mass. 250.

A release by an indorser of a promissory note of a joint maker on payment of part only of the amount due is without consideration and void. *Bender v. Been*, 5 L. R. A. 596, and *note*, 75 Iowa, 233.

68. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Parsons, Cont. \*444. "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent, Com. 12th ed. \*465. Pollock, in his work on Contracts (p. 166), after citing the definition given by the exchequer chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first." Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but

such as have been support the position we have taken. In *Shadwell v. Shadwell*, 9 C. B. N. S. 159, an uncle wrote to his nephew as follows: "My dear Lancey: I am so glad to hear of your intended marriage with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require. Your affectionate uncle, Charles Shadwell." It was held that the promise was binding, and made upon good consideration. In *Lakota v. Newton* (an unreported case in the superior court of Worcester, Mass.), the complaint averred defendant's promise that: "if you [meaning the plaintiff] will leave off drinking for a year I will give you \$100," plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred, on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled. In *Talbott v. Stemmons*, (Ky.) 5 L. R. A. 856 (a Kentucky case, not yet officially reported), the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson Albert R. Talbott \$500 at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death; and if he breaks this pledge he is to refund double the

An agreement by a father, that if his daughter-in-law will pay an indebtedness due him from his deceased son, whose estate is at the time solvent and the indebtedness collectible, he will give her a life lease of certain premises, is void for want of consideration. *Dunkel v. Dunkel*, 56 Hun. 25.

A promise by a party to save a witness harmless as to a forfeiture for failing, at a former term, to attend, on condition of his attending at the next term, is without consideration and void. *Sweeney v. Hunter*, 1 Murph. 181.

A promise by a father to give his son a tract of land by his will, followed by expenditure in improvements, not, however, in execution of the contract or at the father's request, is without consideration, and cannot be enforced. *McClure v. McClure*, 1 Pa. 374.

A, being wealthy and childless, verbally promised his brother B, who was poor and with many children, that if he would not remove to the west country, but would move to and settle on a lot of land of A, he would convey it to him. B accepted the offer, and took possession of the land. It was held that the promise was not supported by either a valuable or meritorious consideration, and would not be enforced specifically against the heirs of B. *Reed v. Vannorsdale*, 2 Leigh. 562.

#### *Performance of a legal obligation is no consideration.*

The performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract. *Robinson v. Jewett*, 118 N. Y. 40; *Dennis v. Piper*, 21 Ill. App. 169.

A promise to pay a debt for which the promisor is already bound does not constitute a consideration sufficient to support a contract. *Harris v. Casaday*, 5 West. Rep. 226, 107 Ind. 158, citing *Laboyteaux v. Swigart*, 1 West. Rep. 562, 103 Ind. 596; *Smith* 12 L. R. A.

*v. Boruff*, 75 Ind. 412; *Fensier v. Prather*, 40 Ill. 119; *Ritenour v. Mathews*, 43 Ind. 7; *Reynolds v. Nugent*, 23 Ind. 328; *Robinson v. Jewett*, *supra*.

An agreement to pay that which a party has already contracted to pay does not constitute a consideration for a new promise to perform the same contract. *Widman v. Brown*, 88 Mich. 241.

#### *Contract founded on illegal consideration is void.*

A contract founded on an act which is prohibited by statute, under a penalty, is void. *Milton v. Haden*, 33 Ala. 30.

A contract in violation of the statute imposing a penalty for the sale of goods by unsealed scales or measure is void. *Blabee v. McAllen*, 39 Minn. 143.

An entire contract, which is founded upon a consideration in part illegal is void, and incapable of confirmation. *Pettit v. Pettit*, 33 Ala. 238.

That a person executed a note given on an illegal consideration, with full knowledge of all the facts, is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law. *Embrey v. Jemison*, 131 U. S. 336, 33 L. ed. 172.

#### *Immoral consideration renders contract void.*

Agreements entered into with a view to future cohabitation and prostitution are illegal and void, as being against public morality. *Walker v. Perkins*, 3 Burr. 1568, 1 W. Bl. 517; *Friend v. Harrison*, 2 Car. & P. 584.

A warrant of attorney, given to induce a plaintiff to live in prostitution with the defendant, is void, and will be decreed to be given up. *James v. Hoskins*, 1 Tidd, Pr. 647.

But an agreement by defendant to allow plaintiff, with whom he cohabited, in case they should separate, an annuity for life, provided she should

amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained, and an appeal taken therefrom to the court of appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless, the surrender of that right caused the promise, and, having the right to contract with reference to the subject matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in *Lindell v. Rokes*, 60 Mo. 249. The cases cited by the defendant on this question are not in point. In *Mallory v. Gillett*, 31 N. Y. 412; *Bellnap v. Bender*, 75 N. Y. 446, and *Berry v. Brown*, 107 N. Y. 659, 9 Cent. Rep. 896,—the promise was in contravention of that provision of the Statute of Frauds which declares void all promises to answer for the debts of third persons unless reduced to writing. In *Beaumont v. Reeve*, 8 Q. B. 483, Shirl. Lead. Cas. 7, and *Porterfield v. Butler*, 47 Miss. 165, the question was whether a moral obligation furnishes sufficient consideration to uphold a subsequent express promise. In *Duvoll v. Wilson*, 9 Barb. 437, and *Wilbur v. Warren*, 104 N. Y. 192, 6 Cent. Rep. 214, the proposition involved was whether

an executory covenant against incumbrances in a deed given in consideration of natural love and affection could be enforced. In *Vanderbilt v. Schreyer*, 91 N. Y. 392, the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guarantee its payment, which was done. It was held that the guaranty could not be enforced for want of consideration, for in building the house the plaintiff only did that which he had contracted to do. And in *Robinson v. Jewett*, 116 N. Y. 40, the court simply held that "the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract." It will be observed that the agreement which we have been considering was within the condemnation of the Statute of Frauds, because not to be performed within a year, and not in writing. But this defense the promisor could waive, and his letter and oral statements subsequent to the date of final performance on the part of the promisee must be held to amount to a waiver. Were it otherwise, the Statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the Statute of Frauds, and therefore such defense could not be made available unless set up in the answer. *Porter v. Wormser*, 94 N. Y. 431, 450. This was not done.

In further consideration of the questions presented, then, it must be deemed established

continue single, is a valid agreement. *Gibson v. Dickie*, 3 Mauls. & S. 463.

A bond given in consideration of past cohabitation is good. *Hill v. Spencer*, Ambli. 641; *Knye v. Moore*, 3 Sim. & Stu. 220; *Turner v. Vaughan*, 2 Will. 339; *Nye v. Moseley*, 9 D. & R. 165. 6 Barn. & C. 123; *Gray v. Matthias*, 5 Ves. Jr. 236; *Hall v. Palmer*, 8 Jur. 459, 13 L. J. Ch. 353.

But a bond for cohabitation with a woman seduced by the obligor, and for maintenance after his death, is void. *Walker v. Perkins*, 3 Burr. 1568, 1 W. Bl. 517.

Past seduction and cohabitation are not a good consideration to support a grant of an annuity. *Beaumont v. Reeve*, 8 Q. B. 483, 13 Jur. 234, 15 L. J. Q. B. 141.

Where a complaint stated that the plaintiff had cohabited with defendant as his mistress, and that it was agreed that no further immoral connection should take place between them, and that defendant should allow her an annuity as long as she should continue of good and virtuous life and demeanor, it was held that there was no good consideration, it not being averred that defendant was the seducer, and that there is no authority to show that past cohabitation alone, or the ceasing to cohabit in the future, is a good consideration for such a promise. *Binnington v. Wallis*, 4 Barn. & Ald. 660.

#### *Moral obligation as a consideration.*

The abandonment of the use of tobacco by one party during the life of the promisor is a sufficient consideration for the promise to pay an agreed sum of money. See *note to Talbot v. Stemmon* (Ky.), 15 L. R. A. 355.

The Code of Georgia (§ 2741) expressly recognizes a strong moral obligation as a consideration for a contract; and there is no reason for confining this

to executed contracts. But according to the common law as now generally understood and administered, such an obligation would not suffice as a consideration for an executory promise. *Gray v. Hamil*, 32 Ga. 386; *Chitty*, Cont. 11th Am. ed. § 2 et seq.; *Wharton*, Cont. §§ 512, 514; *Blishop*, Cont. § 44; *Hare*, Cont. 232 et seq.; *Lampleigh v. Brathwait*, 1 Smith, Lead. Cas. 151, *nota*.

An agreement by one partner, who had, by excessive use of stimulants, become voluntarily disabled from service for the firm, made after dissolution but before full settlement, to allow his co-partner out of the assets a certain sum for past services, to compensate him for his own lack of services, is supported by a strong moral obligation which renders it valid under Ga. Code, § 2741, although it would not be valid at common law. *Gray v. Hamil*, 6 L. R. A. 72, 32 Ga. 375.

A deed made by a father for the benefit of his illegitimate child is upon a good consideration. *Conley v. Nailor*, 118 U. S. 127, 30 L. ed. 112; *Gay v. Parpart*, 106 U. S. 679, 27 L. ed. 256; *Bunn v. Winthrop*, 1 Johns. Ch. 329, 1 L. ed. 159; *Hook v. Pratt*, 78 N. Y. 371; *Annandale v. Harris*, 3 P. Wms. 433; *Jennings v. Brown*, 9 Mees. & W. 493.

Neither "love and affection," nor "blood relationship," nor "friendship," nor any mere moral duty or obligation, nor any voluntary courtesy, constitutes a sufficient consideration for a promise not under seal. *Vance v. Wells*, 8 Ala. 399; *Montgomery v. Lampton*, 3 Met. (Ky.) 519; *Mills v. Wyman*, 3 Pick. 207; *Cook v. Bradley*, 7 Conn. 67; *Loomis v. Newhall*, 15 Pick. 159; *Hawley v. Farrar*, 1 Vt. 420; *Updike v. Titus*, 13 N. J. Eq. 151; *Musser v. Ferguson*, 56 Pa. 475; *Cobb v. Cowdrey*, 40 Vt. 25; *Shepherd v. Rhodes*, 7 R. I. 470; *Glass v. Beach*, 5 Vt. 173; *Canal Fund Comrs. v. Perry*, 5 Ohio, 58; *Turner v. Patridge*, 3 Pa. 172; *Barlow v. Smith*, 4 Vt. 144; *Clark v. Herring*, 5 Binn. 33; *Dodge v. Adams*, 19

for the purposes of this appeal that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of \$5,000, and, if this action were founded on that contract, it would be barred by the Statute of Limitations, which has been pleaded, but on that day the nephew wrote to his uncle as follows:

"Dear Uncle: I am 31 years old to day, and I am now my own boss; and I believe, according to agreement, that there is due me \$5,000. I have lived up to the contract to the letter in every sense of the word."

A few days later, and on February 6, the uncle replied, and, so far as it is material to this controversy, the reply is as follows:

"Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have \$5,000, as I promised you. I had the money in the bank the day you was 21 years old that I intend for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right, and lose this money in one year. . . . This money you have earned much easier than I did, besides acquiring good habits at the same time; and you are quite welcome to the money. Hope you will make good use of it."

W. E. Story.

"P. S. You can consider this money on interest."

The trial court found as a fact that "said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter," and further, "that afterwards, on the 1st day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred and assigned all his right, title and interest in and to said sum of \$5,000 to his wife, Libbie H. Story, who thereafter duly sold, transferred and assigned the same to the plaintiff in this action." We must now consider the effect of the letter and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee and *cestui que trust*? If the former, then this action is

not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is insufficient if the property and disposition of it are definitely stated. Lewin, Tr. 55. A person in the legal possession of money or property acknowledging a trust with the assent of the *cestui que trust* becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. 2 Story, Eq. Jur. § 973. If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands, and stipulating for its investment on the creditor's account, will have the effect to create a trust. *Day v. Roth*, 18 N. Y. 448. It is essential that the letter, interpreted in the light of surrounding circumstances, must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. *White v. Hoyt*, 78 N. Y. 505, 511. At the time the uncle wrote the letter he was indebted to his nephew in the sum of \$5,000, and payment had been requested. The uncle, recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say, "I will pay you at some other time," or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had "earned" for him, so that when he should be capable of taking care of it he should receive it with interest. He said: "I had the money in the bank the day you were twenty-one years old that I intend for you, and you shall have the money certain." That he had set apart the money is further evidenced by the next sentence: "Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it." Certainly the uncle must have intended that his nephew should understand that the promise not "to interfere with this money" referred to the money in the bank, which he declared was not only there when the nephew became twenty-one

Pick. 429; *Ehle v. Judson*, 24 Wend. 97, cited in 1 Addison, Cont. 13.

A mere moral obligation or duty, as an executed consideration, is not a sufficient consideration to support a subsequent express promise to pay. *Condon v. Barr*, 4 Cent. Rep. 558, 49 N. J. L. 58; *Kent v. Rand*, 2 New Eng. Rep. 800, 64 N. H. 45.

But the duty of a father is a sufficient consideration to support the gift of land by him to a third person for the benefit of his daughter; and such gift cannot thereafter be revoked or altered without the consent of the daughter. *Knowles v. Erwin*, 43 Hun, 150.

But the natural affection of the father, and his moral obligation and duty to provide for a bastard child, do not constitute a sufficient consideration to make him liable for its support, where there was 12 L. R. A.

no compromise with the mother or any demand by her for a verbal promise to provide for the child. *Mercer v. Mercer*, 87 Ky. 30.

A promise by the father of an illegitimate child to the mother to pay her an annuity if she would maintain the child, is founded on sufficient consideration. *Jennings v. Brown*, 9 Mees. & W. 493, 12 L. J. Exch. 86; *Hicks v. Gregory*, 8 C. B. 373, 13 Jur. 1030, 19 L. J. C. P. 84; *Smith v. Roche*, 6 C. B. N. S. 223, 5 Jur. N. S. 918, 24 L. J. C. P. 237.

A bond to pay an annuity to the mother of an illegitimate child, executed by the father, on condition that she should not require their custody or management, is given on good consideration. *Re Flaskett*, 30 L. J. Ch. 808, 9 Week. Rep. 623, 4 L. T. N. S. 544.



years old, but was intended for him. True, he did not use the word "trust," or state that the money was deposited in the name of William E. Story, 3d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: "This money you have earned much easier than I did. . . . You are quite welcome to the money. I had it in the bank the day you were twenty-one years old, and don't intend to interfere with it in any way until I think you are capable of taking care of it; and the sooner that time comes the better it will please me." In this declaration there is not

lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented. The learned judge who wrote the opinion of the general term seems to have taken the view that the trust was executed during the lifetime of defendant's testator by payment to the nephew, but, as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

*The order appealed from should be reversed, and the judgment of the special term affirmed, with costs payable out of the estate.*

All concur.

Motion for reargument denied June 23, 1891.

### NEW YORK COURT OF APPEALS.

Frank RUDD, Receiver of the Goodwillie-Wyman Co., *Resp.*,

*v.*

George A. ROBINSON, *Appt.*

(....N. Y....)

1. A director or stockholder is not chargeable as such with actual knowledge of the business transactions of the corporation.
2. Books of account of a corporation are not competent evidence of themselves to establish an account or claim against a trustee or stockholder in an action brought in behalf of the corporation.

(March 30, 1891.)

**A**PPEAL by defendant from an order of the General Term of the Supreme Court, First Department, denying his motion for new trial made upon exceptions taken during the trial at the New York Special Term, of an action brought to recover from defendant as a director and stockholder of the Goodwillie-Wyman Company, money and property alleged to have been wrongfully appropriated by him to his own use, which trial resulted in a judgment in favor of plaintiff. *Reversed.*

The facts sufficiently appear in the opinion.

*Mr. S. Jones, with Mr. Thomas Huntington, for appellant:*

Books of account are received in evidence, only upon the presumption that no other proof exists. They are justly regarded as the weakest and most suspicious kind of evidence. The admission of them at all is a violation of one of the first principles of the Law of Evidence, which is, that a party shall not himself make evidence in his own favor.

*Larue v. Rowland*, 7 Barb. 109.

The admission of this class of evidence was a departure from the common-law rule, and the courts are inclined to restrain rather than enlarge the exception itself.

*Price v. Torrington*, Smith, Lead. Cas. 9th Am. ed. p. 571; *Larue v. Rowland*, 7 Barb. 107. See *Peck v. Valentine*, 94 N. Y. 573; *Merrill v. Ithaca & O. R. Co.* 16 Wend. 586; *Ætna Ins. Co. v. Weide*, 76 U. S. 9 Wall. 677, 19 L. ed. 810; *Chaffee v. United States*, 85 U. S. 18 Wall. 516, 21 L. ed. 908.

That corporate books are evidence of corporate acts is not questioned.

*Blake v. Griswold*, 6 Cent. Rep. 771, 104 N. Y. 618; Abbott, Tr. Ev. p. 46; *Haynes v. Brown*, 86 N. H. 545.

Before memoranda contained in books of account or elsewhere can be admitted:

#### NOTE.—Books of account of corporation.

Before the records and books of a corporation can be received in evidence for any purpose, it must be admitted or proved that the entries were made by an authorized agent of the corporation. *Glenn v. Orr*, 96 N. C. 413.

The records and books of a corporation are, at the least, prima facie evidence of the organization and existence of the corporation. *Ibid.*; *Buncombe Turnp. Co. v. McCarron*, 1 Dev. & B. L. 306, citing *Highland Turnp. Co. v. McKean*, 10 Johns. 154; *Grays v. Turnpike Co. of Randolph (Va.)* 578; *Owings v. Speed*, 18 U. S. 5 Wheat. 420, 5 L. ed. 124; *Ang. & A. Priv. Corp.* §§ 513, 514, 679.

The stock book of a corporation is evidence against a stockholder, in an action to recover the unpaid balance of his subscription, to show that he was a stockholder, and the condition of his stock account; but such evidence may be rebutted. *Glenn v. Orr*, *supra*; *Turnbull v. Payson*, 96 U. S. 418, 24 L. ed. 487.

12 L. R. A.

Books of a business corporation are competent as evidence, so far as related to entries legitimately contained in them, and so far as they are relevant to the issues. *Huntington v. Attrill*, 118 N. Y. 363, citing *Allen v. Coit*, 6 Hill, 318; *First Nat. Bank of Whitehall v. Tiedale*, 84 N. Y. 655; *Blake v. Griswold*, 5 Cent. Rep. 38, 103 N. Y. 429.

The books of a corporation are admissible in evidence against it, although some of the entries were made by the other party when acting as the secretary of the corporation. *Cormac v. Western White Bronze Co.* 77 Iowa, 33.

Where the identity of books offered in evidence as the books of an insolvent corporation is testified to by the superintendent and trustee of the corporation, and the handwriting of various officers of the company, by whom the books were written and kept, has been proved, and the books have previously been judicially recognized and accepted as the genuine books of the company, the evidence is certainly sufficient to justify their admission. *Vanderwerken v. Glenn*, 86 Va. 8.

1. The party making the memorandum or entry must have knowledge himself of the fact entered.

2. The entry must be made with intent to charge the defendant.

*Moody v. Roberts*, 41 Miss. 74; *Cummings v. Nichols*, 18 N. H. 420; *Van Boery v. Fitzgerald*, 21 Neb. 36; *Walter v. Bollman*, 8 Watts, 544; *Peck v. Von Keller*, 76 N. Y. 604.

3. The entry must be the original entry and made contemporaneously with the transaction to which it relates.

4. The books of the original entry must be produced and submitted for inspection.

5. Books are incompetent to prove any collateral fact, such as that a person other than the defendant was indebted to the plaintiff.

6. Such entries are not competent to prove on whose account the money was loaned or advanced.

*Peck v. Von Keller*, *supra*; *Inlee v. Prall*, 23 N. J. L. 457, affirmed, 25 N. J. L. 665.

7. Where the person who made the entry is dead the entry cannot be used to prove a claim in favor of his estate.

*Mason v. Wedderspoon*, 48 Hun, 20.

8. If there is living, attainable evidence then the entries cannot be received.

*Price v. Torrington*, 1 Smith, Lead. Cas. 9th Am. ed. 566; Phillips, Ev. (C. H. & E. notes) 4th Am. ed. note 108, p. 870; 1 Greenl. Ev. 115, and note; *Brewster v. Doane*, 2 Hill, 587; *Wood v. Ambler*, 8 N. Y. 170; *Ocean Nat. Bank v. Carll*, 55 N. Y. 440, 9 Hun, 239; *Gould v. Conway*, 59 Barb. 355; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Haynes v. Brown*, 36 N. H. 545; *Stettauer v. White*, 98 Ill. 72; *State v. Rawls*, 2 Nott & McC. 384; *Peck v. Valentine*, 94 N. Y. 569; *Churchman v. Lewis*, 84 N. Y. 444; *Dooley v. Moan*, 57 Hun, 536; *Ulster County Nat. Bank v. Madden*, 114 N. Y. 280.

Tested by these rules the entries in this case are inadmissible.

*Walter v. Bollman*, 8 Watts, 544; *Kessler v. M'Conachy*, 1 Rawle, 441; *Russell v. Hudson River R. Co.* 17 N. Y. 134; *Merrill v. Ithaca & O. R. Co.* 16 Wend. 586; *Halsey v. Sinsbaugh*, 15 N. Y. 485; *Payne v. Hodge*, 7 Hun, 612, affirmed, 71 N. Y. 598; *Dunn v. James*, 62 How. Pr. 307, affirmed, 85 N. Y. 642; *McGoldrick v. Traphagen*, 88 N. Y. 334; *New York v. Second Ave. R. Co.* 8 Cent. Rep. 822, 102 N. Y. 572.

**Messrs. Benjamin F. Blair and Edwin B. Goodell**, for respondent:

Corporate books, constituting the accounts of the transactions of a private corporation had through agents and officers, are competent between members and between the corporation and members, on any question which concerns them in their interest as such.

*Abbott, Tr. Ev.* p. 52; *Saunders, Ev.* 5th Am. ed. 735, 736; *Merchants Bank of Macon v. Rawls*, 21 Ga. 239; *Greenl. Ev.* Redfield's ed. § 493, p. 540; *Ang. & A. Priv. Corp.* § 681; *Lacey v. Hill*, 20 Moak, Eng. Rep. 755; *Highland Turnp. Co. v. McKean*, 10 Johns. 154; *Pier v. George*, 20 Hun, 210; *Blake v. Griswold*, 5 Cent. Rep. 33, 103 N. Y. 429.

We have found no case arising in this State in which, in a controversy between a corpora-

tion and its members, the question whether its books of account are admissible in its favor has been passed upon.

Cases are not lacking, however, in which, as between members, or as between a member and a stranger, such books have been held admissible *per se*, upon proper authentication.

*Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Hubbell v. Meigs*, 50 N. Y. 480; *First Nat. Bank of Whitehall v. Tisdale*, 84 N. Y. 655; *Huntington v. Attrill*, 118 N. Y. 365; *Humphrey v. People*, 18 Hun, 893.

The principle upon which corporation books are held admissible in all these cases appears to be analogous to that which underlies the rule admitting partnership books between the partners.

*First Nat. Bank of Whitehall v. Tisdale*, *supra*; *Cheever v. Lamar*, 9 N. Y. Week. Dig. 17; *Allen v. Coit*, 6 Hill, 818; *Huntington v. Attrill*, *supra*; *Heartt v. Corning*, 3 Paige, 566, 3 L. ed. 276.

**Earl, J.**, delivered the opinion of the court:

The plaintiff is receiver of the Goodwillie-Wyman Company, an insolvent manufacturing corporation organized under the laws of this State. The action was brought in equity to charge the defendant, as a trustee of the corporation, for the unlawful receipt and appropriation of the money and property of the corporation. An interlocutory judgment was rendered against him, charging him with a large amount of money thus improperly received and appropriated. The liability of the defendant for this money was, in the main, established by the account-books of the corporation, and the principal contention on his behalf upon this appeal is that those books were improperly received as evidence against him. The capital of the corporation is \$50,000, of which Robinson, Briggs and Innet, three of the directors, owned \$1,000 each, and the balance of the stock was owned by Flisk and Goodwillie, the two other directors. Goodwillie was president, Flisk treasurer, and Briggs vice-president and secretary, of the corporation. There was no proof that the defendant had actual knowledge of the entries contained in the books which were used as evidence against him, or that he authorized such entries or caused them to be made. There was no proof from which the law would raise a legal presumption that he had knowledge of the entries, unless he is chargeable with such knowledge from the mere fact that he was a stockholder and trustee of the corporation. There is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder. In this case the broad claim is made that, in an action by a corporation against one of its members to enforce a personal liability of the members to the corporation, its books are competent evidence against him to show the condition of the accounts between him and it, and to establish the extent of his liability to it upon their simple production, and proof that they are the books of the corporation, kept as such by its officers and agents. The proposition is thus announced in the points of the learned counsel for the plain-

tiff: "Between a corporation and its members all its books regularly kept by its officers and agents, for the purpose of recording its transactions and properly conducting its business, are *per se* evidence." The cases reported in this country and England bearing upon this question are very numerous, and the general expressions of judges contained in their opinions are not entirely harmonious. The conflict, however is mainly in the dicta of judges, and not in decisions actually made. The books of corporations for many purposes are evidence, not only as between the corporation and its members and between members, but also as between the corporation and its members and strangers. They are received in evidence generally to prove corporate acts of a corporation, such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors, and its financial condition when its solvency comes in question. But we have not been able, after a careful examination of the authorities cited by the counsel for the plaintiff and many others, to find any case in which it has been decided that the books of account of a corporation are competent evidence, of themselves, to establish an account or claim against a trustee or stockholder in an action brought in behalf of the corporation, and it has been repeatedly said by judges and text-writers that they are not competent for that purpose. In Wharton, Ev. 8d ed. § 682, it is said that, even in suits by a corporation against its members, its books cannot be used as "proving in behalf of the corporation self-serving entries." In Ang. & A. Priv. Corp., 11th ed. § 679, it is said: "Entries in the books of a corporation of private pecuniary transactions with a stockholder are not admissible against him, especially when it does not appear by whom the entries were made." See also 2 Waterman, Corp. 646.

In *Hager v. Cleeland*, 36 Md. 477, in an action by a creditor of a manufacturing corporation against a stockholder to enforce his individual liability for a debt contracted by the company, it was held that the books of the corporation, relating to its private transactions, were not admissible in evidence.

In *Hill v. Manchester & S. Water-Works Co.*, 5 Barn. & Ad. 866, by a clause in the charter of the defendant, it was enacted that its clerks should, in a book provided by the company, keep an account of all acts, proceedings and transactions of the company, and that every proprietor should have liberty to inspect the same and take copies of the entries; and it was held that entries of the proceedings in the books thus kept by the clerk were not admissible in evidence on behalf of the company against one of their own members suing them. Denman, Ch. J., writing the opinion, and speaking of certain facts to be proved, said: "These points of fact, however, could only be established by the books kept by the clerk of the company; and the question now to be decided is whether they are evidence against the plaintiff. It is argued that they were, because he was a proprietor, and the books of a partnership are evidence against any one of the partners; and more particularly as the act requires such books of the proceedings to be kept, and that all the proprietors shall have free access to them at all reasonable times. We are, however, of opin-

ion the principle on which partnership books are evidence against the partners is that they are the acts and declarations of such partners, being kept by themselves or by their authority, by their servants, and under their direction and superintendence. But the clerk of the company, once appointed, is subject to the control of no individual member, and the free access provided for is only for the purpose of inspection. A proprietor entering into a contract with the company must be deemed a stranger, and can be affected by no entry made under orders from the entire body."

In *Haynes v. Brown*, 36 N. H. 545, the action was by a creditor of a corporation to recover against a stockholder; and it was held that the books of the corporation were not admissible against a member of the company, as evidence of his private transactions or dealings with the company, and that in respect to them he was to be regarded as a stranger. That case has been frequently cited by text-writers and judges, and its authority for the rule thus announced has never been questioned, so far as we can discover.

In *Chenango Bridge Co. v. Lewis*, 68 Barb. 111, it was held that the books of a bridge company, proved by its treasurer to have been received by him as the company books upon his accession to the office, containing an account of the tolls received for the bridge for several years previous to that time, were not admissible as against the defendant, a stockholder of the company, to prove the amount of the tolls received during that period, without the necessary and preliminary proof as to such tolls; but that such books proved by its treasurer to have been kept by him and to contain correct entries of tolls, as given to him by the toll-gatherer, coupled with the proof by the toll-gatherer that he had made correct returns of the tolls received by him, were admissible, because proved by the treasurer who kept them. See also *Olney v. Chadsey*, 7 R. I. 224; *Wheeler v. Walker*, 45 N. H. 855.

In *Pearsall v. Western U. Teleg. Co.* 124 N. Y. 250, decided in the second division of this court on the 22d day of last January, the plaintiff was a stockholder of the defendant, and brought the action to recover damages against the defendant for not properly transmitting a message; and it was offered to be proved in defense of the action that the board of directors had adopted a resolution that it would not be liable for mistakes or delays in the transmission or delivery of unrepeat messages, and would not be liable for damages arising from delays in the transmission or delivery of a repeated message beyond an amount specified; and it was insisted that a shareholder was chargeable with notice of this resolution. The resolution was excluded, and the defendant excepted, and it was held that in this there was no error; that a shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and that the plaintiff's rights arising out of defendant's contract to transmit the message were in no wise limited by its regulations or by-laws not brought to his knowledge. That case is ample authority to show that the defendant in

this case was not chargeable with knowledge of the entries made in the books of this company, and that such books were not competent evidence against him of such entries. The principle at the foundation of that decision is that the business transactions of a corporation with its members are on the same footing as its transactions with strangers, and that the business entries in the books of a corporation are no more evidence against the members than they are against strangers.

After a careful consideration of all the cases which have come to our attention, we can perceive no principle upon which the account-books of a corporation can be evidence against a member of the corporation of the accounts and entries therein made in a suit brought by the corporation or its representatives against him to enforce his liability upon such account. The officers and book-keepers of a corporation are in no sense his agents. Individually he has no control over their acts, and has no responsibility therefor; and in making the entries they do not, in any legal sense, represent or bind him. As to the competency of such books, directors and stockholders of a corporation stand upon the same footing. It is quite true that a director stands in a more favorable position to know what is going on within the corporation, and to be more familiar with its books in some cases, than a stockholder. He has the right to inspect the books of the corporation, and so has a stockholder. A stockholder having the ability is just as able to become familiar with the contents of the books of a corporation to which he belongs as a director, and there is no principle of law by which a director

can be charged with knowledge of the entries in the books of a corporation which is not equally applicable to its stockholders. It is frequently easier to charge a director with knowledge of the books than it is to charge a stockholder, because he usually has an active part in the management of the corporation; but, as a general rule, many directors in corporations are just as ignorant, and necessarily so, of the particular accounts contained in its books as the stockholders are. It would be quite a dangerous, and we think startling, proposition to hold that a clerk or other officer in a business corporation could enter charges in its books of account against a director or stockholder which could be proved in favor of the corporation by the mere production of the books, thus throwing upon him, or his personal representatives after his death, the burden of explaining the entries or showing them to be untrue, and we believe the doctrine has no support in principle or authority. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence which are applied in an action brought by an individual to enforce a claim against any defendant. It was admitted on the argument of this case that the evidence furnished by the account-books was vital to the plaintiff's case, and we therefore do not deem it important to examine the other points zealously and ably argued before us.

For the error pointed out, *the judgment should be reversed*, and a new trial granted, costs to abide event.

All concur.

## IOWA SUPREME COURT.

### CONSOLIDATED TANK LINE CO.,

*Appt.,*  
*v.*

HUNT.

(....Iowa....)

The words "teamster or other laborer" who "habitually earns his living" with a horse or team as used in the Code which makes such horse or team exempt, include one whose business is to sell oil which he delivers for the most part by a tank wagon usually driven by his boy, although a few sales are made and the oil delivered at a room where it is stored.

(May 28, 1891.)

**A**PPEAL by plaintiff from an order of the District Court for Page County discharging an attachment. *Affirmed.*

Statement by **Granger, J.:**

Appellant brought an action to recover for oils sold to the defendant, and obtained an attachment, which was levied on a team, harness and oil-wagon. The defendant moved

the court to discharge the attached property, and assigned as reasons therefor the following: "The said team and harness and oil-wagon is the only one owned by the defendant; that defendant is a married man, and the head of a family, and resides in Clarinda, Page County, Iowa; that said team, harness and wagon is the only one owned by defendant, and the only one by which defendant habitually earns a living for his family. It is therefore exempt under the law, as is more fully shown by affidavits hereto attached, marked 'A' and 'B,' and made a part hereof." Affidavits were filed in support of and against the motion, upon a consideration of which the court below sustained the motion, from which order the plaintiff appealed.

**Mr. W. W. Morgan** for appellant.

**Messrs. Clark & Hill** and **J. R. Good** for appellee.

**Granger, J.**, delivered the opinion of the court:

The testimony gives support to the following facts: That the defendant is a resident of Page County, Iowa, a married man, and the head of a family; that prior to March, 1889, he was engaged in selling oils and gasoline at Clarinda, Iowa; that after that he was engaged

NOTE.—For decisions as to execution exemptions, see *notes to Robinson v. Hughes* (Ind.) 8 L. R. A. 383; *Watson v. Lederer* (Colo.) 1 L. R. A. 354; 12 L. R. A.

in a retail trade in those articles, having a place of business known as "head-quarters," in the back room of a building on the north side of the square in Clarinda. From these head-quarters for a time he delivered his sales in an ordinary wagon, and afterwards from the wagon in suit, known as a "tank-wagon." The wholesale trade was discontinued June 27, 1889, for which trade his oils had been stored near the depot. After the discontinuance of the wholesale trade his oils for the retail trade were stored at and delivered from the head-quarters. A few sales were made, including the delivery at the head-quarters, but the general business was carried on by orders being left at head-quarters to be filled about the city from the tank-wagon, and in some cases cans would be "set out" by the customers, and these were also filled from the wagon. At times the oils would be paid for at head-quarters, but generally at the place of delivery. The team for the purpose of delivering the oils was sometimes driven by the defendant in person, and sometimes by his minor son, sixteen years of age. At times both were with the team. The evidence favors the view that most of the time the son was with the team and delivered the oils, but for his father. The oils were received at head-quarters in quantities of from three to five barrels at a time. The team, harness and wagon were used by the defendant in this business, and the business is defendant's means of earning a living. Appellant insists that the facts do not sustain the action of the court. Counsel for appellant states his view of the law in these words: "In my judgment, the right has been clearly defined by statute, and under the statute, in order to maintain the exemption, the debtor must show that he is a teamster or other laborer, who by his personal use of the property habitually earns his living." The Statute to be construed is as follows: "If the debtor is a resident of this State, and is the head of a family, he may hold exempt from execution the following property: . . . The horse or team . . . and the wagon or other vehicle, with a proper harness or tackle, by the use of which the debtor, if a physician, public officer, farmer, teamster or other laborer, habitually earns his living." It is conceded on authority that the Statute is to receive a liberal construction. It would be a grave disregard of the concession were we to hold to the view claimed by appellant, that because the team was driven by the son, though for the father, the debtor is not within the provisions of the law as to exemptions. Let us suppose one who is a laborer or teamster, and earns his living by the personal use of his team, is disabled, we will say, totally, and a minor son, by the use of the team, supports the family; will it be said that the owner if a debtor loses his right of exemption? Confining ourselves to the literal definition of the word "laborer" or "teamster" as quoted in argument, such a result might follow. But looking to the law and the purposes of its enactment there is no difficulty in saying that such a case is clearly within its purview, and that the debtor would come within the statutory meaning of the word "teamster" or "laborer." If a widow, who is the head of a family and a

debtor, owns a team by the use of which her living is supplied, may she be deprived of this means of earning a living merely because she does not in person perform the labor of driving the team? These plain propositions pave the way to clearly observe the legislative purpose. It is strenuously urged that the defendant is not a teamster or laborer, but a merchant, and as such is not entitled to the exemption. It is true that the defendant is engaged in a small way in the sale of merchandise. He has a back room of a building, used more for storage than for any other purpose, which is a base of supplies for his delivery system or business; and the business is carried on mainly by the use of the team; and it is manifest that without the use of the team he has no business to supply a living, for he says that the profits of computed sales at the head-quarters would not pay his rent. Any person thus engaged in receiving and distributing oils must be said to be a laborer. He "is one who labors in a toilsome occupation." The use of the team is necessary to carry on the occupation, and hence, if the occupation supplies his living, he earns his living by the use of his team. That the living is not wholly so earned is not material. The same exemption, upon the same conditions, is made to the physician, public officer and farmer, in which cases it will be readily understood that the use of the team would be but an aid to the profession or calling. If a physician may have the exemption as an aid to the business of his profession by which he obtains a living, why may not the laborer—one who chops the wood in the forest, or quarries the rock from the hillside, to be put by the use of a team on the market to supply his living—have the same protection. The fact that the laborer utilizes his efforts in the way of an independent, rather than a dependent, business, should not operate to his disadvantage. This is the situation of the defendant. If he employed another to do the work of receiving the oils, replenishing the tank and delivering about the city, the employé would without question be a laborer. The defendant is not less so merely because he directs and owns the business, besides performing the labor. The district court, from the evidence, must have found that the defendant was, within the statutory meaning, a teamster or laborer, and that finding is conclusive upon us unless the record affirmatively shows the court in error, and we do not think it does. The case of *Root v. Gay*, 64 Iowa, 399, supports our conclusion.

*Affirmed.*

## CASS COUNTY BANK

v.

George WEBER *et al.*, *Appts.*

(....Iowa....)

### 1. The homestead exemption extends to the entire building used both for a family

**NOTE**—Homestead; doctrine as to exemption of portion of building.

With the exception of the Iowa courts, courts do not seem inclined to divide a building in favor of the creditors of a homestead claimant so as to per-

residence and a hotel where no rooms used exclusively for hotel purposes could be used without passing through rooms occupied by the family, and the rooms used for the office and bar-room, sitting and dining rooms were also in common use by the family.

2. A separate building used for business purposes, and a stable used for hotel purposes, on the same lot with a hotel which is exempt as a family homestead, are not part of the homestead.

(May 28, 1891.)

**A**PPEAL by defendants from a judgment of the District Court for Cass County disallowing their claim to homestead exemption in certain property, and making it subject to plaintiff's judgment. *Modified and affirmed.*

Statement by Granger, J.:

The defendants, George and L. A. Weber, are husband and wife. George Weber is a judgment debtor to the plaintiff bank. In 1885 George Weber conveyed to his wife eighty acres of land and four lots in the City of Atlantic, and this action is to set aside the conveyance as in fraud of the plaintiff's rights as a judgment creditor. The issues involve the bona fides of the transfer, and also the homestead character of the lots in the City of Atlantic. The district court made the following finding of fact and judgment entry: "(1) That on the 20th day of November, 1886, the plaintiff recovered a judgment against one Wm. Kreamer and the defendant George Weber for the sum of \$619.72, and ten per cent interest from the date thereof, and the further sum of \$49.09 costs, with six per cent interest from the

date thereof. (3) That said judgment is the property of the plaintiff, and wholly unsatisfied and unpaid, and that W. H. Kreamer is wholly insolvent, and has no property from which said judgment can be made. (8) That defendant George Weber has no property in his own name from which said judgment can be realized. (4) That on April 15, 1885, the defendant Geo. Weber made and delivered to the defendant L. A. Weber, his wife, a deed of conveyance for the following described real estate, to wit: Lots 9, 10, 11 and 12, in block 14, in the City of Atlantic, Cass County, Iowa; and the north half of the northeast quarter of section 12, township 75 north, of range 85 west, 5th P. M., Cass County, Iowa, being the property then owned by the defendant Geo. Weber. (5) That said deed was made without consideration, and for the purpose of hindering, delaying and defrauding the creditors of defendant Geo. Weber. (6) That part of the building on lot 12, block 14, Atlantic, Iowa, is occupied by the defendant L. A. Weber as a homestead for herself and family, and was so occupied prior to the contracting of the debt herein. It is therefore ordered, adjudged and decreed by the court that the deed of conveyance from the defendant Geo. Weber to the defendant L. A. Weber, his wife, conveying the above-described real estate, and recorded in book 79, on page 426, of the Records of Cass County, Iowa, be held for naught, as concerns this plaintiff, and that the lien of this plaintiff's judgment is declared prior and paramount to any lien or interest the defendants George or L. A. Weber may have in the premises, except their right of homestead in and to parts of the building situated on lots 11 and 12, block 14, Atlantic, Iowa;

mit them to levy on a portion of it. They appear to prefer, if possible, to hold the property either exempt or not exempt as a whole according to the use to which it is put. The homestead which the debtor owns and occupies is exempt with a specified quantity of land appurtenant thereto, without regard to the uses to which he puts the land or the business he pursues upon it. *Binsel v. Grogan*, 67 Wls. 152.

The Homestead Laws are not intended to save a mere shelter for the debtor and his family, but to give him the full enjoyment of the whole lot of ground exempted to be used in whatever way he may think best for the occupancy and support of his family, whether in the way of cultivating it or by the erection and use of buildings upon it either for the carrying on of his own business, or for deriving income in the way of rent. *Hubbell v. Canady*, 58 Ill. 427.

#### *Use of portion of building by owner for business purposes.*

Under a statute providing that a homestead to the extent of one acre, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempt, the whole house occupied as a home by the debtor is exempt although a portion of the same is used and was constructed with a view to be used as a brewery; the building cannot be divided into two portions, one of which is exempt and the other not. *Re Tertelling*, 2 Dill, 389.

Where a building whose size and number of rooms are not shown is occupied as a residence by the family of the owner, its homestead character is not destroyed by proof that a single room or two is

used by the owner for business purposes. *Hogan v. Manners*, 23 Kan. 559.

Where the upper story of the building was occupied as a dwelling, the fact that the lower floor was used by the husband for business purposes was of no consequence, the court remarking that "no one would imagine that a person would lose his homestead privilege if he should happen to use some room in his dwelling for his law office or his wife should in her own right carry on dress-making in one of the apartments. *Orr v. Shraft*, 22 Mich. 264. The fact that the homesteader's wife carries on a retail grocery and provision business in the first story of the main building situated on a homestead claim, and also uses the cellar in connection with her business, will not deprive it of its homestead character or permit a sale of any portion of it on execution. *Rush v. Gordon*, 38 Kan. 536.

The right of homestead may exist in the whole of a country hotel. *Lasell v. Lasell*, 90 Mass. 875.

So where a building designed for a dwelling-house and occupied by the owner and his family was subsequently devoted by him to hotel purposes, the building did not lose its homestead character, at least if the extent of the hotel business did not interfere with the general character of the building as a dwelling-house. *Ackley v. Chamberlain*, 18 Cal. 183.

But property used primarily and principally for hotel purposes cannot be made subject to a homestead exemption. *Laughlin v. Wright*, 63 Cal. 116.

#### *Effect of renting a portion of the building for business purposes.*

Under a statute providing that a homestead consisting of one fourth of an acre of land and the

that plaintiff's judgment is hereby declared and established as a lien from the date thereof, November 20, 1886, upon the following described real estate, as paid in plaintiff's petition, to wit: The north half of the northeast quarter of section 12, in township 75 north, of range 35 west, 5th P. M., Cass County, Iowa; and upon the upper story and the front room down-stairs, and the cellar thereunder, of the brick building situated on lot 12 in block 14, in Atlantic, Iowa; and also the upper story and the east room on the ground floor of the frame building joining the brick on the west, situated on the same lot and block; and also all the ground covered by the frame business-house and stables, being the west end of lots 10, 11 and 12, and all of lot 9, all in block 14, Atlantic, Iowa." The defendants appeal.

**Messrs. L. L. DeLano and Willard & Willard**, for appellants:

If the principal use of the building is that of a residence and a home for the family it would not be liable to execution because rooms in it are rented to others.

Thompson, Homesteads and Exemptions, § 120; *Laell v. Laell*, 90 Mass. 575; *Ackley v. Chamberlain*, 16 Cal. 181; *Clark v. Shannon*, 1 Nev. 568; *Goldman v. Clark*, 1 Nev. 607; *Mercier v. Chace*, 98 Mass. 194; *Re Tertelling*, 2 Dill. 839.

The house could not be divided as suggested by the court below.

*Bebb v. Crowe*, 39 Kan. 342; *Rush v. Gordon*, 38 Kan. 585; *Hogan v. Mannors*, 28 Kan. 551; *Wright v. Dittler*, 54 Iowa, 620.

If the stable was erected for domestic pur-

poses in connection with the use of the homestead it is not liable to execution; and if it can be considered the shop or other building "really used and occupied by the owner in the prosecution of his own ordinary business," it has not been shown to be worth more than \$800, and therefore it cannot be subjected to the payment of the plaintiff's judgment.

*Smith v. Quiggans*, 85 Iowa, 637.

The conveyance of the homestead by the husband to the wife, or *vice versa*, has no effect whatever upon the homestead rights, and whether the conveyance be fraudulent and without consideration, or in good faith and for a valuable consideration, it cannot affect the homestead rights of the parties, nor can it subject their homestead to a sale under execution against either of them.

*Green v. Farrar*, 53 Iowa, 426; *Spoon v. Van Fossen*, 58 Iowa, 494; *Lowell v. Shannon*, 60 Iowa, 713; *Griffin v. Sholey*, 55 Iowa, 513.

**Messrs. C. F. Loofbourow and Phelps & Temple**, for appellee:

To be a homestead the place must be used, and used for the purposes designated by the law, to wit, as a home, a place to abide in, a place for the family.

*Charles v. Lamberson*, 1 Iowa, 485.

When the exemption claimants voluntarily devote part of the land, which would otherwise be exempt, to the uses of an outside business, and the value of the property thus used exceeds \$300 in value, they cannot claim an exemption in this property.

*Rhodes v. McCormick*, 4 Iowa, 368; *Mayfield v. Maaden*, 59 Iowa, 517; *Johnson v. Moser*, 66 Iowa, 586.

dwelling-house thereon and its appurtenances, owned and occupied by any resident of the State, shall not be subject to execution, a building consisting of three stories and a basement, the basement and first story of which are rented for business purposes and the upper stories occupied by the owner and his family as a residence, is all exempt. *Phelps v. Rooney*, 9 Wis. 80.

Under a statute exempting a homestead not exceeding in amount one lot, the uses to which the lot is put are immaterial and no portion of the building thereon is subject to execution, although the lower part is built, rented and used for a store, the cellar also being rented, and a portion of the upper floors being used for offices, while the owner's family occupied the back part of the building as a residence. *Kelly v. Baker*, 10 Minn. 164.

The fact that part of a building is leased to a third person, who carries on a mercantile business in it, does not destroy its homestead character when the owner reserves the right of using it for reaching the part used as his home, the court suggesting a doubt as to whether or not a portion of the building only could be sold on execution. *Bebb v. Crowe*, 39 Kan. 342.

A three-story brick building, the second story of which is occupied as a residence by the owner and his family, and the first story is occupied by a tenant at will, and the third by a tenant under a written lease for five years, is exempt as an entirety, and a receiver cannot be appointed to receive the rents and income due on the lease and apply them on a judgment. *Winland v. Holcomb*, 26 Minn. 296.

The head of a family, who occupies one room of his building as a residence, does not lose his homestead right by renting out the balance of the building for use as a hotel. *Gainus v. Cannon*, 42 Ark. 514.

12 L. R. A.

#### *Effect of renting rooms.*

If property has been dedicated as a homestead, and is actually occupied by the owner for that purpose, the fact that the larger portion of the rooms was let to lodgers will not destroy the homestead right in the whole building. *Goldman v. Clark*, 1 Nev. 608.

The fact that certain rooms in a single building adapted to one family are rented for an annual rent paid to the owner will not exclude that part from being a portion of the homestead; the homestead right is not necessarily limited to that portion of the dwelling which is occupied by the family of the owner. *Mercier v. Chace*, 98 Mass. 194.

#### *Rule in case of double houses.*

Under provisions exempting premises "owned and occupied" by a citizen of the State, a double house erected, one half for the use of the owner and the other half to rent, and actually put to such use, will not be exempt as to the rented part. *Dyson v. Sholey*, 11 Mich. 528.

Where the homestead is defined as the dwelling-house in which the claimant resides and the land on which the same is situated, a landowner who erects thereon a double house with distinct entrances and no connection between them on the inside, intending one for his residence and the other for tenants, and devoting them to that purpose, cannot claim the rented part as exempt. *Tiernan v. His Creditors*, 62 Cal. 228.

#### *The Iowa decisions.*

Under the Iowa Statute providing substantially that the homestead must embrace the house used as a home by the owner thereof and not more than one dwelling-house nor any other buildings except such as are properly appurtenant to the homestead

**Granger, J.**, delivered the opinion of the court:

1. This case, as to its facts in detail, is like many another, where a wife has money in her own right which she gives to her husband for general use, without any agreement or expectation that it is a loan, or creates any obligation for payment, until in later years, when, through the vicissitudes of fortune, the transaction is made a means of protecting her husband's property against his creditors. From the evidence, though quite conflicting in many respects, the district court found that the conveyance was without consideration, and for the purpose of hindering, delaying and defrauding the creditors of George Weber; and, after considering the evidence, we concur in its conclusion.

2. The more difficult question in the case is that of homestead exemption. The property claimed as a homestead is that in the City of Atlantic, lots 9, 10, 11 and 12. These lots have each a frontage of 25 feet and a depth of 140 feet. On lot 12 there was originally built a brick building, with the first floor designed for a business room and living rooms above. The property was afterwards sold to Dierksen & Hansen, who converted it into a hotel known as the "Farmers' Home." The first story was made into two rooms, the first being used as an office and bar-room, and the other as a dining-room. This building is fifty feet in length by 32 feet in width. The second story is reached by a stairway from the front room or office. Underneath is a cellar, access to which is by a stairway from the dining-room. North, and, as we understand, on the side, of this brick building, was built a frame addition, with kitchen and bedroom. Additions were also made to the brick of frame structures, in which

were a sitting-room and bedroom of the ground floor, and bedrooms above. Between the sitting-room and the dining-room, was a wash-room, through which access was had from the brick part to the bedroom, and through the wash-room and bedroom to the sitting-room, the sleeping-rooms in this part being over the sitting-room. It thus appears that the district court found that the parts of the building not occupied as a homestead are, of the brick part, the upper rooms, and the front room below, used as the office, and the cellar beneath; also the bedroom east of and between the sitting-room and wash-room in the frame part, as by its decree the plaintiff's judgment is made a lien thereon. We regret that the condition of the record leaves some uncertainty as to these particular facts. We have endeavored, however, to be precise in our findings. On the rear end of lots 10, 11 and 12, and on lot 9, there were erected some stables for the use of the hotel, and after Weber purchased the premises he built on the lots at the rear end a frame business-house. The stabling was used by the defendants for the purpose of carrying on their business of hotel keeping, and neither that nor the frame business-house was used as a part of the homestead, and the district court thus found.

Our findings of fact as to the homestead occupation do not exactly accord with those of the district court. That the defendants had a homestead in the premises is not questioned. Hence we are not to inquire whether or not there is a homestead, but, conceding one, we inquire after its intent. In *Rhodes v. McCormick*, 4 Iowa, 368, it is said: "When an execution defendant shall use a particular building as a home, the whole of such building, in

as such, it was not the intention to exempt from execution an entire building for whatever purpose used. One portion or floor may be exempt while others are not. So where a building was three stories high with a cellar, the upper ones being used as a dwelling and the first story and cellar being designed and rented for business purposes, and not being used by the owner as a home nor in the prosecution of his ordinary business, the first story and cellar were liable to execution while the others were not. *Rhodes v. McCormick*, 4 Iowa, 372.

But where the building was two stories high with cellar, no part of which was originally intended for business purposes, and the owner occupied the whole building himself, the upper story as a residence and the lower one for business purposes, the cellar being used in connection with the store and for family purposes, and the only convenient access to it as well as to the living rooms being through the store, the whole building was exempt. *Wright v. Ditzler*, 54 Iowa, 626.

In *Mayfield v. Maasden*, 59 Iowa, 517, the court states that some doubt may exist as to the correctness of *Rhodes v. McCormick*, *supra*, but that they would not be justified in overruling it, and decide that a brick house consisting of two stories and basement, of which the second story was occupied as a dwelling and was reached by stairs leading from the street and partitioned off from the room in the first story, and the first story was used as a grocery store, saloon and restaurant (by whom did not appear), except a small portion partitioned off by temporary partitions and used as a store-room, in part by the owner, and the front part of the basement had been used as a barber shop but not since the rendition of the judgment.—was exempt 12 L. R. A.

as to the second story, the stairway and the basement, but not as to the first story.

*Smith v. Quiggans*, 65 Iowa, 637, was a case quite similar to the preceding, with the exception that the store in the first story was occupied by the owner himself in carrying on his business, and was shown to be within the limit of value fixed by the statute, and the whole building was held to be exempt.

When the building was of brick four stories high, with cellar, the second and third of which were occupied by the owner as a residence, the first as a storeroom and place of business, and the fourth, which was unfinished, as a place for drying clothes, the greater part of the cellar being used in connection with the business, and the remainder by the family, and access could be gained to the second story by outside stairways, and a sort of elevator ran from the cellar to the fourth floor, and the only stairway leading to the cellar was from the store, the value of the business portion of the building being greater than the statutory limit, the first and fourth stories and so much of the cellar as was used for business purposes were not exempt, though the remainder of the building was; and the sale of those portions would carry the right to use the hatchways in the second and third floors and the elevator apparatus to reach the fourth floor, and would be subject to the homesteader's right to use the stairway from the store to the cellar for family purposes. *Johnson v. Moser*, 66 Iowa, 540.

So where the first floor was used by the owner as a saloon it was liable to execution under Code, § 1558, for damages accruing by reason of the unlawful sale of liquors by him therein. *Arnold v. Gotshall*, 71 Iowa, 572.



cases of controversy and disagreement will be presumed to constitute and be a part of the homestead until it is shown, by the party adversely interested, that some specific portion is not of the homestead character, and therefore not exempt." As to the office room, the bedroom and the cellar, we have no difficulty in reaching a conclusion that they are not brought within the rule. The most that can be said is that there is shown to be, to some extent, a joint occupancy of them for homestead and hotel purposes. Of the bedroom it is true that it was used as a sleeping-room for guests of the hotel, but at the same time it was used by the family as a passageway from the dining-room to the sitting-room, both of which were found to be parts of the homestead. Now let us suppose the bedroom had not been used for a sleeping-room by any person, but merely a room through which the family passed to the sitting-room from other parts of the house. We do not think that state of facts would justify a finding that it was not used as a part of the homestead, nor do we think the mere fact of its use by the guests of the hotel, while at the same time used for the other purpose, would deplete it of its character as a part of the homestead. Now the front or office room was used as an office and bar-room, but it was at the same time used by the family. It was a means of ingress and egress from the street. It was a front room, back of which was the dining-room, and still back the washroom, bedroom and sitting-room. These rooms were all devoted to the same purpose. At least it does not appear that they were not, and we assume facts not otherwise established in harmony with the homestead right. It is not as if it was shown that one story of the building was used as a store or shop, or leased and occupied by a stranger, which use would indicate of itself a disuse by the family. The entertainment of hotel guests and of boarders is often in a manner to be consistent with an occupation at the same time, by the family, of the apartments as a part of the home. Such entertainment would, it is true, often, if not generally, be a limitation upon the use by the family of certain apartments, but not to the extent of exclusion. If the office room had not been thus used, but had been a room into which the family occasionally went, and through which it passed from the other apartments to and from the street, we do not understand that it would, from such a state of facts, be so devalued of a homestead character as to be liable to execution. Neither will the fact that it is so used in connection with another use have such an effect. The same is true of the cellar. It was used for hotel purposes, but also for the family. The business of the hotel and the support of the family, as to work and supplies, as well as occupation, were so mingled naturally that it is a task of much difficulty to show separate occupations or use, and the burden of doing so is with the plaintiff. The upper story of the brick building is divided into five sleeping-rooms, and these the record shows were used exclusively for the guests of the hotel, and not by the family for homestead purposes; that is, they are a part of the homestead building, but not particularly occupied by the family. The legal problem in this

respect, in the light of authority, is somewhat difficult. Following the rule of *Rhodes v. McCormick, supra*; *Mayfield v. Maasden*, 59 Iowa, 517, and *Johnson v. Moser*, 66 Iowa, 586, that apartments of the homestead building not occupied as such are liable to execution, and we should find for the plaintiff; and under these authorities our duty would be clear but for the fact that in this case the only means of access to these rooms is through the office room, which we hold to be a part of the homestead, and we possess no authority to invade the homestead right by continuing the present means of access unless we extend what is now by many regarded as a rule of doubtful merit,—that of partitioning a homestead building between a debtor and his creditors, which we are not inclined to do. It would of course be idle to hold that a room or rooms in a building not used by the family were liable to execution when the purchaser would have but a barren right,—the title without a right of occupancy or use,—and that, so far as disclosed by the record, would be the situation in this case. In *Johnson v. Moser, supra*, the homestead was limited to the two middle stories of a four-story building, and a right of access was given to the fourth story by hatchways through the floors of the homestead part, and a hoisting apparatus connected with the fourth story. This means of access, it seems, was a part of the plan of constructing the building, and could be continued without any interference with the occupation of the homestead part of the building. It was in effect an independent means of access, and the hatchway could never have been regarded as a part of the homestead. It was therefore no invasion of the homestead right. The difference between that case and a right of access to these rooms, through the front room below, is too obvious to deserve notice. Such a right would be a serious impairment of the homestead privilege. For reasons certainly not stronger, in *Wright v. Ditzler*, 54 Iowa, 620, a room used as a store-room for the sale of merchandise was distinguished and held exempt from execution. Its sale would have interfered with the use and occupation of the living rooms above and cellar below. A similar thought is made use of in *Johnson v. Moser, supra*, in holding that parts of the building might be sold. It is said: "Their sale will not unreasonably interfere with the use of the defendant of those portions of the building which he occupies as a place of residence." The same cannot be said of this case, with a right of access as it now is. These considerations lead us to the conclusion that the entire building should be treated as exempt from execution under the Homestead Law, and that the decree of the district court should be thus modified.

8. A point is made in the argument that defendant George Weber was only surety for one W. H. Kreamer, on the note on which the plaintiff's judgment was obtained, and that plaintiff has alleged, but has not proven, the insolvency of Kreamer. Without an intimation as to the law applicable, we think the fact is otherwise. With an additional abstract, we think the insolvency appears. The decree of the district court is approved, except as to the modification suggested.

*Modified and affirmed.*

Varneda McClain, *Appt.*,

v.

Incorporated TOWN OF GARDEN GROVE.

(....Iowa....)

**The narrowness of a bridge and the insufficiency of its railings are not the proximate cause of an injury to an occupant of a cutter dragged off the bridge by a horse which fell and broke the railing in consequence of disease or choking by the harness.**

(June 2, 1891.)

**A** PPEAL by plaintiff from a judgment of the District Court for Decatur County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

*Messrs. E. W. Curry and S. A. Gates* for appellant.

*Mr. S. H. Amos, with Messrs. Parrish & Hoffman,* for appellee:

Neither of the two defects claimed by the plaintiff—and the only two defects, viz., insufficient railing and width of bridge—had anything to do with the fall in the first instance. Whatever it was it was in the horse and not in the bridge, and consequently no recovery can be had against the town.

*DeCamp v. Sioux City*, 74 Iowa, 892; *West v. Ward*, 77 Iowa, 824; *Spaulding v. Sherman*, 76 Wis. 77.

If Miller, in whose sleigh plaintiff was riding, and who was driving, was guilty of contributory negligence, then his negligence was imputed to her, even if it is held that she was innocent of actual contributory negligence.

*Payne v. Chicago, R. I. & P. R. Co.* 89 Iowa, 523.

There was another available crossing and Miller certainly incurred danger which there was no necessity for incurring.

*Walker v. Decatur County*, 67 Iowa, 807; *Parkhill v. Brighton*, 61 Iowa, 108; *Fulliam v. Muscatine*, 70 Iowa, 436. See also *Rusch v. Davenport*, 6 Iowa, 445; *Hart v. Red Cedar*, 63 Wis. 684; *Harris v. Clinton Twp.* 64 Mich. 447; *Kiernan v. Heaton*, 69 Iowa, 186; *Raridan v. Central Iowa R. Co.* 69 Iowa, 537.

Knowledge of the defective bridge bars recovery.

*Dale v. Webster County*, 76 Iowa, 370.

**Robinson, J.**, delivered the opinion of the court:

In January, 1888, defendant controlled and was responsible for the condition of a certain bridge over a railway within its territorial limits. The bridge was twelve feet wide, provided with side railings, and reached by means of steep approaches. In the month named, one Ira Miller invited plaintiff and another lady to take a sleigh-ride for pleasure. The invitation was accepted, and the party started in a cutter drawn by one horse. In the course of the ride they attempted to cross the bridge

described. The horse drew the cutter with its load up the steep approach, and onto the bridge. When a part of the way over, the horse suddenly fell against the railing on one side of the bridge, broke it down, and dropped off, drawing with him the cutter and its lady occupants. Plaintiff fell to the ground below and received the injuries for which she seeks to recover in this action. She claims that the defendant was negligent in maintaining a bridge of insufficient width, in not providing it with sufficient railings and in permitting it to be used without sufficient railings. Defendant avers that the accident occurred without fault on its part, in consequence of the carelessness of plaintiff and the negligence of Miller, and insists that the alleged defects in the bridge were not the proximate cause of the injuries received by plaintiff. After the evidence had been submitted on the part of both parties the court sustained a motion of defendant to direct the jury to return a verdict in its favor. A verdict was returned in favor of defendant by direction of the court, and judgment was rendered thereon. The first ground alleged in the motion for a verdict was that the evidence showed that the defects alleged in the bridge were not the proximate cause of the injury. It appears without contradiction that there was snow about half way up the approach to the bridge, and none on the bridge. The horse pulled steadily and without apparent difficulty in going onto the bridge, fell without warning of any kind, and appears to have been dead when he fell. Miller, who owned the horse, is of the opinion that its death was caused by heart disease, although it may have been choked by the breast harness in which it was pulling at the time. To entitle plaintiff to recover it must be shown that the injuries of which she complains were the natural and proximate result of the alleged defects in the bridge. *West v. Ward*, 77 Iowa, 825, and cases therein cited.

Under the evidence submitted we do not think that is a matter about which there can be any controversy. The horse which Miller was driving fell because it was diseased, or not properly harnessed and driven. The width of the bridge and the condition of the railing had nothing to do with its fall and death. Had it not fallen, the accident would not have occurred. The railing of the bridge was about two and a half feet high, and it may be true that, had it been of sufficient height and strength to bear the weight of the horse, the accident would have been avoided. But defendant was not an insurer against accidents. 2 Dillon, Mun. Corp. § 789; *Raymond v. Lowell*, 6 Cush. 524. It was its duty to provide for the use of the bridge in the usual manner, and to guard against ordinary contingencies, or those which might be reasonably apprehended. It was its duty to provide railings of sufficient height and strength to prevent horses and other animals from walking off at the side, and to resist any weight and pressure which would be applied under ordinary circumstances; but it was not

NOTE.—As to the proximate and remote cause, see notes to *Smith v. Kanawha County Ct.* (W. Va.) 8 L. R. A. 82; *Read v. Nichols* (N. Y.) 7 L. R. A. 180; *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. 12 L. R. A.

A. 194; *Erickson v. St. Paul & D. R. Co.* (Minn.) 5 L. R. A. 786; *Smethurst v. Proprietors of Ind. Cong. Church* (Mass.) 2 L. R. A. 605.

its duty to provide a railing which would successfully resist the weight of a horse of ordinary size precipitated suddenly against it. It is said that if the bridge had been wider the horse might have been turned when it was discovered that there was no snow on the bridge, but there is no evidence to justify the claim that the horse would have been turned under any circumstances. On the contrary, it is shown that Miller knew the bridge was bare before he drove onto it. We conclude that the condition of the railing and the narrowness of the bridge were not the proximate cause of the injuries sustained by plaintiff. See *De Camp v. Sioux City*, 74 Iowa, 892; *Handelin v. Burlington, C. R. & N. R. Co.* 73 Iowa, 710; *Knapp v. Sioux City & P. R. Co.* 65 Iowa, 98.

The case of *Houff v. Fulton*, 29 Wis. 297, is relied upon as sustaining the claim of appellant. The facts involved in that case were somewhat similar to those under consideration, but it appears that the bridge was without a railing, and that the injury might not have occurred had there been a suitable one. The essentials of such a railing were not considered, and much of what was said in that case is in harmony with conclusions we have announced. We find it unnecessary to determine some of the questions discussed by counsel for appellant, since the one determined is controlling. In our opinion, the evidence shows without conflict that defendant is not liable for the injuries sustained by plaintiff, and the case was properly taken from the jury.

*Affirmed.*

T. H. GORDON

v.

O. A. ANDERSON and Wife, *Appts.*

(....Iowa....)

**A note payable to a certain person "et al., or order," is not negotiable because of uncertainty as to the unnamed payee. This rule is not changed by Code, § 2035, making an instrument promising to pay money or property to another negotiable if such is the manifest intent of the maker.**

(June 2, 1891.)

**APPEAL** by defendants from a judgment of the District Court for Lee County in favor of plaintiff in an action brought to recover the amount due on an alleged promissory note. *Reversed.*

**Statement by Given, J.:**

Plaintiff, as assignee for value and before maturity of two promissory notes executed by defendants, payable "to Charles R. Whitesell et al. or order," asks judgment thereon, and foreclosure of a mortgage given by defendants to secure the same. Defendants answered that the notes and mortgage were executed for part of the purchase price of certain real estate sold to them by Charles R., Emily, J. L. and Phebe J. Whitesell, and for which Charles R., J. L. and Phebe J. executed

to defendants a warranty deed warranting the title to said property. The answer alleges breach of the covenants of warranty, and damage in the sum of \$500, which defendants ask as offset against the notes. Plaintiff demurred to the answer on the ground that the damages set up were claims against the payee of the notes, and no defense against the notes, in his hands, he being a purchaser before maturity, and without notice; and that the answer sets up no defense to said notes, as against the plaintiff, he being an innocent holder for value before maturity. The demurrer was sustained, and defendants elected to stand upon their answer, and refused to plead over, and decree was entered for plaintiff, from which defendants appeal.

**Messrs. H. Scott Howell & Son**, for appellants:

Certainty is the primary law of negotiability. A promissory note in order to be negotiable must be certain as to the amount, the maker and the payee.

*Smith v. Marland*, 59 Iowa, 645; Story, Prom. Notes, 6th ed. § 85; Parsons, Bills and Notes, p. 81; 1 Randolph, Com. Paper, §§ 150, 155; 1 Dan. Neg. Inst. 2d ed. § 99; 1 Edw. Bills and Notes, 3d ed. § 140. See also *Woodbury v. Roberts*, 59 Iowa, 848.

A transfer of the note can only be by a joint indorsement of all the payees.

*Ryhnier v. Feickert*, 92 Ill. 805.

**Messrs. Craig, McCrary & Craig**, for appellees:

A negotiable instrument is one which may be transferred by indorsement or delivery, so as to give a right of action to the person to whom it is so indorsed or delivered in his own name on the instrument so transferred.

1 Wait, Act. and Def. p. 585, and authorities cited.

The additional words or abbreviation "*et al.*" are of no importance and give to the notes no additional payee. If any words are used which indicate that the maker or any other party to the instrument intended that it should be negotiable, the law will give effect to that intention, as against said party.

*United States v. White*, 2 Hill, 59; *Willeys v. Phania Bank*, 2 Duer, 121; Chitty, Bills, Am. ed. 1859, 218; Code, § 2035.

A note payable to the steamboat *Juda*, and its owners, or order, is negotiable.

*Moore v. Anderson*, 8 Ind. 18.

**Given, J.**, delivered the opinion of the court:

1. The discussion is addressed entirely to the question whether the promissory notes sued upon are negotiable. It will be observed that they are promises to pay to "Charles R. Whitesell et al. or order." The discussion is as to the construction to be given to the words "*et al.*," and the effect thereof. The words, as here used, evidently mean, "and others." Therefore the notes are payable to Charles R. Whitesell and others or order, without designating whom the others are. To learn what qualities are essential to a negotiable promissory note, says Mr.

**NOTE.**—As to requisites to negotiability of promissory notes, see notes to *Hegeler v. Comstock* (3 Dak.) 18 L. R. A. 326; *Siegel v. Chicago T. & Sav. Bank* (Ill.) 7 L. R. A. 537.

12 L. R. A.

That a note payable to a man's "estate" or "heirs" is negotiable, see *Shaw v. Smith*, 6 L. R. A. 348, and note, 180 Mass. 166.

Parsons, in his work on Notes and Bills (page 80), "we must bear in mind the purpose of the note, and of the law in relation to it. This is simply that the note may represent money, and do all the work of money in business transactions. For this purpose the first requisite—that thing which includes all the rest—is certainty." "Certainty," says the author, "as to the person who shall receive the money, the person or persons who are to make the payment, the amount to be paid, and the time when payment is to be made." In Story on Promissory Notes (§ 85), it is said: "In instruments designed for circulation, it is of the highest importance to know to whom its obligations apply, and from whom a title can securely be derived." In *Smith v. Marland*, 59 Iowa, 649, it is said: "The qualities essential to a negotiable promissory note are that it shall possess certainty as to the payor, the payee, the amount, the time of payment and the place of payment." Such is the rule uniformly laid down in all the authorities, and it does not require further citations. This case must not be confounded with notes payable in the alternative, as "to A or B;" it is a promise to pay to Charles R. Whitesell and others jointly. Neither must it be confounded with notes payable to bearer, without naming any payee, nor with the cases in which it has been held that whoever legally owns such a note may recover thereon. These notes being promises to pay Charles R. Whitesell and others jointly, Whitesell could not alone transfer them so as to convey the interest of the other payees any more than if they had been named in the notes. A note made to several persons not partners can only be transferred by the joint action of all of them. *Ryhiner v. Fleickert*, 92 Ill. 805, "and neither payee can, of course, indorse the names of the others without special authority." Randolph, Com. Paper, § 155.

Appellee contends that these notes are in accord with the provision of section 2085 of the Code. Turning to section 2082, we see that notes in writing, signed by the person promising "to pay to another person or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery." It will be observed that the promise must be to another person or his order or bearer, and does not dispense with the certainty of which we have been speaking as to whom that other person is. Section 2085 is as follows: "Instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor, or acknowledges property or labor or money to be due to another, are negotiable instruments, with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker; but the use of the technical words 'order' or 'bearer' alone will not manifest such intent." Here, again, the promise must be to another, and there is nothing in the section to modify the rule requiring certainty as to whom that other is. It is true, as contended, that negotiable instruments may be transferred by indorsement or delivery; but that does not aid us in determining whether these particular instruments are negotiable. It is said that Charles R. Whitesell is the only payee named. That is true, but the notes

show that he is not the only person to whom payment is to be made. If it be true, as alleged in the answer, that the other persons named, together with Charles R., are in fact payees of the notes, then, surely, Charles R. is not the only payee, and could not alone transfer them. Authorities are cited in support of the claim that, if any words are used which indicate that the maker intended that the notes should be negotiable, the law will give effect to that intention, as against him. It is a sufficient answer to say that in view of the law which requires certainty in negotiable instruments as to whom the payee is, the fact that it is left uncertain rather indicates an intention that the instruments should not be negotiable. Appellee relies upon *Moors v. Anderson*, 8 Ind. 18. That note was payable to steamboat Juda and owners, and the court held that the word "owners," as it occurred in the note, sufficiently indicated a person, within the intent of the law. It is a familiar rule that, when a person is designated as payee, and question arises as to whom of several persons bearing the same designation was meant, evidence is admissible to show which is the payee. Parsons, *Mercantile Law*, 88. Under this rule it was admissible to show who was the owner of the steamboat, and hence the designation was sufficient. In *Grant v. Vaughan*, 8 Burr. 1516, it is held that a note payable "to ship Fortune or bearer is negotiable, under the rule that, if the name of payee be not the name of a person, as if it be the name of a ship, the instrument is payable to bearer." See also Parsons, *Mercantile Law*, 89. In each of these cases, a person was designated as payee,—in the one as owner of the steamboat Juda; and in the other, as bearer. These notes are payable to Charles R. Whitesell and others or order. The others are not designated by name or otherwise, and therefore it is uncertain "as to the persons who shall receive the money," "uncertain to whom its obligations apply, and from whom a title can securely be derived." We think the district court erred in sustaining the demurrer to the answer.

*Reversed.*

Albert MUSOH

o.

Philip BURKHART, *Appt.*

(....Iowa....)

1. Trees standing on a boundary line will be presumed to belong to the adjoining owners as tenants in common.

NOTE.—Tenants in common; right to relief by injunction against each other.

The earliest cases refused to recognize any right of one tenant in common to relief by injunction against his co-tenants (*Goodwyn v. Spray*, 3 Dick. 667); and it is rarely granted at the present time. *Blood v. Blood*, 110 Mass. 547.

A tenant in common will not be restrained from cutting and disposing of timber in the absence of an averment of insolvency or that he is exceeding his share. *Hihn v. Peck*, 18 Cal. 640; *Arthur v. Lamb*, 2 Drew. & S. 430.

One tenant will not be enjoined from working a silver mine in the absence of wilful injury, or of

2. The cutting down of trees on a boundary line by one of the common owners may be enjoined at the suit of the other.
3. That one owner has cut down and appropriated part of the trees on a boundary line will not defeat his right by injunction to prevent the other owner from cutting down the remainder.

(June 3, 1891.)

**A**PPEAL by defendant from a decree of the District Court for Black Hawk County in favor of complainant in a suit brought to enjoin the cutting down of certain trees. *Affirmed.*

The facts are stated in the opinion.

**Mr. J. J. Tolerton**, for appellant:

If the parties are joint owners, or these trees are common property, cutting them cannot be a trespass but must be waste, and equity will not interfere to restrain waste between joint tenants, tenants in common or coparceners, unless the defendant is insolvent.

High, Inj. § 692.

If the cutting is trespass the plaintiff must clearly establish: (1) his title; (2) that injury is irreparable.

High, Inj. §§ 696, 701, 728, and cases cited in note 3.

These trees are ordinary forest trees, standing directly on the line, fed alike from the soil of both parties, and, in the absence of a different agreement, are the common property of both.

8 Kent, Com. 11th ed. p. 557, note a; *Griffin v. Bixby*, 12 N. H. 454.

The evidence shows that the damage is not irreparable; that it can be measured in money. It shows that adequate compensation may be recovered in law.

*Cowles v. Shaw*, 2 Iowa, 496; *Bolton v. McShane*, 67 Iowa, 207; High, Inj. §§ 701, 702.

If defendant should cut down the trees along

this line he would be a trespasser; plaintiff would not be entitled to enjoin him simply because he is a trespasser.

*Griffin v. Bixby*, *supra*; High, Inj. § 701, and cases cited in note 6, also § 718; *Wilson v. Hughell*, Morris (Iowa) 461; *Waterloo v. Waterloo St. R. Co.* 71 Iowa, 198.

**Messrs. Mullan & Hoff**, for appellee:

Trees standing and growing on a division line are common property, as to which the owners of adjoining parcels of land are tenants in common; and an action of trespass will lie by the one against the other who attempts to cut down and destroy them without the consent of his co-tenant.

*Hoffman v. Armstrong*, 46 Barb. 387; *Griffin v. Bixby*, 12 N. H. 454; *Dubois v. Beaver*, 25 N. Y. 128.

If the trees have special value and one of the co-tenants derives from them some special advantage, benefit or enjoyment, beyond the actual value of trees as trees, courts of equity will not hesitate to interfere by injunction to restrain his co-tenant from cutting down and destroying the same and depriving him of the special value, benefit and enjoyment which he derives therefrom.

2 Story, Eq. Jur. § 928; 3 Pom. Eq. Jur. § 1857; *Barles v. Barles*, 3 Sandf. Ch. 601, 7 L. ed. 973; *Daubenspeck v. Grear*, 18 Cal. 448; *Wilson v. Mineral Point*, 89 Wis. 160; *Shipley v. Ritter*, 7 Md. 408.

Relief will not be withheld because the bill omits to charge the injury as irreparable, provided sufficient facts are alleged to satisfy the court that such would be the case.

*Davis v. Reed*, 14 Md. 152.

An injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damage which may result therefrom cannot be measured by any pecuniary standard.

*Wilson v. Mineral Point*, *supra*.

unnecessary injury or destruction caused by negligence or unskillfulness. *McCord v. Oakland Q. Min. Co.* 64 Cal. 145.

The court refused an injunction where the tenant in possession owned eight twentieths of the whole, had made improvements to the amount of \$2,000 and answered that he only intended to cut the wood and timber from two acres near the barn, and denied all intention to commit waste. *Obert v. Obert*, 5 N. J. Eq. 397.

An injunction will not lie to restrain one tenant from removing oil from a tank, since it has a market value and compensation can be had at law for the removal. *Mason v. Norris*, 18 Grant, Ch. 500.

A few exceptions have been made to the rule, where there are strong reasons for granting the relief.

#### *Destruction of property by insolvent.*

Insolvency of the tenant in possession was soon recognised as a ground for granting the relief (*Smallman v. Onions*, 3 Bro. Ch. 623), even though he was merely committing waste. *Stout v. Curry*, 9 West. Rep. 382, 110 Ind. 514.

It may also be granted for destruction of the common property, but not for acts which amount simply to an ouster. *Durham & S. R. Co. v. Wawn*, 3 Beav. 119.

So it may be granted for malicious destruction of property, but not to stay mere equitable waste. *Hole v. Thomas*, 7 Ves. Jr. 566.

12 L. R. A.

Where the land was valuable only for timber, cutting the timber would amount to a destruction of the property and would be enjoined. *Proudfoot v. Bush*, 7 Grant, Ch. 518; *Coffin v. Loper*, 25 N. J. Eq. 444; *Atkinson v. Hewitt*, 61 Wis. 281.

It may be granted to restrain waste, destruction or removal of chattels out of the jurisdiction of the court. *Low v. Holmes*, 17 N. J. Eq. 152.

It has been granted to restrain one tenant from cutting timber growing on the land and not wanted for the necessary use of the farm. *Hawley v. Clowes*, 2 Johns. Ch. 122, 1 L. ed. 816.

One tenant in common will be enjoined, at the suit of his co-tenant, from digging earth for bricks on the joint property. *Douglass v. Foster*, 4 Grant, Ch. 819.

#### *Tenants having special fiduciary relations to each other.*

It will be granted where one tenant has become by agreement the occupying tenant of the other. *Twort v. Twort*, 16 Ves. Jr. 132.

Where one tenant was trustee for the other, his rights as tenant were subordinate to his duty as trustee, and he was restrained from cutting timber. *Christie v. Saunders* 2 Grant, Ch. 670.

Where one of the tenants was the mother of the others and married an insolvent, who went to reside on and manage the common property, he was restrained from selling crops until he secured the

One co-tenant will not be permitted to injure or destroy the property held in common by him and his co-tenants without the consent of all, and a court of equity will at once interfere by injunction to restrain such injury or destruction.

High, 101, 2d ed. § 692; *Hawley v. Clowes*, 2 Johns. Ch. 122, 1 L. ed. 816; *Atkinson v. Hewitt*, 51 Wis. 281; *Spear v. Cutler*, 4 How. Pr. 177.

**Robinson, J.**, delivered the opinion of the court:

Plaintiff owns the S.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 16, in township 90 N., of range 18 W., in Black Hawk County, and occupies it as a place of residence for himself and family. His dwelling-house, barn and other buildings are on the land described, and near its northwest corner. The defendant owns the N. W.  $\frac{1}{4}$  of the quarter-section described, and the south boundary line of his land is the north boundary line of the west part of the land of plaintiff. About twenty years before the commencement of this action one Jeffers, who then owned the land now owned by plaintiff, planted along and on the north boundary line thereof, for a distance of about thirty rods, commencing at the northwest corner, a line of cottonwood trees. They have grown to a height of from thirty to sixty feet, and their trunks have a diameter, near the ground, of from one to two feet. The average space between them is about three feet. The plaintiff has attached barbed wires to the north side of the trees, thus making a wire fence. He claims that the fence is needed; that the trees are of great value to him as a wind-break; that they afford valuable protection from storm and winter winds to his buildings and stock; and that defendant has threatened to destroy the fence, and to cut down and remove the trees; and that unless restrained he will do so. The defendant claims that, by agreement with

plaintiff, a division of their common boundary line was made for the purposes of fencing, by which plaintiff was to maintain a fence on the east half of the line, and the defendant on the remainder; that the trees described have thrown out roots, which extend for many feet in his land; that by reason of such roots, and the shade of the trees, a strip of his land four or five rods wide, north of the trees, has been rendered unproductive. He denies that the trees are of any value to plaintiff; claims that he has a right to cut and remove them, for the reason that they are a damage to him, and for the further reason that plaintiff has cut and taken away some of those originally planted there, and he claims the right to do the same. He admits that he had threatened and fully intended to cut down those now standing. The evidence shows that the trees are of value to plaintiff, and that they damage the defendant; also that they stand on the common boundary line. They were planted before defendant acquired title to the land he now owns. Under what agreement, if any, between the owners of the two tracts of land, they were planted, does not appear, although Jeffers and his grantees seem to have cared for them as their own. They stand upon and draw sustenance from both tracts of land, and, in the absence of a showing to the contrary, it must be presumed that they are owned by the parties to this action as tenants in common. *Dubois v. Beaver*, 25 N. Y. 124; *Griffin v. Bizby*, 12 N. H. 456.

When one tenant in common destroys the subject of the tenancy, he is liable to his co-tenant for the damage he thereby sustains. *Dubois v. Beaver*, *supra*. A court of equity will, by injunction, restrain one tenant in common, at the suit of another, from doing a serious injury to the common estate. 1 High, 101, § 844. It is well settled that the commission of a trespass may be restrained by injunction. *Grant v. Crow*, 47 Iowa, 688; 2 Story, Eq. Jur.

share of plaintiff, a female twenty-two years of age. *Bates v. Martin*, 12 Grant, Ch. 460.

So where landlord and tenant were tenants in common of the crop, and the landlord had been damaged more than its value by the mismanagement of the tenant, who was insolvent, the tenant was restrained from removing and selling the crop. *Lewis v. Christian*, 40 Ga. 187.

Where the tenants in common had only an equitable title, the legal title being in a surviving trustee, and the tenant in possession was insolvent, the court granted the injunction. *Smallman v. Onions*, 3 Bro. Ch. 623.

#### *In partition suits.*

Injunction may be granted to preserve the rights of the parties to a partition suit. *Wesse v. Welsh*, 80 N. J. Eq. 434.

But even after decree for sale in partition the tenant in possession will not be restrained from selling the crops grown on the land although he may be restrained from destruction of the property or waste. *Bailey v. Hobson*, L. R. 5 Ch. App. 180.

The execution of a decree for actual partition of land may be enjoined to enable the court to determine whether actual partition or sale will be most for the interest of the parties. *Gash v. Ledbetter*, 6 Fred. Eq. 183.

Pending the partition proceedings equity will not interfere with the possession of the premises, nor 12 L. R. A.

will it enjoin one tenant from proceeding to collect his portion of the rent due. High, 101, § 844, citing *Hughes v. D'Arcy*, 8 Ir. Eq. Rep. 71.

#### *Determining water rights.*

Injunction may be granted for the purpose of preserving water rights which are held in common. *Bliss v. Rice*, 17 Pick. 39.

So one tenant in common may be enjoined from wasting water from a common reservoir. *Ballou v. Wood*, 8 Cush. 42.

One tenant in common of a water-power, who also owns a dam and mill higher up the stream, will be restrained from drawing so much water from the stream at his upper mill as to destroy the water-power held in common. *Kennedy v. Soovil*, 13 Conn. 297.

But one tenant in common of water-power will not be restrained from occasionally using more than his share of the water where his co-tenant has no means of utilizing his share and has never sued for damages for the excessive use made by the other. *Norris v. Hill*, 1 Mich. 202.

#### *Collection of judgment.*

To restrain the collection of a judgment at law by one tenant in common against the other until an account can be taken, the bill must distinctly charge the insolvency of the judgment creditor. *McLendon v. Hooks*, 15 Ga. 533.

§§ 928, 929. It is said that an injunction will not be allowed to restrain the commission of a trespass where the recovery of damages in an action at law would be an adequate remedy for the inquiries which would result from the trespass, if committed, and that, to authorize such an injunction, the injury threatened must be irreparable. It was said in *Wilson v. Mineral Point*, 89 Wis. 164, that "an injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard." It was further held in that case that the destruction of trees and shrubbery growing upon premises occupied as a home by the plaintiff would be, in a legal sense, an irreparable injury to him.

In this case the plaintiff stated that the cutting down of the trees would damage him to the amount of \$200. But it does not follow that the damages would not be irreparable within the meaning of the law, nor does it appear that plaintiff is willing to suffer the damages for the sum named. The trees cannot be replaced, nor can their benefit to plaintiff, and the comfort and satisfaction he derives from them, be accurately measured by a pecuniary standard. The use which defendant purposes to make of them is not the one for which they were designed, nor the only one for which they are adapted. There are many cases where rights conflict, or where they are in dispute, in which courts of equity will not interfere by injunction to prevent an impending injury, so

long as there is an adequate remedy at law for the injury threatened. But in this case there is no dispute as to the material facts involved, and the respective rights of the parties are known. The plaintiff has an interest in the trees for which he cannot be compelled, at the election of defendant, to accept a money consideration. A person is not obliged to suffer his property to be destroyed at the will of another, even though he may be able to recover ample pecuniary compensation therefor. This is especially true of property like trees, planted for and adapted to a certain use, and serving a special purpose. Their owner has an interest in them which he may protect, and to be deprived of it without his consent would be to suffer irreparable injury within the meaning of the law. It appears in this case that plaintiff has cut down and appropriated a few of the trees which at one time constituted a part of the line of trees in question, but the fact does not authorize defendant to cut down and remove the remainder. The trees cause him some damage, but not sufficient to authorize him to destroy them. The decree of the district court enjoined defendant "from tearing down or interfering with the fence on said line, and from in any manner interfering with said trees." This must be construed in connection with the injury threatened and the relief asked, to enjoin defendant from destroying or in any manner injuring the trees and fence. It was not designed to prevent him from taking care of the trees and maintaining the fence. His right to do so is as great as that of plaintiff.

*The decree of the District Court is affirmed.*

### ARKANSAS SUPREME COURT.

FORT SMITH & VAN BUREN BRIDGE CO. *et al.*, Appts.,  
v.

James D. HAWKINS, Tax Collector of Crawford County.

(...Ark....)

1. The same rule governs as to the boundaries on streams of water of incorporated territories and of lands of individuals.
2. The boundary of an incorporated town or city on a navigable river in Arkansas, like that of an individual proprietor, extends only to high-water mark, although the county boundary goes to the middle of the channel.
3. Only that part of a bridge across a navigable river which is above high-water mark can be taxed by the municipal corporation in Arkansas, although one half of the bridge is within the county in which the municipality is situated.

(May 23, 1891.)

**A**PPEAL by complainants from a decree of the Circuit Court for Crawford County in favor of defendant in a suit brought to enjoin the collection of taxes assessed on complainant's bridge. *Reversed.*

The facts are stated in the opinion.

*Messrs. Clayton, Brizzolara & Forrester*, for appellants:

The plat defining the limits of a city is construed the same as grants by deed, when the boundary is to be ascertained.

*State v. Canterbury*, 28 N. H. 196.

The land so granted was on the margin of the Arkansas River, a navigable stream. Navigable rivers only are meandered.

*Lester, Land Laws*, 714.

The boundary to lands bordering on rivers and lakes is the meandered line established by the government surveyors.

*Granger v. Stuart*, 1 Woolw. 88.

Therefore the common-law doctrine is not applicable to such streams.

*La Plaisance Bay Harbor Co. v. Monroe Common Council*, Walk. Ch. 168.

The American doctrine is that grants of

**NOTE.**—The arguments and authorities on the respective sides of the vexed question as to the extent of title of one owning land on a navigable stream so fully appear in the briefs of counsel in this case that little value could be added to the case 12 L. R. A.

by annotation, especially since the court follows the safe rule of making the general doctrine upon the subject as adopted in a State apply equally to all whether individuals or municipalities.

lands upon navigable rivers, under title derived from the United States, extend only to the margin of the stream.

Gould, *Waters*, §§ 76, 78, and *note 5*; *Goodwin v. Thompson*, 15 Lea, 209, 54 Am. Rep. 410; *Packer v. Bird*, 71 Cal. 185; 1 U. S. Stat. at L. 468, § 9; 2 U. S. Stat. at L. 285, § 17; U. S. Rev. Stat. § 2476; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74; *Stuart v. Clark*, 2 Swan, 1; *Chicago & P. R. Co. v. Stein*, 75 Ill. 41; *Forsyth v. Smale*, 7 Biss. 201; *Haigh v. Keokuk*, 4 Iowa, 199; *The Genesee Chief*, 58 U. S. 12 How. 454, 456, 18 L. ed. 1068; *Tomlin v. Dubuque, B. & M. R. Co.* 83 Iowa, 106; *Wood v. Fowler*, 26 Kan. 662.

And to hold to high-water mark only.

*Hartley v. Crawford*, 81\* Pa. 486; *Stover v. Jack*, 60 Pa. 839, 100 Am. Dec. 569, *note*; *Poor v. McClure*, 77 Pa. 219; *Chapman v. Kimball*, 9 Conn. 40; *McManus v. Carmichael*, 3 Iowa, 54; *People v. Canal Appraisers*, 83 N. Y. 461; *Barney v. Keokuk*, 94 U. S. 825, 24 L. ed. 224; *Pollard v. Hagan*, 44 U. S. 8 How. 212, 11 L. ed. 565; *Arnold v. Mundy*, 1 Halst. 1, 10 Am. Dec. 885, *note* and authorities cited; *Gould v. Hudson River R. Co.* 6 N. Y. 522, 12 Barb. 616; *Langdon v. New York*, 98 N. Y. 144; *Re Staten Island Rapid Transit Co.* 4 Cent. Rep. 515, 108 N. Y. 260; *Packer v. Bird*, 184 U. S. 661, 84 L. ed. 819, 82 Cent. L. J. 294.

The supreme court of this State has followed the American doctrine as above enunciated.

*St. Louis, I. M. & S. R. Co. v. Ramsey*, 8 L. R. A. 559, 58 Ark. 314.

Navigability in fact, and not the ebb and flow of the tide, is the test by which the character of a stream is determined; and the great, but tideless, waters of the State are therefore navigable waters.

*Little Rock, M. R. & T. R. Co. v. Brooks*, 89 Ark. 408; *Newbit v. Garner*, 1 L. R. A. 152, 75 Iowa, 814, 9 Am. St. Rep. 488; *Miller v. New York*, 109 U. S. 885-895, 27 L. ed. 971-975; *Hickok v. Hine*, 28 Ohio St. 528; *Benson v. Morrow*, 61 Mo. 845; *Weise v. Smith*, 8 Or. 445; *Collins v. Benbury*, 3 Ired. L. 277, 88 Am. Dec. 722; *Carson v. Blazer*, 2 Binn. 476, 4 Am. Dec. 468; *United States v. Montello*, 87 U. S. 20 Wall. 430-445, 22 L. ed. 891-896; *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112, 84 Am. Dec. 540, *note*; *Stuart v. Clark*, 2 Swan, 9, 58 Am. Dec. 49; *Packer v. Bird*, *supra*; Washb. Easem. and Serv. 4th ed. pp. 546, 547; *Tiedeman*, Real Prop. § 885; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678-682, 27 L. ed. 442; *Little Rock, M. R. & T. R. Co. v. Brooks*, 89 Ark. 408.

*Messrs. Turner & Turner, Nimrod Turman and E. D. Peirce*, for appellees:

The river being established as the boundary, it makes the City of Van Buren a riparian proprietor on the Arkansas River, and thereby extends the limits of the corporation to the middle of the Arkansas River, not only on the line of the railroad, but at every other point on the thread of the stream opposite the river front of said town.

*Jones v. Boulard*, 65 U. S. 24 How. 41, 16 L. ed. 604; *Howard v. Ingersoll*, 54 U. S. 18 How. 421, 422, 14 L. ed. 206, 207; *State v. Columbia*, 27 S. C. 187; *St. Louis Bridge Co. v. East St. Louis*, 10 West. Rep. 610, 121 Ill. 238.

Chancellor Kent says: "The right of sovereignty in public rivers above the flow of the 12 L. R. A.

tide is the same as in tide water; they are *juris publici* except that the proprietors adjoining such rivers own the soil *ad flum aqua* [referring to Hale, De Jure Maris, chaps. 4-6]. But grants of land bounded on rivers, or upon the margins of the same, or along the same above tide water, carry the exclusive right and title of the grantees to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river."

8 Kent, Com. 18th ed. \*427, *notes* and citations; *Berry v. Snyder*, 3 Bush, 266.

The question of the extent of admiralty jurisdiction has no bearing on the question of riparian rights.

*The Genesee Chief*, 53 U. S. 12 How. 448, 18 L. ed. 1058.

The doctrine that the riparian owner of land is thereby the owner of the soil of the stream to its center applies to the great rivers in this country like the Mississippi, subject to the public easement of passing over the same in boats or river craft, and doing whatever is necessary to use it as a highway.

8 Washb. Real Prop. pp. 358-355, and *notes*; *Dogan v. Seekright*, 4 Lead. Cas. Am. Law Real Prop. pp. 370-376, *note*; *Ex parte Jennings*, 6 Cow. 518, *note*; *The Magnolia v. Marshall*, 89 Miss. 100; *Middleton v. Pritchard*, 4 Ill. 510; *Morgan v. Reading*, 8 Smedes & M. 366; 8 Kent, Com. \*428, *note d*.

The common law, as laid down by Kent, Washburn and other text-writers, and as declared in the opinions just cited, has been recognized by a majority of the American States, and is sustained by a decided preponderance of authority.

See *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 548; *State v. Canterbury*, 28 N. H. 195; *State v. Gilmanton*, 14 N. H. 467; *Claremont Propre. v. Carleton*, 2 N. H. 369; *Pratt v. State*, 5 Conn. 888; *Chapman v. Kimball*, 9 Conn. 88; *Fletcher v. Phelps*, 28 Vt. 362; *Brown v. Chadbourne*, 31 Me. 9; *Vezie v. Doinet*, 50 Me. 479; *Berry v. Carle*, 3 Me. 269; *Spring v. Russell*, 7 Me. 278, 290; *Com. v. Chapin*, 5 Pick. 199; *Bardwell v. Ames*, 23 Pick. 383; *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Pierrepont v. Loveless*, 73 N. Y. 211; *Mott v. Mott*, 68 N. Y. 246; *Luce v. Carley*, 24 Wend. 451; *Canal Fund Comrs. v. Kempshall*, 26 Wend. 404; *Ex parte Jennings*, *supra*; *Varick v. Smith*, 9 Paige, 547, 4 L. ed. 811; *Gavit v. Chambers*, 8 Ohio, 496; *Walker v. Board of Public Works*, 16 Ohio, 540; *June v. Purcell*, 36 Ohio St. 396; *Middleton v. Pritchard*, *supra*; *Illinois & M. Canal Trustees v. Haven*, 10 Ill. 548; *Ensminger v. People*, 47 Ill. 884; *Chicago v. Laflin*, 49 Ill. 173; *Chicago v. McGinn*, 51 Ill. 266; *Hubbard v. Bell*, 54 Ill. 110; *Chicago & P. R. Co. v. Stein*, 75 Ill. 41; *McCormick v. Huse*, 78 Ill. 363; *McNamara v. Seaton*, 83 Ill. 498; *Cobb v. Lavallo*, 89 Ill. 884; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 516; *Bristol v. Carroll County*, 95 Ill. 84; *Washington Ice Co. v. Shortall*, 101 Ill. 46; *Piper v. Connelly*, 108 Ill. 646; *Buttenuith v. St. Louis Bridge Co.* 14 West. Rep. 551, 123 Ill. 535; *Fuller v. Dauphin*, 14 West. Rep. 361, 124 Ill. 542; *The Magnolia v. Marshall*, 89 Miss. 110; *Morgan v. Reading*, 8 Smedes & M. 366; *Ho-*



*mochitte River Comrs. v. Withers*, 29 Miss. 21; *Jones v. Pettibone*, 2 Wis. 808; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295, 46 Wis. 287; *Cohn v. Wauveau Boom Co.* 47 Wis. 814; *Walker v. Shepardon*, 4 Wis. 486, 2 Wis. 884; *Mariner v. Schulte*, 18 Wis. 692; *Cobb v. Smith*, 16 Wis. 666; *Wood v. Hustis*, 17 Wis. 417; *Harrington v. Edwards*, 17 Wis. 586; *Yates v. Judd*, 18 Wis. 118; *Goss v. White*, 20 Wis. 425; *Wisconsin River Imp. Co. v. Lyons*, 30 Wis. 61; *Greene v. Nunnemacher*, 36 Wis. 50; *Olson v. Merrill*, 43 Wis. 208; *Lorman v. Benson*, 8 Mich. 18; *Rice v. Riddiman*, 10 Mich. 125; *Norris v. Hill*, 1 Mich. 202; *Ryan v. Brown*, 18 Mich. 196; *Clark v. Campau*, 19 Mich. 825; *Watson v. Peters*, 26 Mich. 508; *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 182; *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 808; *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 836; *Macwell v. Bay City Bridge Co.* 41 Mich. 453; *Berry v. Snyder*, 8 Bush, 266; *Miller v. Hepburn*, 8 Bush, 826; *Arnold v. Mundy*, 6 N. J. L. 1; *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997; *Rundale v. Delaware & R. Canal Co.* 1 Wall. Jr. 275, 55 U. S. 14 How. 91, 14 L. ed. 389; *Cobb v. Davenport*, 23 N. J. L. 869; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Dickel v. Polk*, 5 Harr. (Del.) 825; *Broune v. Kennedy*, 5 Har. & J. 196; *Ridgely v. Johnson*, 1 Bland, Ch. 816, note; *Baltimore v. McKim*, 3 Bland, Ch. 453; *Casey v. Inloee*, 1 Gill, 480; *Day v. Day*, 23 Md. 530; *Goodsell v. Lawson*, 42 Md. 848; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Young v. Harrison*, 6 Ga. 180; *Jones v. Water Lot Co.* 18 Ga. 539; *Stanford v. Mangin*, 30 Ga. 355; *Hendrick v. Cook*, 4 Ga. 241; *McCullough v. Wall*, 4 Rich. L. 68; *State v. Columbia*, 27 S. C. 187.

This question was never before this court for adjudication until presented in the late case of *St. Louis, I. M. & S. R. Co. v. Rumsey*, 8 L. R. A. 559, 58 Ark. 814, although there has been an unmistakable recognition of the common-law doctrine of riparian ownership.

*Warren v. Chambers*, 25 Ark. 120; *Little Rock, M. R. & T. R. Co. v. Brooks*, 39 Ark. 403.

An examination of the adjudged cases in which it has been sought to abrogate the common-law doctrine that the riparian proprietor on all fresh-water streams takes *ad medium flum*, shows that they are placed upon unsound reasons.

The first reason, viz.: that in England, whence the common-law doctrine came, there were no streams navigable in fact in which the tide did not ebb and flow, is untrue.

Camden, in his *Britannica*, enumerates 553 rivers and streams in England and Wales, of which probably as many as 50 are navigable, the Thames and Severn each being navigable for about 150 miles above tide water for large barges.

An inspection of Lord Hale's Treatise, "*De Jure Maris*," discloses that the distinction between rivers navigable in fact above tide water and rivers navigable in the strict legal sense as being arms of the sea was as familiar to the English judge as to the American jurist.

A second reason, viz.: that, in the United States, the admiralty jurisdiction of the United States has been extended to the great lakes and the large fresh-water streams, while in England 12 L. R. A.

it is limited to waters in which the tide ebbs and flows. That, as an innovation has been made in the common-law doctrine, and the old criterion discarded touching the subject of admiralty jurisdiction, that criterion should be abandoned in determining the rights of riparian owners.

The case of *The Genesee Chief*, 53 U. S. 13 How. 448, 13 L. ed. 1058, which is relied upon as establishing this doctrine, related alone to the question of admiralty jurisdiction on the lakes and rivers, and had not the slightest relation to or bearing on the riparian rights of persons living on the borders of our great navigable rivers.

See *Jones v. Soulard*, 65 U. S. 24 How. 41, 16 L. ed. 604.

A third ground is predicated on the several Acts of Congress making provision for the survey and sale of public lands bordering on public navigable rivers, and on the various federal statutes declaring, in one form or another, that the navigable waters of the United States shall be common highways and forever free.

See *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 273, 19 L. ed. 74.

It was not the purpose of Congress in these enactments to declare any new rules touching riparian proprietorship.

The remarks of the court in *St. Paul & P. R. Co. v. Schurmeier*, *supra*, so far as they are in opposition to the common-law doctrine, are simply *obiter dicta* and are not authority.

*Carroll v. Carroll*, 57 U. S. 16 How. 287, 14 L. ed. 941. See *St. Clair County v. Lovington*, 90 U. S. 23 Wall. 65, 23 L. ed. 62; *St. Louis v. Myers*, 113 U. S. 566, 28 L. ed. 1181; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 389; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 515.

A fourth ground is that the bed of every fresh-water stream, which is navigable in fact, becomes the property of the State on its admission into the Union, and that the grantee of land bounded by such a stream holding under patent from the United States takes only to high-water mark.

*Pollard v. Hagan*, 44 U. S. 8 How. 212, 11 L. ed. 565, upon which this doctrine rests, is confined to tide water. See also *Goodtitle v. Kibbe*, 50 U. S. 9 How. 471, 13 L. ed. 220; *Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269.

The portion of the opinion in *Barney v. Kookuk*, 94 U. S. 324, 24 L. ed. 224 (1876), laying down the rule that on the great fresh-water streams the riparian proprietor's dominion extends only to high-water mark was a dictum pure and simple.

See *Cooley*, Const. Lim. \*525, and authorities there cited.

No good purpose would be furthered by holding that the title to the soil beneath fresh-water streams navigable in fact is in the State.

See *Lorman v. Benson*, 8 Mich. 18; *Taylor v. Armstrong*, 24 Ark. 102; *Packet Company v. Sorrels*, 50 Ark. 466; 2 Dillon, Mun. Corp. 4th ed. § 664 a.

Whatever objections—real or imaginary—may exist to giving the individual riparian proprietor the ownership of the bed of the stream *ad medium flum* as against the public, vanishes when the riparian proprietor is a municipal

corporation—vanishes, not merely because its dominion does not rest for its warrant on title, but also because a municipal corporation is, as it were, the vicegerent of the State itself.

*Arkadelphia v. Windham*, 49 Ark. 189; *Van Buren v. Wells*, 58 Ark. 868.

Public policy and the well being of the inhabitants of the corporation would seem to require that the jurisdictional limits of the City of Van Buren should be co-extensive with those of the County of Crawford on the Arkansas River.

*Hayden v. Noyes*, 5 Conn. 295.

**Battle, J.**, delivered the opinion of the court:

The object of this action is to enjoin the collection of the taxes, which were levied by the City of Van Buren, for the years 1886, 1887 and 1888, upon the bridge of the Fort Smith & Van Buren Bridge Company. The bridge is across the Arkansas River, and one half of it is in Crawford County, in this State, and is in the main line of the Saint Louis & San Francisco Railway Company, and is used by that company in the operation of its trains. It was assessed for taxation, for the years 1886, 1887 and 1888, by the state board of railroad commissioners as a part of the roadbed of the Railway Company, and was valued by them for that purpose at \$268,000. This valuation was added to and included in the assessment of the railway of the St. Louis & San Francisco Railway Company, and \$3,980 thereof, that is to say, of the valuation of the bridge, was apportioned and certified for taxation by Van Buren for the years named. The assessor of Crawford County also assessed the one half of the bridge lying in that county, for the same years, at \$100,000. The portion of the valuation of the state board of railroad commissioners which was apportioned to Van Buren and the valuation of the assessor were entered and extended upon the tax books of Crawford County for each of said years, and a municipal tax of five mills on the dollar levied by the City of Van Buren was assessed and extended against the bridge on such apportionment and the valuation of the assessor on each of said books; and the books, with the taxes so extended, were placed in the hands of the tax collector of Crawford County, with a warrant to each of them attached authorizing him to collect the same. The taxes assessed against the bridge on the apportionment made by the state board were paid. But the railway and bridge companies refused to pay the taxes assessed upon the valuation made by the assessor, and seek by this action to restrain the collection of the same. They allege that the collection of them should be restrained because they say no part of the bridge is in the City of Van Buren. On the other hand, the Collector, the defendant in the action, avers that the entire one half thereof, which is in the County of Crawford, is in that city. The court below held that so much of the bridge as is in the County of Crawford is within the City of Van Buren, and sustained the levy of taxes assessed against the same upon the valuation fixed by the assessor, and held that the taxes assessed and extended on the tax books according to apportionment

made by the state board were illegal, but held that the Bridge Company was entitled to a credit on the taxes found to be lawfully assessed against the bridge for the amount of the taxes so paid, and decreed accordingly and plaintiffs appealed.

Since this court held in *St. Louis & S. F. R. Co. v. Williams*, 58 Ark. 58, that the bridge in question should be assessed for taxation by the assessors of the counties in which it is situated, as the property of the Bridge Company, and not by the state board as the property of the St. Louis & San Francisco Railway Company, there is but one question in the case, and that is, Is the one half of the bridge in Crawford County subject to taxation by the City of Van Buren?

Municipal corporations can levy no taxes, general or special, unless the power to do so be plainly and unmistakably conferred. The power must be given either in express words or by necessary or unmistakable implication. It cannot be deduced by doubtful inferences from other powers, or from any consideration of convenience or advantage. *Vance v. Little Rock*, 80 Ark. 489; 2 Dillon, Mun. Corp. 4th ed. §§ 763, 764, 786; 1 Dillon, Mun. Corp. §§ 69, 90.

The statutes of this State limit the right of a municipal corporation to levy taxes to the real and personal property within the limits of such corporation. *Manst. Dig. § 896*. Was one half of the bridge in question in the corporate limits of the City of Van Buren?

Van Buren is an incorporated town or city in Crawford County, in this State. The boundary line of Crawford County between it and the County of Sebastian is the middle of the main channel of the Arkansas River. The river is navigable as far up as Van Buren, and beyond. The town is situated on the east bank of the river, on the north fractional half of section 25, in township 9 north and in range 33 west. This tract of land originally belonged to Thompson and Drennen. They laid off the town on it, caused a map of the town, so laid off, to be made and filed in the office of the county clerk of Crawford County in 1842. The town so laid off extended to the river. Along the bank of the river, the whole length of the town, is a strip of land marked on the map "reserved," which was not divided into lots and blocks but nevertheless forms a part of the town. This reserve does not belong to the town, but by an agreement with Thompson and Drennen, the town has been permitted to erect a wharf on it, and to collect wharfage from steamboats lying at such wharf.

The town was incorporated by Acts of the General Assembly in 1842 and 1845. The last Act declared its corporate limits to be the same metes and bounds as are designated on the plat of the town on record at the time it was enacted. Acts of 1842, pp. 172, 173; Acts of 1842-45, p. 186. The evidence clearly proves that the plat referred to in the last Act was the map filed by Drennen and Thompson in 1842. The Acts of the General Assembly of April 9, 1869, and of March 9, 1875, regulating the incorporation, organization and government of municipal corporations, made no change in the territorial limits of towns and cities incorpor-

ated at the time of their enactment, but left them as they were. Gantt, Dig. §§ 8201, 8202; Mansf. Dig. §§ 729, 730.

The bridge of the Fort Smith & Van Buren Bridge Company was erected across the river; and one half of it is in Crawford and the other half is in Sebastian County. A part of it extends over a portion of the strip of land marked on the map "reserved" and onto the block designated on the map as block 81.

In order to determine how much of the bridge is in Van Buren, it is necessary to ascertain its corporate limits on the Arkansas River. Is it high-water mark on the bank of the river in Crawford County, or is it low-water mark on said bank, or is it the middle or thread of the stream?

As a rule the same construction that is given to grants of land is given to statutes which prescribe the boundaries of incorporate territories. *Cold Springs Iron Works v. Tolland*, 9 Cush. 492; 1 Dillon, Mun. Corp. 4th ed. § 182, note 1, and cases cited. Following this rule, courts have differed as to the location of the boundaries of such territories on rivers as they have as to like boundaries of grants of land. In those States where grants of land, bounded on fresh-water rivers, carry the title of the grantee to the soil to the middle of the stream, courts hold that like boundaries of incorporated towns and cities extend to the centre of the river; while in other States, where grants of land bounded on navigable rivers, wherein the tide does not ebb and flow, carry the title of the grantee to low-water mark, courts hold that the boundaries of municipal corporations on such rivers extend to low-water mark and no further.

In *Cold Springs Iron Works v. Tolland*, supra, the court, following the rule stated, and saying that a grant of land, bounded on a stream not navigable, carries the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin, and that this is so although the monuments are described as standing on the margin or bank of the stream, held that a statute which made the west bank of Farmington River, a stream not navigable, a boundary or territory incorporated as the Town of Tolland constituted the centre of the stream, and not the edge or margin, the true boundary line.

Announcing the same doctrine and following the same rule, the court in *State v. Canterbury*, 28 N. H. 195, held that towns bounded by or on the Connecticut or Merrimac Rivers, or by lines up or down the rivers, extend to the centre of the rivers. In the course of its opinion, the court remarked: "We think there is much force in the suggestion of the counsel for the State, that the grants of towns to the proprietors, which are merely grants of land, would, of course, follow the ordinary rules of construction; and it could hardly be reasonable to apply a different rule, when the same land is incorporated into a town by a description entirely identical.

In *Jones v. Soulard*, 65 U. S. 24 How. 41, 16 L. ed. 604, the right to the land in controversy depended on the location of the eastern boundary of St. Louis. It appeared that the Town of St. Louis was incorporated in 1809, and that its eastern line as then incorporated was de-

scribed as follows: "thence," meaning from Sugar Loaf, "due east to the Mississippi; from thence by the Mississippi to the place first mentioned." The question was, whether the eastern line of the corporation, as thus described, extended to the middle thread of the Mississippi River, or was it limited to the bank of the channel. Holding that grants of land bounded by fresh-water rivers confer the proprietorship on the grantees to the centre of the stream, notwithstanding the rivers are in fact navigable, the court held that the eastern line of the city was the middle thread of the Mississippi River. *State v. Columbia*, 27 S. C. 187.

In Pennsylvania it is well settled "that when a navigable river, which is held to be a public highway under the common law of this State, is made the boundary of a grant by the Commonwealth, the title passes to low-water mark, but no further; and that it is to small streams not navigable that the principle *usque ad flum aqua* applies." When the City of Wilkesbarre was incorporated, the Susquehanna River, a navigable stream, was made its boundary on the northwest. In *Gilchrist's App.*, 100 Pa. 600, it appears that the City of Wilkesbarre attempted to collect taxes on a body of coal land lying beneath the Susquehanna River. It was contended on the part of the city that its corporate limits extended to the middle or thread of the river. But the court, following the rule as well settled in that State, as to grants of land, held that they did not extend beyond low-water mark, and that the city had no right to impose taxes on the coal land lying outside of its territorial limits. *Johns v. Davidson*, 16 Pa. 512.

This court has never determined the river boundary of an incorporated town or city. But in *St. Louis, I. M. & S. R. Co. v. Ramsey*, 53 Ark. 314, 8 L. R. A. 559, it held that "the owner of land on the margin of a navigable stream in this State, holding under a grant from the United States government, does not take *ad medium flum aqua*, but to high-water mark." We see no good reason why the same rule should not govern in determining the boundaries of incorporated territories. The incorporation of territory, which has been conveyed to an individual, cannot change its boundary lines when the description of the same in the Act of Incorporation and the conveyance are identical. Upon principle and authority the same description defines the boundaries alike in both cases.

The rule applies in this case. The land on which Van Buren stands was originally held by Drennen and Thompson under a grant from the United States. They laid it off into town lots and blocks, streets and alleys, to the Arkansas River, and made a map of it as laid off, and filed it in the clerk's office. Before it was incorporated the high-water mark of the river in Crawford County was the boundary line of the town on the side next to the river. In 1845 the Legislature incorporated to the town the second time, and declared its corporate limits to be "the same metes and bounds as designated" on said map. The high-water mark was thereby made and is still retained, and has remained a boundary line of the incorporated territory.

So much of the bridge, therefore, as extends over the high-water mark in Crawford County is within the corporate limits of Van Buren.

This part, with the approaches thereto, should have been separately assessed, as a part of the entire bridge, by the assessor of Crawford County for taxation by the city for the years 1886, 1887 and 1888. The taxation of more than that for the municipal purposes of the City of Van Buren for the years mentioned was illegal. The city had no power to impose taxes on that part of the bridge which lay outside of its territorial limits.

The decree of the court below is therefore reversed, and this cause is remanded with instructions to the court to ascertain the value of so much of the bridge as is within the corporate limits of the City of Van Buren, at the time it was subject to be valued by the assessor for taxation for the years 1886, 1887 and 1888, and the amount of taxes that would have been due the city had it been assessed at such valuation at said times and the taxes levied by the city for the years named had been assessed against such portion according to such valuation within the times prescribed by law, and to deduct therefrom the taxes paid the city on the part of the valuation of the bridge apportioned to the city by the state board of railroad commissioners,

and upon the payment by the Bridge Company of the balance remaining unpaid and of all the costs in this action, within a reasonable time to be fixed by the court, to perpetually enjoin and restrain the collection of the municipal taxes that were assessed against the one half of the bridge on the assessment and valuation made by the assessor of Crawford County as before stated; and, in the event the amount ascertained to be due the city and said costs are not paid within such reasonable time, to dismiss the complaint of appellants; and, in the meantime and until such reasonable time shall expire, to make an order temporarily restraining the collection of the municipal taxes that have been assessed against the one half of the bridge as before stated; and that, in the event the court shall not be in session in time to restrain the collection, the judge thereof make an order that the temporary restraining order may be issued by the clerk upon the terms the Statute authorizes the issue of such orders.

*The judgment will be entered here in favor of appellee against appellants for the costs of this appeal.*

## ILLINOIS SUPREME COURT.

**METROPOLITAN NATIONAL BANK of Chicago, Appt.,**

v.

**Noble JONES et al.**

(....Ill....)

**Certification of a check by a bank on the payee's application releases the drawer.**

(May 18, 1891.)

**A**PPPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of defendants in an action brought to enforce the drawers' alleged liability on a dishonored certified check. *Affirmed.*

The facts are stated in the opinion.

**NOTE.—Banking; effect of certification of checks.**

The moment the check is certified the funds cease to be under the control of the original depositor and pass under the control of the person who procures the certification of the check drawn in his favor. *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 360; *Thomson v. Bank of British North America*, 52 N. Y. 1; *Girard Bank v. Bank of Penn. Twp.* 20 Pa. 92.

The prohibition in the Revised Statutes of the United States, § 5303, against certifying any check drawn upon a national banking association, unless there is a sufficient deposit at the time to meet the check, does not affect the validity of the contract as between the parties. *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325, 47 Hun, 621. See *National Bank of Xenia v. Stewart*, 107 U. S. 673, 37 L. ed. 322; *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 631, 25 L. ed. 128; *National Bank of Genesee v. Whitney*, 103 U. S. 90, 26 L. ed. 443.

The certifying bank becomes bound for its payment.

**Messrs. Hamline, Scott & Lord**, for appellant:

The precise question presented in this case has never been passed on by our supreme court, but as early as 1860, our supreme court turned its back on the theories entertained by the courts of New York on the subject of checks, and took advanced ground, holding that the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may again be transferred to another by delivery, and when presented to the banker he becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount; provided the party drawing the check has funds to that amount on deposit subject to his check at the time it is presented.

ment, and cannot defeat the right of the holder upon the ground that the drawer has no funds on deposit. *Born v. Indianapolis First Nat. Bank*, 7 L. R. A. 443, and note, 128 Ind. 73.

The payee of a check who receives it from the drawer in the same place where the bank on which it is drawn is located releases the latter, where he presents it and has it certified on the day on which he receives it. *Continental Nat. Bank v. Cornhauser* (Ill. App.) 4 Bkg. L. J. 116.

One who accepts a certified check in the usual course of business does not assume the risk of insolvency of the bank upon which it is drawn, but in case it proves insolvent he may look to the drawer for payment. *Born v. Indianapolis First Nat. Bank*, *supra*.

The acceptance by a creditor of a certified check does not *ipso facto* constitute payment. *Ibid.*; *Merchants Nat. Bank of Boston v. State Nat. Bank*, 77 U. S. 10 Wall. 643, 19 L. ed. 1012. See also note to *National Bank of Commerce v. Chicago, B. & N. R. Co.* (Minn.) 9 L. R. A. 233.

*Muan v. Burch*, 25 Ill. 35; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 402.

Holders of such checks may bring action upon them in their own name.

*Chicago M. & F. Ins. Co. v. Stanford*, 28 Ill. 168.

After the check has passed to the hands of a bona fide holder, it is not in the power of the drawer to countermand the order of payment.

*Union Nat. Bank v. Oceana County Bank*, 60 Ill. 212.

The check operates to transfer the sum therein named to the payee, provided the depositor has on deposit a sufficient sum to pay the check at the time it is presented for payment.

*Merchants Nat. Bank v. Bitteringer*, 20 Ill. App. 29; *National Bank of America v. Indiana Bkg. Co.* 1 West. Rep. 354, 114 Ill. 492; *Woodburn v. Woodburn*, 3 West. Rep. 85, 115 Ill. 480.

The debt is only paid when the money is received from the bank on which the check is drawn or the maker is released by the laches of the payee. In Illinois laches is not imputed unless there has been unreasonable delay in presenting the check for payment and giving notice to drawer of its nonpayment.

*Stevens v. Park*, 73 Ill. 888; *Willette v. Paine*, 43 Ill. 438.

Unreasonable delay is interpreted by our courts to mean that the check must not be presented for payment at the bank on which the same is drawn later than during business hours of the next day after the receipt of the same, providing the bank is located in the same town in which the check is delivered.

*Strong v. King*, 35 Ill. 9; *Bickford v. First Nat. Bank*, 42 Ill. 238.

In view of these rulings as to the effect of the giving of a plain check, there can be no difference between a certified and an uncertified check as regards the liability of the drawer.

*Bickford v. First Nat. Bank*, *supra*.

The check, though certified and used as money, still retains all the characteristics of an inland bill of exchange; being such, the drawer is liable for the amount after notice of presentation, and protest for nonpayment.

*Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497.

*Messrs. Runyan & Runyan*, for appellees:

If the holder of the check presents it, and consents to accept certification by the Bank,

then the holder is clearly absolved from further liability.

Morse, Banks and Banking, 2d ed. p. 311; Bolles, Banks and Banking, p. 289, § 286 a; Dan. Neg. Inst. § 1601; *Born v. Indianapolis First Nat. Bank*, 7 L. R. A. 442, 128 Ind. 78; *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350; *Thomson v. Bank of British North America*, 82 N. Y. 6; *French v. Irwin*, 4 Baxt. 401.

**Bailey, J.**, delivered the opinion of the court:

This was a suit in assumpsit, brought by the Metropolitan National Bank of Chicago against Noble Jones, Edward S. Jones and Walter Metcalf, copartners doing business under the firm name of Noble Jones, to recover the amount of a bank check for \$1,540, drawn by the defendants on the Traders' Bank of Chicago, payable to the order of the plaintiff. The defendants pleaded non-assumpsit, and on trial before the court, a jury being waived, the issues were found for the defendants, and the court, after denying the plaintiff's motion for a new trial, gave judgment in favor of the defendants for costs.

The facts appear by stipulation, and are, in substance, as follows: On the 1st day of October, 1888, after the commencement of banking hours in the morning of that day, the defendants, being indebted to the plaintiff in the sum of \$1,540, gave to the plaintiff their check on the Traders' Bank of Chicago, as follows:

"Edw. S. Jones, \$1,540.00. Walter Metcalf.

"Noble Jones.

"Chicago, Cook Co., Ill., Oct. 1, 1888.

"Pay to the order of Metrop. Nat'l Bank fifteen hundred and forty dollars.

"To Traders' Bank,

"Chicago, Ill.

"No. 18, 128.

Noble Jones."

On the same day, and during banking hours, the plaintiff sent said check by one of its collectors to the Traders' Bank, and asked said bank to certify it, which was done by writing across the face of it as follows:

"Certified. 10, 1, 1888. Traders' Bank of Chicago. Charles G. Fox."

The next morning, during banking hours, but before clearing-house hours, the plaintiff sent said check by its collector to the Traders'

#### *Must be indorsed by payee.*

A bank which certifies a check thereby contracts that it will retain and apply the money in payment if the check is indorsed by the payee, but it is not liable to one taking it without such indorsement, even if he is a bona fide holder for value. *Goshen Nat. Bank v. Bingham*, 7 L. R. A. 506, 118 N. Y. 349; *Lynch v. First Nat. Bank of Jersey City*, 9 Cent. Rep. 564, 107 N. Y. 138.

Since a bank induced by fraud to certify a check is not liable to one who purchased the check without indorsement, it cannot maintain an action against the purchaser to recover possession of the check. *Goshen Nat. Bank v. Bingham*, *supra*.

The purchaser of a certified check payable to order, who obtains title without indorsement by the payee, holds it subject to all equities and defenses between the original parties, even though he has paid full consideration therefor. *Ibid.*, citing *Harrop v. Fisher*, 30 L. J. C. P. N. S. 233; *Whistler* 12 L. R. A.

*v. Foster*, 14 C. B. N. S. 246; *Savage v. King*, 17 Me. 301; *Clark v. Callison*, 7 Ill. App. 263; *Haskell v. Mitchell*, 58 Me. 468; *Clark v. Whitaker*, 50 N. H. 474; *Caldor v. Billington*, 15 Me. 308; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 12; *Gilbert v. Sharp*, 3 Lana. 412; *Hedges v. Sealy*, 9 Barb. 214; *Franklin Bank v. Raymond*, 3 Wend. 69; *Raynor v. Hoagland*, 7 Jones & S. 11; *Muller v. Pondir*, 55 N. Y. 326; *Freund v. Importers & T. Nat. Bank*, 76 N. Y. 332; *Central Trust Co. of New York v. First Nat. Bank of Wyandotte*, 101 U. S. 63, 25 L. ed. 376; *Osgood v. Art*, 17 Fed. Rep. 575.

The maker or acceptor of a negotiable instrument is not estopped from contesting its validity, because of representations contained in the instrument itself. *Clark v. Sisson*, 23 N. Y. 312; *Bush v. Lathrop*, 23 N. Y. 535; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Fairbanks v. Sargent*, 5 Cent. Rep. 919, 104 N. Y. 108; *Mechanics Bank v. New York & N. H. R. Co.* 13 N. Y. 633.

Bank, and presented it for and demanded payment, which was refused. Thereupon, on the same day, and during banking hours, the plaintiff protested said check for nonpayment, and sent notice of dishonor to the defendants. On the morning said check was presented for payment, and before it was presented, and before clearing-house hours, the Traders' Bank became insolvent, and suspended payment, and its assets were subsequently placed in the hands of a receiver, who has since had possession thereof. Said receiver has paid the creditors of said bank dividends at different times, those paid to the plaintiff amounting to \$698, leaving a balance, principal and interest, due on said check at the time of the trial of \$961.70. At the time said check was drawn, at the time it was certified and at the time payment was demanded the defendants had sufficient funds in the Traders' Bank to their credit to pay the check, and, if payment had been demanded instead of certification, said bank would have paid it. Upon these facts the counsel for the plaintiff submitted to the court the following proposition, to be held as the law in the decision of the case, which was refused: "The court holds, as a proposition of law, that when the holder of a check drawn upon a bank, situated in the same city as the holder, on the day of its issue takes said check to said bank and asks said bank to certify said check, which said bank certifies by marking 'Certified' on the face thereof, and the day following, during bank hours, presents said check to said bank for payment, and the bank refuses payment thereof, having become insolvent and passed into the hands of a receiver before banking hours of said day, and the holder of said check at once, and during banking hours of said day, gives notice of such dishonor to the drawer of said check, said certification does not release the drawer of said check, although at the time of the making and certification of said check the drawer had sufficient funds to his credit in said bank to pay the same, and, if payment had been demanded by the holder instead of certification, such bank could not have refused to pay the same."

The only question presented by this appeal is the one raised by the foregoing proposition, viz., whether the plaintiff, by obtaining certification of said check, released the drawers. A check being payable immediately and on demand, the holder can only present it for payment and the bank can fulfill its duty to its depositor only by paying the amount demanded. In other words, the holder has no right to demand from the bank anything but payment of the check, and the bank has no right, as against the drawer, to do anything else but pay it. It follows that there is no such thing as "acceptance" of checks, in the ordinary sense of the term, for "acceptance" ordinarily implies that the drawer requests the drawee to pay the amount at a future day, and the drawee "accepts" to do so, thereby becoming the principal debtor, and the drawer becoming his surety. Dan. Neg. Inst. § 1601. If, then, the holder, on making presentment of the check, instead of demanding and receiving payment, has the check certified and retains it in his possession, he enters into a new and express contract with the bank not within the

scope of the legal relations of the parties, nor within the presumed intention of the drawer. By certification, the bank enters into an absolute undertaking to pay the check when presented at any time within the period prescribed by the Statute of Limitations. The transaction, as between the holder and the bank, is substantially the same, in legal effect, as though the holder had received payment, and had deposited the money with the bank, and received a certificate of deposit therefor. The liability of the bank, after certification, is independent of the question of its possession of the requisite amount of funds of the drawer; it being, by the act of certification, estopped to deny the possession of sufficient funds. Another result of the transaction is that the bank thereby becomes entitled to, and if its business is properly conducted actually does, charge the amount of the check to the account of the drawer at the time of the certification; thus in reality appropriating to the payment of the check the necessary amount of the money on deposit to the credit of the drawer, precisely the same as though the check were paid. As between the bank and drawer, certification has the same effect as payment, the funds representing the amount of the check being just as effectually withdrawn from the control of the drawer, and the indebtedness from the bank to the depositor created by the deposit being just as effectually satisfied to that amount in one case as in the other. The question whether this change in the rights and relations of the parties should be held to discharge the drawer from further liability on the check has not, so far as we are aware, ever been before this court for decision, but the great weight of authority, as found in the decisions of courts of other jurisdictions and in the treatises of law-writers of the greatest learning and ability, is in favor of the conclusion that the drawer is discharged. Mr. Daniel, in the section of his treatise above cited, lays it down as the rule that the bank, by certifying the check, becomes the principal and only debtor; that the holder, by taking a certificate of the check from the bank, instead of requiring payment, discharges the drawer; and that the check then circulates as the representative of so much cash in bank payable on demand to the holder. The question is very elaborately and learnedly discussed in 1 Morse, Banks and Banking, 8d ed. § 414 *et seq.*, and the same conclusion reached, the following being a portion of the reasoning there adopted: "The drawer can no longer sue, though the bank should finally refuse to pay the check, for he has originally only a right to demand that the check shall be duly paid on presentment, and his action lies for the damage resulting to him or to his credit from not having his debt duly discharged in the manner he has led his creditor to suppose would be sufficient. But if the holder waives his right to immediate payment, by expressly asking for or even by accepting the offer of a certification by the bank, it follows that, since his act acquits the debt due him from the drawer, the drawer can thereafter have no cause or basis whatsoever on which to sue. The matter is voluntarily taken out of his hands by the other parties, who make their arrangements to suit their own convenience. Even if the drawer has suggested or

requested the arrangement, the assent of the payee and holder must be regarded as at his sole risk. He is not obliged to take the bank's promise in place of the drawer's indebtedness. The promise of the bank on the drawer's account, accepted as satisfactory by the creditor, discharges the debtor, and at the same time deprives him of all further concern or possible right of action in the premises." See also Tiedeman, Com. Paper, § 436. This question was before the Court of Appeals of New York in *First Nat. Bank of Jersey City v. Leach*, 53 N. Y. 850, and it was there held that, where a holder of a check presents it and procures it to be certified by the bank instead of being paid, such certification is, as between the holder and the drawer, a payment, and discharges the drawer from liability. In discussing the grounds upon which its decision is based, the court says: "When the drawee accepts, it is an appropriation of the funds, *pro tanto*, to the service and use of the payee or other person holding the bill, so that the amount ceases henceforth to be the money of the drawer, and becomes that of the payee or other holder in the hands of the acceptor. It is entirely clear that the acceptance of a time draft, before due, does not operate as a payment as respects the drawer. Its only effect is to make the acceptor the primary party to pay the draft. But the parties to a certified check, due when certified, occupy a different position. There the money is due and payable when the check is certified. The bank virtually says that the check is good. 'We have the money of the drawer here ready to pay it. We will pay it now, if you will receive it.' The holder says: 'No; I will not take the money. You may certify the check, and retain the money for me until this check is presented.' The law will not permit a check when due to be thus presented, and the money to be left with the bank for the accommodation of the holder, without discharging the drawer. The money being due, and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check, subject to its future presentation at any time within the Statute of Limitations." See also *Essex County Nat. Bank v. Bank of Montreal*, 7 Biss. 198.

It seems to us very clear, both upon principle and authority, that the plaintiff in this case, by obtaining certification of their check, discharged the defendants from all liability thereon as drawers, and that the subsequent presentation of the check for payment, though on the next business day after the check was issued, did not revive or in any manner affect the defendants' liability.

But it is said that a different rule was laid down by this court in *Bickford v. First Nat. Bank*, 43 Ill. 283; *Rounds v. Smith*, Id. 245, and *Brown v. Lickie*, 43 Ill. 497. It will be found, on examination, that in each of those cases certification of the check was obtained by the drawer before delivery to the payee, and that no presentment was made by the holder until made in due course for payment. It is easy to see that an essentially different rule should apply in a case of that kind. The fact that the drawer, before delivering the

check, gets the bank to certify it, in no way changes its essential nature as a check, or affects the drawer's liability in case, on due presentation for payment, the paper is dishonored. The reasoning of the opinion in the above-mentioned cases should be restricted in its application to the facts appearing in those cases, and as applied to those facts, it is doubtless correct and should be followed. But it cannot, and, as we may assume, was not intended to, apply to cases like the present, where the holder has himself made presentment of the check, and, instead of receiving payment, as he might and should have done, has chosen rather to accept, in lieu of payment, an express executory agreement by the bank to pay the check to the holder when presented for payment at any time thereafter.

Much effort is made by counsel to show that, to be consistent with the doctrine established by the case of *Munn v. Burch*, 25 Ill. 85, and in the numerous cases in which that decision has been followed, we must hold that the defendants were not released from liability by the certification of the check. In *Munn v. Burch* we held, contrary to the rule recognized in many of the States, that a depositor, by delivering to another his check on his banker for value, transfers to the payee of the check and his assigns so much of the deposit as the check calls for, and that on presentation of the check for payment, the banker becomes liable to the holder for that amount, provided the drawer has on deposit at the time a sufficient sum applicable to that purpose to pay the check. Accordingly, if the banker refuses to pay the check on presentment, he becomes liable to an action by the holder to recover its amount. It follows that the giving of the check becomes, at least after presentment, an assignment to the holder of a sufficient amount of the deposit to pay the check, and therefore a definite appropriation of that sum to its payment binding upon all the parties to the check. The argument sought to be made, if we understand it, is that the certification of the check is a no more effectual appropriation of the fund on deposit to the payment of the check than was already made by the act of the drawer in giving the check, and therefore that one of the chief grounds upon which the rule adopted in other States, that certification releases the drawer, is based, fails or is inapplicable here. If the mere fact of such appropriation, however made, is the test by which to determine whether the drawer has been released or not, there may be force in the argument. We do not understand, however, that such is the case. Some of the authorities, it is true, allude to and dwell upon that circumstance as possessing very considerable significance, but we do not understand that any of them make it the test or basis of the rule. The rule laid down in *Munn v. Burch* is based upon the implied agreement on the part of the banker to pay out the money deposited to the holders of the depositor's checks, at such times and in such sums as the depositor sees fit, by his checks, to order, and such agreement is held to be so far available to the holder of the depositor's check as to enable him, after the check has been duly presented for payment and payment refused, to bring suit against the banker n

his own name, and recover the amount of the check. The banker, as the result of his implied agreement, becomes the principal debtor, but the drawer is still liable, at least as surety, and is at liberty at any time, by paying and taking up the check, to reinvest himself with the legal title to the money on deposit. The appropriation of the fund, then, so far as any definite appropriation of it can, under the circumstances, be said to be made, is only conditional, and follows in strict accordance with the terms of the contract between the parties, and must be regarded as one of the consequences contemplated by them at the time the check was drawn. But where the holder of the check, on presenting it to the banker, instead of demanding and receiving payment, as the parties contemplated and as is his legal duty, requests and obtains certification, and retains the check in his own hands, wholly different rights are obtained, and consequently different rules of law are applicable. The appropriation of the deposit to the payment of the check then becomes absolute, and the holder enters into new contractual relations with the banker, not contemplated or authorized by the drawer, and which place the fund appropriated wholly beyond his control and out of his reach. Even viewing the drawer as surety, the new contract between the creditor and the principal debtor, affecting as it does the character of the debt and the time and manner of payment, should of itself be held, upon well-settled principles of law, to be sufficient to discharge his liability as surety. But, whether the decision of the case should be placed upon this ground or not, the presentment of the check for payment and its dishonor on the one hand, and its presentment and certification on the other, involve legal rights, and invoke the application of legal rules, so essentially different that the doctrine of the case of *Munn v. Burch*, which is controlling where payment is demanded and refused, can have no relevancy to or controlling effect, even by analogy, in a case where the holder gets the check certified. We are of the opinion that no error was committed in refusing to hold the proposition submitted by the plaintiff as the law in the decision of the case, and that the appellate court properly affirmed the judgment.

*The judgment of the Appellate Court will accordingly be affirmed.*

SLOAN, *Appt.*,

v.

WILLIAMS *et al.*

(....Ill.....)

**1. A lawyer cannot make a valid assignment of a contract giving him an op-**

**NOTE.**—Contracts for personal services requiring special skill and knowledge are not assignable.

A contract to be carried out by the exercise of personal skill cannot be so assigned as to compel the other party to the contract to accept performance by the assignee. *Munsell v. Temple*, 8 Ill. 98; *Lansden v. McCarthy*, 45 Mo. 108; *Bethlehem v. Annis*, 40 N. H. 84; *Joalyn v. Farlin*, 54 Vt. 670; 12 L. R. A.

tion to purchase certain lands in consideration of the use of his professional skill in removing clouds on the title unless the contract has been fully performed on his part.

**2. A widow cannot be compelled to release her dower in lands sold by her husband by a contract which she did not sign.**

(May 13, 1891.)

**A** PPEAL by complainant from a decree of the Superior Court for Cook County in favor of respondents in a suit brought to compel specific performance of a contract to convey land. *Affirmed.*

The facts are stated in the opinion.

*Mr. H. H. Anderson* for appellant.

*Mr. John M. Hamilton* for appellees.

**Magruder, J.**, delivered the opinion of the court:

This is a bill originally filed in the Superior Court of Cook County on February 7, 1888, by the appellant against one John Williams, for the specific performance of a contract for the conveyance of land. On March 26, 1888, the death of John Williams was suggested, and, he having died intestate, a supplemental bill was filed making his widow, heirs and administratrix parties defendant. A demurrer filed to the supplemental bill was sustained, and final decree entered dismissing the bill for want of equity. On March 11, 1885, a written contract was entered into between George A. Du Puy, an attorney-at-law, and the said John Williams, by the terms of which Du Puy agreed to take all such steps as might be necessary to perfect the title of Williams to certain lots in Ravenswood, in Cook County, by filing bills to remove clouds, procuring releases, holding possession by repairing fences and posting sale-boards, etc., and to do all the work incident to carrying out the contract, and that he should not receive any remuneration of any sort except that he should have the option to buy or sell said lots as therein set forth, and should not be required to furnish any money; and Williams agreed to furnish money to discharge liens, redeem from tax sales, pay trustee's charges, and costs necessary to set aside tax titles; and that Du Puy, in consideration of the services to be rendered by him, should have the sole privilege of purchasing any one or more of said lots, or of effecting a sale of any one or more of them to such party as he might desire, at the price of \$500 each, for the space of eighteen months from the time when everything necessary to make the title perfect in Williams shall have finally been done, said price to be paid in cash, or one quarter thereof in cash and the balance in three years, and to be secured by mortgage on the premises, or "said sale may be upon any other terms which said John Williams may deem satisfactory to himself." The contract also contains provis-

*The Lizzie Merry*, 10 Ben. 140; *Robson v. Drummond*, 2 Barn. & Ad. 808.

A contract of an attorney for professional services cannot be assigned without the consent of the client; and the client may, in case of such assignment, declare the contract at an end. *Hilton v. Crooker* (Neb.) 1 Neb. L. J. 882.

Executory contracts which stipulate solely for



ions that Williams will pay all taxes and special assessments due when the sale is made, and will furnish to the purchaser an abstract of title, and will convey said lot or lots by deed covenanting against his own acts, and containing "usual release of all right of dower and homestead which any person may have in any one or more of said lots so sold." The bill sets forth the contract in full, and alleges that on December 28, 1886, Du Puy, for value received, duly assigned in writing to the complainant, Sloan, all his right, title and interest in said contract, and rights and benefits thereunder, and that, by virtue of such assignment, all the rights and interests of Du Puy accrued to the complainant. The bill further avers that Williams was bound, under the agreement and the assignment thereof, on the payment or tender to him of \$500, to convey to complainant, by deed "which should contain the usual release of all right of dower and homestead which any person might have in or to said lot;" that, at different times in the spring and summer of 1887, complainant tendered to Williams, in his own name and in that of Du Puy, said sum of \$500, and demanded that he furnish an abstract of title, "and also that he so deliver to your orator such a deed, as above specified." The bill also offers to bring the \$500 into court in payment for "the said conveyance, as aforesaid."

The main ground of objection to the bill is that the contract which it seeks to enforce is one which calls for the personal services and skill of one of the parties thereto, and therefore is not assignable. We think that this objection is well taken, and that the demurrer to the bill was properly sustained. Du Puy was a lawyer by profession, and, by the terms of the contract, was required to make use of his professional skill in perfecting the title to the lots by instituting and carrying on legal proceedings to remove clouds, by procuring releases, and by the use of other methods. The contract itself upon its face does not provide for any assignment of it. It is well settled that "contracts in which the personal acts and qualities of one of the contracting parties form a material ingredient are, in general, not assignable." 2 Chitty, Cont. 11th Am. ed. p. 1868. Engagements for personal services requiring skill, science or peculiar qualifications may not be assigned. *Devlin v. New York*, 68 N. Y. 8.

A party who thus agrees to use his personal skill and knowledge, and has been contracted with by reason of the trust and confidence placed in him personally, cannot, while the agreement is still executory, substitute another in his place by assignment, in order to perform the service, without the consent of the other contracting party. *Flanders v. Lamphear*, 9 N. H. 201; *Bethlehem v. Annis*, 40 N. H. 34; *Burger v. Rice*, 8 Ind. 125; 8 Pom. Eq. Jur. § 1275, note 2.

The granting of the specific performance of

a contract is a matter of "sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case." 8 Pom. Eq. Jur. § 1404. Such discretion will not ordinarily be exercised in favor of the specific enforcement of contracts for personal services. 8 Parsons, Cont. marg. p. 387; Fry, Spec. Perf. 8d ed. pp. 43, 96; *Sturgis v. Galindo*, 59 Cal. 28. It is true that, after the contract has been executed by the person agreeing to perform such personal services or exercise such personal skill, he may assign the right to recover compensation. 8 Pom. Eq. Jur. § 1275, note 2.

But the bill in the present case is indefinite in its allegations as to the complete performance of the contract by Du Puy before the assignment of it to Sloan. The contract requires steps to be taken to perfect the title of five lots. The right to purchase any one of the lots for \$500 was dependent upon the final securing of a perfect title to them all. The bill alleges that the title to one of these lots was "under a cloud by certain tax sales and alleged tax titles," and that a bill in chancery was filed against "the pretended owner of the said pretended tax titles for the purpose of removing the same." It does not appear from the bill that the decree which was obtained was a decree removing the tax titles from all the five lots. Nor does it sufficiently appear from the allegations of the bill that there were no other clouds than tax titles upon the lots in question. The bill shows affirmatively that the assignment was made before the final termination of the proceeding to remove a tax title from one of the lots.

Moreover, the supplemental bill proceeds upon the theory that Mrs. Williams, the widow, was obliged to release her dower in the lot selected by the appellant after her husband's death. She did not sign the contract made by Du Puy with her husband. Where a husband makes a written contract, in which his wife does not join, to sell a piece of land, and dies after the payment to him of all the purchase money, but before he has executed a deed, the Statute authorizes a court of chancery to make an order compelling his executor or administrator to execute and deliver a deed to the purchaser (1 Starr & C. Ann. Stat. p. 566; Rev. Stat. chap. 29, §§ 2, 3); but the widow cannot be compelled to join in such deed so as to release her dower in the premises. If the husband has covenanted that his wife's dower shall be released, the heirs may be liable upon the covenant in case the widow enforces her dower right against the premises (*Bostwick v. Williams*, 86 Ill. 65); but the widow cannot be deprived of her dower otherwise than by her voluntary conveyance thereof in the mode prescribed by the Statute. Rev. Stat. chap. 41, § 16; *Francisco v. Hendricks*, 28 Ill. 64.

The decree of the Superior Court is affirmed.

the special personal services, skill or knowledge of a contracting party, are not assignable. 8 Pom. Eq. Jur. 284, citing *Weire v. Davenport*, 11 Iowa, 49; *Wheelock v. Lee*, 64 N. Y. 242; *Hoyt v. Thompson*, 5 N. Y. 320; *Haight v. Hayt*, 19 N. Y. 464; *Byxle v. Wood*, 24 N. Y. 607; *Graves v. Spier*, 58 Barb. 349; *Butler v. New York & E. R. Co.* 22 Barb. 12 L. R. A.

110; *Bank of California v. Collins*, 5 Hun. 208; *Tyson v. McGuiness*, 26 Wis. 656; *White v. Com.* 89 Pa. 167; *Devlin v. New York*, 68 N. Y. 17; *Wentworth v. Cook*, 10 Ad. & El. 42. See notes to *William Rogers Mfg. Co. v. Rogers* (Conn.), 7 L. R. A. 779; *Cort v. Lassar* (Or.) 6 L. R. A. 653.

## INDIANA SUPREME COURT.

CITIZENS STREET R. CO. *et al.*, *Appts.*,  
v.

Charles F. ROBBINS, Admr., etc., of Henry  
M. Catherwood, Deceased.

(.....Ind.....)

1. Although the common-law right of the administrator to dispose of decedent's personal property does not exist and the terms of an order of court allowing property to be disposed of at private sale must be strictly complied with, yet an approval of the sale by the court is not necessary to pass the title if the court's order does not require a confirmation; the title passes upon the purchaser's compliance with the terms of the sale.
2. A private sale, by an administrator, of personal property of the decedent upon a credit of ten years with the purchaser's individual note as security is void if made under an order of the court which permits a private sale but directs the taking of good and sufficient security for payment of purchase money without naming the time of credit to be allowed, where the statute only allows a credit of one year.
3. Before a corporation can safely permit a transfer, upon its books, of stock which belonged to a deceased person, and which it knows has been directed by order of court to be sold by the administrator at private sale, it should ascertain whether or not such a sale has been made under the order as vests title in the purchaser; if it fails to do so it is liable to make good any loss occasioned by its permitting the transfer.
4. One who in good faith and without notice purchases in the market a certificate of stock which has been wrongfully issued by the corporation in lieu of certificates which belonged to a decedent's estate and which were not legally sold and disposed of by the administrator, receives a good title as against the decedent's estate if there was nothing on the face of the certificate to put him on inquiry or to give him notice of the infirmity of the title. Such purchaser cannot be required to make an examination of the records to ascertain the validity of the title before he can safely purchase it.
5. Permitting a paper to be read in evidence which was set out in the complaint, and thus made a part of the record in the cause, cannot be detrimental to the objecting party so as to constitute reversible error.

(January 6, 1891.)

**A** PPEAL by defendants from a judgment of the General Term of the Superior Court for

Marion County reversing a judgment of the Special Term in favor of plaintiff in an action brought to recover possession of certain certificates of shares of corporate stock or damages for their detention. *Reversed in part. Affirmed in part.*

The facts are stated in the opinion.

*Messrs. H. C. Allen and Winter & Elam,*  
for appellants:

Personal property in Indiana goes to the administrator, and title thereto is derived from him upon a sale.

*Thomason v. Brown*, 48 Ind. 208; *Ounningham v. Bazley*, 96 Ind. 867; *Smith v. Ferguson*, 90 Ind. 229.

A sale of such property by an administrator needs no confirmation by a court, even where the statute requires a report thereof.

*Wood's App.* 92 Pa. 879; *Nutting v. Thomason*, 46 Ga. 84; *Robert v. Casey*, 25 Mo. 584; *Moffitt v. Moffitt*, 69 Ill. 649; *Bowen v. Bond*, 80 Ill. 351; *Watt v. Scott*, 8 Watts, 79.

If there be any irregularity in such sales, the title of the purchaser is not affected, except in a proceeding against him directly.

*State v. Salyers*, 19 Ind. 482; *Doe v. Heath*, 7 Blackf. 154; *Allen v. Shannon*, 74 Ind. 164; *Lovely v. Speisshoffer*, 85 Ind. 454; *Jones v. Kokomo Bldg. Assn.* 77 Ind. 840.

A purchaser at such a sale may presume that the officer has done his duty, and if there is a judgment and execution authorizing the sale the purchaser may presume that the directions of the court and the provisions of the law have been followed by the officer.

*Frakes v. Brown*, 2 Blackf. 295; *Doe v. Smith*, 4 Blackf. 228; *Givan v. Doe*, 5 Blackf. 260.

Any sale of personal property may be voidable, and yet the fraudulent vendee can convey a perfectly good title to a purchaser in good faith.

*Gwinn v. Williams*, 80 Ind. 874; *Parriah v. Thurston*, 87 Ind. 437; *Ourms v. Rauh*, 100 Ind. 247; *Alexander v. Snackhamer*, 2 West. Rep. 654, 105 Ind. 85.

A purchaser of shares of stock of an incorporated company, which he finds in the market for sale, without any indication upon them of any infirmity of title in the person who holds them with all the indicia of ownership, is not obliged to trace the transfers of such property, and inquire into the proceedings of administrators and others who may at some time have sold the same, and ascertain at his peril whether there was any fraud or irregularity in such sales.

*Mount Holly L. & M. Turnp. Co. v. Ferree*,

**NOTE.**—*Estates of deceased; sale of choses in action.*  
The power of an executor or administrator at common law to sell the personal estate of decedent is in some of the States regulated by statute, for their protection. *Clark v. Blackington*, 110 Mass. 374.

So the probate court may order a part or the whole of the personal estate of the deceased to be sold by public auction, or at private sale. *Crosswell, Executors and Administrators*, 256.

In some States the power to sell personal estate is limited by statute. *Kennedy's Estate*, 25 Pittsb. L. J. 185.

12 L. R. A.

All choses in action belonging to a testator at the time of his death pass, on his death, to his executor, even though they are given as a specific legacy; and the executor has an absolute power of disposal over the whole of his testator's personal effects, including such things as are given by way of specific legacies. *Hayes v. Hayes*, 35 N. J. Eq. 461.

With the exception that it has been limited to such property of the decedent as is visible and tangible, the power of executors and administrators to dispose of all the personal property remains as at common law. *Weider v. Osborn* (Or.) Jan. 6, 1891.

17 N. J. Eq. 117; *Johnston v. Lafin*, 108 U. S. 800, 26 L. ed. 583.

Upon all the facts known to the Company, and with a knowledge of which it was chargeable, it was fully authorized to transfer the stock to Carlisle, or, if he preferred, to issue to him new stock in lieu thereof.

*Loring v. Salisbury Mills*, 125 Mass. 188; *Fisher v. Brown*, 104 Mass. 259; *Shaw v. Spencer*, 100 Mass. 882; *Orocker v. Old Colony R. Co.* 137 Mass. 417; *Hutchins v. State Bank*, 12 Met. 421; *Merchants Bank v. Livingston*, 74 N. Y. 228; *Pierce, Railways*, p. 118.

*Mr. U. J. Hammond* also for appellants. *Messrs. McDonald, Butler & Snow, S. M. Shepard, R. N. Lamb, Howard Cale and Ralph Hill* for appellee.

**Coffey, J.**, delivered the opinion of the court:

The amended complaint in this cause consists of two paragraphs. The first alleges substantially, among other things, that Henry H. Catherwood, deceased, at the time of his death was the owner of 308 shares, of the par value of \$100 each, of the capital stock of the Citizen's Street Railway Company; that he died intestate on the 31st day of August, 1873, leaving as his only surviving heirs-at-law Lucy D. Catherwood, his widow, since married to one Phelps, and two infant children, namely, Ellen B. and John C. Catherwood; that said Lucy D. Catherwood was duly appointed and qualified as the administratrix of the estate of the said Henry H. Catherwood, deceased, and on the 12th day of July, 1878, upon petition to the Circuit Court of Marion County, procured the following order from said court, namely:

"Comes now Lucy D. Catherwood, administratrix of Henry H. Catherwood's estate, and files her petition praying that she be allowed to dispose of 308 shares of the stock of the Citizen's Street Railway Company of Indianapolis, of the par value of \$100 per share, and which has been appraised at the value of fifteen cents on the dollar, and to sell the same at private sale for the appraised value thereof; and now the court having heard said petition and being fully advised in the premises and satisfied that the interests of said estate will be best served by selling the same at private sale, the said administratrix is therefore ordered and empowered to sell the said stock at private sale for the appraised value thereof, taking good and sufficient security for the payment of the purchase money; and said administratrix is further ordered to make a return of her proceedings within ninety days from this date."

That the administratrix made no sale of said stock whatever pursuant to the terms of said order, and made no sale of said stock in compliance with the terms of the statutes of the State of Indiana regulating the sale of personal property of a decedent's estate at private sale; nor did she make any sale of said stock at public sale; that she, without any authority so to do, assigned and delivered to one John Carlisle said certificate of stock, without receiving any pay therefor, and without taking any security of any sort for the payment of the purchase money therefor, taking merely as evidence of said attempted sale, and of the supposed indebtedness therefor, the promissory note of

Carlisle for \$6,160, due ten years from date, no part of which note has ever been paid; that no return of said attempted sale to Carlisle, nor of any sale of said stock, nor of the proceedings of the administratrix in reference thereto, was ever made to the court, and no entry in relation thereto was ever made; that after the attempted sale to Carlisle, the administratrix made out, under oath, a return of said sale, to the effect that she had sold said stock to John Carlisle for the sum of \$6,160 for cash; but the same was never filed or approved by the court; that long after the attempted transfer of said stock to Carlisle the Street Railway Company, upon his request, wrongfully issued certificates for said stock to him, and that he, about the year 1875, sold and assigned the same to appellant Tom. L. Johnson, who bought the same with knowledge that they were issued in lieu of the certificates formerly held by Henry H. Catherwood, deceased; and that said stock had belonged to his estate, and with knowledge of the order for the sale of the same above set out, and with knowledge that no return of said sale had been made and confirmed by the court; that at the time he so purchased said stock he was a stockholder and director in said Street Railway Company; that said Street Railway Company has declared dividends in a large sum, which have been paid to the said Carlisle and the said Tom. L. Johnson, and that before the commencement of this suit the appellee demanded said stock of the appellants and each of them, which they each refused to surrender.

The second paragraph of the amended complaint does not differ materially from the first, except in that it alleges that on the 16th day of July, 1878, the Citizen's Street Railway Company, upon the request of Carlisle, having knowledge of the fact that said stock belonged to the estate of Henry H. Catherwood, and having knowledge of the pending administration of said estate and of the order of sale of said stock and the terms thereof, and having knowledge of the fact that no return of any sale under said order had as yet been made to the court, wrongfully issued certificates of stock to Carlisle, who sold and assigned the same to Johnson.

To this complaint the appellant the Citizen's Street Railway Company filed an answer consisting of three paragraphs. The third paragraph avers, substantially, that on the 16th day of July, 1878, Lucy D. Catherwood, as the administratrix of the estate of Henry H. Catherwood, obtained the order set out in the complaint, authorizing her to sell the 308 shares of the capital stock of the Citizen's Street Railway Company named in the complaint; that said stock was represented by certificates numbered 96, 97, 98, 99, 100 and 101, for fifty shares each, issued to H. H. Catherwood November 18, 1867, certificates numbered 38, 35 and 36 for one share each, issued to E. B. Martindale February 18, 1865, and indorsed in blank by Martindale, and certificate numbered 87 for five shares, issued to R. B. Catherwood February 18, 1865, which was indorsed in blank by said Catherwood; that said Lucy D. Catherwood, as authorized and empowered as such administratrix to sell said stock at private sale, made the following indorsement upon each of said certificates numbered 96, 97, 98, 99, 100 and 101:

"I hereby transfer all my interest in the within stock to John Carlisle, July 16, 1878. Lucy D. Catherwood."

"For value received I assign and transfer to John Carlisle three hundred shares of the capital stock of the Citizen's Street Railway Company, this July 16, 1878. Lucy Catherwood, Adm'rx of H. H. Catherwood;"

—and upon certificates numbered 83, 85 and 86 she made the following indorsement:

"I hereby transfer all my interest in the within stock to John Carlisle, July 16, 1878."

"Lucy D. Catherwood."

"For value received I assign and transfer to John Carlisle three shares of the Capital Stock of the Citizen's Street Railway Company this 16th day of July, 1878."

"E. B. Martindale, by Lucy D. Catherwood, Atty. in Fact,"

—and a similar indorsement on certificate numbered 87, and delivered the said certificates to John Carlisle, to be brought by him to the office of said Company, and to have the same transferred to him as the owner thereof on the books of said Company; that said Carlisle brought said stock to the office of the Company and requested that the same be transferred to him, by canceling the said certificates and issuing new certificates to him in lieu thereof; that the Company caused the records of the Marion Circuit Court to be examined and ascertained that said administratrix had full power to dispose of said stock at private sale, as set forth in the complaint and relying upon the order of the court and the indorsements made by said administratrix and on the fact that said certificates, so indorsed, were in the possession of said Carlisle, and believing him to be the owner and purchaser of said stock, made such transfer of said stock to him and canceled said certificates and issued to him in lieu thereof a new certificate, numbered 185 for 808 shares of stock.

The appellant Johnson filed an answer consisting of four paragraphs. The third paragraph avers substantially that the stock in controversy was represented by certificate number 185, issued by the Citizen's Street Railway Company to John Carlisle, on the 17th day of July, 1878, and in whose name the stock was then standing on the books of said Company; that said stock was indorsed by said Carlisle, and had been pledged to the First National Bank of Indianapolis by him, or by someone in his behalf, and was so held by said bank at the time appellant purchased the same; that at the time of said purchase he had no knowledge where said stock came from or who its previous owner had been; that at the time of the transaction between Carlisle, the Citizen's Street Railway Company and Lucy D. Catherwood, he was a citizen of the State of Kentucky, and had no connection with or interest in said Company, and had no knowledge or information of its affairs, and purchased and paid for said stock without any notice or knowledge whatever of the claim of any other person thereto, believing it to be, as it purported to be, a genuine certificate of the ownership of 808 shares of the capital stock of said Company; that he denies that he had any knowledge that said certificate had been issued in lieu of certificates formerly owned or held by Henry H. Catherwood, or that it had been

owned by his estate, or that any order had been made for the sale of any stock belonging to said estate.

The fourth paragraph avers substantially the same facts averred in the third answer of the Citizen's Street Railway Company, above set out, and in addition thereto that the administratrix permitted the stock to be and remain in the name of John Carlisle, and authorized him to treat said stock as his own property, and hold him out to the public as the owner thereof; that said Carlisle, or someone in his behalf, pledged said stock to the First National Bank of Indianapolis as the owner thereof, to secure his individual indebtedness to said bank; that the said administratrix made no objection thereto, but on the contrary made return to the Marion Circuit Court, on oath, that she had sold said stock to Carlisle for cash, and filed the same in the records of said court where the settlement of said estate was pending; that he afterwards purchased said stock of said bank, and, at the time he purchased the same, he was induced to believe, and did believe, from the conduct of said administratrix, that said bank held said certificate from Carlisle as the owner thereof, and that he had no knowledge or information as to any claim thereto by the estate of Henry H. Catherwood; that at the time he purchased the same he had no knowledge or information that the same had been issued in lieu of the stock formerly held by Henry H. Catherwood or his estate, and no knowledge or information of the legal proceedings set up in the complaint.

To each of these answers the court overruled a demurrer. Upon issues formed, the cause was tried by the court at special term, resulting in a finding and judgment in favor of the appellants. Upon appeal to the general term the judgment was reversed, upon which latter ruling this appeal is prosecuted.

The first question demanding our consideration relates to the rulings of the court at special term, in overruling the demurrer to these several answers; and first in order is the third paragraph of the separate answer of the Citizen's Street Railway Company.

The capital stock in the Citizen's Street Railway Company owned by Henry H. Catherwood at the time of his death was personal property. Ang. & A. Priv. Corp. 11th ed. pp. 590-596; Rev. Stat. 1881, §§ 557-560; 1 Rev. Stat. 1876, § 4152, p. 757, § 10.

Upon the death of Henry H. Catherwood the stock descended to his heirs-at-law, subject to the right of his administrator to subject the same to sale, in the manner prescribed by the laws of the State. The common-law right of the administrator to sell and dispose of personal property does not exist in this State. Sales of such property must be made in the manner prescribed by our statutes upon the subject. In the absence of an order from the proper court, the sale must be public, and where a sale is made at private sale, under the order of the court, it must be made in substantial compliance with the order. *Weyer v. Franklin Second Nat. Bank*, 57 Ind. 198; *Williams v. Perrin*, 78 Ind. 57; 2 Rev. Stat. 1876, § 48, p. 509, § 60, p. 512; Rev. Stat. 1881, §§ 2275-2289.

It is contended by the appellee that in cases

of private sales, made under the order of a court, no title passes until such sale is reported and approved by the court. In this position we think he is in error. The Statute authorizing the private sale of personal property of the decedent by an administrator is most useful where the property is of a perishable nature, such as can best be disposed of in the public market, or such as would probably be sacrificed at a public sale.

In view of the fact that the courts are not in session, in many of the counties of the State, more than six months in the year, the construction contended for by the appellees would in a great measure destroy the usefulness of the Statute. Such a construction would render it inconvenient, if not impossible, to sell in the open market. It would be utterly impossible to sell a stock of goods by retail, at private sale, however apparent it might be that a public sale would result in a loss to estate. We are of the opinion that where the order of the court does not require a confirmation, if the sale is made in substantial compliance with the order of the court, the title passes to the purchaser upon his compliance with the terms of the sale. *Hobson v. Ewan*, 62 Ill. 146; *Stow v. Kimball*, 28 Ill. 93; *Moffitt v. Moffitt*, 69 Ill. 649.

Doubtless in all cases the court may in its discretion require, by its order, that the sale shall be reported and confirmed in order to pass title to the property. *Williams v. Perrin*, *supra*.

It is also probably true that when there is any material deviation from the order to sell no title would pass until such sale was reported and confirmed by the court.

In this case, however, there seems to have been no attempt to comply with the order made for the sale of the stock in controversy at private sale. The sale was on a credit of ten years, whereas the administratrix had no power to give a credit exceeding twelve months. 2 Rev. Stat. 1876, p. 610.

The order of the court required the administrator to take good and sufficient security for the purchase price of the stock, but instead of following the order she took the individual note of John Carlisle without security. This attempted sale is no better than if there had been no order of the court. The sale to Carlisle, or a credit of ten years without any security, was not a sale under the order procured by the administratrix, and was in our opinion void and vested no title.

The Citizen's Street Railway Company had notice that the stock in question belonged to and was part of the estate of Henry H. Catherwood. It also had notice that the Marion Circuit Court had acquired jurisdiction over this property and had made an order to sell the same at private sale. Indeed, the answer discloses the fact that it had examined the proceeding under which the attempted sale to Carlisle was made. We do not think the Company exercised that degree of diligence required by the law when it stopped with the examination of the order of sale. Before canceling the stock held by the estate of Catherwood it should have gone further and ascertained whether such a sale had been made under that order as vested title in Carlisle. It was its duty before canceling the stock at the

request of Carlisle, and issuing to him stock in lieu thereof, to ascertain that he was the owner of the stock in his possession; and having failed to perform such duty, we think it liable to make good any loss occasioned thereby. Before the Company could lawfully cancel the stock held by Catherwood's estate it was bound to know, not only that an order of sale had been entered by the court, but that a sale had also been made pursuant to the terms of that order. *Nugent v. Laduke*, 87 Ind. 486; *Weyer v. Franklin Second Nat. Bank*, *supra*; *Ang. & A. Priv. Corp.* 10th ed. § 582; *Loring v. Salisbury Mills*, 125 Mass. 188.

In our opinion, the Superior Court of Marion County at special term erred in overruling the demurrer to the third paragraph of the separate answer of the appellant, the Citizen's Street Railway Company.

The answers of the appellant Johnson present a question entirely different from the one presented by the answer of the Citizen's Street Railway Company.

The certificates of stock owned by the estate of Henry H. Catherwood were canceled by the Company and a new certificate in lieu thereof was issued to John Carlisle in his own name. So far as appears, there was nothing on the face of the new certificate to put anyone on inquiry or to give notice that it was issued in lieu of the Catherwood stock. In this condition Johnson bought it, in the market, without any notice that it had any connection with Catherwood's estate. The question is, therefore, presented as to whether Johnson, under these circumstances, is liable to account to the estate for the stock purchased by him. Could the appellees show that Johnson and those through whom he makes his title had notice of the fact that the Catherwood stock entered into and formed the consideration of the stock purchased by him, doubtless he could follow such consideration and charge Johnson with it. The complaint seems to proceed upon the theory that it was necessary to charge Johnson with such notice; but as notice is denied by the answers, in considering the demurrer thereto, we must treat the case as one in which he purchased in good faith, without notice. We are bound to know that stocks of the kind now under consideration constitute a considerable article of the commerce of the country, and that they are daily bought and sold in the market. To hold that where such stock is thrown upon the market the purchaser must inquire into the antecedents of the same and into the consideration upon which it was issued by the corporation would be to destroy the value of such property as an article of commerce. If the property was offered for sale at a market remote from the office of the Company such inquiry would be practically impossible, and hence the stock in such market would be of no value. We are not inclined to adopt the view that a purchaser of such property is bound to make such examination, unless there is something upon the face of the stock, or something connected with the transaction, to put him on inquiry. Of course, everyone purchasing such stock takes the chances as to whether it is genuine and as to whether the corporation had the legal authority to issue it; but where the stock issued by a corporation having the legal au-

thority to do so is genuine and is regular upon its face, we think a purchaser in good faith, without notice of infirmities which could be ascertained only by an examination of the records of the Company, should be protected. *Salisbury Mills v. Townsend*, 109 Mass. 115; *Machinists Nat. Bank v. Field*, 126 Mass. 845; *Mount Holly, L. & M. Turnp. Co. v. Ferree*, 17 N. J. Eq. 117.

But in this case Johnson did not purchase the certificates of stock owned by Catherwood. Those certificates were canceled by the Citizen's Street Railway Company. The stock purchased by Johnson was evidenced by new certificates issued to John Carlisle by the Company in consideration of the surrender and cancellation of the certificates held by Catherwood at the time of his death. As to whether the Company was authorized to issue the certificates purchased by Johnson, and whether it is valid, are questions between him and the Company, and one into which we need not inquire in this case. But as he did not purchase the stock evidenced by certificates once held by Catherwood and had no notice that such stock ever existed, at the time of his purchase, we think it follows that he is in no way liable to Catherwood's estate.

In the case of *Salisbury Mills v. Townsend*, *supra*, it was expressly held that a purchaser of such stock was not bound to examine the books of the corporation or look beyond the certificates assigned to him, in search after the validity of former assignments.

In cases like this, where the old certificates have been surrendered and a new one issued in lieu thereof, the doctrine is that the remedy is against the corporation issuing the new certificate, and that a purchaser of the stock represented by the new certificate in good faith, for value and without notice of any illegality in the surrender and cancellation of the original certificates, will be protected. *Pratt v. Taunton Copper Mfg. Co.* 123 Mass. 110; *Machinists Nat. Bank v. Field*, 126 Mass. 845; *Allen v. South Boston R. Co.* 150 Mass. 300, 5 L. R. A. 716, 15 Am. St. Rep. 185.

In our opinion the court at special term did not err in overruling the demurrer to the third and fourth paragraphs of the answer of the appellant Johnson.

A question is also made as to the ruling of the court at special term in admitting in evidence a report, made out and sworn to by the administratrix, in which she states that she had sold the stock in question to John Carlisle for cash. The report, so far as the evidence in the cause discloses, was never filed or approved by the court. In this condition it amounts to the mere declaration of the administratrix and constitutes no part of the record in the proceeding to sell the stock. But assuming, without deciding, that it was not proper evidence in the cause, we do not think the appellee, who objected to its introduction, stands in a situation to make such objection. This paper is set out in full in each paragraph of the amended complaint, and is thus made a part of the record in this cause. As it was already a part of the record, and was, as such, before the court, we do not see how the appellee could be injured by allowing the appellants to read it to the court.

In our opinion the superior court at general 13 L. R. A.

term did not err in reversing the judgment of the special term as to the appellant the Citizen's Street Railway Company, but it did err in reversing the judgment as to the appellant Johnson.

*The judgment of the Superior Court as to the appellant the Citizen's Street Railway Company is affirmed; and said judgment as to the appellant Tbm. L. Johnson is reversed.*

Petition for rehearing overruled June 11, 1891.

## Board of COMMISSIONERS OF GIBSON COUNTY, Appt.

### CINCINNATI STEAM HEATING CO.

(...Ind....)

1. A change in a matter of detail such as in the heating of a public building may be made without filing plans and specifications and advertising for proposals, as required by statute in letting the original contract for the building.
2. The presumption is that county officers in making changes in the plan for heating a new public building made only such as were proper.
3. A bond reciting the proposal of a board of commissioners "to advance" the money to the obligor, who binds himself to complete the job of furnishing heating apparatus for a public building in consequence of the default of the principal contractor for the building, is a contract to pay for the work when completed, and not merely to "advance" money.

#### NOTE.—Building contract; extra work.

The reasonable value of extra work by a contractor is recoverable when done by agreement, but with no price agreed on. *Pacific Bridge Co. v. Clackamas County*, 45 Fed. Rep. 217.

A provision in a building contract, that no new work shall be considered as extras unless a separate written estimate shall have been signed before it is commenced, may be subsequently waived by the parties by parol. *McLeod v. Genius* (Neb.) 1 Neb. L. J. 524.

If there has been a deviation from the original plan by consent of parties the contract and estimate are not on that account excluded, and the excess only is to be paid for, according to the usual rates of charging; but if there be a total deviation the workman may charge for the whole work by measure and value, as if no contract had been made. *Pepper v. Burland, Peake*, 132; *Robson v. Godfrey, Hoyt*, 236; *Ellis v. Hamlen*, 3 Taunt. 53.

For all work done beyond the contract, under subsequent or antecedent directions, plaintiff may recover as if no special contract had been made. *Thornton v. Place*, 1 Mood. & Rob. 219; *Fletcher v. Gillespie*, 3 King. 667.

But the mere assent to certain alterations is not sufficient to make defendant liable for them as extras not covered by the contract. *Lovelock v. King*, 1 Mood. & Rob. 60.

If extras have been done without authority defendant is not bound to pay for them. *Dobson v. Hudson*, 1 Q. B. N. S. 659. See 2 Addison, Cont. § 870.

A contract to heat a building about to be built is performed when the machinery is sufficient for that purpose, as the same was exhibited in plans shown to the contractor. *Phoenix Iron Co. v. The Richmond*, 11 Cent. Rep. 711, 6 Mackey, 180.

Alteration of building contract generally. See note to *Boettler v. Tendick* (Tex.) 5 L. R. A. 371.

4. A promise by a beard to pay for heating apparatus for a public building, made to induce the completion thereof by the other party who had already partly furnished it under agreement with the chief contractor for the building, who has made default in payment, is an original, and not a collateral, contract within the Statute of Frauds, at least as to whatever becomes due after the promise is made.

(May 14, 1891.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Knox County in favor of plaintiff in an action brought to recover the contract price for certain heating apparatus which had been placed in a county building under an alleged contract with defendant. *Affirmed.*

The facts are stated in the opinion.

Mr. L. C. Embree for appellant.

Messrs. Fields & Ewing for appellee.

**Elliott, J.**, delivered the opinion of the court:

On the 25th day of September, 1888, the Board of Commissioners of Gibson County entered into a contract with Joseph G. Miller for the erection of a court-house. The plans and specifications were adopted at a meeting of the Board on the 7th day of August, 1888, and notices inviting proposals for building the court-house were published for more than six weeks prior to the time the contract was awarded. The notice was published in a newspaper of general circulation in the County of Gibson. Miller entered upon the work under the contract, and on the 29th day of December, 1884, made a contract with the appellee to furnish a steam-heating apparatus and appliances for the court-house. The plan and specifications agreed upon by Miller and the appellee were different from those adopted in the first instance by the Board of Commissioners, but what the differences were does not appear. The appellee entered upon the work required by its contract, and furnished labor and material. On the 1st day of April, 1885, it received from Miller in part payment \$3,000, and on the 20th day of June of that year there was owing from Miller to the appellee the sum of \$2,200. This sum Miller failed to pay, although it had been due for more than two months. The architects, McDonald Brothers, refused to issue an estimate, and the appellee tendered to the Board a bond conditioned as follows:

"The condition of this obligation is such, whereas the said Cincinnati Steam Heating Company has a contract with one Joseph G. Miller, who is chief contractor for the erection of a court-house in Gibson County, Indiana, to place certain steam-heating apparatus in said court-house, for which it is to receive the sum of \$6,665 in installments equal to eighty-five per cent of the value of the work done and material furnished as said job shall progress, and as there is now due to it the sum of \$2,200 on said work on said contract, which said Miller has failed to pay, the said Commissioners having refused to advance any more direct to said Miller on his said contract, but being willing and desirous of advancing to the said the Cincinnati Steam Heating Company direct the money now due, and to become due,

19 L. R. A.

for its said work upon the approval of said architects, and propose to advance at once, at next meeting of said commissioners, the \$2,200 aforesaid. Now, therefore, if the said, the Cincinnati Steam Heating Company, shall complete its said job of work in accordance with the plans and specifications and terms of its said contract, and the work so completed shall be accepted by the McDonald Brothers, these presents shall be void; otherwise to remain in full force and virtue."

The Board accepted the bond while in session, but made no entry of record. After the acceptance of the bond the Board caused a warrant to issue to the appellee on which it received \$2,200. The order directing the warrant to issue reads thus: "Comes now Kenneth McDonald, architect on new court-house, and files estimate for work done and materials furnished for steam heating in the sum of \$2,200 by Joseph G. Miller, the estimate having been assigned to the Cincinnati Steam Heating Company, and also showing that Joseph G. Miller, has been previously paid the sum of \$80,879, and making a total allowance of \$82,879; and after hearing the evidence and being fully advised, it is found that said claim ought to be allowed. It is now ordered that the Cincinnati Steam Heating Company be allowed the sum of \$2,200."

The appellee fully performed its part of the contract, and on the 20th day of December, 1885, demanded an estimate, but the architect refused to certify one. On the 1st day of February, 1886, the Board entered an order declaring the court-house completed and ready for occupancy; and, pursuant to such order, possession was taken by the county officers and the record placed in the building. The County, by its officers, occupies the court-house and uses the steam-heating apparatus placed in it by the appellee. On the 14th day of April, 1886, the appellee presented its claim for the remainder due upon its contract, but its claim was rejected. There remains owing the appellee the sum of \$1,465.

The appellant's counsel contended that the Board had no authority to contract for the steam-heating apparatus for the reason that no plans and specifications were ever placed on file in the auditor's office, and no notice was published inviting proposals for furnishing the court-house with steam-heating apparatus. This contention is based upon the provisions of the Statute requiring plans and specifications for the construction of public buildings to be prepared and filed before advertising for proposals. Rev. Stat. § 4243.

We cannot accept the views of counsel as correct. In our opinion, the Statute was not intended to prevent changes in plans and specifications from being made in cases where it becomes apparent in the progress of the work that changes are required. We do not mean to be understood as holding that changes in the general plan of the work may be made at the pleasure of the Board of Commissioners; but we do mean to adjudge that changes may be made in details and in minor particulars. If the rigid rule for which the appellant contends were adopted, then the Board could not change a window, a door, a chimney or any like matter, and certainly the Legislature did

not mean to establish a rule that would prevent such changes. Of course, no important general change in the plan of the building can be made; but a change in a matter of detail, such as the heating or lighting, may be rightfully made when required. If the Board of Commissioners secures and files plans and specifications so full and specific as to show the character of the proposed building and duly advertises for proposals, the County cannot escape liability without showing that changes in important particulars were made. This conclusion is fairly supported by the case of *Bass Foundry & Mach. Works v. Parks County Comrs.* 115 Ind. 284.

Neither the County nor its officers can with reason or justice ask that it shall be presumed that the Board of Commissioners either violated the law or acted in bad faith in ordering changes in a matter of detail such as that of heating a court-house; on the contrary, the presumption is that what was done was done rightfully and in good faith. It must therefore be presumed, in the absence of countervailing facts, that the changes respecting the steam-heating apparatus were of such minor importance and so necessary that it was not only the right of the Board to order them made, but that it was its duty to cause them to be made. The County is using and enjoying the property placed in its possession by the appellee in good faith; and the least that it can do if it would keep and enjoy the property without paying for it is to show such facts as make it clearly appear that the acts of its Board of Commissioners were unauthorized or illegal.

It is argued with ability and plausibility that there was no promise on the part of the Board of Commissioners to pay the appellee for the heating apparatus. In our judgment the contention, plausible as it is, cannot prevail. The facts surrounding the parties when the bond was accepted by the Commissioners furnish the light by which the contract must be read. The County was unwilling to pay anything more to Miller, the principal contractor; it had already paid on account of the heating apparatus a considerable sum of money; it was willing to pay the appellee "the sum due and to become due;" the appellee was willing to complete the work and gave bond that it would do so. It can hardly be doubted that the parties meant that one should do the work and that the other should pay for it when it was done. The one did do the work and the other has received the benefit. It must be implied that one should receive compensation, and if this be the implication, then there is an implied promise. It is said, however, that the writing simply expresses a desire to advance money, and does not even express a desire or willingness to pay money; but this certainly is a forced and unnatural construction of the language employed by the parties. It is not reasonable to infer that the Commissioners understood that all that the appellee expected was "a desire to advance money," nor is it reasonable to infer that the appellee agreed to do work for any such consideration. The cases of *Harmon v. James*, 7 Ind. 263, and *Johnston v. Griest*, 85 Ind. 503, lend appellant no support, for in those cases no consideration was shown, while here a full and

valuable consideration appears. Here, there is a consideration fully expressed; in those cases there was none. The case before us is not ruled by the cases named, but by the principle asserted in *Long v. Straus*, 107 Ind. 98, 4 West. Rep. 235. It is important to mark the fact that not only did the appellee promise the appellant to do the designated work, but that it also gave bond with surety that it would do the work as promised. There was a promise for a promise; there was value previously received, and there was a bond covenanting that what was promised should be performed. No lack of consideration can be justly asserted, for the new bond executed direct to the appellant was itself a consideration, but it was not by any means the only consideration yielded by the appellee. We are satisfied that there was a promise upon a valid consideration moving to the promisor.

We are required to decide whether the promise is within the Statute of Frauds. If it is an original and not a collateral promise, then it is not within the Statute. If it is not an original promise it is within the Statute, for it is well settled that a contract not entirely in writing is verbal and therefore voidable under the Statute requiring collateral contracts to be evidenced by writing. There is here no written promise on the part of the appellant, although there is a verbal assent to a written proposition of the appellee. *Higham v. Harris*, 108 Ind. 248, 5 West. Rep. 643; *Tomlinson v. Briles*, 101 Ind. 538; *Huckelmon v. Henry County Comrs.* 94 Ind. 36; *High v. Shelby County Comrs.* 93 Ind. 580; *McCurdy v. Bowes*, 88 Ind. 583-585; *Madsen v. County Comrs.* 87 Ind. 257; *Gordon v. Gordon*, 96 Ind. 184; *Pule v. Miller*, 81 Ind. 190; *Marion County Comrs. v. Shipley*, 77 Ind. 558.

The promise of the appellant is an original and not a collateral one. The consideration for the promise moved to the appellant, for it obtained a bond securing the performance of the contract and obtained also the materials and labor of the appellee. The benefit accrued to the owner, and not to the original contractor. For what the owner received and retained it was bound in equity and good conscience to pay. *Bass Foundry & Mach. Works v. Parks County Comrs. supra.*

The appellant did not promise to pay for property received by Miller; its promise was to pay for property received by the County itself. The work was not completed when the promise was made, and Miller was not the debtor for the work that had not been done, however it may be as to the work that had already been performed. But even as to the work that had been done prior to the new promise, Miller was not the ultimate beneficiary from it, for, in the end, the benefit was the County. The new promise secured the completion of the work and this consideration directly and beneficially moved to the appellant. The new bond was an additional consideration, so that there was a complete and valuable new and additional consideration. The consideration yielded secured a new promise and that promise was to do work for the promisor, and work, too, which was for its sole benefit. The appellant made no promise to answer for the debt or default of Miller, nor did it undertake to pay for



property delivered to him. What the appellant did promise to do was that it would pay the appellee for work done in improving its property and fitting it for use and occupancy. This new promise was not collateral to any anterior undertaking, for it was not to pay another's debt, nor was it to pay for property delivered to another, or for services rendered for another; on the contrary, the promisor was the sole beneficiary and it was seeking to obtain value for itself and no one else. It seems clear that justice requires that the County should pay what it promised, for its promise was for its own benefit, and all of value that the promise secured accrued directly and completely to it as the owner of the property.

The principle which the well-reasoned cases establish is this: where the owner of property undertakes to pay for work and materials to be subsequently done and furnished by a sub-contractor in order to secure the completion of a building in a case where the principal contractor has failed to carry on the work, the promise is an original one, and not within the Statute of Frauds. This principle is intrinsically just and its enforcement does not in the slightest degree tend to the mischief the Statute of Frauds and Perjuries was intended to repress. In the well-reasoned case of *Emerson v. Slater*, 63 U. S. 22 How. 26, 16 L. ed. 360, the Supreme Court of the United States gave the subject full consideration, and held that a promise similar to that made by the appellant was enforceable. It was there said: "But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the Statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

It is possible that the language quoted states the doctrine rather too broadly, but we shall not inquire whether it does so or not, for here we are not required to decide what the rule is where the promise relates to the past, inasmuch as we are concerned only with what relates to the future at the time the new promise was made. This is so because the only question in this case is whether the appellee is entitled to recover for work done and material furnished after the new contract was made. If the claim asserted was to the sum owing before the new promise was made, there would, perhaps, be more difficulty in solving the legal problem; but the sum due when the new promise was made was paid, so that the controversy concerns only the right to recover the sum that subsequently became due for work done and materials furnished. We do not decide, we may say by the way, that the sum due might not be recovered under the new promise had it not been paid; we simply decide the question before us, and that relates to matters that at the time the new promise was made concerned the future, and not the past. These were promises in their nature severable and the valid promise may certainly be enforced. *Lowman v. Sheets*, 124 Ind. 416, 7 L. R. A. 784.

Resuming our consideration of the decided 12 L. R. A.

cases bearing directly upon the question before us, we take up that of *Sext v. Geise*, 80 Ga. 698, where an owner promised to pay for materials furnished to complete a building then in progress of construction, and where it was said: "If the supply of lumber was about to stop, and the owner of the building procured its continuance by promising to pay for it, his undertaking was not collateral, but original, and he is bound."

Another case is that of *Kutemeyer v. Ennis*, 27 N. J. L. 371, where the court said, speaking of the owner of a building: "He was interested in the completion of the work; he received the benefit of it, and he had it in his power to indemnify himself for the advance to Ennis by withholding the money from the contractors."

In discussing a question which arose in a case very similar to the present, the Supreme Court of Vermont said: "If in this case a third person make an entire substantive and independent contract with him to perform the same service, this may be enforced, though not in writing, as it is not collateral." But without quoting from the decisions or commenting upon them, we cite some of them and affirm that our conclusion that the appellant's contract is original and not collateral is sustained by the overwhelming weight of authority. *Yeoman v. Mueller*, 35 Mo. App. 848; *Crawford v. Edison*, 45 Ohio St. 239, 11 West. Rep. 252; *Clifford v. Luhring*, 69 Ill. 401; *Bayles v. Wallace*, 56 Hun, 428; *Hagadorn v. Stronach Lumber Co.* 81 Mich. 56; *Galveston, H. & S. A. R. Co. v. Hourin* (Tex.) 9 S. W. Rep. 661; *Greenough v. Eichholts* (Pa.) 15 Atl. Rep. 712; *Fitzgerald v. Morrissey*, 14 Neb. 198; *Young v. French*, 35 Wis. 116.

Of the cases cited by the appellant the only ones in point are *Ellison v. Jackson Water Co.*, 12 Cal. 542; *Noyes v. Humphreys*, 11 Gratt. 686; *Ware v. Stephenson*, 10 Leigh, 165.

The Virginia cases are out of line with authority, and so is the California case. The latter cites as authority a single case, that of *Puckett v. Bates*, 4 Ala. 390, and that case is in conflict with the later and better-considered case of *Jolley v. Walker*, 26 Ala. 690.

Our own cases very clearly recognize the distinction between original and collateral contracts. The earlier cases are collected in *Anderson v. Spence*, 72 Ind. 815, and it was shown that the case of *Green v. Cresswell*, 10 Ad. & El. 458, which asserted a doctrine contrary to that here declared had been overruled in England and denied in America.

In *Palmer v. Rain*, 55 Ind. 11, it was held that a promise by a third person to an execution creditor that if the creditor would satisfy the execution he would pay the judgment was not within the Statute. A very similar decision was made in *Frash v. Polk*, 67 Ind. 55; in *Aughie v. Landis*, 95 Ind. 419, it was held that a promise by a defendant to pay for work which the plaintiff agreed to do for a third person was not within the statutory inhibition. The case of *Shaffer v. Ryan*, 84 Ind. 140, illustrates the difference between an original promise and a collateral one, as does also the case of *Hackleman v. Miller*, 4 Blackf. 322.

The case before us is not dependent upon the doctrine of novation, so that the cases of *Langford v. Freeman*, 60 Ind. 48; *Krutz v.*

*Stewart*, 54 Ind. 178; *Crosby v. Jeroleman*, 87 Ind. 264; *Ellison v. Wischart*, 20 Ind. 82, are not of controlling influence. It is not dependent upon that doctrine for the manifest reason that what was done after the new promise was made was done for the promisor, for its benefit and at its request, and it is only for the value of what was so done that the appellee sues. As to the value of the work and materials furnished under the new promise the contract was one between the appellee and the appellant, and it did not concern any debt due from Miller to the former.

*Judgment affirmed.*

**GAMMON THEOLOGICAL SEMINARY,**  
*Appl.,*  
*v.*

**James O. ROBBINS *et al.***

(...Ind....)

**A valid gift of a note retained in the holder's possession** is not made by a sealed instrument acknowledged and attested by witnesses, which declares that the holder does "hereby give, the principal of the note, and says in a later clause that the money is "to be given . . . when the note falls due" for specified purposes.

(April 22, 1891.)

**A**PPPEAL by petitioner from a judgment of the Circuit Court for Henry County sustaining a demurrer to a petition claiming money which had been collected as part of the assets of the estate of John Robbins, deceased. *Affirmed.*

The facts are stated in the opinion.

*Mr. M. E. Forkner*, for appellant.

*Messrs. A. L. Nichols and Charles S. Hearn* for appellees.

**Olds, Ch. J.**, delivered the opinion of the court:

John Robbins, late of Henry County, Indiana, died intestate, leaving no widow or children him surviving, but leaving remote heirs. A. R. A. Thompson was appointed administrator of his estate, collected what was due the estate and filed a final settlement report showing a balance of \$571.21 in his hands for distribution, concluding his report with the statement: "that the amount shown herein in his hands he pays into court; that the Gammon School of Theology of Atlanta, Georgia, is claiming the money; that he does not know who is entitled to the money or who the heirs are, and he therefore pays the same into court for whoever may be entitled to the money."

Among the assets of the estate was a note dated August 4, 1887, given by one William J. B. Luther to the decedent for \$700 borrowed money, due in three years, which note was collected by the administrator and constituted a part of the general funds of the estate of which there remained the balance as stated.

The appellant filed a petition, making the legal heirs parties, alleging facts which it is claimed constituted the appellant the owner of the note for \$700, by gift from the decedent during his life, and asked that it be decreed to be the owner of the fund, and that the clerk be ordered to pay the same to it and its board of trustees.

To this petition appellees demurred and the demurrer was sustained and exceptions reserved. The appellant refused to plead further. Final judgment was rendered on demurrer against the appellant, from which judgment it appeals and assigns such ruling as error. The question presented by the demurrer and discussed by counsel is as to whether or not, under the facts alleged, the title to the note, or the proceeds thereof, passed to the appellant by gift from Robbins.

On the 14th day of September, 1887, Robbins executed and delivered to one Rev. James C. Murray, the duly authorized agent of the board of trustees of the plaintiff, a written instrument of which the following is a copy:

State of Indiana, }  
Henry County, } ss:

I, John Robbins, of the county and State aforesaid, hereby give to the trustees of the Gammon School of Theology, situated at the City of Atlanta, State of Georgia, organized (or to be organized) under the laws of the said State of Georgia, and under the control and management of the Freeman's Aid Society of the Methodist Episcopal Church, the principal of a note for seven hundred dollars (\$700) dated August 4, 1887, due three years after date, and signed by W. J. B. Luther, in trust for the endowment of a perpetual scholarship in said Gammon School of Theology, to be known as the John Robbins Scholarship, said sum of seven hundred dollars to be given in trust to the said trustees when the said note falls due on the 4th day of August, 1890, and to be by them invested according to their best judgment, and the income to be devoted each year to the support of a student in the said Gammon School of Theology under the direction of the faculty of the same.

In testimony whereof I have hereunto set my hand and affixed my seal this 14th day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

his  
John X Robbins (Seal)  
mark

This writing was attested by two witnesses and acknowledged before a justice of the peace.

The note was retained by Robbins and never was delivered. The question presented is as to whether or not the execution of this writing perfected the gift and transferred the title to the principal of the note without a delivery of the note. The universal rule is that their must be a delivery of the article during the lifetime of the donor to constitute a valid gift *inter vivos*.

In the case of *Smith v. Dorsey*, 38 Ind. 451.

**NOTE**—Gift, when valid delivery essential. See note to *Walsh's App.* (Pa.) 1 L. R. A. 535; *Drew v. Hagerty* (Me.) 3 L. R. A. 231; *Re Crawford* (N. Y.) 5 L. R. A. 71; *Williams v. Guile* (N. Y.) 6 L. R. A. 12 L. R. A.

367; *Beaver v. Beaver* (N. Y.) 6 L. R. A. 408; *Miller v. McMeichen* (W. Va.) 6 L. R. A. 515; *Devol v. Dye* (Ind.) 7 L. R. A. 439

the court said: "To constitute a valid gift *inter vivos*, it is essential that the article given should be delivered absolutely and unconditionally. The gift must take effect at once and completely, and when it is made perfect and complete by delivery and acceptance, it then becomes irrevocable by the donor. Gifts *inter vivos* have no reference to the future, but go into immediate and absolute effect. A court of equity will not interfere and give effect to a gift that is inchoate and incomplete."

It is contended that this instrument does make an absolute gift and transfer of the promissory note, and it being declared in writing and the writing being delivered, it operates to pass the title to the property; that a promissory note may be transferred either by an indorsement upon the note or by a separate written instrument. Admitting this to be true in case of a sale and transfer for value of a promissory note, it has no such application in case of a gift. One may make a valid parol contract for the sale of personal property under \$50 in value without delivering the property or the payment of any earnest money or reducing it to writing; but to constitute a valid gift *inter vivos* of personal property, even though it be under \$50 in value, the property must be delivered. In case of a gift, the same principle applies whether the property be of great or small value. A party may make a valid sale or gift of a note by delivery without indorsement, so as to transfer the equitable title. If, in this case, Robbins had indorsed the note on the back to the appellant and retained the note, the gift would be incomplete; it would lack the element of delivery to make it valid. One cannot make a valid gift of a horse or a promissory note by saying: "I give the horse or the note to A." It lacks the element of delivery to make it a valid gift.

The well-settled rule is that there must be a delivery of the property with an intention to give. Delivery is absolutely necessary to the validity of a gift. The owner must part with his dominion and control of the article before the gift takes effect. Mere words alone convey no title, and a present gift must be intended; the donor must intend to part with the title and control of the thing at the time of making the gift. A gift to take effect in the future is void. While a delivery is absolutely necessary to the validity of a gift, yet it is not necessary that there should always be a manual delivery of the thing given. It will be sufficient if the delivery be as complete as the thing and the circumstances of the parties will permit. If the article given be too bulky to admit of a manual delivery, but there is a surrender of the possession and control by the donor to the donee, with a clear expression of the intention of the donor to give, and the donee accepts the gift and assumes control of the property, it will be sufficient. In case of a gift of an article of personal property by the father to his child who is at the time a member of his family, the change of possession need only be such as the circumstances and the nature of the property will permit. The same is true of a gift by the husband to the wife. In the case of a gift by the father to his infant daughter residing in his family, on the occasion of her birthday, of a piano, and thereafter it was

used by her and claimed as her own and recognized by the father and other members of the family as her property; afterwards she married and having no suitable place to keep the piano at her own home, she allowed it to remain at her father's, she visiting and remaining at her father's for weeks at a time,—it was held that there was such a delivery as passed the title. *Ross v. Draper*, 55 Vt. 404.

So in the case where the father declared his intention of giving to his infant child certain cattle, and bought a brand and caused it to be recorded and branded the cattle in the name of such child, with the avowed purpose of giving them to the child, and turned them out, it was held that it was a sufficient delivery to pass the title. *Hillebrand v. Brewer*, 6 Tex. 45.

In these instances the parties made such a delivery of the property as the relations and circumstances of the parties and the nature of the property would permit. The authorities are not uniform as to whether or not, when a present gift of property is expressed in writing and the writing itself is delivered, it is sufficient without the actual delivery of the thing given. It was held that where a father made a gift by a declaration in writing in the form of a deed, to his infant child, of promissory notes, and in the writing itself declared himself a trustee to manage the property for the benefit of the donee, and caused the deed to be recorded, and the donor styling himself trustee, retained the notes, had them assessed to the donee and paid the taxes, and managed them for his said child, that it was a valid gift. *Walker v. Crewe*, 73 Ala. 412.

We do not think the facts alleged in the complaint in this case bring it within any of the rules above stated by which it constitutes a valid gift. In this case it does not appear that the note drew interest, but the averments in the complaint show it to be a note for \$700, due August 4, 1890. The instrument in writing signed by Robbins, when taken as a whole, shows it to be a prospective gift of the money for which the note called. The words in the writing relating to and importing a gift are: "I give to the trustees," etc., the "principal of a note for seven hundred dollars; . . . said sum of seven hundred dollars to be given in trust to the said trustees when the said note falls due on the 4th day of August, 1890, and to be by them invested according to their best judgment." The presumption of law is that the note will be paid when due; and the fair construction to be given to the words used is that it was the intention of the donor to give the money, the principal sum of the note when the note matured to the trustees of the college, and it does not warrant a construction that it was intended by the instrument to assign the principal sum of the note itself to the trustees and authorize them to collect the note; but it is a mere contract to give the money when paid to the trustees, and that they should then invest the money given to them according to their best judgment. While in the fore part of the writing the word "give" is used, yet it is followed by the words "to the trustees of" a school organized, or to be organized. Following later on in the writing it is expressly stated that the sum of \$700—not the note for \$700, but the sum of \$700—is to be given

when the note falls due; so that the gift of \$700 is to be made, when the note falls due, to the trustees of the college, at the maturity of the note.

The writing itself constitutes a mere agreement to give a sum in the future. There is nothing in the writing indicating an intention to assign the note, or to give to the donees any right to maintain an action for the collection of it. Whatever may be the correct rule as to the effect of a writing whereby a party expresses an intention to make a present gift and transfer the immediate title, custody and control of an article of personal property or chose in action, as a promissory note, when nothing prevents the article or thing given from being actually delivered and handed over from the donor to the donee, as in this case, but no actual delivery being made, can make no difference in this case, for the writing is but an expressed intention or contract to give something in the future; and under such a state of facts the authorities are uniform that no property passes. *Zimmerman v. Streeter*, 75 Pa. 147; *Nickerson v. Nickerson*, 28 Md. 327; *Shower v. Pilch*, 4 Exch. 478; *Egerton v. Egerton*, 17 N. J. Eq. 419.

In this case, if Robbins had lived, he alone would have had the right to have collected the note, and it required some further act on his part to have passed the title either of the note or the money to the donee. Had he collected and used the money, the writing, having no consideration to support it, could not have been enforced against him; neither can it be against his estate. If not liable upon the contract, there is no liability for the conversion of the money. If the note or the money actually belonged to the donee, then there would be a liability for the conversion of the money; for if the gift was actually executed, then the donor could not revoke it, but it is revokable until executed. Like a promissory note executed by the maker to the payee as a gift, it is but a mere promise to make a gift, and not enforceable. *Williams v. Forbes*, 114 Ill. 167.

In regard to written declarations of gift, Schouler in his work on Personal Property, § 89, says: "An ordinary writing of gift not under seal would, we presume, have the effect in most States, as in England, of a parol declaration of gift, agreeable to the usual statute provisions, and simply furnish more tangible proof than expressions by mere word of mouth that a gift had been perfected, yet nothing conclusive. Parol declarations of gift, without delivery of the chattel, amount to nothing more at the old law than a promise to give, void for want of consideration; but in some of the later cases written memoranda are found of considerable importance in establishing such a declaration of trust as equity would now be disposed to carry into effect out of regard to the mutual relation of donor and donee."

In 1 Parsons on Contracts, 7th ed. p. 235, it is said: "It is essential to a gift that it goes into effect at once and completely. If it regards the future it is but a promise, and being a promise without consideration, it cannot be enforced, and has no legal validity. Hence delivery is essential to the validity of every gift, for not even a court of equity will interfere to enforce a merely intended or promised gift. There is, it is true, some authority for supposing that a gift *inter vivos* may be valid without delivery, if there be a distinct acceptance. But this is not the law. Nor will transfer by writing alone satisfy the requirement of delivery." See 2 Kent, Com. 12th ed. pp. 488, 489; *Payne v. Powell*, 5 Bush, 248; *Bishop, Cont. § 82*; *Green v. Langdon*, 28 Mich. 223; *Smith v. Dorsey*, 38 Ind. 451; *Smith v. Ferguson*, 90 Ind. 229; *Devol v. Dye*, 123 Ind. 321, 7 L. R. A. 439.

There was no title to the note or the money collected upon the same passed by the writing to the appellant. The court properly sustained the demurrer to the complaint. There is no error in the record.

*Judgment affirmed, with costs.*

## CALIFORNIA SUPREME COURT.

### DUNSMOOR

v.

FURSTENFELDT, *Resp't.*, and GEINGER, *Appl.*

(....Cal....)

#### 1. A distributee's share of money in the custody of a clerk of court after final de-

**NOTE.**—Property in custody of the law not subject to garnishment.

A fund in the custody of the law is not subject to garnishment, although the debtor is a nonresident and the fund is the only one from which the creditor can obtain satisfaction of his debt. *Curtis v. Ford*, 10 L. R. A. 529, and note, 78 Tex. 232.

A fund in the hands of the clerk of the court, pending litigation in regard to its ownership, is not subject to garnishment. *Ibid.*

Money in the hands of a United States marshal, collected on execution from the United States cir-

cree and order of distribution, if nothing remains to be done except to pay over the money, is a "debt" of record and subject to garnishment by a creditor of the distributee, although money in custody of the court cannot as a general rule be reached by garnishment.

#### 2. Any kind of obligation of one man to pay money to another is a debt.

(April 1, 1891.)

cuit court, cannot be attached by trustee process in a suit issued from a state court. *Clarke v. Shaw*, 24 Blatchf. 97, 28 Fed. Rep. 356; *Smith v. Bauer*, 9 Colo. 280, citing *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749; *Lammon v. Feuzier*, 111 U. S. 17, 28 L. ed. 537; *Correll v. Heyman*, 111 U. S. 176, 28 L. ed. 390. See *Van Norden v. Morton*, 99 U. S. 373, 25 L. ed. 453; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145.

Money taken from a prisoner by a jailer is in the custody of the law, and not the subject of attachment or execution. *Dahms v. Sears*, 13 Or. 47, cit-

**A**PPEAL by defendant Geinger from a judgment of the Superior Court for Orange County in favor of defendant Furstenfeldt in a proceeding instituted to determine which was entitled to money in the hands of complainant. *Reversed.*

The facts are stated in the commissioner's opinion.

*Messrs. Wilson & Bulla* and *George A. Rankin* for appellant.

*Messrs. V. Montgomery* and *F. O. Daniel* for respondent.

**Vanclef, C.**, filed the following opinion: The plaintiff (clerk of the superior court) brought this action to compel the defendants, Furstenfeldt and Geinger, to interplead as to their respective adverse claims to be paid a sum of money in the possession and custody of the plaintiff, which he was willing and ready to pay to the one to whom the court should determine it was due. The court adjudged that Furstenfeldt was entitled to the money, and Geinger brings this appeal from the judgment upon the judgment roll, and contends that, upon the facts found, the judgment should have been in his favor. The material facts found are substantially as follows: (1) In January, 1888, Peter Eschelbach made an assignment of his property to one Lewis, for the benefit of his creditors. (2) Thereafter, Sichler, one of the creditors of the insolvent, brought an action in the Superior Court of Los Angeles County against Lewis, the assignee, to compel him to account to the creditors. (3) In this action against the assignee he was ordered by the court (April 11, 1889) to deposit with the clerk thereof, Dunsmoor (plaintiff herein), about \$8,000, to be held pending the litigation as to the proper distribution thereof among the creditors; and thereupon the said sum was so deposited by the assignee. (4) On the same day (April 11, 1889) the court ordered a distribution of said sum among the creditors, one of whom was Antone Miller, to whom the court ordered the clerk (plaintiff herein) to pay from said money the sum of \$305.82. (5) On July 8, 1889, Miller assigned all his right and title to the last-mentioned sum, then in the custody of the clerk, to the defendant Furstenfeldt, who, on the following 9th day of July, demanded it of the clerk, but the clerk then refused, and ever since has refused; to pay the same to Furstenfeldt. (6) On the 6th day of April, 1889, the defendant Geinger obtained a judgment in the Superior Court of San Francisco against Antone Miller for the sum of \$1,819, upon which execution was issued to the sheriff of Los An-

geles County on June 18, 1889, and was duly served by copy and garnishment upon Dunsmoor, the plaintiff, and upon Lewis, the assignee of the insolvent, on June 20, 1889. (7) Dunsmoor, on June 21, 1889, answered to the garnishment notice that he held, subject to the order of the court, \$305.82, which had been distributed, by order of the court, in the case of *Sichler v. Lewis*, to Antone Miller, as above stated. (8) On July 1, 1889, defendant Geinger demanded of Dunsmoor said sum of \$305.82, which the latter refused to pay, and which he still holds in his custody, subject to the judgment of the court in this action, as alleged in his complaint herein. (9) Thereafter the defendant Furstenfeldt petitioned the Superior Court of Los Angeles County for an order commanding Dunsmoor to pay to him said sum of \$305.82, on the ground that it had been assigned to him by Antone Miller, to whom it had been ordered to be paid in the case of *Sichler v. Lewis, Assignee*; but the court, after "due hearing," denied his petition "upon the ground that said court had no further control or jurisdiction over said sum of money by reason of the order of distribution previously made by said court." Whether Geinger had notice of this petition is not stated; nor does it appear that he participated in the hearing. It will be seen that the garnishment by virtue of Geinger's execution was thirteen days prior to the assignment by Miller to Furstenfeldt, and, therefore, if the money (\$305.82) in the hands of Dunsmoor, or a debt from Dunsmoor to Miller for the same sum of money growing out of the transactions, was subject to the garnishment, the judgment should have been in favor of the appellant; otherwise, the judgment in favor of Furstenfeldt should be affirmed. Section 544 of the Code of Civil Procedure provides that "all persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be . . . liable to the plaintiff for the amount of such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied." Respondent contends (1) that no part of the money in the possession of Dunsmoor belonged to the defendant Miller; (2) that the money, of which Dunsmoor acquired the possession by the order of the court, was, at the time of the service of the writ, in the custody of the law, and therefore not subject to garnishment; and (8) that Dunsmoor owed no debt to Miller.

1. We think it must be conceded that the

ing *Robinson v. Howard*, 7 Cush. 267; *Morris v. Penniman*, 14 Gray, 220; *Clymer v. Willis*, 3 Cal. 364; *Wilder v. Bailey*, 3 Mass. 239; *Pollard v. Ross*, 5 Mass. 819; *Commercial Exch. Bank v. McLeod*, 65 Iowa, 686; *Parmlee v. Leonard*, 9 Iowa, 140; *Haley v. Nichols*, 12 Pick. 270; *Hunt v. Stevens*, 3 Ired. L. 365; *Drake, Attachm.* §§ 508-509.

#### When attachable.

But the interest of a party in money paid into court may be attached in proceedings against a nonresident. *Trotter v. Lehigh Z. & L. Co.* 2 Cent. Rep. 787, 41 N. J. Eq. 229. See *Conover v. Buckman*, 38 N. J. Eq. 308; *Wehle v. Connor*, 38 N. Y. 12 L. R. A.

231; *Dunlop v. Patterson F. Ins. Co.* 74 N. Y. 145. The surplus proceeds of property in the hands of an officer of the court after satisfying the process belongs to defendant, and is subject to garnishment by a creditor. *Leroux v. Balduz* (Tex.) May 2, 1890; *Hamilton v. Ward*, 4 Tex. 365.

Property in the custody of an officer is not attachable unless left in possession of the debtor; but when in his possession a second attachment is valid, where property does not appear charged on execution seasonably issued. *Pond v. Baker*, 1 New Eng. Rep. 397, 56 Vt. 233, citing *Beach v. Abbott*, 4 Vt. 605; *Rood v. Scott*, 5 Vt. 233; *West River Bank v. Gorham*, 38 Vt. 649.

\$8,000, while in the custody of Dunsmoor, did not belong to the creditors of the insolvent. Lewis, the assignee of the insolvent, held it in trust for those creditors, to be distributed among them ratably in payment of their several demands against the insolvent. In his hands, no one of the creditors could have lawfully claimed any part of the money as his individual personal property; nor could all the creditors jointly have so claimed all the money, as it was not a special deposit by or for them. Wade, *Attachm.* §§ 329, 407. The transfer of the money from the assignee to Dunsmoor in obedience to the order of the court gave the creditors no more title to it than they had before.

2. Whether the money was ordered to be delivered to Dunsmoor in his official capacity as clerk of the court, or as a receiver or master in chancery, he held it for the same purposes (though not by the same title) for which it had been held by the assignee, and for no other purpose. For such purposes, and until they were accomplished, no doubt the money was in the custody of the law, in the ordinary sense of the term; but, so far as the court was concerned, such purposes were fully accomplished by the final decree in the case of *Sichler v. Lewis, Assignee*, determining the share of the money to which each creditor was entitled, and ordering Dunsmoor (as clerk or receiver) to pay to each creditor a specific certain sum from the fund. That was the end of the judicial proceedings in the case of *Sichler v. Lewis*. The execution of the decree by paying the money to the creditors was all that remained to be done. The only reason assigned by the authorities for the rule prohibiting the attachment of property in the custody of the law is that such attachment would generally delay and embarrass judicial and other official proceedings in the administration of such property; and that this is a sufficient reason for the rule, as applied to all judicial proceedings in regard to such property, is generally admitted; and to this extent the weight of authority admits no exception to the rule. But, according to a great preponderance of the modern cases, there are some exceptions to the rule as applied to property in the custody of purely executive officers, based upon the maxim that the rule should not be applied "when the reason of the rule ceases." *Civil Code*, §§ 8509, 8510. After speaking of the rule and the exceptions thereto in Maryland, Mr. Wade, in his work on Attachment (§ 424) says: "It is elsewhere held, and as it appears, with considerable unanimity, that when defendant has a right to a certain distributive share of the fund in the hands of a receiver, master in chancery or trustee of court, the officer may be effectually garnished by a creditor of the party so entitled, after the court has ordered it to be paid. . . . The authorities seem to concur in holding receivers and similar officers liable to garnishment when they have in their hands a definite sum to which the defendant or judgment debtor is clearly entitled, and the officer has nothing more to do with the fund than to pay it over. Some of them may go beyond, but none, so far as they have been examined,

fall short of this conclusion." See also *Freem. Executions*, § 129; *Gaither v. Ballou*, 4 Jones, L. 488, 69 Am. Dec. 764.

In speaking of assignees in bankruptcy and insolvency, and after admitting that the property in their hands is not subject to garnishment before an order of distribution, the same author (§ 423) says: "It is another matter when, in the course of the administration of his duties, the assignee has in his hands a sum due one of the creditors, and a creditor of such creditor seeks to charge him as garnishee in respect thereto. In such case the exemption could be maintained, if at all, only on the ground of the official capacity in which the money of the defendant was held. It is no longer the property of the assignee. In case of his refusal to pay it over to the party entitled thereto, the latter should maintain an action for it. It is not apparent how, in such case, the assignee would occupy ground more favorable to his exemption than would a sheriff in possession of a surplus due an execution defendant." As to sheriffs, see section 421, same author. In cases of garnishment of executors and administrators in respect to the property of legatees and heirs the exception to the rule of exemption applies after an order of distribution of the property has been made whereby the share or portion of the defendant in attachment is rendered definite and certain. Wade, *Attachm.* §§ 425, 426; *Freem. Executions*, § 181; *Estate of Norac*, 85 Cal. 892.

I think the case at bar comes fairly within the exception to the rule that property in the custody of the law is not subject to garnishment.

3. Having conceded that no part of the money in the hands of Dunsmoor—that is, no particular coins or bank-bills—could be said to be the personal property of Miller, a delivery of which to himself he was entitled to demand of Dunsmoor, it remains to answer the objection that "Dunsmoor owed no debt to Miller." If, as contended and conceded, no particular money in Dunsmoor's hands belonged to Miller, and Dunsmoor might have paid Miller the sum ordered by the court to be paid him in any lawful money, it would seem to follow that Dunsmoor owed Miller \$305.82; and, surely, what Dunsmoor owed Miller was a debt (*Rodman v. Munson*, 13 Barb. 197), the payment of which Miller could have enforced. Indeed, it was a debt in the strict legal sense, —a judgment—a debt of record. Burrill, *Law Dict.* For a full exposition of the word "debt," as used in law, and particularly in statutes, see *New Jersey Ins. Co. v. Meeker*, 87 N. J. L. 300, and authorities there cited. Any kind of obligation of one man to pay money to another is a debt. "A debt signifies what one owes. There is always some obligation that it shall be paid; but the manner in which . . . it is to be paid, or the means of coercing payment, do not enter into the definition." *Rodman v. Munson*, *supra*.

Perhaps Miller might have coerced payment by motion in the same court that ordered the payment. If not, he certainly could have recovered the debt by action upon the judgment rendered in the case of *Sichler v. Lewis*.

I think the judgment should be reversed, and that the lower court should be directed to render judgment on the findings of fact in favor of appellant.

We concur: Foote, a., Temple, a.

**Per Curiam:**

For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to render judgment on the findings of fact in favor of the appellant.

William F. CASHMAN, *App't*,

v.

George B. ROOT *et al.*, *Repts.*

(...Cal....)

**A purchase of stock by a broker for his customer, who puts up a margin and, aside from commissions and interests, simply receives or pays the difference between the buying and selling values, is invalid under Const., art. 4, § 26, as a sale of stock on margin, and can give the broker no remedy to enforce the customer's indebtedness to him thereon.**

(June 1, 1891.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendants in an action brought to compel a reconveyance to plaintiff of certain real estate which he had conveyed to defendant Hooker as security for margins which might be demanded by defendant Root in connection with stock transactions which he was carrying on for plaintiff. *Reversed.*

The facts are stated in the commissioner's opinion.

*Messrs. P. Reddy and W. H. Metson*, for appellant:

All of the alleged accounts and dealings between the defendant Hooker and appellant were void, for the reason that the same were founded upon and were contracts for the sale of shares of the capital stock of corporations on margin.

Const. art. 4, § 26.

The language used by the parties shows an express contract to buy and sell shares of the capital stock of corporations "on margin."

Civil Code, § 1620.

The court must virtually have stricken from the contract the words "on margin" in order to have found, as it did, which, in effect, made a new contract for the parties in the face of the language of the contract, and the expressed intention of the parties, which is contrary to all rules of interpretation and construction.

Jones, Commercial and Trade Contracts, § 8.

Defendant Hooker, being at the time of the making of the contract, a member of the San Francisco Stock & Exchange Board of Brokers, and the plaintiff having been engaged for years before that time in buying and selling

stocks on margin in that market, both of the parties should be presumed to have understood the term "on margin," and to have used it with the trade meaning.

Jones, Commercial and Trade Contracts, § 116, p. 167; Dos Passos, Stock Brokers and Stock Exchanges, pp. 359, 361; *Hatch v. Douglas*, 48 Conn. 116.

For definitions of "margin," see—

*Markham v. Jaudon*, 41 N. Y. 289; Lewis, Stocks, Bonds and Other Securities, p. 124; Dos Passos, Stock Brokers and Stock Exchanges, pp. 103, 104; Cook, Stock and Stockholders, 2d ed. § 457, and notes; Dewey, Contracts for Future Delivery, pp. 106-115; *Cobb v. Prell* (Kan.) 22 Am. L. Reg. N. S. 612, 613, notes; *McNeil v. Tenth Nat. Bank*, 55 Barb. 64; *Stenton v. Jerome*, 54 N. Y. 481.

In the Constitutional Convention "sale on margin," was defined as follows: "It is merely a sale of stock on time, the stock being retained as security, and not delivered until final payment is made. That is what is generally called a sale on margin. If the stock falls in value before the time of final payment arrives, the buyer is called upon to advance more margin."

Debates and Proceedings of the Constitutional Convention, vol. 2, p. 806.

Contracts for sales on margin, as above defined, are the contracts declared to be void by the provisions of the Constitution above referred to.

It is no part of the broker's function to receive the property bought or sold by him, still less to pay the price, or to take the delivery, in his own name.

Cook, Stock and Stockholders, 2d ed. § 457; Bisbee & Simonds, Produce Exchanges, § 103, p. 185; Story, Ag. § 28; Dos Passos, Stock Brokers and Stock Exchanges, pp. 106-111; Mechem, Ag. § 986; *Child v. Hugg*, 41 Cal. 519; Jones, Pledges, § 495.

A broker acts in a threefold capacity: first in purchasing the stock, he is an agent; then, in advancing the money for the purchase, he becomes a creditor; and, finally in holding the stock to secure the advances made, he becomes a pledgee of it.

Jones, Pledges, § 496; Colebrook, Collateral Securities, § 806; Lewis, Stocks, Bonds and other Securities, p. 128.

Where a broker and customer are dealing in stocks on margin, the broker is a principal and one of the parties to the contract, and not a mere agent.

*Buchisky v. Dehaven*, 97 Pa. 202-206; *Whitesides v. Hunt*, 97 Ind. 191; *Beveridge v. Hewitt*, 8 Ill. App. 468; *Flagg v. Baldwin*, 88 N. J. Eq. 229; *Justh v. Holliday*, 2 Mackey, 846, 11 Wash. L. Rep. 418; *Cobb v. Prell*, 15 Fed. Rep. 774, 22 Am. L. Reg. N. S. 609; Cook, Stock and Stockholders, §§ 845, 846.

The account was founded upon an illegal and void contract, and therefore it created no indebtedness on the part of plaintiff to the defendant Hooker.

Rapalje & Lawrence, Law Dictionary, *Debt*. The contract was void.

**NOTE.**—As to invalidity of option deals and contracts for stock on margin, see notes to *Preston v. Cincinnati, C. & H. V. R. Co.* (Ohio) 1 L. R. A. 141; 12 L. R. A.

*Osgood v. Bauder* (Iowa) 1 L. R. A. 656; *Sprague v. Warren* (Neb.) 3 L. R. A. 679; *Harvey v. Merrill*, (Mass.) 5 L. R. A. 200.

Const. art. 4, § 26; *Greenhood*, Pub. Pol. Rules I. II. p. 1; *Bell v. Leggett*, 7 N. Y. 176; *Higgins v. Higgins*, 55 Mo. 846; *Gibbs v. Smith*, 115 Mass. 592; *Story*, Eq. Jur. par. 298; 2 *Parsons*, Cont. chap. 2, par. 8, pp. 888-890; *Smith v. Johnson*, 1 Ala. Sel. Cas. 562; *Smith v. Johnson*, 37 Ala. 638; *Maybin v. Coulton*, 4 U. S. 4 Dall. 298, 1 L. ed. 841.

There was no indebtedness, even though the defendant Hooker acted as a broker.

*Irwin v. Williar*, 110 U. S. 510, 28 L. ed. 380; *Re Green*, 7 Bias. 343; *Stewart v. Garrett*, 3 Cent. Rep. 719, 65 Md. 392; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *First Nat. Bank of Lyons v. Oakalosa P. Co.* 66 Iowa, 41; *Thompson v. Cummings*, 68 Ga. 125; *Barnard v. Backhaus*, 52 Wis. 598; *Bartlett v. Smith*, 13 Fed. Rep. 263; *Tenney v. Foote*, 95 Ill. 99; *North v. Phillips*, 89 Pa. 250; *Faraira v. Gabell*, Id. 89; *Swanger v. Mayberry*, 59 Cal. 94.

The contract and dealings between the parties being void, all securities thereunder are also void.

Cook, Stock and Stockholders, § 847.

It was a wagering contract.

Cook, Stock and Stockholders, §§ 843, 847.

*Messrs. Pillsbury & Blanding* for respondent Root.

*Messrs. M. C. Baum and Charles J. Heggerty* for respondent Hooker.

*Temple, O.*, filed the following opinion:

This action is brought to compel a conveyance to plaintiff of certain real estate, which it is averred was conveyed by plaintiff to defendant Root on the 18th of June, 1884, in trust to secure the payment by plaintiff to defendant Hooker of any indebtedness which might exist within six months after the 14th of July, 1885. The complaint alleges that plaintiff was not, at the commencement of the suit, and for a long time prior had not been, indebted to Hooker in any amount whatever. Demand for a deed and refusal are also averred. The answers admit that the conveyance was made in trust, as charged in the complaint, but charge that plaintiff is still indebted to the defendant Hooker in the sum of \$2,847. Defendant Hooker was a stock broker engaged in buying and selling mining stocks in San Francisco, on margin or otherwise, as required. Plaintiff had been a regular customer of Hooker for many years, and had lost heavily in stock speculations. Being, as Hooker testified, rather short of money, he conveyed the property sued for in trust to defendant Root, who was in Hooker's employ, to cover margins, and to enable plaintiff to continue his speculations in stock. Hooker states that he valued it at about \$3,000, and to that extent plaintiff could buy on margin without actually putting up money. They continued to deal together until Hooker's business was closed by his insolvency in December, 1886, at which time Hooker held certain stocks for plaintiff, and, according to Hooker's books, plaintiff owed him \$2,847. Plaintiff does not dispute the correctness of the account according to the course of dealing between the parties or their understanding at the time, but claims that the debt is illegal, and the contract to pay void, under section 26 of article 4 of the Constitution of this State. It reads as follows: "All contracts

for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." Plaintiff's dealings with Hooker were altogether on margin. When the estimated value of the land did not afford sufficient margin, it was put up in cash, and was kept good as the market fluctuated. Upon purchasing stock, the cost price was charged to plaintiff, less the amount of margin put up in cash. When sold, his account was credited with the amount realized. He was, of course, charged with the broker's commissions and the interest on the money advanced. The result, of course, was that plaintiff, aside from the commissions and interest, simply received or paid the differences between the buying and selling values. It was not contemplated that he should ever receive the stock, although he might, had he been able, have paid his debt and demanded the securities at any time. Stock ordered was always purchased by Hooker, paid for in full, and delivered to him, except when he had orders to sell the same stock for another customer, in which case the stock was simply transferred from one account to the other at market rates. The account was generally balanced monthly, when, as Hooker testified, plaintiff could tell whether he had lost or won in stocks. Hooker did not keep the stock of his customers separate, or preserve its identity, but always had under his control sufficient to satisfy the claims of his customers.

It is evident from these facts that the only purpose of these dealings was to enable plaintiff to speculate in the fluctuations of the market. If there were no break in the proceedings, it was indifferent to plaintiff whether any stock was bought or not, provided the entries were made in his account according to the market rates. It was quite a different matter, however, to Hooker. Had he not purchased, the transaction would have been a continuous wager between himself and his customer as to the future of the market. By purchasing he secured himself, and had no other interest than his commissions and the interest on his money. So, too, had there been a break anywhere in the deal, it might have been important to determine whether the stock was purchased by Hooker as agent and belonged to plaintiff, or was purchased for himself simply to make himself safe upon his contract to give plaintiff the advantage of the fluctuations of the market. The respondent contends that the relation of vendor and vendee did not exist between plaintiff and Hooker; that they neither bought nor sold stock to each other; that Hooker, as agent for plaintiff, purchased and paid for the stock, receiving immediate delivery for plaintiff, and thereafter held it subject to his order upon the payment of the price and commissions. The further contract, by which he held it as security for a loan, constituted the relation of pledgee and pledgor, which is not prohibited by the Constitution. This view was adopted by the learned judge of the trial court, and the findings are carefully drawn upon that theory. They find that the stock was purchased by Hooker as agent of and belonged to



plaintiff, and that Hooker never sold stock to or bought from, plaintiff. No part of the indebtedness, therefore, arose from the sale of stock on margin or otherwise.

This view of the relation between the broker and his customer in such a transaction is sustained by the weight of authorities, in this country and in England, but the decisions are by no means uniform. The first prominent case on the point is *Markham v. Jaudon*, 41 N. Y. 285. The question there was whether the stock in the hands of the broker was a pledge. In order to determine this question, an analysis is made of the contract relations, separating the powers and obligations of the parties. It was held that the broker undertook (1) to purchase for his customer; (2) to advance the money required beyond the margin; (3) to carry the stock, the margin being kept good, the customer to receive the gain or suffer the loss; (4) to retain the stock, or an equal amount of the same kind of stock; (5) to deliver to customer when required, upon payment; or (6) to sell when required, accounting for the proceeds. That the customer contracts: (1) to pay the stipulated margin; (2) to keep the margin good; and (3) to take the shares when required, and pay the amount due the broker.

This statement of the rights and obligations of the parties has been generally followed in other cases, in which similar questions have arisen; and stockboards and brokers have adopted it as correctly stating the nature of the relation between broker and customer. It is evident, however, that the court in this analysis assumes the conclusion which it desired to reach. Its correctness has been questioned. In that case there were two strong dissenting opinions, in which the relation between the broker and his customer was regarded simply as a contract relation, by which the fact of agency was ignored or denied. *Mr. Justice Grover* says: "The contract contemplated that the title should at all times remain in the defendants (brokers)." *Mr. Justice Woodruff* refers for his views of the relation to his opinion in *Morgan v. Jaudon*, 40 How. Pr. 866. He there states his opinion to be that "it does not contemplate, in the first instance, that the customer shall ever acquire the title to the stock. It is a pure speculation in the rise and fall of stocks, . . . and the broker is employed to provide the means, either from his own funds, . . . or by borrowing in his own name and on his own credit, by pledge of the very stock which he buys, the required amount; and the whole expectation and intention of the parties is satisfied, if, when directed to sell, he produces the required number of shares, and sells them for the very purpose for which the speculation is made, viz.: to realize the profits or determine the loss which results to the party employing him for that purpose. It is entirely clear that in these transactions the party employed, though he belongs to a class commonly called 'brokers,' does not act as broker merely. In such business they are more than brokers; and all arguments imputing to them a mere agency, so far as they rest upon the facts that they are called 'brokers,' are unsound and fallacious." In Pennsylvania it has been held that the relation of principal and agent does not exist between the broker

and his customer, but both are principals. *Buchizky v. De Haven*, 97 Pa. 202; *North v. Philips*, 89 Pa. 250; *Dickson v. Thomas*, 97 Pa. 278; *Gheen v. Johnson*, 90 Pa. 88.

In *Ingraham v. Taylor*, 58 Conn. 508, it was held that the broker, under such a contract, was not bound to purchase the stocks at all. It was enough if he could procure them when called for, at the market rate, when ordered. It is said: "By such contracts the plaintiff bought the right to demand at his option as to the time the delivery of shares at the price of the day of agreement. The defendants, in consideration of his payments upon margins, assumed the risk of an undertaking to deliver shares upon demand at that price." These citations are made to show that it is not universally admitted that the broker in such transactions purchases the stock as the agent of the customer. Looking at it from the point of view of the customer only, it is clear that by this device he has been able to purchase stock on margin. This phrase has come to have a peculiar or technical meaning among stock dealers, and it is applied to just these transactions between broker and customer.

It is a matter of public history that the constitutional provision was adopted just after a period of remarkable stock speculation, in which a large part of the community had been set wild with the apparent prospect of great gain, and the rapid fluctuations of stock afforded unusual inducement to stock gambling. By skillful manipulation of the markets, a few fortunate ones had been able to take advantage of the existing mania, and make large fortunes for themselves, at the cost of wide-spread financial ruin and distress. People of small means were enabled by brokers to speculate largely at that time, through these very purchasers on margin. Of these matters this court will take judicial notice, and, doing so, cannot doubt that this inhibition was intended to strike down this practice. If it does not do this, it simply beats the air. Although an isolated case or two might occur, where a transaction directly between vendor and vendee is upon like terms, certainly we know there was no practice of that kind which could have been regarded as an evil of sufficient importance to be prohibited in the fundamental law. Such a prohibition is of little worth if it can be evaded by so simple a device. A party wishing to purchase on margins has but to interpose his broker, who is to carry the stock instead of the original owner. This would not diminish the evil. In fact, it is the very form of the evil mainly intended to be prohibited. It may be said that if the relation be not one of principal and agent, but simply a contract relation, by which the broker agrees to speculate in stocks, the customer indemnifying him against loss, and taking the profits, still there is no sale. It would be, it may be said, a contract to enable the customer to speculate in differences of market values. It is only sales on margin that are prohibited and made void. It is not easy to characterize by a name the relation between the broker and his customer. For all ordinary purposes, it may be admitted that the broker purchases as the agent of his customer, and then holds the stock as a pledge to secure a debt; but if by the transaction the customer is

enabled to do that which is prohibited, to wit, purchase stock on margin, it must be held to be within the prohibition; and if Hooker did not himself sell to plaintiff, but was only the instrument through whom the illegal end was accomplished, he being privy to the design, the same result would follow. *Irvine v. Williar*, 110 U. S. 510, 28 L. ed. 280. In the accomplishment of the unlawful purpose, he took the place of the vendor, and carried the stock as the vendor might have done; and the end was thus reached *per interpositam personam*. The end attained, and not the form of the transaction, must determine the question. It is claimed that it does not appear

that the stock was the capital stock of a corporation or an association; but it is so found, and the respondent is in no position to complain of the finding. We think the court erred in holding, from the evidence, that plaintiff was indebted to Hooker or his assignee. We therefore recommend that the order and judgment be reversed, and a new trial ordered.

We concur: **Foots, C.; Fitzgerald, C.**

**Per Curiam:**

For the reasons given in the foregoing opinion, the order and judgment are reversed, and a new trial ordered.

**TENNESSEE SUPREME COURT.**

Roena SHELTON, Impleaded, etc., *Appt.*,

ORR, JACKSON & CO. *et al.*

(....Tenn....)

**Real estate held by husband and wife jointly as tenants by entireties** is subject to the right of homestead exemption under Code § 2935, exempting real estate belonging to the head of a family to the amount of \$1,000; and the right may be claimed by the wife after a decree of divorce by which she is given the homestead.

(April Term, 1890.)

**A**PPPEAL by defendant Roena Shelton from a decree of the Chancery Court for Benton County denying her right of homestead exemption in certain property. *Reversed.*

The facts are stated in the opinion.

**Mr. J. E. Jones** for appellant.

**Mr. L. L. Hawkins** for appellees.

**Caldwell, J.**, delivered the opinion of the court:

G. W. Shelton and his wife, Roena Shelton,

were joint owners as tenants by entireties of a residence in Camden. It was worth less than \$1,000, and he owned no other real estate. In 1888 they conveyed it, by deed of trust, to secure the payment of certain debts, to one H. F. Stegall. In 1888, when but a small part of the secured indebtedness remained unpaid, other creditors of G. W. Shelton filed this bill to foreclose the deed of trust and reach the surplus proceeds of the trust property for their own debts. G. W. Shelton made no defense, but his wife answered the bill, claiming homestead in the house and lot, subject to the deed of trust, the proper and binding execution of which she admitted. Before the filing of this bill, Mrs. Shelton brought her suit in the circuit court against her husband for divorce; and an absolute divorce was granted to her, pending the present bill in the chancery court. The circuit court, in its judgment, granted the dissolution of the bonds of matrimony, also adjudged that, as between her and him, she was entitled to homestead in said house and lot; such adjudication being subject to the single reservation that it should not operate to the

**NOTE.—Tenancy by the entirety defined.**

Tenancy by entireties, says Mr. Preston, is where husband and wife take an estate to themselves jointly by grant, or devise, or limitation of use made to them during coverture, or by grant, etc., which is *in fieri* at the time of the marriage, and completed by livery of seisin or attornment during the coverture. 1 Preston, Estates, 181.

If the estate be conveyed to husband and wife originally, they are tenants by the entirety and neither can convey his or her interest so as to affect the right of survivorship in the other. *Lux v. Hoff*, 47 Ill. 425; *Mariner v. Saunders*, 10 Ill. 124; *Davis v. Clark*, 28 Ind. 424; *Babbitt v. Scroggin*, 1 Duvall, 272; *Marburg v. Cole*, 49 Md. 402; *Shaw v. Hearsey*, 5 Mass. 521; *Fox v. Fletcher*, 8 Mass. 274; *Draper v. Jackson*, 16 Mass. 480; *Harding v. Springer*, 14 Me. 407; *Wales v. Coffin*, 18 Allen, 215; *Hemingway v. Scales*, 42 Miss. 1; *Hall v. Stephens*, 65 Mo. 670; *Fisher v. Provin*, 25 Mich. 850; *Zornstein v. Bram*, 1 Cent. Rep. 66, 100 N. Y. 12; *Doe v. Howland*, 8 Cow. 277; *Torrey v. Torrey*, 14 N. Y. 430; *Wright v. Saddler*, 20 N. Y. 320; *Den v. Branson*, 5 Ired. L. 42; *McCurdy v. Canning*, 64 Pa. 38; *Fairchild v. Chastelleux*, 1 Pa. 176; *Taul v. Campbell*, 7 Yerg. 812; *Brownson v. Hull*, 16 Vt. 309; *Ketchum v. Walsworth*, 5 Wis. 95. See note to *Baker v. Stewart* (Kan.) 2 L. R. A. 434, 12 L. R. A.

**Husband and wife as tenants by entirety.**

Where land is given by will to husband and wife, they hold by entireties, and the right of survivorship will prevail over any attempted alienation by the husband. *Simonton v. Cornelius*, 26 N. C. 433, 3 Bl. Com. 183.

Both are seised of the entirety *per tout, et non per my*, so that neither can dispose of any part without the assent of the other, but the whole must remain to the survivor. *Litt. § 635*; *Co. Litt. 187*; *Bro. Abr. title, Out in Vita*, 8; *Back v. Andrew*, 3 Vern. 130; *Purefoy v. Rogers*, 2 Lev. 39; *Doe v. Parrott*, 5 T. R. 654.

But where an estate is conveyed to a man and a woman who are not married, but who afterwards intermarry, as they took originally by moieties, they will continue to hold by moieties after the marriage. 1 Inst. 187 b; 2 Cruise, Dig. 511; 5 Cruise, Dig. 448; *Moody v. Moody*, Amb. 642; *Ames v. Norman*, 4 Sneed, 668; *McDermott v. French*, 15 N. J. Eq. 80; *Babbitt v. Scroggin*, 1 Duv. 272; 1 Washb. Real Prop. \*453.

**Right of husband to control estate.**

The right at common law to control the possession during the joint lives of husband and wife is in the husband, yet neither can defeat the right of the

prejudice of the rights of complainants in the present bill. Hearing the cause on pleadings and proof, the chancellor adjudged that complainants were entitled to the relief sought in their bill, and that Mrs. Shelton had no right of homestead in the property involved. From that part of the decree refusing her claim to homestead she has appealed to this court. The conveyance of the residence by husband and wife, to secure payment of particular debts, is not a waiver of the right of homestead therein, as against other debts. *Hall v. Fulgham*, 86 Tenn. 451. If the secured debts be not paid, and the deed of trust or mortgage be foreclosed, the surplus proceeds of the property is subject to the homestead right, and will be held as an exempt fund, to the extent of \$1,000, for reinvestment in other real estate. *White v. Fulghum*, 87 Tenn. 281. So that in the case before us there is nothing to defeat the claim of Mrs. Shelton in the fact that she and her husband conveyed this property in trust to secure Stegall's debts, and that foreclosure has been decreed. As against complainants, her right is the same as it would be without such conveyance and decree. If in that case she would be entitled to homestead in the property, she is now entitled to the same right in such of its proceeds as may remain after payment of the secured indebtedness. The homestead is in the head of the family, and, in case of marriage, in the husband primarily; but when the wife obtains a divorce from her husband, on account of his fault or misconduct, "the title to the homestead shall be vested, by decree of the court granting the divorce, in the wife, and after her death it shall pass to the children." Mill. & V. Code, § 2946. This provision of the Statute was met by the judgment of the circuit court when granting Mrs. Shelton a divorce, and the homestead was thereby effectually vested in her, if in law the property was subject to the right of homestead at all. The reservation in that judgment did not diminish her legal rights thereunder, for complainants

in this cause had taken no steps, nor indeed could they have taken any, which could operate to the prejudice of any existing right of homestead. It follows, therefore, that Mrs. Shelton is now entitled to the right of homestead in said house and lot, or its proceeds when sold, subject alone to the prior claim of Stegall, if said property was held by such a title as to be subject to the claim of homestead by G. W. Shelton before the execution of the deed of trust. In short, the question is whether or not the right of homestead exists or inheres in real estate owned by husband and wife jointly as tenants by entireties. The learned chancellor was of opinion that it did not, and so adjudged. By the Statute, "a homestead or real estate in the possession of or belonging to each head of a family, and the improvements, if any, thereon, to the value of, in all, \$1,000, shall be exempt from sale under legal process during the life of such head of a family, and which shall inure to the benefit of his widow and children, and shall be exempt from sale in any way, at the instance of any creditor or creditors." Mill. & V. Code, § 2935. "Each head of a family owning real estate shall have the right to elect where the homestead or said exemption shall be set apart, whether living on the same or not." Id. § 2936. These provisions "apply as well to equitable as legal estates," and also "to leasehold property." Id. §§ 2937, 2938. And homestead exists in favor of one owning only a life estate in the land. *Arnold v. Jones*, 9 Lea, 548. The homestead exemption is a favorite in this country, and laws concerning it are construed liberally in favor of the claimant. Thompson, Homestead and Exemptions, §§ 4, 7, 781; 9 Am. & Eng. Encyclop. Law, 519; *White v. Fulghum*, 87 Tenn. 284; *Dickinson v. Mayer*, 11 Helsk. 520; *Arnold v. Jones*, 9 Lea, 548; *Ren v. Driskell*, 11 Lea, 649.

The language of our Statute is most comprehensive. In the description of the property in which the right exists, its terms are broad and

survivor to the whole estate. The husband has such rights as are incident to his own property. *Pray v. Stebbins*, 1 New Eng. Rep. 521, 141 Mass. 223.

The right of the husband to control the estate held by entireties is not affected by statutes enabling married women to hold and dispose of their property as if sole unless expressly so stated. *Ibid.*, citing *Robinson v. Eagle*, 29 Ark. 202; *Hulett v. Inlow*, 87 Ind. 412; *Rogers v. Grider*, 1 Dana, 242; *Marburg v. Cole*, 49 Md. 402; *Fisher v. Provin*, 25 Mich. 847; *McDuff v. Beauchamp*, 50 Miss. 531; *Den v. Hardenbergh*, 10 N. J. L. 49; *Bertles v. Nunan*, 63 N. Y. 152; *Barber v. Harris*, 15 Wend. 615; *Bennett v. Child*, 19 Wis. 362. See, *contra*, *Cooper v. Cooper*, 76 Ill. 57; *Hoffman v. Stigers*, 23 Iowa, 302; *Clark v. Clark*, 56 N. H. 105.

#### *Lease by husband.*

By the great weight of authority the husband may lease an estate conveyed to him and his wife in fee, which will be good against the wife during coverture, and will fail only in the event of his wife surviving him. *Washburn v. Burns*, 34 N. J. L. 18; *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; *Bertles v. Nunan*, 63 N. Y. 152; *Topping v. Sadler*, 5 Jones, L. 357; *Fairchild v. Chastelleux*, 1 Pa. 176; *Ames v. Norman*, 4 Sneed, 683; *Pollok v. Kelly*, 6 Ir. C. L. 367; *Wyckoff v. 12 L. R. A.*

*Gardner*, 20 N. J. L. 556; *Ward v. Ward*, L. R. 14 Ch. Div. 506; *Godfrey v. Bryan*, Id. 516.

#### *Husband cannot convey to prejudice of wife's estate.*

The estate of the wife as survivor of her husband is not affected by conveyance by the husband, during coverture, of the whole estate (*Ames v. Norman*, 4 Sneed, 683), nor by a levy upon the estate by creditors of the husband. *French v. Mehan*, 56 Pa. 286.

But he can convey directly to his wife such title as he has in real estate which they own as tenants by entireties. *Enyeart v. Kepler*, 118 Ind. 84.

#### *Conveyances to husband and wife and third person; tenancy created.*

Where an estate is made to a husband and wife and a third person, unless a tenancy in common has been created, they together take one half by entirety and the third person the other half to be held in common. *Hulett v. Inlow*, 87 Ind. 412; *Hall v. Stephens*, 65 Mo. 670.

It is always competent, however, by appropriate words, to make the husband and wife tenants in common. The laws of the several States are not uniform on this subject. 1 Washb. Real Prop. 426; 4 Kent, Com. 362; *Anderson*, Dict. 404, citing *Chandler v. Cheney*, 87 Ind. 294; *Re Benson*, 8 Biss. 118; *Jacobs v. Miller*, 80 Mich. 124; *Hadlock v. Gray*, 2 West. Rep. 819, 104 Ind. 598; *Thornton v. Thornton*, 3 Rand. 122; 3 Lead. Cas. Law of Real Prop. 143.

unrestricted: "A homestead or real estate in the possession of or belonging to each head of a family . . . shall be exempt, etc.; and "each head of a family owning real estate shall have the right to elect," etc. Interpreting these words according to their ordinary significance, as must be done in the absence of any qualification or limitation upon them, there can be but little trouble in ascertaining the legislative intent. Undenially the designation "real estate," in its ordinary sense includes the interest of a husband in a house and lot owned by himself and his wife jointly as tenants by entireties. If such an interest is not, in fact and in law, real estate, what can it be? Certainly it is not personalty. So naturally does it fall within the meaning of the words "real estate," as employed in the Statute, that they must inevitably be held to embrace it, there being nothing in other parts of the Act, or in its history, indicating, even remotely, that the lawmakers used those words unadvisedly, or intended to omit or exclude such an interest from the protection of the Statute.

Moreover, the object of the Statute, as well as its language, demands this construction. It was conceived that an Exemption Law, protecting \$1,000 worth of real estate to heads of families owning the same, would be wise legislation, and promotive of the public welfare. To be so, it must be impartial, and apply alike to each head of a family owning "a homestead or real estate," whether in fee, for life, leasehold interest, legal or equitable estate. The nature of the estate or extent of the title of the beneficiary was not of the essence of the scheme. The purpose was to stay the hand of the creditor, as against a limited amount in value of real estate, of whatever character, belonging to any citizen who should be the head of a family. It was known, unquestionably, that different persons, entitled to the same protection, owned different interests and different estates in land, and terms broad enough to include them all were employed. Why not include the head of a family who owns land as tenant by entirety with his wife in the scope of a law whose purpose is so humane and commendable? To the extent of his interest, he can use the land for the shelter, support and benefit of his family, in the same manner as could another man owning the absolute fee. He stands in the same or greater need of the law's favor. Is he any the less deserving of protection because he does not own the whole estate? Or is the officer of the law to take what he has because he has not more? Manifestly not. The protection of such an interest is clearly within the spirit and the letter of the Statute. We can conceive no satisfactory reason why the Legislature should not have intended to embrace in this wholesome provision all present interests in land naturally embraced in the language used in the Act. Again, under the authority of *Ames v. Norman*, 4 Sneed, 682, the estate of G. W. Shelton in the house and lot in question here might, before the deed of trust, have been seized and sold at law, and the purchaser at such a sale would have become vested with the "right to occupy and enjoy the rents and profits of the land during the joint lives" of Shelton and wife, and, in case Shelton survived her, with 12 L. R. A.

the fee. Now, can it be that an interest in land which is so subject to seizure and sale, and the sale of which will vest in the purchaser the right to the full enjoyment of the whole property during the life of the debtor at least, is not real estate, within the contemplation of the Homestead Law? We think not. If the creditor, in right of the husband, may take the whole property, at all events during the life of the latter, so the husband, in his own right, may invoke the protection of the law for the whole property during the same period. The husband's estate under the deed, augmented by his marital interest in his wife's estate, becomes practically tantamount to the whole estate during their joint lives. It is so held in favor of his creditors seeking a sale, or in favor of purchasers at judicial sale; for like reason it must be so held in his favor when he asserts his claim for homestead. That property held by husband and wife by entireties could not "inure to the benefit of his widow and children" upon his death, but would vest in her absolutely by right of survivorship, is not a sufficient reason for denying his right of homestead therein while they both live. If so, then the right of homestead could never exist in favor of a life tenant, for his estate ceases with his death, and nothing can "inure to the benefit of his widow and children" as homestead. But the right of homestead does exist in a life estate (*Arnold v. Jones*, 9 Lea, 548) and in "leasehold property" (Code, § 2988), though the period of the lease may terminate in the lifetime or at the death of the lessee. The meaning of the Statute is that, in lands descending from the husband and father, the homestead "shall inure to the benefit of the widow and children." We cannot believe, in the absence of an express declaration to that effect, in the face of the law itself, that the framers of our Constitution, and the members of the General Assembly, intended to extend the benefits of the homestead exemption to citizens owning real estate in severalty, and not to those owning it jointly with their wives, as tenants by the entirety. A law making such a distinction would, in our judgment, be both impolitic and unjust. It would be an unjustifiable discrimination in favor of some persons and against others alike deserving of the law's favor and protection. Such is not our law, which, as we understand it, is distinctly impartial, extending the right of the exemption to "each head of a family owning real estate," whether in fee, for life, for years, in severalty, in joint tenancy, etc.

The case of *McRoberts v. Copeland*, 85 Tenn. 211, is not in point. There a husband and father conveyed a tract of land to his daughters, reserving a life estate to himself and his wife. The court held that after his death his wife took the life estate by survivorship in her own right, and that it should not be "reckoned as a part of his land in the assignment of homestead and dower" to her as his widow, because "all his title and interest in that particular tract of land ceased absolutely with his death." 85 Tenn. 212, 218. The husband's right of homestead exemption in the reserved life estate was in no sense involved, and could not have been, under the facts of that case, it arising after all his interest had passed away.

Had he made the claim of such right in his lifetime, it should have prevailed; but how that would have been the court was not called upon to express an opinion, and could not properly have done so. As to the case of *Avans v. Everett*, 3 Lea, 76, wherein it was decided that the right of homestead did not exist in land held by tenants in common, we content ourselves with the observation that its reasoning (which we do not feel called upon to approve) has no application to this case, because here the debtor's interest is practically equivalent to an estate for life, at the least, in severalty, and is not an undivided interest merely, as in that case; that if sound upon its own facts, which we do not decide, the doctrine of that case should not be extended. In *Mary O. Oulom v. John A. Cooper et al.*, decided at the December Term, 1888 (oral opinion), the question was exactly the same as that involved in the present case, and the decision was against the claim of homestead. With the greatest care we have reconsidered the question, and now decide it otherwise, holding that the right of the homestead exemption does attach to real estate owned by husband and wife jointly as tenants by entireties. For reasons already stated, it is clear that G. W. Shelton was entitled to homestead in the house and lot, subject alone to the deed of trust. The judgment of the circuit court granting Mrs. Shelton a divorce vested her with the same right. She is now entitled to an exemption in the surplus proceeds of the property, the same to be reinvested according to law. *White v. Fulghum*, 87 Tenn. 290.

Reverse the decrees as to homestead, and enter decree in accordance with this opinion. Complainants will pay costs of appeal.

**Snodgrass, J., dissenting:**

We do not concur in the holding that the homestead exemption applies to the interest of a husband in land held in joint tenancy with the wife. He is not the owner of the property, or sole possessor, as contemplated by our law. Under the Constitution, "a homestead in the possession of each head of a family, and the improvements thereon to the value, in all, of \$1,000, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same." Const. 1870, art. 11, § 11. The Statute of 1870 on this subject is in exactly the same terms, exempting "a homestead in the possession of each head of a family." It also provided that such homestead should inure to the benefit of the widow, and be exempt during the minority of the children occupying it, and until the youngest child reached the age of twenty-one years. The 6th section of the Act provided that "the homestead in the possession of a husband shall, upon his death, go to his widow during her natural life, with the products thereof for her own use and benefit, and that of her family who reside with her, and upon her death it shall go to the minor children of her deceased husband, free from the debts of the father, mother or said children; and upon the death of said minor child or children, or their arrival of age, the same may be sold, and the

proceeds distributed among all the heirs-at-law of the deceased head of a family, according to the Laws of Descent and Distribution in this State." The 7th and 8th sections are as follows: "Sec. 7. Upon the death of said head of a family without widow or minor children, said land shall be sold for the payment of the debts as may be legally established against his estate, and the remainder distributed among his heirs according to the rules of descent in force at the time in this State. Sec. 8. If the head of a family is married, and his wife obtain a divorce on account of his fault or misconduct, the title to the homestead shall be vested by the decree of the court granting the divorce in the wife, and after her death it shall pass to their children."

These sections quoted show conclusively that the homestead contemplated was to exist on land owned by the head of a family; that it was such as might inure to the benefit of his widow (because she was such) after his death, and which would descend to his children, or, when sold, the proceeds might be distributed "among all the heirs at law of the deceased head of a family," "among his heirs." It was an estate too, which, after the death of wife or children, might be sold "to pay debts legally established against his estate," and was such a one that, if the wife obtained a divorce on account of his fault or misconduct, it was to be vested by decree of court in the wife for life, and after her death in "their children."

These provisions show, first, that the land subject to homestead must belong to the husband in severalty, and especially that they do not apply to lands held by husband and wife in joint tenancy. Such land goes to the survivor on the death of either. *Taul v. Campbell*, 7 Yerg. 319; *Berrigan v. Fleming*, 2 Lea, 271; *Shields v. Netherland*, 5 Lea, 201; *McRoberts v. Copeland*, 85 Tenn. 211. It is manifest, then, that a homestead on it would not inure to the benefit of his widow as such, and for her use and benefit, and that of her family residing with her, and upon her death to the minor children of her deceased husband, because on his death the entire fee would vest in her, and "her family residing with her" could take no interest in it whatever, nor upon her death would it go to the minor children of her deceased husband. It would go to her devisee, or, in default of a will, to her children or heirs, and not to his, unless, of course, they were the same. And, for the same reason, it could not be sold and proceeds distributed among his heirs in the contingencies provided for as quoted; nor, upon divorce granted for his misconduct, could it be vested in the wife for life, with remainder to their children, because that would be to limit her own fee for life, and deprive her of the power to devise her estate after coverture. If, upon dissolution of the marital relation, the property would vest in her, it would be absolutely. These considerations, it seems to us, show conclusively that the Homestead Law is not applicable to such a tenancy; but there are others. If a legal homestead does exist on such an estate, what is the effect of it? Suppose a divorce granted to the husband. He would still remain the head of the family, and the homestead right would exist in him. Then it must continue to the destruction of

the wife's interest in the fee for life; so that in that event a homestead would be carved out exclusively for him in land which did not belong to him, but which in fact belonged also to another. So, too, the husband can abandon a legal homestead, and the fee in it may be sold in that event for his debts, and it will vest in the purchaser free from the homestead right; but it cannot be said that such sale would affect the wife's right in a joint tenancy, even if she joined in the abandonment, because her interest in the fee, her right of survivorship, would not be affected by either abandonment or sale. The Act of 1879, amending the Homestead Law of 1870, does not affect the question by adding to the words "a homestead" the words "or real estate belonging to each head of a family," because these words made no other change in the law than to give the husband or head of the family the right to elect where he would locate the homestead. *Flatt v. Stadler*, 16 Lea, 379. Now, suppose the husband elects to locate it on the joint tenancy of himself and wife, and dies leaving other lands. The wife, according to the case being considered, would take the selected homestead as such (although it was her own), and would thereby be cut out of any homestead in the husband's land. This would inevitably result if such an interest was a proper homestead, but we have held it was not, and defeated this very result in her favor. *McRoberts v. Copeland*, 85 Tenn. 211.

There are many considerations of like character which go to prove that such a joint estate in land was not within the contemplation of the law-makers in establishing "a homestead in possession of the head of a family;" and there is still a part of the Statute unquoted which we think clearly shows that neither such an estate, nor any other estate held in common with others, was within such contemplation; and that only such was exclusively within the ownership and possession of the head of a family was contemplated,—such as he held in severalty, and could be set apart to him by metes and bounds, and that without resorting to a court to partition and carve out for him such estate. The third and fourth sections of the Act provide for levy upon the real estate of the debtor upon which the homestead is situated by execution and attachment, and directs that the levying officer shall summon three disinterested freeholders, and have them set apart the homestead of the debtor out of the real estate levied upon. They are to fix the precise boundaries, and the remainder of the lands are to be sold. If it is of greater value than \$1,000, and is so situated that it cannot be divided so as to set apart the homestead, the freeholders shall certify the fact, and the officer shall sell the whole, and pay proceeds to the clerk of the court rendering judgment or condemning the land for sale; and he shall, under order of the court, invest \$1,000 in the purchase of a homestead for the family of the debtor, and the creditor take the surplus. Now, it is clear that this cannot apply to an interest held jointly with the wife any more than with anyone else; because, if it does so

12 L. R. A.

apply, it forces the sale of her land, and makes her take in lieu of all of it, and all interest in it, her family share in the part allotted as homestead, or in that purchased for the benefit of the family,—this upon the theory that such is the effect that results under the law, and must result if this land is within its meaning. That these consequences could follow no one can maintain, and thus it appears that such an estate was never within the intent of the Act. There are more reasons why such an estate could not be burdened with a homestead, by proper construction of our Act, than there are why a tenancy in common could not. The tenancy in common, while, like this, a legal estate, has no termination in survivorship, but will descend to heirs, and may inure to the benefit of a widow, not because of her own, but because of her husband's interest; and yet the reason of a want of an interest and possession in severalty, which prevents a tenancy in common being so burdened, exists here, and equally precludes the possibility of the existence of a homestead upon a joint tenancy, and to this extent authority against homestead on a tenancy in common is authority against a homestead here. It was ten years ago decided that no such right existed in favor of a tenant in common. *Avans v. Everett*, 8 Lea, 76. And this has ever since been followed. But the direct question came before us at Knoxville, September Term, 1886, and it was then held such an interest as the wife's on survivorship could not be taken into consideration in fixing homestead, but the wife owned such land, and homestead must be assigned out of other lands of the husband. *McRoberts v. Copeland*, 85 Tenn. 211 (opinion by Judge Caldwell). It came again before this court at Nashville, last term, and we there held that the Homestead Law did not apply to a joint tenancy of husband and wife. *Culdom v. Cooper* (oral opinion). These cases settled the law in accord with the case referred to, and many others unreported. They are sound in reason, and should be adhered to as the only proper construction of the Statute. It does not matter that one was an oral opinion. It was in accord with the written one cited, and, besides, this court, of course, adheres to principles settled, however it may be done, and does not have one law to administer orally and another in writing. The one delivered in this case was oral, but since adjournment at Jackson a written opinion has been prepared. In this opinion, not only is the case in 85 Tenn. referred to, impliedly overruled, but the case of *Avans v. Everett*, 8 Lea, 76, would share the same fate, if the reasoning of Judge Caldwell in this case should be adhered to when the question arises, for it is based upon authority hostile to it, and which was referred to and rejected by Judge Cooper, who delivered the opinion of the court in *Avans v. Everett*. We regard the overruling of 85 Tenn. and the oral opinion at Nashville, as not only erroneous, but unwise in policy. We therefore respectfully, but earnestly, dissent from the present ruling.

Lurton, J., concurs in this dissent.

JOYCE *et al.*, Appts.,  
v.

J. I. CASE THRESHING MACHINE CO.

(....Tenn....)

**A tenant in common of land has no homestead right therein under Code, § 2986, exempting "a homestead or real estate in the possession of or belonging to each head of a family," and § 2986, giving each head of a family the right to elect where the "exemption shall be set apart, whether living on the same or not."**

(Caldwell, J., and Turney, Ch. J., dissent.)

(November 5, 1890.)

**APPEAL** by defendants from a decree of the Chancery Court for Rutledge County, in favor of complainant in an action brought to foreclose a mortgage. *Reversed in part. Affirmed in part.*

The facts sufficiently appear in the opinion. *Messrs. Shields & Shields and R. O. Samuell* for appellants.

*Messrs. Ingersoll & McHenderson* for appellee.

**Snodgrass, J.**, delivered the opinion of the court:

We agree with the chancellor in the conclusion reached in this case as to Joyce, and do not deem it necessary to discuss the assignments of error as to his branch of the case further than the point made that the chancellor was in error in holding that Joyce was not entitled to homestead in the land decreed to be sold because his interest in it was that of a tenant in common. His decree was upon the authority of *Avans v. Everett*, 8 Lea, 76, decided in September, 1879, but upon the Act of 1870; and it is earnestly and ably argued: *first*, that this case was originally wrong; and, *second*, that under our present Homestead Law, embodying the Amendment of 1879, a homestead does exist on the undivided interest of a tenant in common in "real estate;" that these words are broad and comprehensive enough to include any interest in real estate, and exempt it. The argument is put upon the ground that our present Homestead Law, in consequence of the use of the term "real estate belonging to each head of a family," now included in the law by vir-

tue of the Act of 1879, exempts the interest of a tenant in common, because, according to Kent, and all other authors who ever treated of that subject, "real estate" includes the interest of a tenant in common, joint tenant, or any other interest in land. If that were the question being considered, there would be no controversy, or there could be no debate. As no one ever did deny that proposition, it is fair to presume that no one ever will. If the Legislature of 1879 intended to protect real estate as such, the question was settled in 1879, and before the delivery of the opinion in *Avans v. Everett*. But the error of the argument results from treating the Legislature as intending to protect any interest in real estate as such, and ignoring the fact that this was not (and has been construed as not) to protect real estate at all, or any interest in it, but was, and was alone, to exempt a homestead,—a right of occupancy upon such real estate as was owned by a head of a family, which he had converted, or was in a situation to convert and occupy, as a homestead, should he wish to do so. Because before 1879 it had been necessary that real estate which was possessed by a head of a family for a home must be occupied in order to give him the homestead right, the law was then so amended as to secure a debtor a homestead in land not thus occupied, but such as he might select and appropriate to that purpose when he desired. It was intended to protect that occupied as a homestead, or owned by him, in such way that he could appropriate it as such, and, of course, it either must have been converted, or been in his hands susceptible of being so converted into a homestead; that is, he must have had it in exclusive possession, or it must have been owned by him in severalty, and in a condition to be so claimed, used and appropriated, whether the estate be legal or equitable or a leasehold. That this Act did not exempt real estate as such, or any interest in it, has been since very often adjudged, and the Act held to have no extending or other effect on the law as it stood, and as an amendment, than to exempt a right of occupancy (a homestead) in real estate which was occupied or might be occupied as a home. The use of the words "or real estate" was originally supposed by some members of the profession to exempt land, or some interest in it, and the question was soon made; but this court repudiated that view, and held

**NOTE.**—*Estate in common not subject to homestead right.*

A homestead cannot be jointly held with another. *Cornish v. Erees*, 74 Wis. 480; *West v. Ward*, 26 Wis. 579.

A tenant in common, or one holding land in joint tenancy, cannot acquire a homestead therein to the extent of his undivided interest, unless he has the land enclosed and is in exclusive occupancy thereof. *Fitzgerald v. Fernandez*, 71 Cal. 504, citing *Wolf v. Fleischacker*, 5 Cal. 244; *Reynolds v. Pixley*, 6 Cal. 165; *Giblin v. Jordan*, Id. 417; *Kellersberger v. Kopp*, Id. 544; *Bishop v. Hubbard*, 23 Cal. 517; *Elias v. Verdugo*, 27 Cal. 413; *Seaton v. Son*, 22 Cal. 453.

Upon the question whether an estate in common will support a right of homestead in one of the co-tenants, or whether it must be an estate in severalty, the authorities are conflicting, says Judge Thompson, in his learned treatise on Homesteads 12 L. R. A.

and Exemptions, and he proceeds to give the reasons which support the opposing conclusions. Thompson, Homesteads and Exemptions, §§ 180-189.

In the affirmative he cites the following cases: *Greenwood v. Maddox*, 27 Ark. 660; *Thorn v. Thorn*, 14 Iowa, 49; *Hewitt v. Rankin*, 41 Iowa, 35; *Tarrant v. Swain*, 15 Kan. 146; *Horn v. Tufts*, 30 N. H. 473; *Lacey v. Clements*, 36 Tex. 633; *Williams v. Wethered*, 37 Tex. 180; *Smith v. Deschaumes*, 37 Tex. 429; *McClary v. Bixby*, 36 Vt. 254.

In the negative the following cases are cited: *Wolf v. Fleischacker*, *Reynolds v. Pixley*, *Kellersberger v. Kopp*, *Bishop v. Hubbard*, *Elias v. Verdugo* and *Seaton v. Son*, *supra*; *Kingsley v. Kingsley*, 39 Cal. 655; *Cameto v. Dupuy*, 47 Cal. 79; *Thurston v. Maddocks*, 6 Allen, 427; *Bemis v. Driscoll*, 101 Mass. 421; *Amphlett v. Hibbard*, 29 Mich. 298; *Ventress v. Collins*, 23 La. Ann. 753; *Simon v. Walker*, 23 La. Ann. 603; *Borron v. Solilbellos*, 23 La. Ann. 355; *West v. Ward*, 26 Wis. 580.

that the Act added nothing to the old law but an exemption of possession on \$1,000 worth of land owned by the debtor, but which he did not actually occupy, and gave him the right to select the part of his land upon which the homestead should be located and thereafter exist. *Flatt v. Stadler*, 16 Lea, 871-879.

This case goes over the whole subject, and concludes as follows: "The whole of the Acts upon this subject should be construed together as one Act, and, if there is any seeming conflict, it should be so construed as to give effect to the will of the law-making power. But we think there is no real conflict in the object and design of the several statutes, nor any purpose by the Act of 1879 to alter the then existing law further than to give the owner of the land the power to locate his homestead upon any part of it." This opinion was at the April Term, 1886, and has ever since been followed. And see *Fauver v. Fleenor*, 18 Lea, 622. This ends all argument upon the broad or comprehensive terms of the Statute. It includes no more than it did before the Act of 1879, so far as interests in land are concerned, and leaves the question unembarrassed by any play upon phraseology or speculation in familiar or foreign law.

The law is just as it was when *Avans v. Everett* was decided, and the first question to be investigated is, Was that case right? In the first place, we remark it is evidently well considered. On its face it appears to be the unanimous opinion of the court, but we personally know that our present chief justice did not concur. This, however, only shows that it was better considered, because the dissenting view, we need not add, was pressed, and, after all that could be urged in argument or consultation, was rejected, and the case decided as it was,—against the exemption. In the next place, it was in accordance with the holding of numerous courts in many of the States, some of them of the very highest rank in the estimation of the bar throughout the Union. It was so decided in Massachusetts, California, Wisconsin and other States. A number of references to these opinions, and much quotation from them, can be found in Thompson on Homesteads and Exemptions, §§ 182-185, inclusive. They need not be restated or requoted here. Some of the States had taken the contrary view. The author of that work advocated the contrary view. He even believed that the exemption extended to partnership realty, but admits, of course, what it is superfluous to repeat, that the courts have, by a very decided weight of authority, settled the question against his views. Section 194. It is needless to add that the court of this State has so settled it. *Chalfant v. Grant*, 8 Lea, 118; *Spiro v. Paxton*, Id. 75; *Gill v. Latimore*, 9 Lea, 381; *Hollins v. Webb*, 2 Leg. Rep. 74.

Judge Cooper, who delivered the opinion of the court in *Avans v. Everett*, cites the sections referred to herein to sustain it and in opposition to the view we have taken of Thompson on Homesteads and Exemptions, and says the weight of authority under similar statutes is in accord with the conclusions of the court in that case. He quotes our statutes, and says: "It manifestly contemplates the occupancy of a special portion of land, capable of being set

apart by metes and bounds. It is impossible to apply its provisions to an undivided interest in realty. The debtor owns nothing in severalty, and the creditor could neither ascertain, nor, of course, subject the remainder, after setting apart the homestead. Until the Legislature changes the provision of the law, or makes specific provisions for the case, we see no mode of conceding the homestead rights consistently with the equally declared rights of creditors." Page 78. This was at the September Term, 1879. The court then, at that date, assuming that the weight of authority was already with this conclusion, added to it the precedent then made in Tennessee, and thus added this State to the list of those in which it was held that the interest of a tenant in common was not exempt under the Homestead Law. For seven years that court recognized and followed the precedent then established, and for four years this court has done so. We are now urged to reverse it, and the authority rejected by the court in 3 Lea, referred to, is pressed upon us as conclusive on the other side of the question. In deciding that case the court referred to the sections of Thompson on Homesteads and Exemptions (§ 180 *et seq.*) embodying both views, and disagreeing with the author of that work as to the weight of authority. Among the sections thus cited and rejected was one quoted by Thompson from Freeman on Co-Tenancy and Partition and other works of the same author, saying that a co-tenant may lawfully occupy a parcel of the lands of the co-tenancy, and may employ them, not merely for cultivation or for other means of making profits, but may also build houses and barns, plant shrubs and flowers, and surround himself with all the comforts of home. His wife and children may of right occupy and employ the premises with him. Upon the land of which he is but a part owner he may, and in fact he frequently does, obtain all the advantages of a home. These advantages are none the less worthy of being secured to him and his family in adversity because other co-tenants are entitled to equal advantages in the same home. That he has not the whole is a very unsatisfactory and a very inhumane reason for depriving him of that which he has. This seems to be the stronghold of that side of the case,—of the theory that the exemption of a home to the head of a family does not mean his home, exclusively his, but means that it exempts any interest which he is authorized to possess with others, although he cannot claim any distinct parcel of it as his own, for a home or any other purpose, and this, too, upon the theory that he can go on any part of it, and may, jointly with others, use the land, and may himself improve and beautify any part or all of it.

It seems that this has so little to do with the question, under our Statute giving a homestead to him alone who owns the home or the real estate, in such way that it, or a certain part of it, can at any time be set aside to him against everybody, by three freeholders summoned by a sheriff or constable for that purpose only, that it would not be seriously cited in such question, and only needs statement, not refutation. It may be true that a co-tenant can plant shrubs and flowers in a co-tenancy, while his defrauded or defeated creditor grows weeds adjacent in a



rented homestead; but surely this does not make the property so adorned the home of the debtor, in the sense of our Homestead Law; nor is there anything in our Partition Law that necessarily gives to any co-tenant the portion he elects to take or beautify. The homestead which our law contemplates is a specific parcel of land owned by him, and capable not of being partitioned in a suit in court, but of being partitioned and set apart by metes and bounds by the three freeholders summoned by the levying officer. See 8 Lea, 78. And see, for further elaboration of this question, the dissenting opinion in the case of *Jackson v. Shelton*, 89 Tenn. 82.

An argument is made that, because land can be partitioned among tenants in common on application to the courts of this State, therefore a homestead exists in favor of each one, and can be set apart to him. This is erroneous, for several reasons. In the first place, all lands or real estate held in such tenancy cannot be partitioned. A hundred tenants in common may own one small house or small tract incapable of being divided, much less making a homestead for each; and if this is answered that each interest might be sold, and separate proceeds invested, we reply that this would be impossible of small interests. Suppose the interests to bring only a few dollars. It would be totally impracticable to take it and invest it in a homestead, and let the creditor sell the fee; for it is only a homestead interest in land thus bought on reinvestment that is protected,—the fee is to be subjected to the creditor's demand. But, it is useless to discuss our Partition Law. The Homestead Law has nothing to do with it. The Homestead Law has a partition method of its own. It declares that land on which such an estate of occupancy exists is one which can be and must be partitioned or sold under the action and certificate of three freeholders summoned by the levying officer. It follows that land which cannot be so partitioned is not included. This is the argument, and it is not answered by a reply that land may be partitioned in court in this State,—a true enough proposition in itself, but having nothing to do with the question. But if we could apply by amendment our Partition Law to create a homestead, the argument is (as we have already seen) vicious, because all land cannot be partitioned. There are often dozens, sometimes hundreds, of tenants in common to whom one homestead descends. It could not have been contemplated that each would be thus split up into dozens.

Before leaving the merits of the question, it is proper to add a word respecting the sophistry of the statement quoted from Mr. Freeman, "that because a tenant has not the whole is a very unsatisfactory and a very inhumane reason for depriving him of that which he has." To make of this rhetoric a plain sentence it reads: "Because the defendant has not a whole homestead is a very unsatisfactory reason for declaring that he has not a homestead." It would seem to follow as a matter of course that if he has not a homestead the court does not deprive him of anything by saying he has not. It is neither unsatisfactory nor inhumane. On the contrary, the policy of disincumbering his small interest, or large one, held in com-

mon with others, of the restraint against alienation which the Homestead Law imposes, is to his advantage, and to the general advantage, as it leaves the property free in his hands for conveyance or for credit. Nor is it inhumane to allow it to be taken in satisfaction of his debts. If he is in debt, it is because someone has trusted him, and he has received an equal value in money or other property to that which can be taken. The creditor is not to be treated as a hostile enemy who is robbing him. He, too, may want a home, and often would have had one had he received his due. He may have a wife and children alike needing comforts. He but demands a fair show before the law to collect his debt and enable himself to acquire home and comforts; but no sentiment is wasted on him. Whatever may be the condition to which he and his are reduced by the default of the debtor, his rights are forgotten in such sentimentality as we have quoted; but they are nevertheless as dear to him, and should be as sacred to the courts. The loss of a real homestead is after all no extraordinary grievance. The loser is still as well off as thousands of other good men who pay what they owe, and live in rented houses. A man who yields it up to pay his honest debts plants a flower in his rented home that will bloom while he lives as a token of honor, and shed a fragrance above his grave when he is gone that will endure forever. It will be a treasure to his children, and children's children, when the shrubs he might have planted in a co-tenancy, which he was only able to keep by allowing his debts to remain unpaid, would have decayed by lapse of time and been blown away in the revilings of those he defeated or defrauded of justice by refusing to render them their own.

Leaving the question of right, we come to the second inquiry contemplated in this opinion, and that is whether this case should be overruled as a matter of judicial policy, having tried to establish that it should not be as a matter of judicial right. Ordinarily, a case which is doubtful may be examined and reviewed, even after many years; but it should not be done unless clearly wrong and the public good is to be subserved by overruling it. It is better that the law should be fixed and certain rather than approximately perfect. The change of ruling on any point is more or less evil. Often done, everything becomes doubtful. None can advise or act with certainty or security. But where great evils cannot flow from reversal of former rulings, it is the duty of the courts to reverse, of course, and follow a better and wiser policy in exceptional cases. The contrary is true respecting cases which have become rules of property, and under which estates have been established, and where land titles depend on the former construction. In such case it is said: "When a decision or a series of decisions has established a rule of property, and more particularly a rule affecting title to real estate, which has become generally known and been acted upon, such a land-mark should not be disturbed." *Sherfy v. Argenbright*, 1 Heisk. 143, 144; and see *Mitchell v. Lipe*, 8 Yerg. 180; *Atkinson v. Dance*, 9 Yerg. 427; *Thompson v. Watson*, 10 Yerg. 368; *Smith v. McCall*, 2 Humph. 163-166.

Here we have a ruling made eleven years ago, and during the intervening time again and again repeated and confirmed. Lawyers have advised their clients they could safely buy and sell these interests of tenants in common. Hundreds of sales on executions and attachments, as well as private sales, have been made. The change of ruling on that question now would destroy them all. Any person *sui juris* might sue to reclaim homestead in such interests sold at public sale within the last seven years, or longer, if possession was not taken and adversely held by the vendees for that period. Many such suits will be maintainable where the sales were private; while, in cases of persons under disability, no lapse of time affecting their rights, suits to recover such interests, sold either at public sale under process or privately, where the wife did not join in conveying the homestead, would be maintainable, and thus we would unsettle and destroy all estates so created. It is not the case, as put in argument for the contrary ruling, that if many have lost their property by an erroneous construction more need not do so. This ignores the real question we have just stated. If the change, that more need not be injured, was the question, change would be praiseworthy. But that is not the question. It is whether we should by one fell stroke destroy titles already vested, and lands improved under a former construction, for the fore-cited good of saving future losses. There is no policy, and less necessity, for such change of construction. Everybody has acquiesced in the one given in 1879. Judge Cooper pointed out to the Legislature the situation, and called attention to the facts that additional legislation was necessary if it was desired to exempt real estate held in co-tenancy. Five sessions of the Legislature have since followed and no change has been deemed wise or desirable. Nobody has demanded such change, and none has been made,—no effort by anybody to disturb the law in that respect. It thus appears to have met universal approbation. Credit has been received and extended on the faith of it. The effect has been far-reaching in the changes of titles and its influence on property rights and management. It is now within three months of the meeting of the next Legislature, when the evil, if such it be, for the future can be corrected without disturbing the settled transactions of the past, and it would be inexcusable for us at this time to precipitate this wide flood of trouble by a change of construction of this law. Every reason of right and policy constrains us to adhere to it, and to affirm the decree of the chancellor on this point.

We think, however, *he was in error in holding defendant Jones liable to complainant, and as to him the decree is reversed*. The cost of this court will be divided between complainant and defendant Joyce; that of the court below will be paid as decreed by the chancellor.

#### Caldwell, J., dissenting:

To secure the debt sued on, Joyce mortgaged his interest in two tracts of land, that interest being an undivided one half in one tract and an undivided one fourth in the other tract. Joyce and his wife now reside on the former tract, and have lived upon it as their home for

many years. The wife did not join Joyce in the execution of the mortgage. On that ground he defends this bill to foreclose, and claims homestead for himself and family in the mortgaged lands. The chancellor denied them that right, and decreed the sale of the lands. His decree is affirmed by the majority of this court.

In denying Joyce and his family the right of homestead, *Chief Justice* Turney and the writer cannot agree with the majority. The Constitution and the Statute declare that the homestead shall not be alienated without the joint conveyance of the husband and wife, where that relation exists. Const. art. 11, § 11; Mill. & V. Code, § 2935. Therefore, when the husband attempts to convey the homestead without the joint conveyance of the wife, as in this case, his deed is ineffectual to pass the homestead right as to either of them, and will only vest the grantee with the husband's interest in reversion expectant on the termination of the homestead right. *Maah v. Russell*, 1 Lea, 543; *Kennedy v. Stacy*, 1 Bart. 225; *Hoge v. Hollister*, 2 Tenn. Ch. 612.

It follows that, if the right of homestead existed in favor of Joyce in those lands before the execution of the mortgage, it still exists, and should be allowed. But it is held by the majority that the right did not exist in the first instance because Joyce did not own the lands in severalty, but only as a tenant in common with others. *Chief Justice* Turney and the writer do not think this construction of the Homestead Law justified either by its letter or spirit. The wise and humane object of that law is to secure the shelter, the comfort and the independence of a home of limited value to the families of all citizens who may own an estate or interest in land capable of being in any way applied, used or enjoyed as a home. The words of the Statute are broad and comprehensive. The property around which the benefits of the exemption are thrown is described as "a homestead or real estate in the possession of or belonging to each head of a family" (Code, § 2935), whether the owner's estate therein be "legal" or "equitable," or "leasehold" (Id. §§ 2937, 2938); and "each head of a family owning real estate shall have the right to elect where the homestead, or said exemption, shall be set apart, whether living on the same or not." (Id. § 2936.) It is not easy to conceive how more plain and appropriate terms could have been used to embrace every kind and character of estate in lands. The term "real estate" means an estate in fee or for life in lands, and is used as synonymous with "lands and tenements." 8 Kent, Com. \*401; 1 Washb. Real Prop. \*45. Unmistakably it embraces estates in fee owned by tenants in common as well as estates in fee held in severalty. The Statute makes no distinction. It includes all estates in land, and excludes none. Estates of co-tenancy are very common in this State. They are created by our Law of Descent whenever an owner of land dies intestate, leaving children, grandchildren, etc. Such estates existed when the homestead provision was incorporated into the Constitution and statute law of the State; and, being so clearly within the object and language of that provision, they must have been in the contemplation of the law-makers, and by them

deemed subject to the exemption provided. In the absence of an express declaration to that effect, we could not believe that any law-making power ever intended to extend the benefit of such an exemption to citizens owning real estate in severalty, and not to those owning undivided interests as tenants in common. A law making such a distinction would in our judgment be both impolitic and unjust. It would be an unjustifiable discrimination in favor of some persons and against others, though alike deserving of the law's favor and protection. Such is not our law, which, as we understand it, is distinctly impartial, extending the right of exemption to each head of a family owning real estate, whether in fee for life, for years, in severalty, in joint tenancy or tenancy in common.

In *Arnold v. Jones*, 9 Lea, 548, it was decided that the right of homestead exemption existed in favor of a life-tenant, the court saying: "If the homestead, the place of residence and home of the family, is protected where the head of the family owns the fee, much more, it seems, it ought to be in favor of the poorer man, who has only an estate less valuable, liable to be determined at any time by his death." It was also decided in *Jackson v. Shelton*, 89 Tenn. 82, that the right of homestead existed in a house and lot owned by husband and wife jointly as tenants by entireties. In the latter case, after holding that the comprehensive and unrestricted words, "real estate," should be interpreted according to their ordinary legal meaning, the court said: "The nature of the estate, or extent of the title of the beneficiary, was not of the essence of the scheme; the purpose was to stay the hand of the creditor as against a limited amount, in value, of real estate, of whatever character, belonging to any citizen who should be the head of a family. . . . Why not include the head of a family, who owns land as tenant by entirety with his wife, in the scope of a law whose purpose is so humane and commendable? To the extent of his interests, he can use the land for the shelter, support and benefit of his family, in the same manner as could another man owning the absolute fee. He stands in the same, or greater, need of the law's favor. Is he any the less deserving of protection because he does not own the whole estate? Or is the officer of the law to take what he has because he has not more? Manifestly not. The protection of such an interest is clearly within the spirit and letter of the Statute. We can conceive no satisfactory reason why the Legislature should not have intended to embrace in this wholesome provision all present interests in land naturally embraced in the language used in the Act." An eminent text-writer says: "The Homestead Laws have an object perfectly well understood, and in the promotion of which courts may well employ the most liberal and humane rules of interpretation. This object is to assure to the unfortunate debtor, and his equally unfortunate but more helpless family, the shelter and the influence of home. A co-tenant may lawfully occupy every parcel of the co-tenancy. He may employ them, not merely for cultivation or for other means of making profit, but may also build houses and barns, plant shrubs and flow-

ers, and surround himself with all the comforts of home. His wife and children may of right occupy and enjoy the premises with him. Upon the land of which he is but a part owner, he may and in fact frequently does, obtain all the advantages of a home. These advantages are none the less worthy of being secured to him and his family in adversity because the other co-tenants are entitled to equal advantages in the same home. That he has not the whole is a very unsatisfactory and a very inhumane reason for depriving him of that which he has." *Freeman, Exemptions*, § 248. To this view Thompson lends the weight of his opinion. *Thompson, Homesteads and Exemptions*, §§ 181, 188.

It is said, in substance, by the majority that estates of co-tenancy must be excluded from the exemption because no particular mode for the assignment of the homestead in lands held by co-tenants is expressly prescribed. To this we say the general provisions on this subject, as contained in sections 2940, 2941 and 2944 of the Code, in connection with those then and now existing in Code, §§ 8993, 4024, on the subject of partition and sale for division, afford the amplest direction and remedy for the allotment of homestead in every case, whether the claimant have an estate in severalty or in co-tenancy with others. Hence, in the absence of an express exclusion of co-tenants from the benefits of a law whose terms are so broad and whose purpose is so general, we think they should be held to be included. In our opinion, it is a harsh and unwise construction that excludes such persons from the beneficial operation of a law whose provisions are, in express terms, for the advantage of "each head of a family" owning real estate. Such a rule of interpretation should not be applied in this case, for the courts almost universally indulge a liberal construction in favor of the right of homestead. *Thompson, Homesteads and Exemptions*, §§ 4, 7, 781; *Dickinson v. Mayer*, 11 Helsk. 520; *Arnold v. Jones*, 9 Lea, 548; *White v. Fulgum*, 87 Tenn. 284; *Jackson v. Shelton*, 89 Tenn. 82. This liberality of construction extends as well to the assignment of homestead as to the ascertainment of the existence of the right. By the indulgence of such rule of construction the courts will readily find in existing statutes all necessary means for the assignment of homestead in lands held by tenants in common. In the case before us the complainant would only have to bring the other co-tenants before the court, and have the lands partitioned in kind, if that could be done, and, if not, have them sold for division of the proceeds. The interest of the debtor being thus separated from that of others, the creditor and debtor could each be protected by decree in conformity to the Statute. This might be some inconvenience to the creditor, but mere inconvenience in the assignment of homestead should not be allowed to defeat the right of exemption itself. No mere matter of inconvenience in the administration of a law can operate to its amendment; yet the reasons given for denying the right by the courts of those States which hold that homestead is not allowable in cases of co-tenancy are reasons of convenience merely. *Thompson, Homesteads and Exemptions*, § 188.

The majority opinion follows the case of *Avans v. Everett*, 8 Lea, 76. But, not agreeing to the reasoning or conclusion in that case, we think it should now be overruled, as contrary to the manifest purpose and plain language of the constitutional and statutory provisions for the exemption of the homestead to "each head of a family owning real estate." The reasoning of the court in that case is found in the following extract from the opinion: "The Statute manifestly contemplates the occupancy of a specific portion of land, capable of being set apart by metes and bounds. It is impossible to apply its provisions to an undivided interest in realty. The debtor owns nothing in severalty, and the creditor could neither ascertain, nor, of course, subject the remainder after setting apart the homestead." 8 Lea, 78. To our minds, the difficulty of applying these "provisions to an individual interest in realty" is entirely removed by the Statutes of Partition, under which one co-tenant's interest may be ascertained and separated from that of other co-tenants, either by partition in kind or by a sale of the whole land for a division of proceeds. By this means the

rights of both creditor and debtor may be amply protected, while by the doctrine of that case those of the debtor are entirely destroyed, and those of the creditor augmented. The importance of uniformity and stability in judicial decisions can scarcely be exaggerated. Nevertheless, when it appears that a decision has departed from the plain mandate of the Constitution and the Statute, as we believe to be true of that case, it should be overruled, and not longer followed. A decision which misinterprets a law, and renders a provision which is just and impartial in its terms both partial and unjust in its administration, as we think that one does, should be departed from whenever the mistake is discovered. That many debtors have lost their homesteads under the doctrine of that case, and that reparation cannot now be made, are not sound reasons for its perpetuation, and for forcing others to undergo a like deprivation in the future. We think that case should now be overruled, and that Joyce and family should not be driven from a place that has afforded them the shelter, comfort and independence of a home so long.

**Turney, Ch. J.**, concurs in the dissent.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

Lewis H. WILSON

v.

Augusta A. WILSON.

(....Mass.....)

**Connivance by a husband in his wife's adultery is not shown, where already suspect-**

ing her to be guilty, he merely suffers her in a single instance to avail herself of an opportunity therefor which she has already arranged without his knowledge, even though he purposely refrains from warning her because he hopes to obtain evidence which will entitle him to a divorce.

(June 27, 1891.)

**NOTE.**—*Connivance as a defense to suit for divorce on the ground of adultery.*

Connivance on the part of the husband will, in point of law, bar him from obtaining relief on account of adultery which he has allowed to take place. *Rogers v. Rogers*, 3 Hagg. Eccl. 58; *Myers v. Myers*, 41 Barb. 114.

A husband may be debarred from a divorce by active procurement or passive toleration of his wife's adultery. *Crewe v. Crewe*, 3 Hagg. Eccl. 129.

If the husband connives at the wife's adultery, if he knows that she is living in an improper manner, if he is aware of what is going on, he will be prevented from obtaining relief by divorce. *Hodges v. Hodges*, 3 Hagg. Eccl. 119.

A husband who consents to the adultery of his wife is not entitled to a divorce. *Woodward v. Woodward*, 3 Cent. Rep. 368, 41 N. J. Eq. 224.

Relief will be refused to a husband who wanted his wife to commit some offense which will enable him to get rid of her and was willing that she should be lured into such a course of conduct as would warrant the legal presumption that she had committed adultery. *Cane v. Cane*, 39 N. J. Eq. 148.

Connivance by a wife in her husband's adultery will prevent her from using such adultery as a defense to a suit by him for a divorce because of her adultery. *Bleck v. Bleck*, 27 Hun, 297.

*Weight to be given to the English decisions upon the subject.*

The general principles which govern the ecclesiastical courts in England were adopted in this country so far as they were applicable and found to be reasonable. *Robbins v. Robbins*, 1 New Eng. 12 L. R. A.

Rep. 484, 140 Mass. 528; *Morrison v. Morrison*, 2 New Eng. Rep. 729, 142 Mass. 861.

But the decisions of the English ecclesiastical courts are not of the same weight in this country as in England. *Robbins v. Robbins*, *supra*.

### *Definition of connivance.*

To sustain the defense of connivance the facts must show that the husband so connived at the wife's adultery as to give willing consent to it. Mere negligence, mere inattention, mere dullness of apprehension, mere indifference will not suffice; there must be an intention on his part that she should commit adultery. If such a state of things exists as will in the apprehension of reasonable men result in the wife's adultery, whether that state of things is produced by the connivance of the husband or independent of it, and if the husband intending that the result of adultery shall take place does not interfere when he might do so, he is guilty of connivance. *Allen v. Allen*, 80 L. J. N. S. 2.

Connivance is an act of the mind; it implies knowledge and acquiescence. A willing mind is all that is necessary. *Boulting v. Boulting*, 38 Swab. & T. 329.

There must be corrupt connivance, corruption being a necessary ingredient to bar a suit. *Phillips v. Phillips*, 3 Notes of Cases, 444; 1 Rob. Eccl. 144, S. C. on appeal, 4 Notes of Cases, 523, 10 Jur. 829, 5 Notes of Cases, 435.

The husband need not necessarily have been an accessory before the fact or have taken active measures to bring about the result of adultery, but it must appear that he was cognizant that such a result would follow from transactions of which he

**R**EPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of a suit brought to secure a divorce in which a decree had been entered dismissing the libel. *New trial granted.*

The facts sufficiently appear in the opinion. *Messrs. William B. Orcutt and E. J. Jenkins*, for libellant:

Libellant, having had cause previously to suspect his wife's fidelity, on December 11 watched her movements, to get evidence, if he could, of her infidelity. This he had a right to do. He put no temptation in her way; he simply watched her own movements. All the opportunities for the commission of the act of adultery were of her own making. The husband has the right to so watch his wife and permit her licentiousness to take its full scope, and the obtaining of evidence in this manner will not bar his right to a divorce.

*Timmings v. Timmings*, 3 Hagg. Eccl. 76, 5 Eng. Eccl. 22, 25; *Pierce v. Pierce*, 3 Pick. 299; *Oloves v. Oloves*, 9 Jur. 356; *Cairns v. Cairns*, 109 Mass. 408.

Even a scheme to detect the adultery of the wife, and without which the adultery would

not have been committed, does not amount to connivance.

*Robbins v. Robbins*, 1 New Eng. Rep. 484, 140 Mass. 528.

*Mr. Joseph G. Holt*, for libelee:

If upon the hearing of a libel for divorce for adultery there are facts and circumstances from which the inference of connivance may be fairly drawn, this court cannot determine the weight and effect of the evidence and revise the finding.

*Morrison v. Morrison*, 136 Mass. 810, and cases cited.

A corrupt intention is necessary to constitute connivance. This consent must necessarily often be inferred from the circumstances, but the fact must be found that the libellant either desired and intended, or at least was willing, that the libelee should commit adultery, before the libellant can be said to have connived at it.

*Ibid.*; *Robbins v. Robbins*, 1 New Eng. Rep. 484, 140 Mass. 528.

*Morton, J.*, delivered the opinion of the court:

This case turns on the question whether the

approved, and to which he consented. *Glennie v. Glennie*, 8 Jur. N. S. 1158.

But no blindness or weakness short of actual, willing consent beforehand to the wife's adultery will constitute connivance so as to bar a suit for divorce. *Marris v. Marris*, 3 Swab. & T. 580.

Mere failure of the husband to take notice of, and be warned by, acts which to other people look suspicious is not sufficient to show connivance on his part. *Burgess v. Burgess*, 3 Hagg. Consist. 225.

It was not necessary that any active steps should be taken on the part of the husband to corrupt the wife; passive acquiescence would be sufficient provided it appeared to be done with the intention, and with the expectation, that she would be guilty of the crime, but there must at all events be consent. *Rogers v. Rogers*, 3 Hagg. Eccl. 58; *Moorsom v. Moorsom*, 3 Hagg. Eccl. 107.

It is not sufficient that the man did not act as a wise or prudent or attentive man, nor that he in fact contributed to his wife's guilt; he must either show an intention to contribute thereto or there must be intentional permission or corrupt facility. *Moorsom v. Moorsom*, *supra*.

If the husband sees what a reasonable man could not permit, he must be supposed to see and mean the consequences; but the presumption of law is against connivance and if the fact can be accounted for without supposition of intention the court will incline to that instruction. *Moorsom v. Moorsom*, *supra*.

A husband is not barred by a mere permission of opportunity for adultery. He is at perfect liberty to let the licentiousness of the wife take its full scope. He cannot, however, contrive the meeting or place the parties together and then depart for the purpose of giving opportunity. *Timmings v. Timmings*, 3 Hagg. Eccl. 83.

To establish connivance it is not necessary to show knowledge of or privy to the actual commission of adultery. Such extreme negligence to the conduct of the wife and such encouragement of acquaintance and familiar intimacy as are likely to lead to an adulterous intercourse are sufficient. *Gilpin v. Gilpin*, 3 Hagg. Eccl. 150.

The word "conniving," as used in the English Statute, 20 and 21 Vict. chap. 85, means, not merely refusing to see an act of adultery, but also willful abstaining from taking any step to prevent

adulterous intercourse which from what passes before the husband's eyes he must reasonably expect will occur. *Gipps v. Gipps*, 11 H. L. Cas. 1.

#### *Illustrations of connivance.*

Mere imprudence and error of judgment are not connivance. So held where the husband, in order to get rid of the man with whom the wife afterward committed adultery, told him of confessions which the wife had made to the husband of her attachment for the paramour. *Hoar v. Hoar*, 3 Hagg. Eccl. 140.

Failure to remove from a town where a mere casual residence was maintained upon suspecting his wife of too great intimacy with another man, and frequent absences from her on hunting expeditions, will not amount to connivance. *Hamerton Hamerton*, 3 Hagg. Eccl. 12.

Where the husband takes money from his wife's paramour as the price of not resorting to his legal remedy, and then leaves the wife in a situation likely to occasion a renewal of adulterous intercourse with the same person, he is guilty of such connivance as to bar a suit for divorce. *Gipps v. Gipps*, 11 H. L. Cas. 1.

Permitting a servant to remain in his house after he knows of great and indecent familiarities between the servant and his wife amounts to such connivance as will bar the husband of a right to divorce. *Lovering v. Lovering*, 3 Hagg. Eccl. 86.

Where the husband not only knew of suspicious relations between his wife and a servant, but appeared quite willing that they should unite their futures, if he did not actually connive at and further the conduct of the servant, a divorce will be refused. *Herriek v. Herriek*, 31 Mich. 238.

Introducing the wife to persons of bad character may be evidence of connivance. *Graves v. Graves*, 3 Curt. Eccl. 235.

Where from evidence in the case it appeared that the husband was witness of acts lasting some time, from which the very worst inferences might be drawn, without in any way interfering and without objecting afterward, there is such a strong indication of his intention to have his wife transgress, or at least to allow her to do so undisturbed and unprevented, that it amounts to connivance and operates as a bar to his suit. *Bourgeois v. Chauvin*, 30 La. Ann. 216.

Where a wife with full knowledge of the facts

finding of the court was correct that the libelant was, upon the evidence, guilty of connivance.

The libelant did nothing to encourage his wife to commit adultery and did not directly nor indirectly throw opportunities in her way. Until the day he detected her, the report does not show that any unusual or improper acts had occurred in his presence between her and any other man. He had suspected and had watched her, but had not obtained proof of her guilt, and had not, till the day he caught her, had the assistance of a detective or police officer. On that day he came from his home in Dorchester and waited suspecting she might come to Boston also and might leave the Dorchester car at the corner of Federal and Beach Streets, which she did. She met a man by the name of Andrews, whom there is nothing to show the libelant had ever seen or heard of before, and went with him to the hotel. The libelant followed her and after waiting in the hotel an hour, and listening ten or fifteen minutes at the door of the room where they were,

burst it open and found them in bed together. He hoped she would commit adultery so that he could get a divorce and he gave her plenty of time and did not warn her so that she might do it. He thought before this that she had committed adultery.

We think as matter of law it cannot be said on this state of facts that the libelant was guilty of connivance. It is true that he could have prevented his wife from committing adultery and did not; on the contrary, he wished she would, that he might have evidence on which he could get a divorce. But he did not make or aid in any way in making the opportunity. He did no overt act unless keeping still was one, which it clearly was not. It was not a case where he supposed his wife was about to commit adultery for the first time, and where it would have been his duty to have given her the assistance which husband and wife are mutually expected to give to each other. It certainly cannot be held that a husband who suspects his wife of infidelity can take no means to ascertain the truth of his suspicions without being

remained quiet for seventeen years without complaining of her husband's cohabitation with another woman or applying to the courts for relief, relief was denied. *Boulting v. Boulting*, 8 Swab. & T. 829.

*Duty of husband and wife to watch over and assist each other; consequence of neglect.*

Husband and wife ought mutually to aid each other in doing right and to guard each other from doing wrong. *Robbins v. Robbins*, 1 New Eng. Rep. 486, 140 Mass. 523.

A husband is expected by law to pay due attention to the behavior of his wife and to give her the benefit of some superintendence where she is placed in dangerous situations. *Forster v. Forster*, 1 Hagg. Consist. 155.

But a chaste husband ought, if he desires it, to have a wife who will remain chaste when exposed to the temptations which are incident to ordinary conditions of modern social life, and if she commits adultery against his wishes and without his procurement he ought to be permitted to obtain evidence of it. *Robbins v. Robbins*, *supra*.

Every husband is bound to give his wife that protection which the society of a husband affords, and the fact that the wife had been familiar with him before marriage makes that duty more incumbent upon him. *Hawkins v. Hawkins*, L. R. 10 Prob. & Div. 177; *Graves v. Graves*, 3 Curt. Ecol. 285.

A man marrying a young woman whom he had previously seduced is bound to exercise more than ordinary marital care over her conduct and deportment. *Dillon v. Dillon*, 3 Curt. Ecol. 88.

A husband who seduces his wife before marriage and after marriage sees her in a situation of temptation and does nothing to rescue her, and she yields, will be understood as having consented to her adultery. *Cane v. Cane*, 39 N. J. Eq. 148.

If a husband sees what a reasonable man could not see without alarm, or if he knows that his wife had been guilty of antenuptial incontinence, or if he himself had seduced her before marriage, he is called upon to exercise peculiar vigilance and care over her, and if he sees what a reasonable man could not permit and makes no effort to avert the danger, he must be supposed to see and mean the result. *Hedden v. Hedden*, 21 N. J. Eq. 70.

Great inattention on the part of the husband will not bar him to establish the defense of connivance; he must have been privy to her guilt, or have led her into the crime. *Rix v. Rix*, 3 Hagg. Ecol. 74.

13 L. R. A.

But in *Harris v. Harris*, 7 Hagg. Ecol. 415, the court states that it can conceive that a case might arise of such willful neglect or exposure as might, without proving actual connivance, possibly bar the husband of all remedy by a divorce. He might introduce his wife to society so abandoned, and expose her to risks so great, as to render a deviation from the paths of chastity the most probable, if not the necessary, consequence; but the mere introduction of the wife to a woman who was maintaining improper relation to another man is not sufficient to show connivance if the particular acts of adultery charged did not flow from such introduction.

Under the English statutes willful neglect or misconduct may deprive a petitioner of his right to a divorce, but in order to do so it must have concluded to his wife's first fall. *St. Paul v. St. Paul*, L. R. 1 Prob. & Div. 739.

*Effect of abandonment by husband of his wife.*

Where a husband broke up his home and sold his furniture for the purpose of getting rid of his wife, made her no allowance and never saw her until eight years after the separation, when he met her by accident, and five years afterward brought suit for divorce on the ground of her adultery, he was held to be guilty of such connivance as to bar his right to the relief prayed. *Heyes v. Heyes*, L. R. 13 Prob. & Div. 11.

The absence of the husband from the wife and the withdrawal of her allowance by the husband's father, the husband himself having no means of subsistence independent of the father, although accompanied by the setting up of persons to watch the wife and expressions of satisfaction upon obtaining proof that she had committed adultery, are not sufficient to show connivance if there is nothing to show that she was driven to, nor entrapped into, the adultery by the conduct of the husband. *Cloves v. Cloves*, 9 Jur. 354.

Where a minor, who was dependent upon his father for support, secretly married a woman whom he afterward suspected of being unchaste, left her with instructions to a friend to watch her conduct and furnished her with no support because of his inability to do so, he was not guilty of connivance so as to bar a suit for divorce, if he did nothing to lead her into temptation after leaving her. *Reeves v. Reeves*, 2 Phil. Ecol. 125.

The abandonment by a minor, dependent on his family for support, of his wife, is not sufficient to

deemed guilty of connivance. "There is a manifest distinction," says the court in *Robbins v. Robbins*, 140 Mass. 581, 1 New Eng. Rep. 484, "between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and his desire and intent to obtain evidence against his wife, whom he believes already to have committed adultery and to persist in her adulterous practices whenever she has opportunity." Merely suffering in a single case a wife whom he already suspects of having been guilty of adultery to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife, whom he suspects of adultery, in order to obtain proof of that fact. He may do it with the hope

and purpose of getting a divorce if he obtains sufficient evidence. He must not, however, make opportunities for her though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed. 2 Bishop, Mar. and Div. 5th ed. § 9; *Timmings v. Timmings*, 8 Hagg. Eccl. 76; *Storer v. Storer*, 1 Rob. Eccl. 99-101; *Phillips v. Phillips*, 10 Jur. 849.

The law does not compel a husband to remain always bound to a wife whom he suspects, and it allows him, as it does other parties who think they are being wronged, reasonable scope in their efforts to discover whether the suspected party is or is not guilty, without themselves being adjudged guilty of conniving at the crime which they are seeking to detect. *Robbins v. Robbins*, *supra*. In a libel for divorce for desertion the willingness, or even the desire, of the deserted party to be deserted, so long as it is not expressed in conduct or acts to the other party,

show connivance at her subsequent adultery so as to bar a suit for divorce. *Morgan v. Morgan*, 3 Curt. Eccl. 679.

#### *Effect of neglect and cruelty.*

Course and brutal behavior, obscene and disgusting language, even disregard of decorum, will not constitute connivance; nor will cruelty and desertion, though they tend to induce a wife to disregard her own duties and tempt her to commit adultery. Facts to constitute connivance must have a direct and necessary tendency to cause adultery to be committed or continued. *Stone v. Stone*, 3 Notes of Cases, 305.

Indifference, ill-behavior or cruelty cannot be shown in support of a defense of connivance. *Moorsom v. Moorsom*, 3 Hagg. Eccl. 92.

A charge that the husband was guilty of cruelty towards his wife with the purpose of inducing adultery and thereby enabling him to obtain a separation is not admissible in defense of a suit for divorce on the ground of adultery, although the court intimates in that case that there may possibly be cases where cruelty on the part of the husband directly leads up to the wife's adultery, but intimates no opinion as to the result. *Dillon v. Dillon*, 3 Curt. Eccl. 86.

#### *Obtaining proof.*

The husband need not bring suit the moment he suspects his wife of infidelity; he may wait for adequate proof, but he must show reasonable vigilance and delay no longer than is necessary to obtain proof. *Crewe v. Crewe*, 3 Hagg. Eccl. 122.

But a husband who has suspicions of infidelity of his wife will not be allowed to lay a train which may lead her to the commission of adultery in order that he may take advantage of it to obtain a divorce. *Pierce v. Pierce*, 3 Pick. 299.

#### *Connivance at adultery with different men.*

A husband who endeavors to procure his wife to be lured into the commission of adultery will be regarded as consenting to all subsequent acts of adultery which she may commit whether they be committed with the persons selected by him or with others. *Woodward v. Woodward*, 3 Cent. Rep. 368, 41 N. J. Eq. 234.

A husband who connives at or assents to adultery by his wife with one person will be deemed as assenting to it with others and will not be entitled to a divorce for the subsequent act with a different person. *Hedden v. Hedden*, 21 N. J. Eq. 70, citing *Timmings v. Timmings*, 3 Hagg. Eccl. 76; 13 L. R. A.

*Lovering v. Lovering* Id. 85; *Stone v. Stone*, 1 Rob. Eccl. 99; *Hodges v. Hodges*, 3 Hagg. Eccl. 112, *contra* as overruled.

Connivance at one act with one man will not necessarily bar a divorce for adultery by a prior act with another man, but the circumstances may be so open, gross and revolting that the court will find no injury done to the husband and therefore no right to redress. *Morrison v. Morrison*, 2 New Eng. Rep. 729, 142 Mass. 361.

#### *Corruption inferred.*

If a system of connivance at improper familiarity almost amounting to proximate acts be established, corrupt intention will be inferred without more direct proof. *Moorsom v. Moorsom*, 3 Hagg. Eccl. 92.

#### *Connivance by the wife.*

The courts appear to favor the wife to a considerable degree in determining what acts will amount to connivance on her part. The reason of this is perhaps the dependent condition of the wife and the smaller opportunity on her part to know of her husband's familiarity with other women and lack of ability to prevent it.

Thus in a suit for separation for the husband's adultery with his wife's sister proof that the wife after knowledge of previous adultery allowed under peculiar circumstances the sister to accompany them to India and to live in the same house with them will not bar the wife on the ground of connivance, her conduct not being traced to any motive necessarily criminal. *Turton v. Turton*, 3 Hagg. Eccl. 388.

Although the wife knows of adultery on the part of the husband and continues to live with him and by her own acts gives opportunity for intercourse between her husband and his paramour, it does not necessarily show that she assents to his crimes and conspires to drive him to their commission. *Cochran v. Cochran*, 35 Iowa, 479.

A wife's consent to a deed of separation which secures an allowance to her is not sufficient to show her connivance at her husband's adultery in the absence of evidence that at the time the deed was made she was aware of the adulterous intercourse and consented to it. *Ross v. Ross*, L. R. 1 Prob. & Div. 784.

But if a wife, although unwilling to consent that her husband should live in adultery, ultimately gives her consent for the sake of obtaining an allowance from him, she is guilty of connivance. *Ibid.*

will not bar a divorce. *Ford v. Ford*, 148 Mass. 577, 8 New Eng. Rep. 785.

Of course, as the court says in that case, there is always the difficulty of believing that the desire or willingness did not manifest itself in conduct or acts expressive of it to the other party. But nothing of the sort appears here.

In *St. Paul v. St. Paul*, L. R. 1 Prob. & Div. 789, the court held that the neglect of the husband which would justify the court in withholding a decree in his favor under a statute which provided that the court might do so where the husband was guilty of "such willful neglect or misconduct as . . . conducted to the adultery," must be such neglect as conducted to his wife's fall, and not neglect conducting to any

particular act of adultery subsequent to her fall.

The case of *Morrison v. Morrison*, 186 Mass. 810, referred to by the libelee, differs from this. In that case the husband, after he had been cautioned to watch his wife, made opportunities for her and her suspected paramour to be together alone, witnessed without objection acts of considerable familiarity between them, said nothing whatever to his wife, intimating any disapproval of her conduct, and in other ways acted in such a manner as to induce the adultery for which he was watching.

In the opinion of the court there must therefore, according to the reservation of the report, be a new trial granted, and *it is so ordered*.

### MISSISSIPPI SUPREME COURT.

TOWN OF KOSCIUSKO, *Appt.*,

v.

Solomon SLOMBERG.

(....*Miss*....)

**An ordinance prohibiting second-hand clothing from being brought into, or offered for sale within, a town, without first proving that it did not come from a place where contagion or infection is, or has been, prevailing, is unreasonable and void in the absence of any epidemic or other apparent necessity therefor.**

(April 20, 1891.)

**A**PPPEAL by plaintiff from a judgment of the Circuit Court for Attala County in favor of defendant in a proceeding to recover a fine from defendant for dealing in second-hand clothing without complying with a municipal ordinance. *Affirmed*.

The case sufficiently appears in the opinion. *Messrs. Anderson, Haden & Davis* for appellant.

*Messrs. Allen & McCool* for appellee.

**Woods, Ch. J.**, delivered the opinion of the court:

The charter of the Town of Kosciusko confers upon the authorities of that municipality the power of establishing and enforcing quarantine and other regulations necessary to the health of the town; of making regulations to secure the general health of the inhabitants of the town, and to prevent and remove nuisances; and of passing all ordinances, which may be necessary to carry into effect the powers conferred. In supposed pursuance of these charter powers, the municipal authorities adopted an ordinance declaring it unlawful for any person to bring into the Town or to offer for sale therein second-hand clothing, without first having produced satisfactory proof to the mayor of the Town that such clothing did not come from a district or locality in which any

contagion or infection was prevailing or had prevailed. The power to prevent the introduction of infectious and contagious diseases, by appropriate regulations, is not to be disputed. But to justify the sweeping and far-reaching use of the power exercised in the ordinance in the case before us, there must be, at least, some circumstances apparently rendering such exercise of this power necessary for the preservation of the health of the public. The Town may quarantine, in cases demanding that extraordinary measure, in seasons of epidemic, in the interest of public health, but to justify the exercise of this power there must be apparent necessity for so doing. In such cases regulations unpleasantly or injuriously affecting the individual may be properly employed to accomplish the general safety. But, in the absence of any epidemic apparently requiring the use of quarantine regulations and regulations restraining trade temporarily, the exercise of such power, in the manner employed in the ordinance in the Town of Kosciusko, becomes unreasonable and oppressive. The ordinance is in restraint of a legitimate trade, and is unequal and unjust in its terms and operation. It cannot be contended that a second-hand clothing store is a nuisance *per se*, or that second-hand goods are infectious in their nature. If brought from a locality in which infectious and contagious diseases are prevailing or have recently prevailed, second-hand goods might properly be regarded as endangering the general safety and public health; but the same is equally true of new and unused goods. Between the new and the second-hand, the difference, at the most, is a degree in danger only. Why impose the burden in the one case, and not in the other? And why impose, in either case, where there is no pretext of apparent necessity for such interference with lawful traffic? The ordinance is clearly an unreasonable and unjust interference with a legitimate and recognized business pursuit, and is a permanent restraint upon trade.

*Affirmed*.

**NOTE.**—That municipal ordinances attempting to regulate business must be reasonable, see 12 L. R. A.

notes to *Bills v. Goshen* (Ind.) 8 L. R. A. 261; *People v. Armstrong* (Mich.) 3 L. R. A. 721.



## GEORGIA SUPREME COURT.

AMERICAN MORTGAGE CO., of Scotland,  
Limited, *Pff. in Err.*,

v.

TENNILLE.

(....Ga....)

\*1. Under the Act of February 8, 1877, providing that the State of Georgia will not consent to foreign corporations owning 5,000 or more acres of land in this State, unless they shall become incorporated under the laws of Georgia, the State alone can make the question as to the right of such corporations to hold said land.

2. A motion to dismiss an affidavit of illegality was rightly denied when at least one of the grounds thereof presented a legal defense against the further progress of the execution.

(March 23, 1891.)

\* Head notes by LUMPKIN, J.

NOTE.—*Escheat defined.*

The word "escheat," originally French or Norman, signifying chance or accident, is now applied to the obstruction of the course of descent and determination of tenure by some contingency, in which case the land by a kind of reversion results back to the original grantor (2 Bl. Com. 244). In feudal law it results back to the lord from extinction of the blood of the tenant by natural or by civil means (1 Bl. Com. 72). So if the tenant died without heirs of his blood, or if his blood was corrupted by commission of treason or felony, the land "fell back" to the lord of the fee. *Ibid.*

In the United States, however, there can be no attain of blood by the commission of crime. U. S. Const. art. 1, § 9, cl. 3.

At common law if a bastard die intestate and without issue, his real estate escheats. Doe v. Bates, 6 Blackf. 538; Bent v. St. Vrain, 30 Mo. 268.

In the United States it implies a reversion of property to the State in default of a person who can inherit it. Anderson, Dict. 413.

When the owner of real estate dies intestate, without heirs capable of inheriting it, the title thereof devolves by operation of law upon the State. Ill. Rev. Stat. 1845, p. 225; Wallahan v. Ingersoll, 5 West. Rep. 124, 117 Ill. 123.

Land is not subject to escheat, until the failure of heirs of original grantees. Hall v. Gittings, 2 Har. & J. 112.

*Question of escheat, how determined.*

The question of the escheat of a decedent's property for non-existence of heirs can be determined only by the method provided by the statute; it cannot be determined in a proceeding by an heir to restrain the escheator. Muir v. Thomson, 28 S. C. 499.

It must be established by a judicial proceeding in the proper court, in the name of the people, for the purposes of proving and establishing it by judicial determination. Rev. Stat. 1845, p. 225. Wallahan v. Ingersoll, 5 West. Rep. 124, 117 Ill. 123.

The proceeding is in the nature of an inquest of office, and the record of it is the only competent evidence by which a title by escheat can be established. Den v. O'Hanlon, 21 N. J. L. 562; Crane v. Reeder, 21 Mich. 24; Com. v. Hite, 6 Leigh, 568; People v. Cutting, 3 Johns. 1.

Where *scire facias* does not run in the name of 12 L. R. A.

ERROR to the Superior Court for Quitman County to review an order dismissing the levy of an execution upon defendant's real estate. *Reversed.*

The facts are stated in the opinion.

*Messrs. William E. Simmons and W. C. Worrill* for plaintiff in error.

*Mr. W. D. Kiddoo* for defendant in error.

Lumpkin, J., delivered the opinion of the court:

Tennille executed and delivered to J. K. O. Sherwood a promissory note, and at the same time, in order to secure the same, made and delivered to said Sherwood a deed to certain land. Sherwood transferred the note, and conveyed the land to the American Mortgage Company of Scotland, Limited, who sued the note to judgment in the Superior Court of Quitman County, and an execution issued thereon was levied upon the land described in the aforesaid

the people, it is void upon its face. Wallahan v. Ingersoll, *supra*.

Where land is declared escheated for want of heirs, persons claiming to be heirs may come in under the statute and obtain an order for leave to make up an issue at law to have their right determined. *Ex parte Williams*, 13 Rich. L. 77.

The right of action to recover lands escheats to the State upon the death of the owner without heirs or next of kin. Johnston v. Spioer, 9 Cent. Rep. 566, 107 N. Y. 185.

Equity cannot enjoin proceedings to have an escheat declared where, if escheat should be found, every question presented could be decided on a traverse. Olmsted's App. 86 Pa. 234.

An *amicus curiae* cannot move to quash an inquiry unless he has an interest or represents somebody who has. Dunlop v. Com. 2 Call (Va.) 284.

*Action to declare escheat; practice and procedure.*

The circuit court of the county is vested with general powers over the subject matter of escheats; nevertheless, the court must be put in motion by filing an information, and by issue of *scire facias* against all alleged to hold, possess or claim such estate. Wallahan v. Ingersoll, 5 West. Rep. 124, 117 Ill. 123.

The names of all persons in possession of the premises, and such as were known to claim an interest therein, must be set forth in the information, and the *scire facias* must be served on them personally; as to all other persons constructive service is sufficient. *Ibid.*

A return which shows service on only one of two occupants is insufficient to confer jurisdiction. *Ibid.*

The information must require them to appear and show cause why it should not be vested in the State; and the court is required to make an order to that effect. *Ibid.*

The order to appear and show cause must be published. *Ibid.*

Jurisdiction as to the subject matter depends on the performance of all these acts. *Ibid.*

*Notice of proceedings.*

Jurisdiction depends on the statutory requirements as to notice being complied with. Wiederanders v. State, 64 Tex. 133.

The validity of escheat proceedings is not affected by the want of formal notice and by the

deed, the Mortgage Company having previously filed in the clerk's office a deed purporting to reconvey the land to said Tennille, for the purpose of making this levy. To the levy of the execution Tennille filed his affidavit of illegality, containing several grounds, one of which was as follows, viz.: That "the said plaintiff was a foreign corporation, has never been incorporated by the laws of Georgia and owned more than 5,000 acres of land in said State (so far as to claim the same and hold deeds thereto), in conflict with and against the laws of said State and therefore could not hold the title to lands, or convey the same to the defendant, legally." The defendant served on the plaintiff a notice to produce at the trial a number of papers, and among them the charter of the plaintiff, and deeds from fourteen persons to Sherwood, and from Sherwood to the plaintiff, covering various lands in Randolph and Quitman Counties; the use intended to be made of said deeds being to prove the ground of illegality above quoted. The court held that said charter and these deeds should be produced, and, upon the plaintiff's failure to do

so, ordered the levy of the execution to be dismissed. We can see no error in requiring the production of the charter, as it might contain evidence supporting one of the grounds of the illegality. The main question, therefore, upon which this court is asked to pass in this case, is whether or not the ground of illegality setting forth plaintiff's inability to hold land in excess of 5,000 acres is good in law, and consequently whether or not the plaintiff should have been required to produce said deeds.

1. It seems to be well settled that, in a case of this kind, the State alone is authorized to assert her policy in prohibiting foreign corporations from holding 5,000 or more acres of land in Georgia, and that individuals have no right to make the question in controversies with each other. Numerous decisions may be found to the effect that, where a corporation acquires or uses land to any extent or for any purpose not authorized by its charter, the question of its right so to do cannot be made by an individual in a legal controversy with the corporation, or with those claiming under it, but must be

fact that others not notified did not appear. One appearing is entitled to a separate trial of his traverse. *Re Malone*, 21 S. C. 435.

S. C. Gen. Stat., § 2303, requiring the publication of a notice of escheat the first week in every month for a required time, is satisfied by one publication in a weekly newspaper, and does not require its publication in a daily paper every day of the week. *Eason v. Witcofskey*, 29 S. C. 229.

The statutory prohibition of service of process on a Sunday does not render void a publication in a Sunday paper of the notice of escheat under this section, nor does the statute forbidding the doing of labor on a Sunday avoid such notice. *Ibid*. See *Genobles v. West*, 23 S. C. 163.

#### *The information.*

An information for lands claimed to have escheated may be made the subject of an original action or of a counterclaim by the State. When filed as a counterclaim and the original action dismissed, defendant still has the right to a trial. *Reid v. State*, 74 Ind. 202.

It must appear that the owners were foreigners; that they died without issue and left no relations within the United States entitled by law to the succession. *Catham v. State*, 2 Head, 533.

A complaint alleging that there are no resident heirs must, under the Indiana Act of March 9, 1861, further allege that the nonresident alien heirs did not convey the land during eight years preceding that date. *State v. Witz*, 37 Ind. 190.

#### *Traverse of information.*

Proceedings to escheat the estate of an intestate without heirs or kindred may be traversed by any person, including his administratrix, in whose possession the estate is found. *Com. v. Crompton*, 137 Pa. 123.

In New York the traverser is considered as a defendant, and by showing that the people have no title, he need prove nothing but a bare possession in himself. *People v. Cutting*, 3 Johns. 1.

The escheator who is defendant to the petition has the same right to plead the Statute of Limitations that the representative of the debtor would have. *Watson v. Lyle*, 4 Leigh, 236.

In Texas claims for improvement are not allowed in actions of escheat. *Brown v. State*, 36 Tex. 222. 12 L. R. A.

#### *Trial.*

Traversers of an escheat have no precedence over others on the docket of cases. *Lance v. Dobson*, Riley (S. C.) 301.

Where an inquest is traversed and the case comes on for trial in the common pleas, the traverser is entitled to begin and conclude to the jury. *Com. v. Desilver*, 2 Ashm. 163.

In a *monstrans de droit* to an inquisition prosecuted under the statute, the *monstrant* is plaintiff. *French v. Com.* 5 Leigh, 612.

He must show a good title in himself to entitle him to a judgment of *amoscas manus*. *Ibid*.

#### *Evidence; Findings.*

There is a presumption of law that every person dying leaves heirs, and it must be rebutted by one who would claim under an alleged escheat. Evidence may be competent as negating the presumption, without being sufficient to change the burden of proof. *North Carolina University v. Harrison*, 90 N. C. 335.

The law will not presume that a person died without heirs, and the absence of a claim under the patentee for many years, accounted for by the land being covered with navigable waters, is insufficient to establish an escheat. *Peterkin v. Inloes*, 4 Md. 175.

Some negative proof is required that a person proved to be dead left no heirs; the law will not presume it in favor of escheat. *Hammond v. Inloes*, 4 Md. 138.

Nor will the law presume that a person died under the age of ninety years. *Ibid*.

The finding in favor of the Commonwealth will not deprive of title a purchaser claiming under a deed of bargain and sale executed and recorded before the inquest was sealed, though not known by bargainee till afterward. *Com. v. Selden*, 5 Munf. 160.

An inquisition that does not find that decedent died intestate and without heirs or known kindred is a nullity and constitutes no lien on real estate. *Ramsay's App.* 2 Watts, 223.

#### *Effect of escheat proceedings.*

A suit to subject escheated lands to a debt of the former owner, where the State is not made a party, is inoperative to affect the title of the State. *Sands v. Lynham*, 37 Gratt. 231.

raised directly by a proceeding instituted for that purpose by the State wherein such corporation is exercising such powers *ultra vires*. Some of these decisions were made by the courts of the States in which the corporations themselves were created, and others in States outside of which the corporations involved had been chartered. None of them are directly in point as to the precise question made in the case now before us, because the disability of the corporations arose under the provisions of their own charters. They are referred to merely to show the trend of judicial opinion on this question. These cases are so numerous, and the doctrine they establish is so well recognized, we deem it unnecessary to cite them by name. The following language, used by Judge Dillon in his great work on Municipal Corporations, has some bearing on the question now being considered: "Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has acquired and is holding such property for other purposes, is a question which can only be determined in a proceeding instituted at the instance of the

State. If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a complete sale; and whether the corporation, in purchasing, exceeds its power, is a question between it and the State, and does not concern the vendor or others." 2 Dillon, Mun. Corp. ed. 1890, § 574. We have been able to find some cases directly in point. In that of *Barnes v. Suddard*, 117 Ill. 237, 4 West. Rep. 134, it was held that, where a foreign corporation had power to acquire real estate so far as necessary for its business, its acquisition of realty cannot be assailed in a collateral proceeding as an act *ultra vires*. It appears from an examination of that case that in Illinois foreign corporations had the same rights to own and hold real estate as did domestic corporations of that State, and the case turned, not upon the charter powers of the corporation, but upon its right under the Illinois law to hold land. The Pennsylvania Act approved April 26, 1855, forbade any foreign corporation to acquire and hold real estate. Notwithstanding this Statute, it was held, in the case of *Hickory Farm Oil Co. v.*

The administrator cannot convey, and the Legislature cannot divert, property which escheats to the State. *State v. Reeder*, 5 Neb. 308.

No sale can be made under an escheat found, after the grant of letters of administration until the year for filing administrator's account has expired. *Com. v. Weart*, 12 Phila. 345.

The State in case of escheat is not to be deemed an heir within the statute requiring notice of probate to presumptive heirs. *State v. Ames*, 23 La. Ann. 69.

After the State has acknowledged one as heir-at-law, and released its right to him, the heir cannot proceed in the name of the State for his own benefit. *State v. Engle*, 21 N. J. L. 347.

If the saving in the statute in favor of creditors applies to the land held by an alien, the fact of such indebtedness would not prevent escheat, but would remain a charge upon the land to which the State succeeded. *Congregational Church v. Morris*, 8 Ala. 122.

#### *Interest in property subject to escheat.*

An estate held in trust may be escheated when the trust expires. *Com. v. Nalle*, 33 Pa. 429.

A remainder in fee dependent on a valid life estate may escheat before the death of the life tenant. So where a citizen devised a life estate in land to his wife, remainder to his nephews and nieces who were aliens, as tenants in common, the land escheated on the death of the wife though the sole surviving remainderman was naturalized before her death, the others having died aliens. *People v. Conklin*, 2 Hill, 67.

An interest in remainder cannot be escheated until the expiration of the life estate. The limitation begins to run only from that time. *Com. v. Nalle*, *supra*.

Stipulations in a covenant to hold land for the benefit of an alien, and to convey as he shall direct, create no interest in the land, nor right of possession. A citizen being the owner in fee, there can be no forfeiture by reason of such interest in the alien. *Ludlow v. Van Ness*, 8 Bosw. 173.

#### *Lands held in partnership.*

Where all the partners of a firm have died intestate and without heirs or known kindred, the property of the firm escheats to the Commonwealth; but this would not preclude the heirs or kindred of a partner from traversing the inquisition. *Com. v. North American L. Co.* 57 Pa. 102, 12 L. R. A.

#### *Lands held by foreign corporations subject to escheat.*

A purchase, by a foreign corporation, of the capital stock of a local corporation, as a device to enable it to hold real estate, is a violation of the Act prohibiting foreign corporations from acquiring any real estate within the Commonwealth, unless authorized by law; and lands so held are subject to escheat. *Com. v. New York, L. E. & W. R. Co.* 5 Cent. Rep. 743, 114 Pa. 340.

The Act of April 15, 1890, making it lawful for railroad companies to aid corporations authorized by law to develop coal, etc., in the Commonwealth, by the purchase of their capital stock, etc., does not authorize such a purchase. *Ibid*.

The penalty of escheat is removed, although the Act imposing it is not repealed in terms, when, before any inquisition is taken, a statute has declared that the land should be held "indefeasibly as to any right of escheat" in the Commonwealth. *Com. v. New York, L. E. & W. R. Co.* 7 L. R. A. 634, 123 Pa. 591.

#### *Title in State, when vests.*

Title by escheat vests on death of owner without heirs. *Sands v. Lynham*, 27 Gratt. 201.

The real estate of a citizen who dies intestate without heirs vests immediately in the State. *Montgomery v. Dorion*, 7 N. H. 475; *O'Hanlin v. Den*, 20 N. J. L. 31, 21 N. J. L. 532.

Lands which escheat for want of heirs may be the subject of legislative grant before office found. *Colgan v. McKeon*, 24 N. J. L. 566; *McCaughal v. Ryan*, 27 Barb. 376.

In Texas, the fact of abandonment of land *ipso facto* vacates it, and no proceeding in the nature of "office found" is necessary to revest the title in the State. *Holliman v. Peebles*, 1 Tex. 373.

Where for many years nothing had been heard of the grantee of land or of any will or any heir of his, it will be presumed that the land had escheated on due inquest. *Vickery v. Benson*, 26 Ga. 523.

The claim of the State for taxes is merged in its ownership by escheat. *Reid v. State*, 74 Ind. 253.

#### *Possession by State.*

An inquisition of escheat vests possession immediately if the possession is vacant otherwise if held adversely; in such case an entry is necessary to give the government possession. *Com. v. Hite*, 6 Leigh, 582.

Where an alien dies leaving known devisees the

*Buffalo, N. Y. & P. R. Co.*, 82 Fed. Rep. 22, that a deed of conveyance of land to such a corporation was not void, but passed the title, and that the corporation held the land subject to the Commonwealth's right of escheat; also that the Commonwealth alone could object to the legal capacity of the corporation to hold real estate. In support of this opinion, *Bons v. Delaware & H. Canal Co. (Pa.)*, 5 Atl. Rep. 751, and *Chicago, B. & Q. R. Co. v. Lewis*, 58 Iowa, 101, are cited. Another case holding the same way is that of *Carlson v. Aultman*, decided by the Supreme Court of Nebraska, and reported in 28 Neb. 672. An Act of Nebraska, passed in 1887, provided that no non-resident alien foreigner, nor any corporation not incorporated by laws of that State, should acquire or own, hold or possess, any real estate in the State of Nebraska. While this law was in force, *Aultman & Co.*, a foreign corporation, purchased land in that State at a judicial sale, and it was held that this corporation's

title was valid against everyone but the State, and could be defeated only by proceedings brought by the State for that purpose. These foreign corporations, it seems, have been treated as aliens were in England as to purchasing and holding real estate. By the common law, while an alien might purchase, he could do so only for the benefit of the king, and the king was entitled to land purchased by him by virtue of his prerogative upon "office found;" and accordingly it was held that, unless the proceeding of "office found" was perfected an alien had the power to hold and convey the land *inter vivos*. 1 Devlin, Deeds, §§ 124, 126.

It therefore seems clear, in view of the cases cited and the common-law foundation upon which the principle governing them is based, that the doctrine is thoroughly established in our American States that the right of foreign corporations to purchase or hold lands in excess of the authority conferred, either by their

State must first establish her title, before she is entitled to possession. *Reid v. State*, 74 Ind. 232.

#### *Disabilities of alienage; rule in various States.*

Under the Statute of Colorado nonresident aliens may own, inherit and convey property, real or personal, the same as citizens and residents. *McConville v. Howell*, 17 Fed. Rep. 104.

Where an alien becomes a citizen of Kentucky and dies intestate and childless, his sister, an alien and foreign resident, may take his real estate by descent subject to the rights of his widow. *Eustache v. Rodaquest*, 11 Bush, 42.

The Laws of Massachusetts recognize but two cases of escheat of real estate, one in case of an alien, the other in case of a citizen dying without heirs and intestate. *Sewall v. Lee*, 9 Mass. 368.

The Missouri Statutes remove all disabilities of alienage. An alien, therefore, may take land by descent from an alien. *Burke v. Adams*, 80 Mo. 504.

The law existing at the time of descent cast governs the right of aliens to inherit realty. *Pilla v. German School Asso.* 28 Fed. Rep. 700.

The Nevada Constitution gives to foreigners becoming bona fide residents the rights of citizens as to property, etc. *State v. Preble*, 18 Nev. 251.

Such a provision does not prevent extending the right of inheritance to nonresident aliens. *Re Billings*, 65 Cal. 592.

When it appears that a person claiming to be heir to an intestate is an alien he cannot take by descent, and no presumption can be indulged in his favor. *Eitenheimer v. Heffernan*, 66 Barb. 374.

The statutes which enable resident aliens to take and hold real estate in New York apply only to purchasers, or those who have a conveyance, or to whom the lands have descended or been devised. *Ibid.*

Land claimed by heirs-at-law of a resident alien is theirs to enjoy and hold until a forfeiture declared by the State. Until then the State cannot convey or release to a stranger. *Maynard v. Maynard*, 36 Hun, 227.

In New York a nonresident alien can inherit land. *Re Powers*, 8 Dem. 198.

Under the treaty between the United States and Wurtemberg, the alien heir for two years has precisely the same rights as a resident heir. *Kull v. Kull*, 37 Hun, 476.

Where an alien purchased land, and died before naturalization, the land escheated to the State, but might be vested in the widow of the alien. *Rubeck v. Gardner*, 7 Watts, 455.

The Tennessee Act allowing lands of an unnaturalized resident on dismissal of the suit for 12 L. R. A.

an escheat to vest in his widow, is valid. *Garretson v. Brien*, 2 Heisk. 534.

The Tennessee Code and the Treaty between the United States and France annul the right of escheat in the State, and a subject of France can hold and convey land as a citizen of Tennessee. *Baker v. Shy*, 9 Heisk. 85.

The Code embodies the common-law principle that an alien has no inheritable blood, but can hold and convey lands by will or deed, burdened with the right of escheat by the sovereign. *Ibid.*

The widow of an alien, who deserted her abroad, came to Tennessee and there acquired land and died, was held entitled to dower in such land. It is otherwise, however, under the Homestead Laws. *Emmett v. Emmett*, 14 Lea, 399.

In Texas the statute does not prohibit administration in the county court upon the estate of persons dying intestate without heirs. *Hall v. Claiborne*, 27 Tex. 217.

Where aliens are prohibited from acquiring real estate, a deed upon a secret trust for a foreigner, the maker having no knowledge of the trust, is not void; the trust alone is void. *Hammekin v. Clayton*, 2 Woods, 336.

The law in force at the death of the former owner must govern the decision between claims of aliens to inherit, and of the State to take by escheat. *Hauensteins v. Lynham*, 28 Gratt. 62.

A testator died without lawful issue, having devised his real estate to executors in trust to convert the same into money, the proceeds and the rents and profits of said lands to be given to his sisters, who were aliens, charged with payment of his debts, his personal estate being sufficient to pay his debts, on equal division of the court the lands were held not to escheat. *Com. v. Martin*, 5 Munf. 117.

#### *Other disabilities.*

A deed of bargain and sale executed by a lunatic is void, and the land escheats on failure of heirs. *Destilver's Case*, 5 Rawle, 111.

Where free colored persons entered on land under a deed, which because of their color was void, and remained in possession until a change in the law, their possession was good as against the claim of all except the State. *Beatty v. Benton*, 78 Ga. 187.

#### *Escheated property devoted to educational purposes.*

The Statute enabling children adopted under laws of another State to take and hold real estate does not contravene the constitutional provision giving

own charters or by the laws of the State in which such purchase is made, can only be questioned by the State itself in which such land may be situated. It follows, of course, that the defendant in this case had no right whatever to raise the question made in the ground of this illegality hereinbefore set forth; and, that being true, the production of the deeds called for was unnecessary and useless, because the ground of illegality, in support of which it was sought to introduce these deeds, presented no legal reason for interfering with the progress of the plaintiff's execution.

2. Another ground of the illegality alleged, in effect, that the deed purporting to be from the plaintiff to the defendant in execution, which had been filed in the clerk's office, was no sufficient deed, and would not convey title out of the plaintiff to the defendant, but would only throw a cloud upon the defendant's title, and cause the land to sell for less than its

true value. If these assertions are true they amount to a good ground of illegality. It may be that such ground is not set forth with sufficient clearness, but, as there was no special demurrer or objection to it, because it was wanting in distinctness or fullness, but only a general motion, in the nature of a demurrer, to dismiss the affidavit of illegality, the point was not rightly made to the court below as to the insufficiency of this ground, and the judge, therefore, properly refused to dismiss the affidavit of illegality as a whole. If this ground failed to set forth the reasons why the deed referred to was insufficient, and failed to convey title to the defendant, this distinct objection should have been made to it. We therefore leave the case to be tried again in the court below, with such additional light shed upon the law of the case as may be gathered from this opinion.

*Judgment reversed.*

escheated lands to the school fund. *State v. Meyer*, 63 Ind. 33.

It is sufficient answer to aver title through such adoption and to file the record thereof. *Ibid.*

In North Carolina escheated lands belong to the university of the State. *University v. Johnston*, 1 Hayw. (N. C.) 373; *University v. Sawyer*, 2 Hayw. (N. C.) 98; *University v. Foy*, Id. 310; *Den v. Foy*, 1 Murph. 53.

In Tennessee all escheated property is appropriated to common schools, to be disposed of by the school commissioners as they may deem best for the common-school fund. *Hinkle v. Shadden*, 2 Swan, 43; *Parchman v. Charlton*, 1 Coldw. 381.

A sale of escheated land under a decree of the court for the purpose of paying the debts of intestate is void unless the board of common-school commissioners is a party to the proceeding. *Ibid.*

A society having a right under its charter to escheated property does not forfeit or waive its right by proceeding through the state escheator rather than by one appointed by itself. *Nettles v. Cummings*, 9 Rich. Eq. 440.

#### *Sale of escheated property.*

Notice of an application to release escheated lands should be given to bona fide purchasers of lands under mortgage foreclosure, or they will not be bound by the release. *Bradley v. Dwight*, 63 How. Pr. 300.

Trustees of escheated property "may sell or otherwise dispose of the land or property as they may deem for the best interest of the State." *Crane v. Reeder*, 23 Mich. 322.

#### *Escheated lands, how acquired.*

Lands that escheat cannot be regranted as vacant land, but must be sold pursuant to statute. *Bodden v. Speigner*, 2 Brev. (S. C.) 321.

Escheated lands are not subject to location as vacant lands, nor will a junior patent for such lands held by another be ended by proceeding for an escheat. *Hughes v. State*, 41 Tex. 10.

Officers of the land office have no authority to issue warrants for taking up escheated lands. They are to be sold at auction after seven years from the inquisition. *Straub v. Dimm*, 37 Pa. 36.

Land which has escheated can be taken up only under an escheat warrant, but one who in good faith has paid for lands supposed to be vacant will be protected against a subsequent grant issued to another upon an escheat warrant. *Armstrong v. Bittinger*, 47 Md. 103.

12 L. R. A.

The warrant issued on application for a patent of escheated lands should state that the owner of the land died seized in fee intestate and without heirs. *Ibid.*

An escheat grant passes all the land in its true location, but not where it clearly appears that it was not intended to include it all, and the taker of the escheat warrant knew that it did not. *Jones v. Bradley*, 4 Md. Ch. 167.

An escheat patent is prima facie evidence of an escheat at the date of a warrant. *Peterkin v. Inloes*, 4 Md. 173.

#### *Statutes relating to escheats.*

The law regulating escheats on civil grounds is not within the prohibitory clause of the United States Constitution concerning *ex post facto* laws. *White v. Wayne*, T. U. P. Charl. (Ga.) 94.

Under the Act of 1801, the property of an intestate remains in hands of the administrator, and his rights can only be devested by verdict of the jury. *Carnochan v. Abrahams*, R. M. Charl. (Ga.) 813.

A statute passed pending proceedings by the escheator, that property of an illegitimate should go to his legitimate half brothers, is good. *Gresham v. Rickenbacher*, 28 Ga. 237.

Where during pendency of the action the State passed an Act relinquishing the land to occupants, the Act was constitutional. *State v. Tilghman*, 14 Iowa, 474.

The Statute of Rhode Island, providing that real estate of an alien dying thereafter shall be transmitted to his heirs, does not affect a bill filed prior to its passage; in such case the estate of the alien escheats. *Haigh v. Haigh*, 9 R. I. 26.

Provisions of the Code requiring clerks of courts to pay over moneys which have remained in their offices for a specified time to the county treasury are based upon the doctrine of escheat, and are constitutional. *Deaderick v. Washington County*, Ct. 1 Coldw. 202.

Where the Constitution gives power to the Legislature to provide methods by which forfeiture may be enforced, until the Legislature acts, there can be no proceedings. *Wederanders v. State*, 64 Tex. 133.

Requiring the comptroller to take charge of all escheated property and to account for its proceeds is in conflict with the authority conferred by statute upon the district court to order the sale of escheated property. *Hughes v. State*, 41 Tex. 10.

## OHIO SUPREME COURT.

CINCINNATI INCLINED PLANE R. CO.,  
*Pf. in Err.,*

*v.*  
 CITY & SUBURBAN TELEGRAPH  
 ASSOCIATION.

(....Ohio St....)

\*1. The dominant purpose for which streets in a municipality are dedicated and opened is to facilitate public travel and transportation, and in that view, new and improved modes of conveyance by street railways are by law authorized to be constructed, and a franchise granted to a telephone company of constructing and operating its lines along and upon such streets, is subordinate to the rights of the public in the streets for the purpose of travel and transportation.

2. The fact that a telephone company acquired and entered upon the exercise of a franchise to erect and maintain its telephone poles and wires upon the streets of a city, prior to the operation of an electric railway thereon, will not give the telephone company, in the use of the streets, a right paramount to the easement of the public to adopt and use the best and most approved mode of travel thereon; and if the operation of the street railway by electricity as the motive power tends to disturb the working of the telephone system, the remedy of the telephone company will be, to re-adjust its methods to meet the condition created by the introduction of electro-motive power upon the street railway.

3. Where a telephone company, under authority derived from the Statute, places its poles and wires in the streets of a municipality, and in order to make a complete electric circuit for the transmission of telephonic messages, uses the earth, or what is known as the "ground circuit," for a return current of electricity; and where an electric street railway, afterwards constructed upon the same streets, is operated with the "Single Trolley Overhead System"—so-called—of which the ground circuit is a constituent part, if the use of the ground circuit in the operation of the street railway interferes with telephone communication, the telephone company, as against the street railway, will not have a vested interest and exclusive right in and to the use of the ground circuit as a part of the telephone system.

(June 2, 1891.)

**E**RROR to General Term of the Superior Court of Cincinnati to review a judgment affirming a judgment of the Trial Term in favor of plaintiff in an action brought to enjoin defendant from operating its cars by electricity in such a way as to interfere with plaintiff's business. *Reversed.*

Statement by **Dickman, J.:**

The original action was commenced in the Superior Court of Cincinnati, by the City and Suburban Telegraph Association, defend-

\*Head notes by the Court.

ant in error, against the Cincinnati Inclined Plane Railway Company, plaintiff in error.

The petition filed was as follows:

"The plaintiff says that it is an association incorporated under the laws of Ohio, for the purpose of constructing, maintaining and operating telegraph and telephone lines in said State and elsewhere, and has its principal office and business in the City of Cincinnati, where it is now, and has for more than ten years past been, conducting a telephone business, by means of wires stretched upon poles lawfully placed and maintained in the streets pursuant to the statutes made for that purpose, and under the direction of the authorities of said city.

"Said wires are connected with and terminate at the several 'exchanges' owned by the plaintiff in said city and vicinity.

"At the 'exchanges' the wires are so arranged, by means of a device for that purpose, that any one of them can be immediately connected with any other. Each wire also terminates in the office, store, room, place of business or residence of some person, firm or company—a subscriber to this Association paying an annual sum for the use of the telephone and the service in connection therewith. Each of such subscribers can, by the use of the telephone and other patented inventions of which the plaintiff is the sole licensee in the territory where it transacts business, immediately communicate with and speak to an operator in an 'exchange', and said operator can, and if requested does, forthwith connect such subscriber's wire with that of any other subscriber named, so that the two may converse directly with each other.

"Such communication is effected by means of a slight but continuous electric current passing over the wire from the speaker to the hearer, and, unless interrupted or interfered with, is easily and quickly made.

"Plaintiff says that many thousand such communications are daily made between persons in all parts of said city and in the County of Hamilton; that all the principal public offices, business houses, newspaper offices, hotels and other places of resort, and many residences in said county, are thus connected together and brought into communication.

"Plaintiff says that it has over 8,000 such subscribers in the city and vicinity, that its lines also extend to and connect all the villages for many miles around said city, and hundreds of communications are daily made over the last-named lines, for each of which a small sum is paid plaintiff by the person sending the same; that the whole constitutes a business of value to the plaintiff and important to the public.

"Plaintiff further says that the defendant is a corporation under the laws of Ohio, engaged in the maintenance and operation of

NOTE.—The brief of Mr. Wise for plaintiff in error seems to cover all the citations applicable to the points drawn out in the litigation of this case, so 12 L. R. A.

that any additional note to what has been produced by the court and counsel would be more superfluous. *Ed.*

an inclined-plane railway in the City of Cincinnati, and claims to own, and is now in possession of, the street railway tracks of what is generally known as the Mt. Auburn Street Railway, which, beginning at the corner of Fifth and Walnut Streets in said city, extends thence, by single track, on Fifth to Main Street, thence on Main, by single track, to Court Street, thence on Main, by double track, to Mulberry Street, where it connects with said Inclined Plane Railway; also, extending from the north end of said Inclined Plane Railway, by double track, on Locust and Mason Streets, Auburn Avenue and Vine Street to the Carthage Turnpike and Zoological Garden; also, on Court Street, by single track, from Main to Walnut Street, and on Walnut Street, by single track, to Fifth Street to place of beginning.

"Plaintiff further says that said defendant claims to own and control said track by virtue of an assignment or transfer of the same from other parties or companies; but plaintiff is not informed as to said transfers, or the validity thereof, and does not admit that the same or any of them are lawful or valid.

"But plaintiff says that the said tracks were originally constructed by the parties under whom defendant claims under alleged grants from the City of Cincinnati, which provided that 'no motive power, except horses or mules, shall be used on said tracks,' and the same have never been altered or amended in that respect, and the defendant has never acquired from the State of Ohio or the City of Cincinnati any right to erect and maintain poles or wires in the streets aforesaid, or to use electricity as a motive power for its cars.

"Plaintiff further says that since the defendant came into possession of said Street Railway, it has, within six months last past, and without any lawful authority so to do, caused a line of iron poles to be erected on each side of all the streets where said tracks are situated as aforesaid, and placed upon the said poles large wires which it keeps constantly charged with powerful currents of electricity, generated by large steam engines and dynamos owned and operated by defendant for that purpose, by means whereof the cars upon all parts of the track aforesaid are run and operated from six o'clock in the morning until twelve o'clock at night of each and every day.

"Plaintiff further says that the defendant claims to have secured authority from the commissioners of Hamilton County to extend tracks along and upon the Carthage Turnpike, to be operated by electricity as aforesaid, from the existing tracks to the Village of Carthage, and will place thereon poles and wires, and unless restrained by the order of this court will proceed to run and operate street-cars thereon in the same manner that it is now running and operating them upon existing tracks.

"Plaintiff further says that ever since defendant commenced the operation of its cars by electricity, it has caused, and is still causing, great damage and injury to plaintiff by creating electric currents and noise upon plaintiff's telephone wires, many of

which are, and have been, for a period long prior to the use of electricity by defendant, located upon each and all the streets aforesaid and upon the Carthage Turnpike. By reason of the proximity of the defendant's poles and wires to those of plaintiff, and of the powerful currents used by defendant, together with its mode of use and manner of construction, currents of electricity are transmitted to or inducted upon the wires of plaintiff such as to render them useless for telephonic purposes.

"The noises produced by defendant's operations are loud and continuous, so as to prevent communication by telephone, and the connection of many of plaintiff's subscribers with the exchanges and with each other has been thereby interrupted and broken up, and some of said subscribers have ordered their telephones removed and canceled subscriptions, while others have only been restrained from so doing by the representations of plaintiff's officers that steps would be taken to induce or compel defendant to remedy the evil.

"Plaintiff has received and is receiving a multitude of complaints from subscribers whose lines are affected by defendant's operation, and numerous notices that unless the difficulty is remedied, the telephones of the complaining subscribers must be removed.

"Plaintiff further says that as soon as the defendant began the operation of cars by electricity, and the consequent injury to its, plaintiff's, plant and business, defendant was notified thereof and requested to remedy the same, and has since been repeatedly urged to do so, but up to the present time has failed and refused to apply, or attempt to apply, any remedy, or take any step, to prevent the injury to plaintiff aforesaid, which plaintiff is informed and believes can be done by defendant without any great expenditure of money, and without giving up the use of electricity as a motive power for its cars.

"Plaintiff asserts that great injury has been caused, and great and irreparable injury will be caused, to it by the continued operation of cars by defendant, as it now and has been heretofore operating the same.

"The plaintiff's lines and telephones in the vicinity of said street railway will be rendered useless, the revenue received from the subscribers thereof cut off, and the business of the Company greatly reduced.

"Wherefore, the plaintiff prays that defendant be temporarily enjoined from constructing and operating an electric railway on the Carthage Turnpike, of the sort that it is now using, or of any sort that will interfere with or injure plaintiff's lines or business. That on final hearing said injunction be made perpetual, and the defendant further restrained from operating any of its cars by means of electricity in the manner it is now operating the same, or in any manner that may interfere with or injure plaintiff's business.

"That the damages already suffered by the plaintiff be assessed and ordered paid by defendant, and for such other and further relief as the nature of the case and equity may require."

To this petition the defendant filed an

answer, in which, among its averments and denials, the defendant denies that the plaintiff is an association incorporated under the laws of the State of Ohio for the purpose of constructing, maintaining and operating telephone lines in said State; and denies that the plaintiff's telephone poles and telephone wires are lawfully maintained in the streets and highways pursuant to the statutes made for that purpose, or under the direction of the authorities of the City of Cincinnati, and alleges that the plaintiff exercises the powers of a telephone company and maintains its poles and wires without any lawful authority whatever.

The answer avers that under and by reason of the ordinances, grants, laws, lease and resolutions therein mentioned, it rightfully and lawfully maintains, controls and operates by the electric system, known as the "Sprague Single Trolley Overhead System," all its lines of road described in the plaintiff's petition.

"The defendant, answering, says, that it is not liable to the plaintiff in any form of action, whether in law or equity, for the alleged interferences and disturbances as set forth in the petition; and denies that there is anything in any of the laws of the State, or in any pretended grant to the plaintiff, which gives to the plaintiff the right to use the earth at all, much less the exclusive right to use the earth for its return circuit; on the contrary, the defendant denies that the authorities which made any pretended grant to the plaintiff knew that the plaintiff intended to use the earth at all for its return circuit, or would so construct its lines; and further denies the claim set up by the petition to the exclusive use of the earth by the plaintiff, because of the vagueness of said claim.

"The defendant, further answering, says that the plaintiff, if undisturbed by the electrical current from the dynamos of the defendant, will be compelled to resort to other than a grounded circuit in order to give efficient service to its patrons; that the uniform and slight current which the plaintiff claims to be necessary to the successful operation of the telephone cannot be obtained by the use of the ground circuit, but may be obtained by constructing the telephone either with a complete metallic circuit, or by resort to what is known as the McCluer device; that whereas, instead of being injured by abandoning the ground circuit and resorting to the metallic circuit or the McCluer device, the plaintiff will be actually benefited in its service to its patrons; the defendant cannot abandon its use of the ground circuit without injury to its railroad and to its patrons; that the defendant could not alter its plan of electrical propulsion so as to have a metallic circuit—that such a change is impracticable, would involve a very large outlay, necessitate an overhead structure of double or treble cost of that now used, and very unsightly, and after it is constructed it would not be successful; that such a system has been tried and found to be a financial and commercial failure, and in its effect as annoying and disturbing as the Sprague system, under which the defendant is now operating.

12 L. R. A.

"The defendant, further answering, denies that the noises produced by its operations are loud and continuous so as to prevent communication by telephone, and that the connection of many of the plaintiff's subscribers with the exchange, and with each other, had been thereby interrupted and broken up. It denies that the plaintiff has received and is receiving a multitude of complaints from subscribers whose lines are affected by defendant's operations, and also numerous notices that unless the difficulty is remedied the telephones of the complaining subscribers must be removed.

"It denies that great injury has been caused, and great and irreparable injury will be caused, to the plaintiff by the continued operation of cars by defendant as it is now and has been heretofore operating the same. It denies that the plaintiff's lines and telephones in the vicinity of said Street Railway will be rendered useless, the revenue received from the subscribers therefor cut off, and the business of the plaintiff greatly reduced."

The plaintiff, for reply, denies each and every allegation contained in the answer, except such as admitted allegations of the petition.

The action came on to be heard at a special term of the court, held in February, 1890, and neither party demanding a jury, the cause was heard and tried by the court upon the pleadings and evidence; and thereupon the court made a finding of facts, and stated its conclusion of law upon the facts so found, and rendered a judgment and decree thereon in favor of the Telegraph Association against the Railway Company, as follows:

"This cause coming on to be heard upon the pleadings and the evidence, and having been fully argued by counsel and submitted to the court without intervention of a jury, the court, upon consideration thereof, finds that plaintiff lawfully maintains telephone lines upon the streets named in the petition and upon the Carthage Turnpike, and had so maintained the same ever since a time long prior to the introduction of electro-motive power upon the street railway of defendant, and that said telephone lines are maintained and operated in the manner set forth in the petition; that defendant began the operation of cars by means of electro-motive power upon the Street Railway on the—day of June, 1889, and by reason thereof, and especially of the manner in which the electric current is permitted to pass from the wheels of defendant's cars into the rails and thence into the earth, great injury has been and continues to be inflicted upon the plaintiff in the manner described in the petition, and that great and irreparable injury will be inflicted upon the plaintiff by the continued operation of defendant's cars, in the manner in which they are now operated, and will continue to be operated, unless restrained by the order of this court, and that plaintiff has no adequate remedy at law for said injury.

"The court further finds that there is a mode of operating street-cars by electro-motive power by means of the double trolley, available to the defendant, the use of which



will avoid and prevent the injury to the plaintiff above mentioned.

"As matter of law, the court concludes that defendant is bound to adopt some mode of propelling its cars other than the one which inflicts the said injury upon the plaintiff, to which finding and decision of the court the defendant excepted at the time the same was made, and moved the court to set the same aside and grant it a new trial:

"1. Because the finding and decision of the court is not sustained by sufficient evidence, but is against the weight of the same.

"2. Because the finding and decision of the court is contrary to law.

"Which said motion the court overruled, to which ruling the defendant at the time the same was made excepted and presented to the court its bill of exceptions herein (embodying all the testimony, evidence and exhibits offered by either party upon the trial of the action), which, being found by the court to be true, is allowed and signed, and on motion is hereby made part of the record of the case, and thereupon the court orders, adjudge and decrees that the said defendant Company be and it is hereby perpetually restrained and enjoined from operating any car or cars upon the street-railway track mentioned in the petition, or any of them, or upon any tracks laid or to be laid upon Carthage Turnpike, by means of electric currents passing from a wheel or wheels of such car or cars into the rails of such track or any of them, or by means of electric currents, the whole or any part of which may be knowingly permitted to pass into the earth, or for which the earth constitutes any part of the conducting medium in such manner as to cause injury to the plaintiff, to all of which the defendant excepts. It is further ordered that the operation of this decree be and it is hereby stayed for the period of six months from date hereof, with liberty upon the part of the defendant to apply for an extension of said time."

The court appointed a special master, with directions that he ascertain and report the amount of damage, in money, theretofore sustained by the Telegraph Association, and hear evidence for that purpose, and report to the court.

Upon petition in error, the superior court, at general term, affirmed the judgment and decree of the court at special term. By the present proceeding in error, this court is asked by the Railway Company to reverse the judgment of the superior court at general term, and to render such judgment as the court below should have rendered.

Further facts disclosed by the record, and undisputed, are stated in the opinion.

**Mr. John S. Wise**, with **Messrs. E. A. Ferguson** and **R. A. Harrison**, for plaintiff in error:

In 1871 defendant was incorporated and admitted into the streets of Cincinnati as a street railway. In 1877, the board of public works was empowered to authorize a change of its motive power at any time. This was notice to the world, before the discovery of the telephone, that the Railroad Company might,

whenever it chose, stop the use of horses and use any propulsive agency, then or thereafter in lawful use as a motive power, for street railways in Cincinnati.

*Pittsburgh Junction R. Co.'s App.* 4 Cent. Rep. 268, 123 Pa. 580.

Under sanction of the Board of Public Works of Cincinnati, granted in 1886, the Railway Company proceeded to use a single-trolley electric railway, as described in the bill and proceedings.

In Ohio, street railways enjoy the easement of the public highway for purposes of public travel, in the strict line of the original objects for which the public highway was dedicated.

*Cincinnati & S. G. St. R. Co. v. Cummins-ville*, 14 Ohio St. 546.

The same has been held in many other States.

See *People v. Kerr*, 27 N. Y. 188; *Mahady v. Bushwick*, 91 N. Y. 148; *Husner v. Brooklyn City R. Co.* 114 N. Y. 437; *Hobart v. Milwaukee R. Co.* 27 Wis. 194; *Hinchman v. Paterson Horse R. Co.* 17 N. J. Eq. 76; *Briggs v. Lewiston & A. H. R. Co.* 4 New Eng. Rep. 546, 79 Me. 868. See also *Judge Green in Cent. Union Tel. Co. v. Akron St. R. Co.*; *Judge Zane in Rocky Mt. Bell Tel. Co. v. Salt Lake City St. R. Co.*; *Judge Bundy in Wis. Tel. Co. v. Eau Claire St. R.*; *Judge Gibson in East Tenn. Tel. Co. v. Knoxville St. R. Co.*; *Judge Brown in Oumber land Teleph. & Teleg. Co. v. United Electric R. Co.* 42 Fed. Rep. 373; *Taggart v. Newport St. R. Co.* 7 L. R. A. 205, 16 R. I. 668; *Pelton v. E. Cleveland R. Co.* Ohio Common Pleas Ct., opinion by Stone, J.

Electric railways are nothing but an improvement upon street railways propelled by horses, or other antecedent motive power; and occupy the highways with exactly the same rights as were enjoyed by street railways so propelled, before electric propulsion was resorted to.

See *Mt. Adams & Eden Park Inclined Plane R. Co. v. Winslow*, 8 Ohio Circuit Ct. Rep. 425; *People v. Kerr*, *supra*; *Williams v. New York Cent. R. Co.* 16 N. Y. 108; *Louisville Bagging Mfg. Co. v. Central Pass. R. W. Co.*; *Loneragan v. Lafayette St. R. Co.*; *Halsey v. Rapid Transit & R. W. Co.*; *Detroit City R. v. Mills*.

The public highways were not originally dedicated for the purposes of telegraph and telephone poles.

The law under which the telegraph companies are organized grants them no co-ordinate rights with travelers upon the public highway, but assigns them to a secondary and subordinate position. They are not upon the highway by virtue of rights acquired under its original dedication; their presence upon, and use of, the highway, is an additional burden upon the highway.

*Smith v. Tel. Co.* 2 Ohio Circuit Ct. Rep. 259; *Mt. Adams & Eden Park Inclined Plane R. v. Winslow*, 8 Ohio Circuit Ct. Rep. 425; *Blanchard v. Western Union Tel. Co.* 60 N. Y. 510; *Knor v. Mayor*, 55 Barb. 404; *Story v. New York Elev. R. Co.* 90 N. Y. 122; *Sheldon v. Western Union Tel. Co.* 51 Hun, 591; *Metropolitan Teleph. & Teleg. Co. v. Colwell Lead Co.* 18 Jones & S. 488; *Tuttle v. Brush Electric Illumin. Co.* Id. 484; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; *Willis v. Erie Teleg.*

& *Teleph. Co.* 87 Minn. 847; *Hewlett v. Western U. Teleg. Co.* 28 Fed. Rep. 181, 18 Wash. L. Rep. 461; *Virginia W. U. Tel. Co. v. Williams*, decision filed; *Dillon*, Mun. Corp. 4th ed. §§ 698, 698a.

Even if, in the enjoyment of a common right of user of the highway, a user in which both plaintiff and defendant in error are of equal dignity, the plaintiff in error has been guilty of a violation of the defendant in error's rights, the way to redress those rights is not by an injunction.

*Heerman v. Beef Slough Mfg. B. L. D. & Transp. Co.* 8 Biss. 824.

The hardship and injury caused to plaintiff in error and to the public by granting the injunction is greater than the mischief to defendant in error which the injunction is intended to remedy.

*Wood v. Sutcliffe*, 2 Sim. N. S. 168, 16 Jur. 75, 8 Eng. L. & Eq. 217.

An injunction, if granted, while it would destroy the plaintiff's property, would not give the defendant immunity from the disturbances complained of.

See *Wood v. Sutcliffe*, *supra*; *Irwin v. Division*, 50 U. S. 9 How. 10, 18 L. ed. 25; *Mohawk Bridge Co. v. Utica & S. R. Co.* 6 Paige, 554, 8 L. ed. 1099.

The mere allegation of a great, a continuous or an irreparable injury is not enough. Facts must be stated, and must appear, sufficient to satisfy the court of the existence of such damages.

See *Waterman's Eden*, Inj. pp. 10, 11; *High*, Inj. § 85; *Hilliard*, Inj. 3d ed. § 82; 1 *Barton*, Ch. Pr. p. 485; *Branch Turnp. Co. v. Yuba County Supra*, 18 Cal. 190; *Central Union Tel. Co. v. Sprague Elec. R. W. & M. Co.* etc. record filed; *Wood v. Sutcliffe*, 2 Sim. N. S. 168, 16 Jur. 75, 8 Eng. L. & Eq. 217.

Admitting all the injuries set forth in the complaint, the damage sustained is "*damnum absque injuria*."

*Dillon v. Acme Oil Co.* 49 Hun, 566; *Frazier v. Brown*, 12 Ohio St. 294; *Pennsylvania Coal Co. v. Sanderson*, 4 Cent. Rep. 475, 118 Pa. 141; *Pennsylvania R. Co. v. Marchant*, 12 Cent. Rep. 261, 119 Pa. 541; *Rocky Mt. Bell Tel. Co. v. Salt Lake City R. Co.* record filed; *Wisconsin Tel. Co. v. Eau Claire St. R. Co.* record filed; *Cassady v. Cavenor*, 87 Iowa, 800, 805; *East Tenn. Tel. Co. v. Knoxville St. R. Co.* and *Cumberland Tel. Co. v. United Electric R. Co.* *supra*; *Waterliet Turnp. & R. Co. v. Hudson R. Tel. Co.* Ct. App. of N. Y., *Judge Andrews'* opinion and referee's report, filed herewith.

Bills similar to the one in this case have been filed in the following cases:

*Central U. Teleph. Co. v. Sprague Electric R. & M. Co.* Common Pleas Court at Akron, Ohio; *East Tenn. Tel. Co. v. Chattanooga & L. Mt. R.* at Chattanooga; *Salt Lake City v. Salt Lake City St. R.*; *Hudson River Teleph. Co. v. Waterliet Turnp. & R. Co.* 121 N. Y. 897; *Wisconsin Tel. Co. v. Eau Claire R. & S. Co.*; *East Tenn. Tel. Co. v. Knoxville St. R. Co.*; *Cumberland Teleg. & Teleph. Co. v. United Electric Co.*, U. S. Court, Nashville,—in each of which the injunction was refused.

Besides these direct efforts, covert efforts to obtain injunctions have been made and have failed, in—

12 L. R. A.

*Louisville Bagging Mfg. Co. v. Central Pass. R. Co.*; *Pelton v. E. Cleveland R. Company*; *Loneragan v. Lafayette St. R.*; *Detroit City R. v. Mills*.

*Messrs. Aaron F. Perry, Peck & Shaffer and Selwyn N. Owen*, for defendant in error.

*Dickman, J.*, delivered the opinion of the court:

The Cincinnati Inclined Plane Railway Company was incorporated in the year 1871, under the Act of May 1, 1853, entitled, "An Act to Provide for the Creation and Regulation of Incorporated Companies in the State of Ohio." On March 30, 1877, the Legislature passed an Act authorizing any inclined-plane railway or railroad company theretofore or thereafter organized under the Act of 1853, to hold, lease or purchase, and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as might be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it held, maintained and operated its inclined plane; "provided, that no other motive power than animals shall be used on the public highways occupied by such street-railway company without the consent of the board of public works in any city having such board, and the common council, or the public authority or company having charge, or owning any other highway in which such street railroad may be laid."

In September, 1885, the Cincinnati board of public works adopted a resolution, consenting "to the use either of electricity, cable or compressed air, as a motive power by the Cincinnati Inclined Plane Railway Company upon the highways in which the street railroads, connected with its inclined plane, and held and operated by it, are laid."

In October, 1888, the Railway Company, setting forth the resolution giving such consent, and stating that it had decided to use electricity as a motive power on its road, made application to the board of public affairs—the legally constituted successor of the board of public works—for permission to erect along the entire length of its road the poles, wires and other appliances necessary to operate and maintain its entire line from Fifth and Walnut Streets to the zoological garden, as an electric road.

And thereupon, the board of public affairs, acting under authority of the Act of March 30, 1877, and in furtherance of the grant made by the board of public works, granted the application of the Railway Company, upon the following conditions:

"1. The poles to be made of iron of the size and pattern, and the wires to be strung in the manner as shown on the plan submitted to this board, and hereby approved."

In February, 1889, in accordance with the provisions of section 8306, of the Revised Statutes, the stockholders of the Railway Company extended the northern terminus of its road at the zoological garden to the Village of Glendale. And in March, 1889, the board of county commissioners of Hamilton County, by resolution, granted the application of the Railway Company to use and

occupy the Carthage Turnpike, to its northern terminus, by double tracks, and with necessary appendages and appurtenances of an overhead electric railroad system, so as to enable the Company to permit continuous, rapid and safe transportation between Fountain Square in Cincinnati and the Village of Carthage. A provision in the grant provided for the removal by the county commissioners of any and all telegraph and telephone poles which might interfere with the operation of the electric road. This provision, however, was afterwards modified by the action of the commissioners, so as to locate the telegraph and telephone poles at the curb line.

The plan submitted to and approved by the board of public affairs is known as the "Sprague Single Trolley Overhead System." Under the supervision of the engineer of the board, the poles were erected and wires strung; and about the beginning of June, 1889, the Railway Company had put its street railway in operation under that system, as far as the zoological garden; and at the commencement of the original action, was engaged in constructing its extension along the Carthage Turnpike under the grant of the county commissioners, with the necessary appendages and appurtenances of the single-trolley system.

In the Sprague system, the electricity used to operate the motors under the cars is conveyed to them by a single overhead trolley wire, and a single arm or pole attached to the car and carrying a contact wheel which runs along and passes up underneath the trolley wire. The current passes down the pole or arm to the switch apparatus on board the car, through the motors, thence to the wheels and to the tracks. It then passes back to the station along the iron rails of the track interlaced together by conducting wires, and finally connected by a conducting wire with the negative pole of the dynamo, the greater portion of the current flowing along this line of the track as the return current. Some portions of such current, however, are unavoidably diverted through whatever conductors are in proximity, and which themselves have grounded circuits, but generally returning to the source in which it originated, by means of the metallic ground connection of the rails, as extended by the wire to the dynamo. The single-trolley system is in use on nine tenths of the railroads in the United States using electricity. As compared with the double-trolley method, it is deemed more simple, less liable to disarrangement, much cheaper and not liable to accidents which would blockade the cars. It has proved successful, and its general adoption, with full knowledge of the double-trolley method, furnishes strong proof that it is the most approved system. And in the findings of facts by the court at general term, there is nothing in disparagement of the single-trolley system in itself, but it is held objectionable because it includes the grounded circuit, which the defendant in error has adopted, and claims a monopoly of its use as against the Railway Company, as an essential part of its telephonic system.

It is evident, therefore that the Railway

Company derived from the Legislature the right to use on its road other motive power than animals; that it acquired the franchise of using electro-motive power; and eliminating from view the Telegraph Association, it is making lawful use of such franchise, in a manner authorized by the statute.

The City & Suburban Telegraph Association was incorporated July 1, 1878, as a telegraph company, with lines extending from Cincinnati to Hamilton, in Butler County, under laws since embodied in the chapter of the Revised Statutes regulating "Magnetic Telegraph Companies," and containing section 8454, which provides: "A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but the same shall not incommode the public in the use of such road."

In 1878 the Telegraph Association became the licensee of the American Bell Telephone Company, with the exclusive right to use all its patents in Cincinnati and certain territory adjacent thereto, and although organized as a telegraph company, entered upon the business of a telephone company. After obtaining the license to use the telephone, the Telegraph Association erected poles and wires upon the streets wherein the railway of the plaintiff in error is situated, and which was then being operated as a horse railway. These poles and wires were mainly erected in the years 1881 and 1882. But prior thereto, in 1880, the following section was added to the Telegraph Law: "Section 8471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers and be subject to the same restrictions as are therein prescribed for magnetic telegraph companies. But without this section making the provisions of the chapter relating to telegraph companies expressly applicable to telephone companies, we think that the term "telegraph," as a mode of transmitting messages or other communications, is sufficiently comprehensive to embrace the telephone.

It is thus apparent that while the Telegraph Association was organized after the incorporation of the Railway Company, it had planted its poles, and strung its wires, and entered upon the business of a telephone company before the Railway Company had put its street railway into operation, with electricity as the motive power; that permission, in due form of law, was granted to the Telegraph Association to place and maintain its poles and wires for the purpose of supplying telephonic communication to its subscribers in Cincinnati and vicinity, and also as a means of communication for its longer lines.

But it is urged that the franchise of the Telegraph Association to construct lines of telephone is greatly impaired by reason of the single-trolley railway using a grounded circuit, whereby a large part of the electric current flows off from the rails to the surrounding earth, and to and upon all tele-

phone wires which may be connected with the earth in proximity to the railway. The action is described as conduction, causing more or less of electric current to be poured into the earth and into all electric conductors connected with the earth, thereby reaching telephone wires in a grounded circuit, and creating loud and continuous noises upon the wires, which disturb telephonic communication. This disturbance, however, results not solely from the earth circuit of the Railway Company, but also from the fact that the defendant in error likewise relies upon the earth for its return circuit, by connecting with the earth the end of its wire furthest from its electric batteries. The telephone wires are carried from the phones of subscribers to the gas pipes in the rooms where the phones are located, or to water pipes, or to the earth, in order to make a complete circuit. The interference moreover, with the operation of the telephone is said to be largely attributable to the delicate mechanism of the telephone wires and phones. The wires, being designed to carry the extremely small current needed for telephone transmission, are too small in size to carry successfully the strong current passing into them from electric railways.

It is claimed that in addition to this conduction or leakage disturbance, the single-trolley electric railway introduces serious disturbances on telephone lines by induction, for the reason that such electric railways employ large wires to convey the current used for the propulsion of their cars, and this current is constantly and rapidly changing its strength; that these rapidly changing currents in the electric railway wires induce disturbing currents in parallel telephone wires near which the electric railways have been built, and thus prevent a successful transmission of telephonic messages. These interferences with the telephone service may be obviated, it is stated, by the railway company giving up the single-trolley system with the ground circuit, and substituting the double-trolley system with its two trolley wires, two trolley wheels, and electric current passing from one wire through one trolley, through the motor, back through the other trolley to the other wire, and so back to the generator, without escaping to the earth. The grounded circuit, it is insisted, should be abandoned and surrendered to the sole use and service of the defendant in error. But it is admitted that other remedies of the telephone disturbances may be easily obtained by constructing the telephone with a complete metallic circuit, or by resort to what is known as the McCluer device, consisting of a single return wire, to which a number of telephone wires are attached.

Conceding that the mode adopted by the Railway Company of propelling its cars by electricity is an interruption to the telephone service of the defendant in error, and calculated to impair its franchise in the manner contended, the inquiry is suggested, whether the Railway Company must yield up a useful franchise that the same may be exclusively enjoyed by the Telegraph Association, or whether the Association shall adapt its

system to existing conditions; whether the Company shall change from the single to the double trolley system, from the grounded to the metallic circuit, or whether the Association shall use either a complete metallic circuit, or resort to the McCluer device. It is immaterial on which party the expense of the change may fall the more heavily. It is a question of legal right, and as remarked by Lord Hatherly, *L. C.*, in *Atty. Gen. v. Colney H. L. Asylum*, *L. R. 4 Ch. App. 158*, "the simplest course, as far as regards the administration of justice, is to ascertain the exact state of the law which regulates the relations of the parties; and, having done so, to proceed to act on it, without any reference to the difficulties of the case on the part of those against whom it is obliged to decide; leaving those parties to relieve themselves as they best can from the position in which they have placed themselves, and if there be no other mode of escape, to cease to do the acts which occasion the wrong."

When the Telegraph Association erected its poles and lines in 1881 and 1882, with the design of conducting the business of a telephone company, it found the Railway Company operating its street railway, with authority under the Statute to use other motive power than animals, to wit, electricity, cable or compressed air, upon obtaining the consent of the board of public works. The telephone business was not among the probabilities when the streets of Cincinnati, now made use of by the Telegraph Association, were dedicated or condemned for the public use. The primary and dominant purpose of their establishment was to facilitate travel and transportation; they belong from side to side and end to end to the public, that the public may enjoy the right of traveling and transporting their goods over them. The telephone poles and wires and other appliances are not among the original and primary objects for which streets are opened; for they may be placed elsewhere than on the highways, and yet accomplish their purpose.

In *Taggart v. Newport St. R. Co.*, *16 R. I. 668*, *7 L. R. A. 205*, it was said by *Durfee, Ch. J.*, that telephone poles and wires are not used to facilitate the use of the streets for travel and transportation; "whereas the poles and wires of the railway company are directly ancillary to the use of the streets as such, in that they communicate the power by which the street-cars are propelled." As a general rule, an occupation of the streets otherwise than for travel and transportation is presumptively inferior and subservient to the dominant easement of the public for highway purposes, for, if not so, the primary object of their dedication or appropriation might be largely defeated. And the fact that permission is granted to occupy the streets or highways for a purpose other than travel does not confer a prior and paramount right to occupy them to the exclusion of their use for travel in a mode different from what obtained when such permission was given.

The main purpose of streets or highways being to facilitate travel and transportation, new and improved agencies for effecting that

purpose must be presumed to have been in contemplation, in addition to those in existence when the ways were established. To those improved agencies, devised for the convenience and advantage of the community in general, the franchise of the Telephone Company to occupy the streets for carrying on its business must be secondary and subordinate. "The use of a highway for the purpose of a street railway, involves the application of new appliances and modes of travel, rather than of any new principle. In both, a corporation is employed and invested with rights in the highways; in both, an expenditure of money is required to put the road in a condition for use and to keep it in repair; but in both, the great leading object and public benefit is the accommodation of travelers who may have occasion to use them at fixed tolls or rates of fare, and not the profit of the proprietors." Ranney, J., in *Cincinnati & S. G. A. St. R. Co. v. Cumminsville*, 14 Ohio St. 523, 545.

In the case *Hudson River Teleph. Co. v. Wateriset Turnp. & R. Co.*, 121 N. Y. 897, the right of the telephone company to enjoin the railroad company from operating its road by electricity under the single-trolley system incidentally came under consideration. In delivering the opinion of the court, Andrews, J., after stating that the use of a grounded circuit is not necessary to a telephone system, and that the substitution of the metallic for the earth circuit, besides obviating the disturbance caused by the defendant's road, would promote the general efficiency of the telephone service, says: "The plaintiff is but one of a large number of telephone companies which, under the general permission of the Statute for the incorporation of telegraph companies, have erected poles and strung their wires in the streets of the cities and villages of the State. The claim that under this permissive grant they can exclude the use of the streets by electric railways, or for other street purposes requiring the use of electricity, wherever the use of this agent interferes with the use of the telephone, although the municipality may consent and the public interest will be promoted by the other uses to which the streets are sought to be subjected, needs but to be stated to induce hesitation." In the last-entitled case, the telephone company erected poles for its wires, and perfected its system of telephone communication, several years before the railroad company substituted electricity in place of horse-power for the movement of its cars.

The authority given by the Statute to a telephone company to construct its lines from point to point, along and upon any public road, under the continuing prohibition that, "the same shall not incommode the public in the use of such road," would plainly indicate an intention on the part of the Legislature that the company shall exercise such franchise with reference to the comfort and convenience of the traveling public, and shall not in any manner abridge or impair the use by the public of the most approved methods of travel and transportation. And a reasonable interpreta-

tion of the Statute would lead to the conclusion that to impair the public enjoyment of an approved method of conveyance on the streets would be in derogation of the statutory prohibition that the public shall not be incommoded in the use of the roads and highways.

The statutory permission to the Telegraph Association to construct its telephone lines along and upon the highways was not, therefore, without qualification. But whether the Legislature had or had not imposed the condition that the public should not be incommoded, the Association, in our judgment, acquired its privilege or permissive grant, subject to the duty of so changing and adjusting, when necessary, its system of operating its telephone lines, as not to curtail the enjoyment by the public of the best modes of travel and transportation upon the streets. Whether all who go upon the streets shall have the most convenient and expeditious passage and carriage of person and goods, has not been made dependent upon the manner in which the defendant in error has preferred to locate its poles, stretch its telephone wires or form the electric circuit.

It is in recognition and maintenance of the superior easement of the public in the streets, that city councils are required to "cause the same to be kept open and in repair, and free from nuisance;" that the streets are graded and paved, and proper regulations of police provided to govern the actions of persons using them; that the abutting owner, though having a peculiar interest and easement in the adjacent street, appendant to his lot, has no right to place permanent obstructions in the street, nor do any act on his own land outside the limits of the street, that will make the way inconvenient or hazardous, or less secure than it was left by the municipal authorities. *Crawford v. Delaware*, 7 Ohio St. 459; *Elliot, Roads and Streets*, 811; *Mallory v. Griffey*, 85 Pa. 275; *Milburn v. Fowler*, 27 Hun, 568; *Dillon, Mun. Corp.* § 1082, and cases there cited. In *Ree v. Russell*, 6 East, 427, the right of the owner to load and unload his wagons in the highway before his warehouse was held to be entirely subordinate to the right of public passage, and must not be exercised in such a manner as unreasonably to abridge or incommode the latter right. The court says: "The primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance. If the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot." As against the public easement in the highway, a telephone company that obtains the naked permission to locate its poles and wires along the streets should, we think, stand on no higher vantage ground than the owners of property abutting on the streets, who hold or acquire their property subject to all the consequences which may result, advantageously or otherwise,

from any public and authorized use of the streets, in any mode promotive of, and consistent with, the purposes of establishing them as common highways.

This paramount easement or estate which the public acquires in the streets, carrying with it a special interest in the adoption of the most approved systems of modern street travel, cannot be made subservient to the telegraph or telephone when admitted on the highway, without the clearest expression of the legislative will. In *Hickok v. Hine*, 28 Ohio St. 528, it was held that where the Legislature has power to require one public easement to yield to another more important—a *fortiori*, where the other is inferior—the intention to grant such power must appear by express words or by necessary implication; and such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. We fail to discover any authority, either express or implied, to subordinate the public easement in the streets to the privileges exercised thereon by the Telegraph Association, under the general terms of the Statute, permitting the erection of posts, piers and abutments necessary for its telephone wires, and especially when coupled with the condition that the same shall not incommode the public in the use of the highway. The demand made by the Telegraph Association is, not that the Railway Company shall so modify its existing electrical apparatus as not to interfere with the telephone service, but shall forever abandon the use of an essential part of its electro-motive system, or be perpetually enjoined. In other words, the Association claims the exclusive use of the grounded circuit, inasmuch as the mechanism of the telephone is so complex, and the electric currents employed so delicate and sensitive, that they cannot be used without disturbance from the heavier currents employed by neighboring electrical enterprises that operate with the grounded circuit. We find no foundation for such an exclusive franchise or right. When the Telegraph Association began its operations under the telephone system, neither the statute authorizing it to erect and maintain poles, wires and other necessary fixtures, nor the ordinance under which it obtained the power to extend its lines in the streets, gave an exclusive right either to use the earth for a return circuit, or a complete metallic circuit formed by double wires. The Legislature did not grant the right by general enactment, nor was the municipal corporation empowered by the Legislature to give the Telegraph Association the exclusive right to make use of its streets so as to create a monopoly. In *State v. Cincinnati G. L. & C. Co.*, 18 Ohio St. 262, it was held that a municipal corporation cannot, without clear legislative authority, grant an exclusive right to the use of the streets for certain purposes to an individual or corporation. To enable it to grant such an exclusive right by ordinance in the nature of a contract, the power must be shown to have been expressly granted, or to be so far necessary to the proper execution

of the powers which are expressly granted, as to make its existence free from doubt.

In the year 1838, Professor Steinheil made the important discovery of the practicability of using the earth as one half, or the returning section of an electric circuit. Professor Morse claimed to have made the discovery about the same time, but he failed to obtain a patent therefor. It was the discovery of an elementary principle of science, of a truth in physics, of a law in the operation of the forces of nature, and was not bounded by the trammels of the Patent Law. For forty years before the telephone was discovered, the use of the earth as a conducting medium in the formation of an electric circuit had been the common property of any electric enterprise. By what grant or title then did it become the especial, peculiar and exclusive franchise of the Telegraph Association? As it did not originate in legislative or municipal grant, so, such exclusive franchise did not spring from priority in its exercise. Where a right is common and universal, and capable of being exercised by all at the same time, there is no applicability of the rule that he who in its enjoyment is prior in point of time is prior in right. He who is first in the field does not thereby gain a monopoly of use.

It is contended, however, that the defendant in error, by virtue of its grants, acquired, before the Railway Company had a right to use electricity as a motive power, a vested interest in the telephone system as it now operates it, with a grounded circuit, and that not even the Legislature of the State could take away from it or injure this franchise, or the faith of which it has expended its capital and labor. Special privileges or immunities are under the control of the Legislature. If granted they may be altered, revoked or repealed by the General Assembly. Const. art. 1, § 2. And, while corporations with valuable franchises may be formed under general laws, all such laws may, from time to time, be altered or repealed. Const. art. 18, § 2. In view of these constitutional provisions, it is clearly within the power of the General Assembly to authorize one class of corporations to use, in the streets, electricity with the grounded circuit as a motive power, and another class to employ the same or a similar agency for the transmission of telegraphic or telephonic messages. And if the proper exercise of the rights granted to the one class under general law is irreconcilable and plainly interferes with a prior grant to a corporation of the other class, it may be construed as the intention of the Legislature to deny an exclusive franchise, if not to repeal the antecedent grant.

In view of the special benefit derived from the grant of corporate power, it is evident that the primary object or design of the State in granting the franchises of telegraph and telephone companies is, in a large measure, to subserve the public benefit and convenience, and not the mere pecuniary advantage of the owners of the corporate property. The exercise of their corporate privileges is subordinate to the accommodation of those who travel on the streets or highways—"the profit

to the proprietors being a mere mode of compensating them for their outlay of capital in providing and keeping up the public easement." Shaw, *Ch. J.* in *Com. v. Temple*, 14 Gray, 69, 77. It is in contemplation of such companies being thus subservient to the promotion of the public convenience and welfare, that the Legislature has granted to them the privilege, among others, of exercising the power of eminent domain, by entering upon any land and appropriating so much thereof as may be deemed necessary, for the erection and maintenance of poles, piers, abutments, wires and other necessary fixtures.

Having received their corporate franchises from the State, they hold them in implied trust for the benefit of the community at large, and subject to the constitutional grant of legislative power to control the exercise of those franchises, in the future, as the public good may require. A franchise, if granted by the State with a reservation of a right of repeal, must be regarded as a mere privilege while it is suffered to continue, and the Legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchise granted to them solely upon the faith of the sovereign grantor. *Pratt v. Brown*, 8 Wis. 603; *Cooley*, Const. Lim. 6th ed. 472. But in the absence of such a reservation, its force and effect may be attained through the constitutional power vested in the General Assembly to alter or repeal, from time to time, all general laws under which corporations are formed, and to alter, revoke or repeal all special privileges or immunities that may have been granted.

In illustration of what we have said, is the case *Lake Shore & M. S. R. Co. v. Cincinnati S. R. Co.*, 80 Ohio St. 604. In that case, the Lake Shore & Michigan Southern Railway Company instituted proceedings to appropriate, for the construction of its railroad, the right and privilege of crossing with its track and way the track and way of the Cincinnati, Sandusky & Cleveland Railroad Company. It was the decision of the court, as set forth in the syllabus, that every railroad corporation in this State accepts its charter and franchise, and owns and uses its tracks, subject to the power of the State to authorize the construction of other railroads across its tracks whenever the public welfare may require. Neither the priority of one charter over the other, nor the prior location or construction of a railroad thereunder, affects this right. Under the Constitution and laws of this State, the right of one railroad corporation to cross the track of another in constructing and operating its road is de-

rived by grant of the franchise so to do from the State, and not by purchase or appropriation from the road first located and constructed. The latter has no vested exclusive right to such crossing for its use, against the right of the public to a crossing. The court further held that the railway company, across whose track a right of way was condemned, could not recover for an injury to its franchise as a railroad; and that detention of trains, loss of future business, or additional expenses incident to the future exercise of its corporate powers, could not be taken into the account in estimating consequential damages.

It is contended, however, in behalf of the defendant in error, that conceding the Railway Company and Telegraph Association to be upon an equal footing on the streets and highways in the enjoyment of their respective franchises, the Company is bound to conform to the rule *sic utere tuo ut alienum non laedas*. In the view which we take of the relation to each other of the parties to the action, we deem it unnecessary to inquire whether there has been a want of conformity, and to what extent, if any, on the part of the Railway Company, to the requirements of the legal maxim. Nor do we think it necessary to determine how far an incorporated company, making a lawful and careful use of its own property, or of a franchise granted to it by the proper municipal authorities, may be held liable for damages incidentally caused to another.

From the undisputed facts in the case, as disclosed in the record and printed arguments of counsel, it is evident, as we have already seen, that the Railway Company acquired from the State, and from the City of Cincinnati, authority to erect and maintain poles and wires in the streets or highways, and to use electricity as a motive power for its cars. Clothed with such authority, we have, upon weighing the allegations in the original petition, and applying to them the well-settled principles governing the legal rights of the public in the highways, reached the conclusion that the facts set forth in the petition are not sufficient to constitute a cause of action. We are of the opinion that there has been no invasion of the rights of the Telegraph Association by the plaintiff in error, and that the Telegraph Association is not entitled to the relief prayed for in its petition.

*The judgment, therefore, of the Superior Court at General and Special Term must be reversed, and the original petition dismissed.*

*Judgment accordingly.*

## UNITED STATES CIRCUIT COURT, MIDDLE DISTRICT OF TENNESSEE.

CUMBERLAND TELEPHONE &amp; TELEGRAPH CO.

v.

UNITED ELECTRIC RAILWAY *et al.*

\*In the present state of electrical science a telephone company cannot maintain a bill for an injunction against the operation of an electric railway to prevent damages incidentally sustained by the escape of electricity from its rails.

(May 19, 1890.)

SUIT to enjoin defendants from using electricity for the propulsion of their cars under any system which makes use of the earth for its return circuit. *Injunction denied.*

Statement by Brown, J.:

This was a bill in equity to enjoin the use of electricity by the street railways of Nashville under any system which makes use of the earth for its return circuit. The complainant is a Kentucky corporation "empowered" by its charter "to construct and operate lines of telephone." It entered the State of Tennessee, claiming a right under § 1535 of the State Code, which provides that "any person or company may construct a telegraph line along the public highways and streets of this State, or across the rivers, or over any lands belonging to the State, free of charge, and over the lands of private individuals as hereinafter provided, and may erect the necessary fixtures therefor." The City of Nashville gave its consent to the use of its streets by an ordinance passed in 1879, and in that year complainant established a telephone plant, which it has continued to enlarge and improve to the present time. In 1885 an Act was passed by the Legislature of Tennessee authorizing both foreign and domestic corporations to "construct, operate and maintain such telegraph, telephone or other lines necessary for the speedy transmission of intelligence, along and over the public highways and streets of the cities and towns of this State: . . . provided, that the ordinary use of such highways and streets . . . be not thereby obstructed," etc. In 1888 the city passed another ordinance, confirming complainant's rights to the streets and alleys, as then established, and granting the further right to extend its plant as public needs might require. Under these provisions, complainant built and operated its lines of telephone through the streets of Nashville, now having in use about 1,400 telephones, and 1,800 miles of wire.

Defendants are five street railways, all now operated by electricity, under the Sprague and Thompson-Houston systems, and using a single trolley or overhead wire. Three of these roads were originally incorporated by special Act authorizing them to operate street rail-

ways by horse-power. By an Act approved March 21, 1887, amending the General Incorporation Laws, all street railways thereafter organized under the general laws of the State were authorized to propel their cars by electricity. Two of these railways were organized under the General Incorporation Laws. By another Act, approved February 28, 1889, all street railway companies which before that time had operated cars by animal power were empowered to operate the same by electricity, provided the city gave its assent. Acting under this supposed authority, one of the defendants, the McGavock & Mt. Vernon Company, proceeded to equip a portion of its road with electricity.

Thereupon, and on April 17, 1889, complainant filed its bill in the chancery court to enjoin it. Before the cause was heard, the parties entered into an agreement by which the Telephone Company agreed to dismiss its bill, to elevate all its wires which might interfere with the operation of the road, to use all means to prevent its wires from coming in contact with the trolley wires of the road, and not to interfere further with the operation of the road, the Railroad Company agreeing, upon its part, to construct at its own expense a return metallic circuit, for the use of the Telephone Company whenever it is ascertained that its service is being injured by electricity generated by the Railway Company, and to use all necessary precautions to prevent the telephone wires from coming in contact with its own wires. In January, 1890, a similar agreement was made between the Telephone Company and the City Electric Railway, with a proviso that if, upon a fair trial, the return wire should not protect the Telephone Company from substantial injury, the parties should be remitted, without prejudice, to their legal rights and remedies as they existed before the agreement was made. The bill charged that the metallic current had not given the relief anticipated, and that complainant was not estopped by this agreement. The gravamen of the bill was that the electricity, which is supposed to return to the dynamos by means of the iron rails, scatters through the earth, and is thereby conducted to the wires of the Telephone Company through various agencies, known as "conduction" or leakage, and this current, being stronger, overcomes the weaker current of the telephone, producing loud, buzzing noises, and wholly preventing, or greatly interfering with, telephonic communication. Besides, the electricity thus conducted acts upon the bells of subscribers when there is no call from the central office, causing them to ring, and also causing a great number of the annunciators at the exchange to fall at one time, so that the operators cannot tell who, if anyone, has called. That if the currents used by the cars were constant and uniform it would not interfere with the telephone. It further averred that the service was interfered

\*Head note by BROWN, J.

NOTE.—See preceding case and note. For applications of the maxim *sic utere tuo ut alienum non laedas*, see note to *Moellering v. Evans* (Ind.) 6 L. R. A. 448.

12 L. R. A.

That which exists by legislative sanction cannot be held to be a nuisance. See note to *Bohan v. Port Jervis Gas-Light Co.* (N. Y.) 9 L. R. A. 711; *Aldworth v. Lynn* (Mass.) 10 L. R. A. 210.



with by induction, where a varying current of electricity, conveyed on a conducting wire, will produce in a parallel wire other currents of electricity. The varying current upon the trolley line induces a like current in the parallel telephone wires on the same street, and also, as in the case of conduction, produces the noises and sounds, and rings the bells of subscribers, and throws down the annunciators. The bill also charged that the single trolley was dangerous to life and property. If, by winds and storms, a telephone wire should break, and fall across the trolley, it might be fatal to a man or beast to touch it, and dangerous to the lives of those in the telephone exchanges, sometimes causing fire in the houses of subscribers. The bill concluded that all these troubles and dangers would be avoided if defendant would use an entire metallic circuit, or double trolley, properly constructed, and that the same result would follow if complainant would use a complete metallic circuit for every one of its subscribers, but the latter would nearly double the cost of the plant, and grave difficulties would be encountered at the central office, which it was not certain could be successfully overcome. On the contrary, the single trolley could be converted into a double trolley at a comparatively small expense. That, in consequence of these interferences, subscribers make constant complaints, many threaten to, and some actually do, refuse to pay for their telephones.

The answer did not make an essentially different case, but averred that in February, 1889, all the defendants were sold to the United Electric Railway; that each company had sold its mules, and changed its stabling to an electric-car plant; that the entire system furnishes transportation to 15,000 persons per day. It denied that the metallic return wire has failed to protect the telephone, and averred that little or no trouble was experienced on the route so protected. It further alleged that, of the four methods of equipping electric railways, viz.: storage batteries, the conduit system, double trolley overhead and single trolley overhead, all have substantially proved to be failures, except the last. It denied that the complainant was entitled to a monopoly of the earth for its return circuit, and insisted that it should make use either of a complete metallic circuit, or of a device known as the "McCluer Device" for its return circuit.

**Mr. Thomas H. Malone**, for complainant:

When the terms of complainant's charter were accepted by the Company, and its lines constructed on the faith of the grant, the Legislature itself could not deprive the Company of the easement granted. But if the relations between the State and the accepting company are not those of contractors, and the Act must be construed as a mere license, revocable at will, certainly the State, and all claiming under the State by subsequent grant, are bound by the terms of the Act until the license shall have been revoked, expressly or by necessary implication.

*Troy v. Troy & L. R. Co.* 49 N. Y. 657.

The right of defendants to use electricity as a motor depends upon the State's grant, as, in 13 L. R. A.

deed, does their right to use the streets at all.

Dillon, Mun. Corp. p. 568; Redfield Rep. to Mass. Legis., cited in Dillon, Mun. Corp. note to p. 568; *Memphis City Pass. R. Co. v. Memphis*, 4 Coldw. 406, 77 U. S. 10 Wall. 88, 19 L. ed. 844.

It is manifest, therefore, that their right is of no higher dignity than complainant's. Each is derived from the same source—the State of Tennessee.

Inasmuch as no special power is given to defendants to condemn property necessary for their purposes, if the enjoyment of their franchise must necessarily deprive complainant of the enjoyment of its franchise, or seriously interfere with its enjoyment, the maxim, "*qui prior est in tempore potior est in jure*," must apply.

Lewis, Em. Dom. p. 306.

Grants by the Legislature, which may injuriously affect others, should be strictly construed.

*State v. Gainer*, 8 Humph. 89, 40; *Gas-Light & C. Co. v. Vestry of St. Mary Abbots*, L. R. 15 Q. B. Div. 1; Taylor, Priv. Corp. 2d ed. p. 122, citing *Pennsylvania R. Co's App.* 98 Pa. 150; *Packer v. Sunbury & E. R. Co.* 19 Pa. 211; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659-666, 24 L. ed. 1086-1088; Lewis, Em. Dom. p. 276.

Where a grant of a franchise is made, or a duty is imposed by the Legislature, and no manner of enjoyment or execution is specified, the franchise must be exercised and the duty performed, if possible, without injury to others, and without creating a private or public nuisance.

*Geddis v. Proprietors of Bann Reservoir*, L. R. 8 App. Cas. 480; *Atty-Gen. v. Gas-Light Co.* L. R. 8 App. Cas. 480, 28 Eng. Rep. (Moak) 586.

While the fact that complainant's right is prior in point of time confers no exclusive privilege, yet it does impose certain duties upon those subsequently acquiring rights which may conflict with complainant's.

*Bell Teleph. Co. v. Bellville Electric Light Co.* (Canada Case, Q. B. Div.); *Nebraska Teleph. Co. v. New York Gas & Electric Light Co.* 27 Neb. 284.

An act strictly within the scope of the powers granted cannot be a public nuisance. But it may nevertheless be a private nuisance, "and the legislative grant is no protection against a private action resulting therefrom."

Wood, Nuisance, p. 757; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 106 U. S. 317, 27 L. ed. 789; *Northwestern Fertilizing Co. v. Hyde Park* and *Atty-Gen. v. Gas-Light & C. Co. supra*.

Defendants are guilty of creating and maintaining a nuisance, with respect to complainant's franchise.

Wood, Nuisance, 1st ed. p. 119.

Defendants, by a physical agency, invade our property and interfere with its use. The fact that this agency is subtle and its nature imperfectly understood, seems immaterial.

*Barrick v. Schifferdecker*, 48 Hun, 355; *Rheinhardt v. Mentast*, L. R. 43 Ch. Div. 685.

**Mr. John J. Vertrees** also for complainant.

**Mr. James C. Bradford**, for defendants:

Assuming that each party has a valid grant, and that each, independently of the other, has the right to occupy the streets, what are their relative rights? Electric railroads are within the purposes of the original dedication of the streets. As an electric road it is as much a street railroad as before. The motive power is immaterial.

*People v. Kerr*, 27 N. Y. 188; *Williams v. New York Cent. R. Co.* 6 N. Y. 108; *Pelton v. East Cleveland Railroad Co.* Ohio Common Pleas Court, opinion of Stone, J.

Complainant has no exclusive right to use the earth. Public grants are to be strictly construed, and in favor of the public; and nothing passes unless it is obvious that the intent was that it should pass.

*Perrine v. Chesapeake & D. Canal Co.* 50 U. S. 9 How. 172, 13 L. ed. 92; *Stourbridge Canal Co. v. Wheeley*, 2 Barn. & Ad. 792.

The corporation takes nothing that is not clearly given by the grant.

*Delaware & R. Canal Co. v. Raritan & D. Bay R. Co.* 16 N. J. Eq. 322; *Omaha Horse R. Co. v. Omaha Cable T. Co.* 80 Fed. Rep. 324.

What is not exclusively granted is expressly withheld.

*Leavenworth L. & G. R. Co. v. United States*, 92 U. S. 740, 28 L. ed. 637.

Where two legislative grants conflict, the elder in point of time and use does not exclude the younger from the enjoyment of its privileges.

*Atty-Gen. v. New York & L. B. R. Co.* 24 N. J. Eq. 49; *Heerman v. Beef Slough Mfg. B. L. D. & Transp. Co.* 8 Biss. 334. See *Hinchman v. Paterson Horse R. Co.* 17 N. J. Eq. 71; *Hogencamp v. Paterson Horse R. Co.* Id. 84.

The complainant cannot be the judge of the extent of its use of the earth; and if it have at hand the means wherewith it may prevent injury to itself, and allow defendant the reasonable use of its franchise, its obligations to the public and its duty to the defendant require their adoption.

*Rocky Mountain Bell Teleph. Co. v. Salt Lake City R. Co.* 8d Jud. Dist. of Utah; *Jacobs v. Allard*, 42 Vt. 303; *Snow v. Parsons*, 28 Vt. 459; *Waffle v. New York Cent. R. Co.* 58 N. Y. 11; *McCormick v. Horan*, 81 N. Y. 86.

**Brown, J.**, delivered the following opinion:

We do not care, in this case, to discuss the constitutionality of the Act of 1885, or the present obligation or effect of the contract entered into between the complainant and two of the defendant railway companies, under which the latter agreed to furnish proper return wires to the Telephone Company in order to obviate the difficulties experienced by the escape of electricity from their rails. We prefer to assume that both these parties are lawfully exercising their franchises, and to consider their respective rights and obligations unembarrassed by any previous contracts or understandings. We see no reason to doubt the position assumed by the complainant, that a telephone company is a telegraph company, and that, under its right to construct and operate telegraphs, it was empowered to establish a telephone service. *Atty-Gen. v. Edison* 12 L. R. A.

*Teleph. Co. L. R. 6 Q. B. Div. 244; Wisconsin Teleph. Co. v. Oakkosh*, 63 Wis. 32.

Complainant, in operating its instruments, connects each telephone with the ground by what is termed a "ground wire," through which the return current of electricity is carried to the earth, and perhaps through the earth, acting as a conductor, back to the telephone exchange. Such return, in some form or other, is necessary to the production of a current of electricity in every case. Defendants, upon the other hand, use a single overhead wire or trolley, suspended over the middle of the track, along which the electric current passes, descending by the trolley rod or mast through the cars to the motors underneath, and thence to the rails, which are connected together at their ends, and which operate to convey the return current back to the dynamo at the power-house. The evidence, however, establishes the fact that the current does not all return by the rails. Much of it escapes, becomes scattered through the earth, ascends through the ground wires to the telephones, and seriously impairs their operation, by causing a humming or buzzing noise, which drowns the voice of the speaker, and often causes the annunciators in the exchange to fall, and the bells to give false calls, so that it is impossible for the operators to tell which, if any, of its subscribers have called, and, in short, throws the whole system into confusion.

That these evils exist, to the serious detriment of the telephone service, is not denied; but it also appears from the evidence upon both sides that they are not absolutely insurmountable. Indeed, there are but few serious questions of fact in this case, and these turn upon the relative practicability and expense of the several methods of overcoming this difficulty. In solving these questions, we are compelled to bear in mind the fact that the science of electricity is still in its experimental stage; that a device which to-day may be the best, cheapest and most practicable, may, in another year, be superseded by something incomparably better fitted for the purpose. It is quite possible, too, that the legal obligations of the parties may change with the progress of invention, and the duty of surmounting the difficulty be thrown upon one party or the other, as a cheaper or more effectual remedy is discovered. For example, if it were shown that by the use of a certain device the defendants could control their return current in such a way as not to interfere with the use of complainant's instruments, the law might treat their failure to adopt such measures as negligence in the use of their franchise, and enjoin them, or hold them liable for all damages sustained by the complainant. If, upon the other hand, the difficulty can be better controlled by a device applicable to telephones, it might be incumbent upon the complainant to adopt it, leaving the courts to settle the further question, whether the expense of so doing is recoverable of the defendants. We are thus compelled to consider this case with reference to the present state of the art, and with the possibility that in another year circumstances may so change as to reverse completely the legal obligations of the parties. Indeed, since

the litigation between the telephone companies and the electric railway companies originally began, considerable progress has been made towards a solution of the problem. Let us consider the respective methods now suggested:

1. The double trolley. There seems to be no doubt that if defendants adopt a second trolley wire, the return current might be carried back to the dynamos without coming in contact with the earth at all, and the difficulty be completely overcome. Upon the other hand, we are satisfied from the affidavits that this would not only entail a large expense upon the defendants, but that it disfigures the streets with a complicated network of wires, and, wherever there are curves, turn-outs or switches, renders the road very difficult of operation. There are two of these double-trolley roads in operation in Cincinnati; and they are used to a limited extent in other cities. But the fact that nine tenths of the electric railways in this country are equipped with a single trolley, and that, in most of the cities where the double trolley was formerly used, including Montgomery, Pittsburgh, Denver, Albany and Appleton, they have been abandoned, are strong arguments against their practicability. Indeed, it is only where the roads make use of a double track that the double trolley can be made a success. Add to this that, in the numerous cases between the telephone companies and the electric railways which have arisen in other States, the courts have uniformly held the double trolley to be a failure as applied to single tracks, and it would seem that the question could no longer be considered an open one.

2. There seems to be no doubt that the evil may also be remedied by a return wire attached to each telephone, by which the current is carried directly back to the exchange, instead of being dumped into the earth. This, however, is open to the same objection as the double trolley. It is not only very expensive, doubling the cost of the electric plant, but would double the number of wires carried through our streets, already far too numerous for comfort, beauty or safety. In addition to this, it involves a large outlay and increased complication and expense for the central office, there being not only two line wire terminals to provide for every subscriber, but four terminals to handle for every connection, instead of two, as with the single wire and earth systems. Upon the whole, we deem this to be impracticable.

3. A third device, known as the "McCluer System," remains to be considered. This contemplates the employment of a single return wire upon each route disturbed by the railway service, to which each telephone upon that route is connected, and which operates to complete the metallic circuit. If we are to believe the affidavits of those who are familiar with this device, it affords a perfect remedy for all disturbances produced by leakage or conduction, though there are also slight disturbances produced by induction from parallel wires, from which no complete relief has been discovered by any kind of metallic circuit, unless supplemented by the use of non-inducting cables, and the transposition of wires. This evil, however, is remediable by increasing the distance

between the parallel wires, and does not seem to be regarded as a serious matter. It is true, defendants have produced affidavits which tend to throw some doubt upon the utility of the McCluer device, but this doubt seems to have arisen more from the reluctance of the telephone companies to adopt it than from any proven insufficiency. We think we are justified in assuming that the adoption of this device by the complainant would obviate the disturbances now produced by leakage.

The case, then, practically resolves itself into the question, At whose expense shall this change be made? As the testimony tends to show that the introduction of the McCluer device into the telephone service of Nashville would not cost to exceed \$10 to each telephone, the question is not vital to the existence of either of these companies. At the same time, as it is one that confronts the telephone and electric railways in every city of the country where both are used, it becomes of great importance. Are the telephone companies which have the prior rights to use the streets, bound to conform their business to the demands of these new-comers, though by so doing they put themselves to large expense? Or are the railway companies bound, as a condition of occupying the same territory, to see to it that, in operating their roads, no incidental damage is done to their neighbors?

If the existence of one was absolutely incompatible with the continued operation of the other, it might be incumbent upon us to make a choice between these two great benefactions, both of which will rank among the necessities of modern urban life. But, as we are bound to assume that they can be persuaded to live together in harmony, the case virtually resolves itself into a question of liability for certain damages sustained by the complainant. In this view it is open to serious doubt whether it is entitled to invoke the aid of a court of equity at all. Conceding that the case made by the bill is one of equitable jurisdiction, still the granting or withholding of an injunction is largely a matter of discretion, and if, upon all the pleadings and the testimony, the court can see that it involves a mere question of dollars and cents, it may well hesitate to stop the operation of these roads by resorting to the harsh remedy of an injunction, especially in view of the fact that defendants are amply able to make reparation. We do not desire, however, to dispose of the case upon this ground.

It would be perfectly competent for us to stay the issue of an injunction, as has already been done in one or two cases, until a reasonable time had elapsed for the ascertainment and payment of these damages; and, as both parties have addressed their arguments to the question of liability, we are disposed to give them the benefit of our views.

We are referred in this connection to a large number of decisions of courts of the highest respectability, upon the very questions involved in this case. If these decisions had been harmonious, we should not have hesitated to defer to them; but, as these courts have reached different results, we do not feel like indicating a preference for one or the other. While all are persuasive none are controlling; and we have deemed it more satisfactory to treat this as an

original question, and inquire how far it may be answered by the application of well settled principles.

We are asked to determine how far a person making a lawful and careful use of his own property, or of a franchise granted to him by the proper municipal authorities, is liable for damages incidentally caused to another; in other words, whether the right of the other to an injunction does not depend upon something more than the simple fact that he has suffered injury, though his right to an undisturbed use of his own may antedate that of another. It is true that in one case, namely, *Rheinhardt v. Mentasti*, L. R. 42 Ch. Div. 685, it is said that the principle governing the jurisdiction of the court in cases of nuisance does not depend upon the question whether the defendant is using his own reasonably or otherwise, but upon the question, Does he injure his neighbors? This case lays down a broader doctrine of liability than any to which our attention has been called, but it is sufficient to say in reply to it that nothing which is authorized by competent authority can be treated as a nuisance *per se*. *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 886; *Hinchman v. Paterson Horse R. Co.* 17 N. J. Eq. 77; *Easton v. New York & L. E. R. Co.* 24 N. J. Eq. 68; *Grand Rapids & L. R. Co. v. Heise*, 88 Mich. 52; *Davis v. Mayor*, 14 N. Y. 506.

We take it to be well settled, so far as persons operating under legislative grants are concerned, that something more than mere incidental damage to another must be proved—something, in fact, in the nature of an abuse of the franchise—to entitle the party injured to an injunction. It is perfectly obvious that there are a large number of instances in which a person may suffer damages without recourse to the offender. Thus, the smoke that fills our lungs and soils our garments; the dust that enters our dwellings and stores, and damages our furniture; the noxious odors that assail our nostrils; the impure water we are sometimes compelled to drink,—are the necessary penalties we pay for living in cities; but in ordinary cases there is no legal remedy for the evil. In the somewhat flowery language of *Lord Justice James*, in *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. 705: "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town, which would drive the Dryads and their masters from their ancient solitudes."

I may expend a fortune in building a handsome house thirty or forty feet from my front fence. My neighbors upon either side may build theirs upon the line of the street, and completely ruin its market value. In the absence of a prescriptive right on my part, they may wall up my windows, and completely exclude the light, or undermine the foundation of my outer wall so that it crack or tumble down. But, if it be necessary to the beneficial enjoyment of their own property, I have no remedy. *Panton v. Holland*, 17 Johns. 92.

There are undoubtedly a large number of cases where persons have been held liable for an infringement upon the maxim, *sic utere tuo* 12 L. R. A.

*ut alienum non laedas*; but, upon examination, they will usually be found to turn upon questions of negligence or nuisance.

1. There is no doubt that every person is bound to the exercise of reasonable care in the use of his own property; and, for any default in that particular, he will be liable to the person injured in an action for negligence. Thus, in *Vaughan v. Menlove*, 8 Bing. N. C. 468, defendant was held liable for negligence in building a hay-rick so near the extremity of his own land that, in consequence of its spontaneous ignition, his neighbor's house was burned; although, in *Higgins v. Dewey*, 107 Mass. 494, this principle was limited to cases where the burning was negligent, or might reasonably have been expected to have injured the property of a neighbor. This was the real ground upon which a recovery was permitted in the leading case of *Rylands v. Fletcher*, L. R. 8 H. L. 830, though the case is often cited for the broader proposition, that the person who, for his own purpose, brings on his lands and collects and keeps everything there likely to do mischief if it escapes must keep it at his peril. This case has not been accepted either in England or in this country without some qualifications. The same rule applies if a man permit a wall which had been negligently constructed to fall upon his neighbor's house (*Gorham v. Gross*, 125 Mass. 383), or a chimney to which a gas-light company had fastened a telegraph wire. *Gray v. Boston Gas-Light Co.* 114 Mass. 149.

The principle of these cases was also applied in *Tarry v. Ashton*, L. R. 1 Q. B. Div. 814, where it was held to be the duty of a person hanging a lamp over the highway to keep it in good repair. This case proceeds, perhaps, as far as any in holding the defendant responsible.

To the same principle is also referable the case of *Gas Light & Coke Co. v. Vestry of St. Mary Abbots*, L. R. 15 Q. B. Div. 1, whereby the defendants were held liable for using steam-rollers, in repairing a highway, so heavy that they injured the gas pipes of the plaintiff. The statement of the case shows that the pipes were laid from twenty to twenty-four inches beneath the surface of the streets, and that this was a sufficient depth to prevent their being injured by the ordinary travel of the streets, and also by the ordinary mode of repair, if steam rollers of great weight had not been used. The decision was put by the court upon the express ground that heavier rollers were used than were necessary; and it was said that, if "the defendants were expressly authorized by statute to use steam-rollers of such a weight as necessarily to injure the plaintiffs' pipes, the plaintiffs would have no ground of complaint. The case would then be one of *damnum absque injuria*. The same consequence would follow if the defendants were expressly authorized by statute to repair in some way which necessarily required the use of heavy steam rollers, or other machinery which could not be worked without injuring the plaintiffs' pipes."

2. Similar to these are the cases in which persons have been held liable for keeping upon their land anything which operates as a nuisance to their neighbors generally, or to any particular individual. Upon this principle, if a person allows a privy to get out of repair and

the water percolates into his neighbor's cellar (*Tenant v. Golding*, 1 Salk. 21; *Ball v. Nye*, 99 Mass. 583; *Ballard v. Tomlinson*, L. R. 29 Ch. Div. 115; Cooley, Torts, 568); or maintains a mill-dam in an unsafe condition (*Mayor v. Bailey*, 2 Denio, 438; *Gray v. Harris*, 107 Mass. 492); or permits injurious accumulations of snow or ice upon his roof (*Shipley v. Fifty Associates*, 106 Mass. 194); or permits loud and unnecessary noises (*Brill v. Flagler*, 23 Wend. 354; *Tanner v. Albion*, 5 Hill, 121); or carries on a trade offensive to the neighborhood by reason of dust, smoke, foul odors, or jar of machinery, or otherwise (Cooley, Torts, 600, 601).—he is liable for the consequences. In all this class of cases, the question whether the carrying on of an offensive business is a nuisance or not depends very largely upon the character of the neighborhood, the time it has been carried on without objection and the prior use of the buildings in the vicinity, as a trade may be adjudged a nuisance in one place and not in another. *Gilbert v. Showerman*, 23 Mich. 448; *Robinson v. Baugh*, 81 Mich. 290.

A leading case in the federal courts is that of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 817, 27 L. ed. 789. In that case it was held that legislative authority to a railroad company to bring its tracks within the limits of the City of Washington, and to construct shops and engine-houses there, did not confer upon it authority to erect noisy workshops in the immediate vicinity of a church where services had been held several times during the week for a number of years before the erection of the shops. But, in delivering the opinion in that case, *Mr. Justice Field* drew a distinction between nuisances of that description, and a railway through the streets authorized by Congress, which, when used with reasonable care, produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, and affords no ground of complaint. "Whatever consequential annoyance may necessarily follow from the running of the cars on the road with reasonable care is *damnum absque injuria*."

3. There are also a few cases which indicate that, even if a man be guilty of no negligence, but is engaged in doing something dangerous in its nature, he is liable for the immediate and direct consequences of his acts. Thus in *Hay v. Cohoes Co.*, 2 N. Y. 159, the defendant, a corporation engaged in digging a canal, was held liable for blasting rocks in such a way that the fragments were thrown against and injured plaintiff's dwelling, upon lands adjoining. It was held that it was liable although no negligence or want of skill was alleged or proved. The doctrine laid down in this case, however, was carefully limited in the subsequent case of *Loose v. Buchanan*, 51 N. Y. 476, in which the owner of a steam-boiler was held not to be liable for damages occasioned by its explosion, in the absence of proof of fault or negligence on his part; and it was said that the defendant was held liable in the *Cohoes Case* upon the ground that its acts in casting the rocks upon the plaintiff's premises were direct and immediate. In the same line is the case of *Cahill v. Eastman*, 12 L. R. A.

18 Minn. 324 (Gil. 292), in which the defendants were held liable for the consequences of an ordinary spring freshet, without proof of negligence or unskillfulness on their part in the construction and maintenance of a tunnel through which water flowed and damaged the plaintiff's mill. Defendants' liability was put upon the ground that the damages the plaintiff sustained were the direct and immediate result of defendants' operations on their own land. "The plaintiffs had a right to hold their property free of such a result of the defendants' use of their land." The authorities are carefully collated, and the opinion is a very instructive one. These cases would be apposite, if the defendants had found it necessary, in the construction of their line, to cut the wires of the Telephone Company, remove its posts or commit any other direct depredation upon its property.

4. Subject to these exceptions we understand the law to be well settled that no person is liable for damages incidentally occasioned to another by the necessary and beneficial use of his own property, or of a franchise granted to him by the State. The principle is thus stated by Judge Woodworth, in *Panton v. Holland*, 17 Johns. 92-99: "On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others, when there is no just ground for the charge of negligence or unskillfulness, and when the act is not done maliciously."

Illustrations of this principle are plentifully scattered through the reports. It extends not merely to the digging up of ground for a new building, whereby the walls of the next house are injured (*Panton v. Holland*, 17 Johns. 92-99; *Thurston v. Hancock*, 12 Mass. 220), but to the burning of fallow land, whereby fire is communicated to adjoining lands (*Clark v. Foot*, 8 Johns. 421), to the erection of a mill-dam, whereby water is in part diverted from a lower mill (*Platt v. Johnson*, 15 Johns. 218), to the building of a basin or bridge, whereby access to plaintiff's dock is obstructed (*Lansing v. Smith*, 8 Cow. 148, 4 Wend. 9; *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 713, 18 L. ed. 96), and even to the pollution of a stream by the discharge of tan-bark from an upper mill, which was suffered to float down upon the mill of the plaintiff, where it was shown to have been the uniform custom of the country to permit it. *Snow v. Parsons*, 28 Vt. 459.

A distinction is drawn between cases where the pollution of a stream is indispensable to its beneficial use, and cases where the pollution is such as to make it absolutely useless to manufacturers lower down the river. Of the latter class is *Merrifield v. Lombard*, 18 Allen, 16, where the defendant threw vitriol and other noxious substances into the stream a short distance above plaintiff's factory, by means of which the water was corrupted so that it corroded plaintiff's engine and boiler and rendered them unfit for use. In such cases the court will weigh the circumstances and necessities of the case, and the manner in which the stream has heretofore been used. Cooley, Torts, 587.

In the case of *Pennsylvania Coal Co. v. San-*

*derson*, 118 Pa. 126, 4 Cent. Rep. 475, it was held that one operating a coal mine in the ordinary and usual manner may drain or pump water upon his own lands, which percolates into the stream which forms the natural drainage of the basin in which the mine was situated, although the quantity of water may thereby be increased, and its quality be so affected as to render it totally unfit for domestic purposes by the lower riparian owners. It was intimated that the use and enjoyment of a stream of pure water for domestic purposes must, from the necessity of the case, give way to the interests of the communities, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal. It is said, in the opinion of the court, to be "a general proposition, that every man has the right to the natural use and enjoyment of his own property; and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*; for the rightful use of one's own land may cause damage to another, without any legal wrong."

The same principle is applicable to the case of a public officer, who, if authorized by law to excavate earth in grading a street, or constructing a tunnel, will not be responsible in the absence of negligence for damage to abutting property owners. *Smith v. Washington Corp.*, 61 U. S. 20 How. 185, 15 L. ed. 858; *Northern Transp. Co. v. Chicago*, 99 U. S. 685, 25 L. ed. 336; *Callender v. Marsh*, 1 Pick. 418; *Radcliff v. Mayor*, 4 N. Y. 195. In this last case, it is said that an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow. The case of *McCombs v. Akron*, 15 Ohio, 474, in which it was held that a corporation was liable for injuries to plaintiff's property in cutting down and grading a street, is opposed to the great weight of authority, and in a number of cases has been denied to be law. See also *Chapman v. Albany & S. R. Co.* 10 Barb. 860. In *West Cumberland I. & S. Co. v. Kenyon*, L. R. 6 Ch. Div. 778, it is said, with regard to the storage of water upon defendant's land, that it was necessary for the plaintiff to show, not only that he had sustained damage, but that the defendant had caused it by going beyond what was necessary in order to enable him to have the natural use of his own land. In *Atty-Gen. v. Colney H. L. Asylum*, L. R. 4 Ch. App. 146, defendant was held liable for polluting a stream by its sewage, upon the ground that the evil might have been remedied by depositing the sewage elsewhere. Other instances of serious damage, suffered without the possibility of recourse, may occur whenever a rival bridge is authorized to be built across a stream, as was done in *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 420, 9 L. ed. 778.

The building of a new railroad may destroy the value of a turnpike, of a line of coaches, of taverns, public houses, and even of small towns lying along its line. Illustrations are found in *Boulton v. Crother*, 2 Barn. & C. 708, and *Nichols v. Marsland*, L. R. 10 Exch. 255.

12 L. R. A.

In *Rockwood v. Wilson*, 11 Cush. 226, it is said that "nothing can be better settled than that, if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence." What shall be considered indirect, as distinguished from direct, injuries, is clearly stated in *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 12 Cent. Rep. 261, in which a construction was given to a constitutional provision of Pennsylvania securing just compensation by corporations for property "injured or destroyed," as well as "taken." It was held to be confined to such injuries to one's property as are actual, positive and visible,—the natural and necessary results of the original construction or enlargement of its works by a corporation, and of such certain character that compensation therefor may be ascertained at the time the works are being constructed or enlarged, and paid or secured in advance, as distinguished from indirect injuries to the plaintiff, which were the result merely of a subsequent operation of its railroad in lawful manner, without negligence, unskillfulness or malice.

The substance of all the cases we have met with in our examination of this question—and we have cited but a small fraction of them—is that, where a person is making lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. *Hoyt v. Jeffers*, 30 Mich. 181. If in the case under consideration it were shown that the double trolley would obviate the injury to complainant without exposing defendants or the public to any great inconvenience or a large expense, we think it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction; but, as the proof shows that a more effectual and less objectionable and expensive remedy is open to the complainant, we think the obligation is upon the Telephone Company to adopt it, and that defendants are not bound to indemnify it; in other words that the damage incidentally done to the complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the Telephone Company has a monopoly of the use of the earth, and of all the earth within the City of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained. We place our denial of an injunction upon the grounds:

1. That the defendants are making lawful use of the franchise conferred upon them by the State, in a manner contemplated by the Statute, and that such Act cannot be considered as a nuisance in itself.

2. That, in the exercise of such franchise, no negligence has been shown, and no wanton, or unnecessary disregard of the rights of the complainant.

3. That the damages occasioned to the complainant are not the direct consequence of the construction of the defendants' roads, but are incidental damages resulting from their operation, and are not recoverable.

The cases involving this principle are almost innumerable; and in our examination of them we are satisfied the great weight of authority bears in the direction we have indicated.

As a result, *the motion for an injunction must be denied.*

## CONNECTICUT SUPREME COURT OF ERRORS.

O. Wilbur FIELDS  
v.  
Sidney V. OSBORNE *et al*

(....Conn....)

1. A political party the name of which can be placed on ballots under the Election Law is formed where a Republican caucus votes to adjourn for the organization of a citizens' caucus and thereupon some Democrats unite with the Republicans present and nominate a citizens' ticket, which is voted at a town meeting, although no committees are appointed or any steps taken to effect a permanent organization.
2. Courts cannot inquire into the motives which underlie the formation of a political party in determining whether or not it has such an existence as to be entitled to issue separate election ballots bearing its name.
3. The fact that the real object of a caucus failed of accomplishment is not sufficient to show that no political party was formed which would be entitled to issue election ballots bearing its name.
4. Ballots cast at a town meeting, which include the name of a candidate for judge of probate, who can be legally elected only at a state election, or which have the words "and *ex officio* Registrar of Births, Marriages and Deaths," added to the name of the office of town clerk, are invalid under Pub. Acts 1890, chap. 247, which provides that ballots shall contain in addition to the official indorsement, only the "names of the candidates, the office voted for and the name of the political party."
5. The use of the word "for" before the name of each office named in a ballot does not necessarily invalidate the ballot under Pub. Acts 1890, chap. 247, prohibiting any words thereon except the official indorsement, the names of candidates, the office voted for and the name of the political party.

(June 1, 1891.)

**R**ESERVATION by the Superior Court for New Haven County for the opinion of the Supreme Court of Errors of an action brought by petitioner to have himself declared elected to the office of Selectman of the Town of Branford. *Dismissed.*

The facts are stated in the opinion.  
*Messrs. Harrison & Zacher*, for plaintiff:  
If there is anything upon the ballot that is

**NOTE.**—For decisions as to the proper form of ballots under the recent Election Laws, see *note to Talcott v. Philbrick* (Conn.) 10 L. R. A. 150.  
12 L. R. A.

See also 17 L. R. A. 364.

prohibited, it must be in the nature of a mark or a device, and when this mark or device is found, it will condemn the ballot upon which it is found.

*Steele v. Calhoun*, 61 Miss. 556.

Where the sheriff is *ex officio* collector a ballot having printed thereon "Sheriff and Collector" is not in violation of the law requiring that the ballot shall contain no printing except the names of the candidates and the designation of the offices.

*State v. Watson*, 9 Mo. App. 592.

The general decisions of the highest courts in those States that have adopted technical Ballot Acts do not sustain the claim that the use of the word "for" under such circumstances as those in this case would render the ballot invalid.

*Druliner v. State*, 29 Ind. 808; *Napier v. Mayhew*, 85 Ind. 275; *Wyman v. Lemon*, 51 Cal. 278; *Stanley v. Manly*, 85 Ind. 275; *Low v. Wheeler*, 2 Ellsworth, 61; *Millholland v. Bryant*, 39 Ind. 368; *Newton v. Newell*, 26 Minn. 529; *People v. Cicott*, 16 Mich. 283; *People v. Matteson*, 17 Ill. 187; *Cooley, Const. Lim.* 761, 763; *Coffey v. Edmonds*, 58 Cal. 521; *Applegate v. Eagan*, 74 Mo. 258; *State v. Watson*, 9 Mo. App. 598.

The State of Mississippi seems to be the only State which has construed its Election Laws so strictly as to bar out ballots of this character.

*Oglesby v. Sigman*, 58 Miss. 502; *Perkins v. Carraway*, 59 Miss. 222.

The violations of law in the matter of the citizen's ballots are plain and distinct, especially in the use of the words "For Judge of Probate, Henry H. Steadman." That violation of the law is so plain and distinct that it comes within the ruling made by this court in the case of *Talcott v. Philbrick*, 10 L. R. A. 150, 59 Conn. 472.

*Mr. W. L. Bennett* for appellees.

*Seymour, J.*, delivered the opinion of the court:

This petition was brought under section 59 of the General Statutes. The petitioner alleges that he was a candidate for selectman at the annual meeting of the Town of Branford, held on the first Monday of October, 1890; that he verily believes he received a sufficient number of votes to elect him; that he was not declared elected, but, on the contrary, the respondents were declared elected selectmen for the then ensuing year. The facts upon which his claim is based, so far as they are important to the decision of the case, are in said petition

stated as follows: That more than 100 ballots were counted for the respondents which were illegal and void, and ought not to have been counted, 'because they had upon them other words, and contained other words than the names of the candidates, the office voted for, the name of the party issuing the ballot, and the official indorsement; and such words were not alterations or changes of the ballot, within the provisions of section 12, chapter 247, of the Public Acts of 1889. Said one hundred and more ballots were cast in violation of the provisions of said Act, and did not conform to its requirements, because they did not contain the word 'Republican' or the words 'Republican Party,' but did contain at the top of the ballots the words 'Citizens' Ticket.' Said one hundred and more ballots also contained at the bottom of said ballots the following illegal words: 'For Judge of Probate, Henry H. Steadman.' Thereupon the petitioner prays that he may be granted a certificate entitling him to hold and exercise the duties and powers of a selectman in said town." The case was heard and reserved for the advice of this court.

In respect to the first claim, the circumstances attending the origin and history of the "Citizens'" ticket are detailed in the finding. We extract such as are to the purpose. Pursuant to public notice a Republican caucus was held October 4, for the purpose of nominating candidates for the town offices to be filled at the town meeting aforesaid. Immediately after the caucus was organized a plan for making up a Citizens' ticket, from candidates of all political parties, was advocated. After discussion it was voted that the Republican caucus adjourn, and that a Citizens' caucus be organized. Thereupon some ten or fifteen Democrats, who were present, but had not participated in the proceedings, came forward, and acted with the about fifty Republicans who were present, in nominating the Citizens' ticket. The candidates nominated were Republicans, except those for town clerk, treasurer, and one grand juror, who were Democrats. A general collection was taken to defray the expense of printing the ticket. No committees were appointed at said caucus to carry out its purposes, nor were any steps taken to effect a permanent organization of a Citizens' party, or to provide for its further existence. The chairman of the Republican town committee procured the printing of said Citizens' tickets, and caused them to be placed in the booths on election day. The Republican party issued no tickets, and no ballots were used at the election except those headed "Democratic" and those headed "Citizens' Ticket." Previous to the caucus in question there had been no call issued for a Citizens' caucus, nor any organized political party in the Town of Branford known as the "Citizens' Party," but there had been some talk among a few Republicans and Democrats about the possibility of having a Citizens' caucus, and of turning the Republican caucus, that had been called, into a Citizens' caucus. Occasionally, in previous years, town officers have been elected in said town on tickets denominated "Citizens' Ticket."

We are abundantly satisfied from the facts stated in the finding that for the time being,

and for the purposes of the election under consideration, and within the meaning of the law requiring the ballots to contain the name of the party issuing them, there was a Citizens' party in Branford. The element of time is not essential to the formation of a legal party. It may spring into existence from the exigencies of a particular election, and with no intention of continuing after the exigency has passed. To hold the contrary would be to strike a blow at that independence in political action upon which the good government of a locality may depend. Nor can the number of voters that must unite in order to form a legal party be prescribed by law without violating one of the fundamental theories of popular government. If it is shown, as it is in this case, that an independent political party was formed, that it assumed a distinctive name, and that the ballots which it issued sought the suffrages of the people under no false title, but bore the name of the political party issuing them, it is enough, so far as the point now being considered is concerned. To hold otherwise would be to abridge rights which are not only generally held to be sacred, but which it is of the utmost importance to preserve. The petitioner lays some stress upon the finding that the real object and intent of holding the Citizens' caucus was to nominate a ticket to defeat a certain candidate for selectman who had already been nominated at the Democratic caucus, by nominating another Democrat who had been an unsuccessful candidate for the same office in such Democratic caucus. That may or may not have been a laudable object. We have no data from which to judge. But no one will seriously contend that courts can inquire into the motives which underlie the formation of political parties. Nor is the further suggestion sound,—that because the real object of the caucus failed of accomplishment, and the hoped-for candidate for selectman was not nominated, therefore no Citizens' party was formed. Notwithstanding such failure, a Citizens' ticket was nominated and a Citizens' ballot issued and voted.

The second reason stated in the petition for granting the certificate is because said 100 and more (Citizens') ballots also contained, at the bottom of said ballots, the following illegal words: "For Judge of Probate, Henry H. Steadman." It appears that the Citizens' caucus, in addition to the town officers that could be voted for at the annual town meeting, also nominated Henry H. Steadman for the office of judge of probate, who, by statute, could only be voted for for said office at the election held for state officers, etc., on the Tuesday following the first Monday of November thereafter, and that each of the "Citizens' Tickets" had upon it the words "For Judge of Probate, Henry H. Steadman." It also appears that the Democratic ballots issued and cast at said election contained, after the words "For Town Clerk," the words "and *ex officio* Registrar of Births, Marriages and Deaths."

The Act concerning elections, passed in 1889, for the purpose of securing uniformity in the ballots used at electors' meetings, and all regular town and city elections, made certain express provisions as to the contents, among other things, of such ballots. The first section



requires that, "in addition to the official indorsement, the ballots shall contain only the names of the candidates, the office voted for, and the name of the political party issuing the same." The ninth section provides that, if any ballot "shall contain any mark or device, so that the same may be identified in such manner as to indicate who might have cast the same, it shall not be counted," etc. All ballots cast in violation of the provisions of the Act, or which do not conform to the requirements thereof, as contained in the sections preceding the twelfth, said section declares, "shall be void and not counted," with a proviso which does not affect this case. Now there can be no question but that the Legislature intended to say that a ballot which failed to accord with certain specifically enumerated requirements should be void, irrespective of all considerations as to the intent or effect of such failure. It considered uniformity an important means of preventing fraud, and there were certain matters in which uniformity could be expressly provided for. But ballots which satisfied the express standard of uniformity might yet be made to lack entire uniformity, and so be identified by various devices which the Legislature could neither provide against nor foresee; so section 9 was added. As it stands, therefore, there are certain particulars so clearly stated in the Act that it can be seen at a glance whether a given ballot conforms to them. As to them there is no room for construction. It is not within the province of the court to say what the consequence of the failure to conform shall be; the Act itself fixes it. Though, ordinarily, there can be little difficulty in deciding whether a ballot conforms to the requirements of the first section of the Act, yet not everything can be settled by mere inspection. For instance, it is a question of fact to be proved whether the party whose name the ballot contains in fact issued it. The meaning and intent of the words "the office voted for," used in describing the contents of the ballot, may be open to construction, and the question whether that provision has been violated may depend upon circumstances. But whether the ballots in question which in fact contained the words "For Judge of Probate, Henry H. Steadman," in addition to the official indorsement, the names of the candidates who could be legally voted for, the office voted for, and the name of the political party issuing the same, complied with the requirements of the law admits of no discussion. At the time the ballots were issued and cast, there was no election for judge of probate. That office could not be filled at a town election. The title of the office and the name of the candidate were foreign to the ballot, and were inserted in violation of the express and unambiguous terms of the Act. So, too, in respect to the words "and *ex officio* Registrar of Births, Marriages and Deaths," contained in the Democratic ballots; they were inserted in violation of the Act. There is no such office as that named in the ballots. Chapter 181 of the Public Acts of 1889 gives the names of the town offices to be filled at the town elections. Among them is the office of "town clerk." Section 98 of the General Statutes provides that town clerks of the several towns shall be *ex officio* the registrars of births,

marriages and deaths in their respective towns, except in the towns where such registrars are elected under special laws. Nowhere in the statutes are town clerks called anything but town clerks. It needs no argument to prove that the duties performed *ex officio* by the incumbent of an office form no part of the legal title of the office, unless it is so expressed.

It being clear that the words "For Judge of Probate, Henry H. Steadman," on the Citizens' ballots, and the words "and *ex officio* Registrar of Births, Marriages and Deaths," on the Democratic ballots, both come within the express prohibition of the law, what is our duty? If it was doubtful whether the Act applied to them, if their legality depended upon a construction of the meaning of the language of the Act, our duty might not be plain, except to decide in favor of the right to vote. If they could be held to fall within the prohibition of any mark or device, contained in the ninth section, instead of within the express prohibitions of the first section, then it would be our duty to inquire whether they constituted a mark or device by which the ballot might be identified in such manner as to indicate who might have cast the same. But no. A plain provision of the law is violated in a point concerning which the Act does not authorize us to inquire into the intent or the consequences of the violation. In short, the Legislature has seen fit to say if a ballot contains the addition to the specified contents which these do it shall be void. Unless we are prepared to hold the Act unconstitutional we cannot disregard its requirements. If it is harsh and unreasonable, the remedy is with the Legislature that enacted it, and not with the courts, which are bound to respect it. In regard to provisions which are plain on their face, which are not dependent upon the question of good faith, or the actual or possible result of disregarding them, we can only say again, in the language of the majority opinion in *Talcott v. Philbrick*, 59 Conn. 478, 10 L. R. A. 150: "We are relieved of any obligation to inquire into the necessity or reason of such requirement; and we are not at liberty to dispense with anything that is required, whatever the reason for it may be, or even if without any apparent reason at all. The Legislature has spoken, and obedience is our first and only duty. It is at liberty to throw around the ballot-box such safeguards and regulations as it may deem proper, and it is the duty of the citizen to conform thereto. Some inconvenience is not too great a price to pay for an honest, pure ballot."

The conclusions to which we have thus come are themselves decisive of the case. In addition, however, to the claims already considered, the record shows that the defendants claimed that the Democratic ballots are illegal because the word "for" is printed on each of them before the name of every office named therein. This presents a question of some difficulty, and because it does we are satisfied that we have come to a correct solution of it. If it was plain and clear that the Act, in limiting the contents of the ballot to the official indorsement, the names of the candidates, the name of the political party issuing the same, and "the office voted for," prohibited the use of the word "for" before the title to the office,

we should be bound, upon the principles which we have herein already recognized as sound, to declare the ballots void for that reason. But that the Statute so intended is not plain and clear. On the contrary, the language is ambiguous. There is room for honest and intelligent men to differ as to its meaning. The record in this very case shows that the secretary of the State, in a notice concerning elections issued in August, 1888, immediately after the Act went into force, and before any discussion had arisen upon the point in hand, inclosed a printed form for a town ballot. This was sent to every postmaster and town clerk and to the respective chairmen of the Democratic and Republican committees in every town in the State; and the form of ballot so sent contained the word "for" before the title to every office named therein. It is a matter of public notoriety also that ballots prepared by different persons, equally determined to observe the requirements of the law, have in some cases contained the word "for" in juxtaposition with the offices voted for, and sometimes omitted it. The Republican ballots as well as the Democratic ballots in the case before us contained the word. We refer to these instances in confirmation of our position that the language under consideration is in fact ambiguous. If ambiguous, it is the proper subject of construction. In discharging the duty of construing it so that the voter shall not be deprived of his vote, except upon a plain and unambiguous provision of the law, we feel bound to hold that the Act does not, in terms and expressly, nor by necessary construction, prohibit the use of the word "for" before the title to the office. It follows, there-

fore, that neither its use nor the failure to use it necessarily and of itself invalidates a ballot. The question of illegality is remitted to the provisions of the ninth section of the Act. If the regular ballots issued by a political party contain the word "for" before the title to the offices therein named, then it cannot be held to be a "mark or device," so that the same may be identified in such manner as to indicate who might have cast the same, and, therefore, is not obnoxious to that provision. If the regular ballots of a political party omit the word "for" in the connection stated, then the use of the word on some of the ballots cast, inasmuch as it would be a mark or device by which the same might be identified, would be illegal. Each case must be governed by its own circumstances, and be decided as a question of fact under the principles herein stated. Upon the facts in this case, we hold that the ballots in question were not illegal and void because of the use of the word "for." They were, however, illegal, as we have already stated, for another reason.

Being illegal, there is no foundation for the petitioner's claim that he was elected selectman, and his *petition*, which was based upon that claim, *must be dismissed*. We so advise.

Carpenter and Loomis, JJ., concur. Andrews, O. J., and Torrance, J., concur in the judgment, and fully in so much of the opinion as discusses the "for" ballots; but in the other parts of the opinion they concur because they felt bound by the case of *Talcott v. Philbrick*, and did not intend, in so doing, to change or modify what was said by them in their dissenting opinion in that case.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

Rose SHINNERS

v.

PROPRIETORS OF LOCKS & CANALS  
ON MERRIMACK RIVER.

(....Mass. ....)

1. An exception to the exclusion of a question cannot be maintained where there is nothing to show what the answer would have been or what exceptant offered to prove thereby.

2. Precautions after an accident to prevent other accidents cannot be proved for the purpose of showing that they were needed at the time of the accident as an admission of negligence.

(June 26, 1891.)

EXCEPTIONS by plaintiff to a ruling of the Superior Court for Middlesex County, excluding certain evidence at the trial of an action brought by plaintiff under Stat. 1887,

NOTE.—Of exceptions to the exclusion of evidence; *views of the Massachusetts Supreme Judicial Court.*

A very recent rule in the Massachusetts Supreme Judicial Court, cited in the principal case, fully establishes the accuracy of the decision. Mr. Justice Allen holds, in the course of the opinion, that where there is nothing to show what the testimony of the defendant would have been if admitted, or what the defendant offered to prove thereby, or that it would in any respect have been material, an exception to the exclusion of the question asked is not open to review in the appellate court. *Hathaway v. Tinkham*, 148 Mass. 85. See also *Wheeler v. Rice*, 8 Cush. 205; *Brown v. Leach*, 107 Mass. 384; *Baker v. Gavitt*, 128 Mass. 98; *New Haven & N. Co. v. Campbell*, 128 Mass. 104; *Stone v. Sargent*, 129 Mass. 508.

The same court, in a still more recent case, has 12 L. R. A.

re-affirmed this ruling; and in *Farnum v. Pitcher*, 151 Mass. 470, it was held that an exception to the exclusion of the question cannot be maintained where it fails to show what the answer would have been, or what the party asking the question offered or expected to prove by the answer. Still another application of the same rule appears in the case of *Crowley v. Appleton*, 148 Mass. 98. Here was an exception to the exclusion of a question, but an entire absence of anything tending to show what the answer would have been or what the plaintiff offered to prove by the evidence which was excluded. This failure to disclose the object of the question asked proved fatal to the efficacy of the exception. The bill of exceptions should have indicated the nature and scope of the exception, and the court says: "This has been so often determined that it hardly requires the citation of authority to sustain

chap. 970, § 2, to recover damages for the loss of her husband, who was alleged to have been killed by defendant's negligence, which action resulted in a verdict in favor of defendant. *Overruled.*

The facts sufficiently appear in the opinion. *Mr. Charles Cowley*, for plaintiff:

Evidence that precautions were taken, immediately after the killing of plaintiff's husband, to prevent parts of the bank from falling, is admissible to show that such precautions were needed at the time of the killing.

*Dale v. Delaware, L. & W. R. Co.* 73 N. Y. 472; *Brennan v. Lachar*, 14 Daly. 197; *Shattuck v. Rand*, 2 New Eng. Rep. 159, 143 Mass. 88; *Readman v. Conway*, 126 Mass. 374; *Mandershid v. Dubuque*, 29 Iowa, 87; *Smith v. Ryan*, 8 N. Y. Supp. 853.

The Supreme Court of Pennsylvania has never swerved from the doctrine that such evidence as was here excluded is admissible.

*Pennsylvania R. Co. v. Henderson*, 5 Pa. 315; *West Chester & P. R. Co. v. McElwee*, 67 Pa. 311, 314; *McKee v. Bidwell*, 74 Pa. 218.

The same doctrine has been held in three cases by the Supreme Court of Minnesota.

*O'Leary v. Mankato*, 21 Minn. 65; *Phelps v. Mankato*, 28 Minn. 276; *Kelly v. Southern M. R. Co.* 23 Minn. 98.

The reasoning on which these decisions rest is not weakened by *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465, adopted in *Nalley v. Hartford Carpet Co.*, 51 Conn. 525, 530, qualified by *Salters v. Delaware R. Co.*, 10 N. Y. Supp. 841.

The pretext for rejecting evidence of this kind is, that the jury might draw unwarranted inferences from it. But that is not a sufficient reason for excluding it. "The evidence should be submitted to the jury, leaving them to draw such inferences from it as they should think they ought to draw."

*Nourse v. Henshaw*, 123 Mass. 100; *Martin v. Towle*, 59 N. H. 31; *Com. v. Brasley*, 184 Mass. 580.

Later acts often give character and color to earlier acts.

*Thayer v. Thayer*, 101 Mass. 111.

It. "Warren v. Spencer Water Co." 3 New Eng. Rep. 503, 143 Mass. 155.

#### *Exceptions; their purposes and effect.*

For the purpose of obtaining a ruling by the trial judge as to the admissibility of evidence offered by a party upon the trial, the adverse party takes an objection to its admission, stating the reasons why it is inadmissible. The objection is or should be taken when the party asks a question calling for an answer which is deemed objectionable, or offers in evidence a document which for any reason should not be received. The office of an objection is to stop an answer to a question put to a witness, or to prevent the receipt of a document in evidence until the court has ruled as to its admissibility. An objection to testimony is unavailing if taken after the evidence has been received. See *Platner v. Platner*, 73 N. Y. 90. After the court has decided that the evidence shall be received or excluded, the party prejudiced by the ruling takes an exception thereto. The office of an exception is to point out errors committed by the court during the progress of the trial. *Matthews v. Meyberg*, 63 N. Y. 656.

#### *Rulings in the United States Supreme Court.*

The Supreme Court of the United States has held in numerous cases that exceptions must be actually taken at the trial. And further, that it will review only such exceptions as were so taken. These positions are sustained by the following cases: *Pittsburgh, O. & St. L. R. Co. v. Heck*, 102 U. S. 120, 25 L. ed. 58; *Zeller v. Eckert*, 45 U. S. 4 How. 239, 11 L. ed. 979; *Phelps v. Mayer*, 56 U. S. 15 How. 160, 14 L. ed. 642; *Bryan v. Forsyth*, 60 U. S. 19 How. 534, 15 L. ed. 674; *Barton v. Forsyth*, 61 U. S. 20 How. 532, 15 L. ed. 1012; *Campbell v. Boyreau*, 62 U. S. 21 How. 223, 16 L. ed. 96; *Dredge v. Forsyth*, 67 U. S. 3 Black. 503, 17 L. ed. 233; *Houghton v. Jones*, 68 U. S. 1 Wall. 702, 17 L. ed. 506; *Hutchins v. King*, 68 U. S. 1 Wall. 63, 17 L. ed. 46; *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 736.

And it is a cardinal principle in the same court that to render an exception available it must affirmatively appear that the rule excepted to affected or might have affected the decision of the case. *Florida R. Co. v. Smith*, 88 U. S. 21 Wall. 255, 22 L. ed. 512.

#### *Waiver of right.*

A party to the litigation may waive his right to an exception by omitting to make it until the case is decided.

has been submitted to the jury. *Roberts v. Graham*, 73 U. S. 6 Wall. 578, 18 L. ed. 791.

#### *Exceptions to be available must be specific.*

The exceptant, in order to avail himself of the full results of an exception to the admission or rejection of evidence, must specifically allege the grounds upon which he would base his exception. *Frier v. Jackson*, 8 Johns. 496; *Jackson v. Cadwell*, 1 Cow. 622; *Whiteside v. Jackson*, 1 Wend. 418; *Waters v. Gilbert*, 2 Cush. 37; *Covillaud v. Tanner*, 7 Cal. 38; *Killer v. Kimbal*, 10 Cal. 238; *People v. Glenn*, 10 Cal. 37; *Owen v. Frink*, 24 Cal. 177; *McDonald v. Bear River & A. Water & Min. Co.* 13 Cal. 223; *Sneed v. Osborn*, 25 Cal. 637; *Voorman v. Voight*, 46 Cal. 392; *People v. Chee Kee*, 61 Cal. 404.

The federal decisions with reference to the subject matter now under review are in entire accord and harmony with the decisions in the various state tribunals, as will appear from the brief consideration of the authority. In *United States v. McMaster*, 71 U. S. 4 Wall. 680, 18 L. ed. 311, it was held by an undivided court that it was the duty of the party excepting to evidence to point out the part excepted to, so that the attention of the court may be drawn to it. If the exception covers any admissible evidence, it is rightly overruled.

Exceptions to evidence must be taken as soon as the court decides to admit or reject it; a note of the exception is then made and it is usually reduced to form afterwards. *Bradstreet v. Thomas*, 29 U. S. 4 Pet. 102, 7 L. ed. 736; *Poole v. Fleeger*, 39 U. S. 11 Pet. 185, 9 L. ed. 631; *Liggett v. Pennsylvania Bank*, 7 Serg. & R. 219; *Morris v. Buckley*, 11 Serg. & R. 211; *Stewart v. Huntingdon Bank*, 11 Serg. & R. 267; *Lewis v. Post*, 1 Ala. 66; *Chambers v. Baptist Ed. Soc.* 1 B. Mon. 215; *Gordon v. Ryan*, 1 J. J. Marsh. 58.

The exception must be taken immediately upon the overruling of the objection. *Griggs v. Howe*, 31 Barb. 100, 3 Keyes, 136, 2 Keyes, 574.

An objection to the reception of incompetent evidence must be raised as soon as it is offered; and if a party allows such evidence to be taken without objection, a denial of a motion to strike it out, when the party finds it prejudicial to his cause, will not be a ground of exception. *Levin v. Russell*, 42 N. Y. 251; *Cheesebrough v. Taylor*, 19 Abb. Pr. 227.

The proposition is well settled that to entitle an exception to the after consideration of the appellate court when interposed to the admission or rejection

**Messa. George F. Richardson, George R. Richardson and Daniel M. Richardson,** for defendant:

Defendant's adoption of a particular safeguard at any time, whether an accident had previously occurred or not, could not be deemed an admission that taking any less precaution would be negligence.

*Menard v. Boston & M. R. Co.* 150 Mass. 886; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Swell v. Cohoes*, 11 Hun, 626, 75 N. Y. 54; *Lafayette v. Weaver*, 92 Ind. 477; *Hart v. Lancaster & Y. R. Co.* 21 L. T. N. S. 261; *Cleveland v. New Jersey S. B. Co.* 68 N. Y. 810.

**Lathrop, J.**, delivered the opinion of the court:

This is an action under the Statute of 1887, chap. 270, § 2, brought by the widow of Matthew Shinnars, to recover damages sustained by her in consequence of the death of her husband, caused by the falling upon him of a portion of a bank of earth, while he was working

tion of evidence it must specifically state the ground upon which the objection is made, and the exception must be at once noted to the ruling of the trial court; otherwise it will not be considered. *Voorman v. Voight*, 46 Cal. 392; *Miller v. Duff*, 34 Mo. 167.

The Supreme Judicial Court of Massachusetts has decided in an early case, the force of which has never been shaken, that exceptions will not be sustained which simply show that incompetent declarations were admitted in evidence. The exclusion of the question is not matter of complaint when it is not shown what the answer would disclose. *Hackett v. King*, 8 Allen, 144.

The contentions of the text are sustained by numerous authorities, and the Supreme Court of the United States is authority for a proposition that the fact that the party made the point as to the competency or incompetency of the evidence while the jury were at the bar and the court decided it against him, is not sufficient to bring the question before this court. He must show that he excepted to the decision overruling his objection. *United States v. Breitling*, 61 U. S. 20 How. 252, 15 L. ed. 900.

Where the error assigned is to the rejection of evidence, the specification must quote the full substance of the evidence offered. *Northwestern Union Packet Co. v. Clough*, 87 U. S. 20 Wall. 523, 22 L. ed. 403.

In the case last cited *Mr. Justice Strong*, commenting upon the failure of the counsel to quote in a bill of exceptions the full substance of the evidence offered, said: "This is to enable the court to see whether the evidence offered is material, for it would be idle to reverse a judgment for the admission or rejection of evidence that could have no effect on the verdict."

Objections and exceptions must be specific as a general rule. *Keogh v. Westervelt*, 66 N. Y. 636; *Sands v. Church*, 6 N. Y. 247; *Pratt v. Foote*, 10 N. Y. 599; *Sohle v. Brokhabus*, 30 N. Y. 615; *Stockwell v. United States*, 3 Cliff. 234.

Where the evidence given consists of a number of particulars, and the adverse party excepts to it generally, without pointing out the parts objected to, the exception will be overruled if any part of the evidence was admissible. *Moore v. Bank of Metropolis*, 88 U. S. 13 Pet. 302, 10 L. ed. 172; *Elliot v. Peirson*, 26 U. S. 1 Pet. 397, 7 L. ed. 169; *Camden v. Doremus*, 44 U. S. 8 How. 615, 580, 11 L. ed. 705, 712.

In the case of the rejection of competent evidence

as a day laborer in the employ of the defendant corporation and engaged in digging a trench in Lowell. He died without conscious suffering. The bank was eighteen feet high, and was composed of hard gravel, clay and marl. The plaintiff contended that the fall of the bank took place in consequence of the unreasonable neglect of the defendant to have the bank properly shored up.

At the trial in the superior court, the jury returned a verdict for the defendant; and the case comes before us on the plaintiff's exception to the exclusion of the following question, put by the plaintiff to one of her witnesses, who worked in the trench before, after and at the time of the accident: "What, if anything, was done by the defendant to said bank after the accident?"

There is nothing in the bill of exceptions to show what the testimony of the witness would have been, if admitted, or what the plaintiff offered to prove thereby, and for this reason an exception to the exclusion of the question can-

denoe, it must clearly appear on the face of the exception that the evidence was, and not that it possibly might have been, relevant. *Cohn v. Mulford*, 15 Cal. 50.

If the evidence received by the referee was objected to, and it turns out that such evidence was competent, the rights of the objecting party cannot be in any way affected, because the referee reserved his decision as to its admissibility until the conclusion of the case, and the judgment will not be reversed on that ground. *Kerslake v. Schoonmaker*, 1 Hun, 423.

#### *Apparent qualification of the rule.*

In rare instances an objection to the admissibility of evidence should prevail, notwithstanding its general character in instances where it appears that it could not have been obviated on the trial, as where the subject of the evidence offered by a defendant as constituting a defense does not, in law, constitute any defense. *Merritt v. Seaman*, 6 N. Y. 163.

#### *Offer of proof.*

An offer of evidence is intended solely to inform the court what the party making the offer intends to prove, so that it will be enabled to rule intelligently on objections to questions which have been asked. It is not a substitute for testimony; and it is not good practice, except in very special cases, to decide a case upon an offer of evidence. Judges will rarely receive an offer of proof when it can be avoided (*Coulson v. Whiting*, 12 Daly, 408); nor will they require counsel to object to it; and experienced counsel are rarely willing to rest the case of their client on an objection and exception to an offer of proof. It is much better, if practicable, to receive the testimony which is offered to be given, subject to objection, with leave to the party taking the objection to move to strike it out. See 2 Rumsey, Pr. 297.

The case of *Scotland County v. Hill*, 113 U. S. 183, 28 L. ed. 692, is chiefly remarkable as embodying the opinion of *Chief Justice Waite* in reference to this topic. And in connection with the assumptions of the text the pertinency of the following language is apparent: "It is claimed, however, that error cannot be assigned here on the exception to the exclusion of the oral proof, because the record does not show that any witness was actually called to the stand to give the evidence, or that anyone was present who could be called for that purpose, if the court had decided in favor of ad-

not be maintained. *Hathaway v. Tinkham*, 148 Mass. 85, 87, and cases cited; *Orowley v. Appleton*, 148 Mass. 98, 101; *Smethurst v. Proprietors of Ind. Cong. Church*, 148 Mass. 261, 267. 2 L. R. A. 695; *Farnum v. Pitcher*, 151 Mass. 470, 475. As, however, the point of law sought to be presented by the exception is an important one, arising constantly in trials at *nisi prius*, and as it has been elaborately argued by counsel, we are disposed to rest our judgment upon a broader ground than the one above stated.

The plaintiff contends that where an accident has happened through the alleged negligence of a person, the subsequent acts of this person in taking additional precautions to prevent other accidents are admissible in evidence, in an action against him for the injuries occasioned, for the purpose of showing that such precautions were needed at the time of the accident. If such acts are admissible, it must be on the ground that the conduct of the person amounts to an admission of negligence;

mitting it; and we are referred to the cases of *Robinson v. State*, 1 Lea, 672, and *Eschbach v. Hurtt*, 47 Md. 66, in support of that proposition. Those cases do undoubtedly hold that error cannot be assigned on such a ruling unless it appears that the offer of proof was made in good faith, and this is in reality all they do decide. If the trial court has doubts about the good faith of an offer of testimony, it can insist on the production of the witness and upon some attempt to make the proof before it rejects the offer; but if it does reject it and allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made and govern itself accordingly."

The decision last cited merely affirmed and restated a position previously assumed by the New York Court of Appeals, in which *Chief Justice Folger* wrote an opinion equally conclusive. From that opinion it seems that where testimony is offered which, taken alone, is incompetent, but which may be made competent by other evidence, and this the party offering it promises to produce, the reception of it at the time is not error, and if the party fails to produce the promised evidence the opposite party to save his point must move to strike out testimony before the close of the case. *Bayles v. Cookcroft*, 81 N. Y. 368.

If the competency or materiality of the facts offered to be shown depends upon other facts, they must also be stated, and the offer must also be made to prove them as well, or it is not error to sustain the objection. *Carnes v. Platt*, 4 Jones & S. 361.

In order to put the trial court in the wrong, on appeal or writ of error, for rejecting an offer of evidence on direct examination, the offer, as stated in the bill of exceptions, must show the materiality of the evidence which was tendered. *United States v. Doty*, 8 Sumn. 20; *Bank of Pleasant Hill v. Wills*, 79 Mo. 276; *Jackson v. Hardin*, 38 Mo. 175.

The court may, in the exercise of a sound discretion, require counsel to state the substance of evidence which is tendered, so as to enable the court to judge of its materiality and relevancy; and a reviewing court will not control the trial court in the exercise of such a discretion. *Morgan v. Browne*, 71 Pa. 180; *McClelland v. Lindsay*, 1 Watts & S. 300; *Roy v. Tarzee*, 7 Wend. 359.

A very accurate exposition of this subject is found in the opinion of *Judge Cowen* in *Van Buren v. Wells*, 19 Wend. 204.

The principle is, that a proposal to introduce an

and this is the ground upon which such evidence has been sometimes held to be admissible. *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *West Chester & P. R. Co. v. McElwee*, 67 Pa. 311; *McKee v. Bidwell*, 74 Pa. 218. And in *Dale v. Delaware, L. & W. R. Co.*, 78 N. Y. 468, it is said by *Mr. Justice Rapallo*, speaking of repairs made by a railroad corporation immediately after an accident: "In such a case the making of the repairs may be regarded as some evidence that they were needed, and consequently that the road was out of repair." This remark was, however, *obiter*, and although in accord with some decisions of the supreme court of the State of New York, which we need not further refer to, is contrary to what is now the well-established doctrine of the Court of Appeals of that State, as will presently appear.

The Pennsylvania doctrine was at first followed by the Supreme Court of Minnesota. *O'Leary v. Mankato*, 21 Minn. 65; *Phelps v. Mankato*, 28 Minn. 276; *Kelly v. Southern*

isolated circumstance must contain in itself or by reference to something else, either already in evidence or which is offered as yet to come, enough to evince the manner in which it is to be legitimately operative, or it may be rejected. The important branch of *nisi prius* practice, resting on this principle is sustained by many authorities; but I think it will be found best explained and exemplified by the late case of *Weidler v. Farmers Bank of Lancaster*, 11 Serg. & R. 184. See also, in connection with this case, 4 Starkie, Ev. 351; *Winlock v. Hardy*, 4 Litt. 372; *Harris v. Paynes*, 5 Litt. 106; *Wilson v. Bowen*, 5 T. B. Mon. 38; *Clark v. Beach*, 6 Conn. 149; *Rowt v. Kile*, 1 Leigh, 216; *People v. Genung*, 11 Wend. 18, 21, per *Sutherland, J.*; *Rex v. Fursey*, 6 Car. & P. 81.

These cases contain some very apt illustrations; and the practice was also very well examined in a still later case, that of *Davis v. Calvert*, 5 Gill & J. 269, 304, and also in *Harwood v. Ramsey*, 15 Serg. & R. 81, 85. The result seems to be that the court may reject on the ground of the apparent irrelevancy, or may let in the proof in the first instance, and repudiate it if, after all is heard, it shall come short of any tendency to prove the issue. But the better way is to reject it in the first instance, if it come plainly short, as satisfactorily shown by *Gibson, J.*, in *Weidler v. Farmers Bank of Lancaster*, *supra*.

When an offer of evidence embraces matters which are admissible among those which are inadmissible, the whole may be rejected. *Hosley v. Black*, 28 N. Y. 432, 444.

So where no objection is taken to evidence, the counsel must call the attention of the court to the particular portion to which he objects; for if he objects to the whole evidence of two witnesses, the most of which is unobjectionable, his objection will go for nothing. The same rule applies as in offers of evidence or exceptions to the charge of the court. *Keller v. New York Cent. R. Co.* 24 How. Pr. 173; *Daniels v. Patterson*, 8 N. Y. 47, 51; *Elwell v. Dodge*, 38 Barb. 336, 342.

The offer of evidence must be specific (38 Barb. 336), and must show how it may be material. *First Baptist Church v. Brooklyn F. Ins. Co.* 23 How. Pr. 443.

It must appear affirmatively that the evidence was relevant when offered and excluded, that the court erred to the prejudice of the party excepting, the presumption being in favor of the rectitude of the proceeding and in favor of the decision. *Van Amringe v. Barnett*, 8 Bosw. 357.

*Minn. R. Co.*, 28 Minn. 98. But these cases were deliberately overruled in *Morae v. Minneapolis & St. L. R. Co.*, 80 Minn. 465, in an elaborate opinion, in which the question is fully and carefully considered.

Such evidence has also been held to be inadmissible by the highest tribunals in New York, Connecticut, Indiana, Illinois and Iowa. *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; *Corcoran v. Peekskill*, 108 N. Y. 151, 10 Cent. Rep. 492; *Nalley v. Hartford Carpet Co.* 51 Conn. 524; *Terre Haute & I. R. Co. v. Clem*, 128 Ind. 15, 7 L. R. A. 588; *Hodges v. Percival*, 132 Ill. 58; *Cramer v. Burlington*, 45 Iowa, 627; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581. See also *Hart v. Lancaster & Y. R. Co.*, 21 L. T. N. S. 261.

In a recent case in this Commonwealth (*Menard v. Boston & M. R. Co.* 150 Mass. 386), the plaintiff was struck by a locomotive engine of the defendant at a highway crossing. At the time of the accident no flagman was sta-

tioned there, but the jury when they took a view found one there. The plaintiff's counsel in argument proposed to comment upon this fact, and was stopped by the court. On exceptions, this action of the court was held to be correct; and *Mr. Justice Knowlton*, in delivering the opinion of the court, said: "The defendant's method of managing its business before, or after, or at the time of the accident was not evidence of what due care required. The defendant, or any other corporation, might at any time do more or less, in some particular, than a reasonable regard for the safety of the public demanded. Its adoption of a particular safeguard at any time, whether an accident had previously occurred or not, could not be deemed an admission that taking any less precaution would be negligence, any more than its use of a more dangerous system would indicate that it considered that reasonably safe."

The plaintiff relies upon the case of *Readman v. Conway*, 126 Mass. 874, where the fact that the defendants repaired a platform after

But if it appear that the court assumed a fact in issue as a ground for excluding the evidence offered, it is an error for which a new trial will be ordered. *McIntyre v. Clapp*, 81 N. Y. 569.

It appears, upon the high authority of *Mr. Austin Abbott*, that to sustain an exception to the rejection of evidence counsel should make his offer in such plain and unequivocal terms as to leave no room for doubt as to what was intended. If he leaves the offer fairly open to two constructions he cannot insist in a court of review on the construction most favorable to himself, unless it is justly inferrible that he was so understood by the judge who rejected the evidence. *Abbott, Trial Brief*, p. 49.

#### *If offer is in hearing of jury.*

Where the evidence sought to be introduced is of an oral nature, the offer to produce it is necessarily oral, and may be made in the presence and hearing of the jury. Should, however, its introduction be excluded by the trial court, any renewal of the attempt should not be indulged (*Scrapps v. Reilly*, 38 Mich. 10); and in cases where the proffered evidence is of a documentary character, the court before passing upon its admission or rejection may require its submission to him for inspection.

The principle embodied in the adjudications relating to this subject is ably stated by *Mr. Justice Nelson* in *Gould v. Weed*, 12 Wend. 12, decided in 1834. In the course of a singularly exhaustive opinion his honor says: "Upon this offer (of evidence) a question arose on the trial which it may be proper to notice. The counsel insisted upon reading from the stipulation the parts objected to, to enable the judge to understand the question, while the latter requested that the paper should be handed to him, and he would examine it for himself, which was refused. Questions involving the admissibility of evidence belong exclusively to and are to be considered and decided by the court; and we are unable to discover any well-founded reason why the judge should be compelled to hear the counsel read the document objected to, upon this preliminary inquiry, if he chooses to examine it for himself. The only legitimate object in reading it is to put the court in possession of the contents, which is most effectually attained by submitting it to his perusal. Even the adverse counsel is entitled to the inspection of a paper thus offered in evidence, before it can be read, to enable him to object to its admission, if he thinks proper to do so; and it would be strange if the same privilege did not belong to the court when an objection is made 12 L. R. A.

to it. There are obvious reasons why the power thus claimed should be possessed, as the practice of offering inadmissible testimony is liable to abuse, and is sometimes abused when it rests in parol, with a view improperly to influence the jury. The character of the counsel forbids any such inference in this case. We are satisfied, however, that he erred in refusing to submit the stipulation to the inspection of the judge, and that the judge would have been justified in rejecting it solely upon that ground."

A comparatively recent case decided by the Supreme Court of Illinois holds it to be error for the trial court to permit a reading of the substance of proffered evidence, where a valid objection has supervened, and where it appears that it is but a subterfuge for placing doubtful or improper evidence before the jury. *Philpot v. Taylor*, 75 Ill. 809.

It is a settled rule that where a conversation between persons is offered in evidence, it is the duty of the party offering it to disclose how it may be material, and this was decided by the New York supreme court at general term in an opinion pronounced by *Rosecrans, J.*, which was concurred in by both *Justices Ingraham and Leonard*. *First Baptist Church v. Brooklyn F. Ins. Co.* 23 How. Pr. 443.

The case of *Miles v. Loomis*, in the New York Court of Appeals in 1878, and reported in 75 N. Y. 238, is suggestive as typifying a peculiar phase of the subject under review. In order to secure a comparison of handwriting with a disputed signature, and to conform with the well-recognized rule which requires that the document with the signature compared should already be in evidence, the counsel made an offer of evidence, which was not objected to, and the court all concurred in holding that the failure to object when the offer was made absolutely precluded the party from subsequently resisting the use of the testimony.

Where such evidence is offered and admitted, even under objection, it cannot be impeached by the party offering it and the document is to be taken in its entirety for all purposes to which it applies. *Maclin v. New England Mut. L. Ins. Co.* 28 La. Ann. 801; *Hewett v. Buck*, 17 Me. 147, 35 Am. Dec. 243.

Principles contended for in the decisions previously cited have received additional vindication in the case of *Carnes v. Platt*, 15 Abb. Pr. N. S. 837.

*Mr. Justice Freeman* holds that where it clearly appears that the fact is immaterial unless it is connected in a way to bind a party to the action, a

an injury occasioned to the plaintiff by a defect therein was held to be admissible as an admission "that it was their duty to keep the platform in repair." This case is readily distinguishable from the case at bar. The defendants were the owners of a building containing a number of shops, each let orally to a separate tenant. The building stood back from a street, and had a wooden platform in front of it, which extended to the sidewalk of the street. The question was whether the landlords or the tenants were bound to keep the platform in repair. The act of the defendants in making the repairs was an act of dominion exercised by them, which the jury might well find was inconsistent with their defense that the tenants were under an obligation to keep the platform in repair. For the same reason the fact that a city makes repairs upon a highway after an accident thereon has been held to be admissible to show an acceptance of the highway as dedicated. *Manderich v. Dubuque*, 29 Iowa, 78. See also *Sewell v. Co-*

*loss*, 75 N. Y. 54; *Lafayette v. Weaver*, 92 Ind. 477.

The plaintiff further contends that, if this evidence was not admissible in an action at common law, it was admissible in an action under Stat. 1887, chap. 270, because, by § 8, "the amount of compensation, in case of death, is to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable." But if the evidence is not admissible to show culpability, we fail to see how it can be admissible to show the degree of culpability.

At the trial, after the question above referred to had been excluded, one of the defendant's witnesses testified to the manner in which the bank was shored up before the accident, namely, by placing a plank fourteen inches wide horizontally along the bank, about midway between the top and the bottom, he having observed a fissure near the top of the bank about six feet long and a quarter of an inch wide. He and other witnesses testified

counsel's offer to prove the fact and subsequently to introduce proof of such connection may be refused; and such refusal is discretionary with the trial court, and hence, in the absence of manifest abuse, not a pertinent subject of inquiry upon appeal.

#### *The principal case sustained.*

The contention of the principal case is fully sustained by a well-considered decision of the New York Supreme Court in 1886, upon a state of facts that bears a strong analogy to the case under review. There was an offer to prove certain conversation, but no attempt to show what it was. The testimony was received under objection; and the case decides that evidence so offered cannot be received under defendant's objection, and that the referee has no right to reserve to himself the power of retaining or rejecting it at the conclusion of the case. *Peck v. Yorks*, 47 Barb. 181.

The Superior Court of the City of New York has held that evidence cannot be received against the objection and exception of a party, upon the offer of the opposite party to prove a certain fact and reserve to himself the power of retaining or rejecting it at the conclusion of the case. See *Clusman v. Merkel*, 3 Bosw. 402; *Brooks v. Christopher*, 5 Duer, 216.

There is an intimation in favor of the same principle in *McKnight v. Dunlop*, 5 N. Y. 537.

#### *Negligence; precautions after accident as proof of.*

The attitude of juridical comment upon this important topic has undergone violent fluctuation and may be regarded as far from settled yet. The argument as outlined in the principal case is doubtless perfectly consistent with many well-considered opinions; but as many eminent jurists have expressed contradictory views it is the province of this note to indicate the tenor and trend of modern adjudication and leave the discrepancies of view for future judgment. The case of *Morse v. Minneapolis & St. L. R. Co.* 30 Minn. 465, is chiefly remarkable for a well-considered opinion which overthrew several previous decisions of a singularly able court and established a precedent as far as regards the State of Minnesota, that is at hopeless variance with that in other jurisdictions. In *O'Leary v. Mankato*, 21 Minn. 65, in *Phelps v. Mankato*, 23 Minn. 276, and in *Kelly v. Minnesota R. Co.*, 23 Minn. 98, the principle was distinctly announced that the subsequent acts of a party in making repairs and alterations was evidence of negligence; but the 12 L. R. A.

later opinion announced in *Morse v. Minneapolis & St. L. R. Co.*, *supra*, distinctly repudiates the former rule in the use of the following language: "On mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong, not for the reason given by some courts, that the acts of the employes making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence."

In reaching this conclusion the Minnesota court harmonized the decision with that of the New York Court of Appeals as reported in *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1, in which case Mr. Justice Grover held that evidence of the defendant's acts after an accident had occurred, which were designed to prevent the recurrence of a similar accident, was immaterial. Negligence must be determined by what was known before and at the time of an accident, not from the knowledge that springs from accident itself.

In *Salters v. Delaware & H. Canal Co.*, 3 Hun, 338, it was held erroneous to admit evidence to show that after the accident the railroad company changed the character of its switch. Landon, J., writing the opinion, said: "The plaintiff was permitted to give evidence to the effect that after the accident the defendants submitted a target switch for the common one. Within the ruling in *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1, this seems to be error. Whether the defendants were negligent was a question to be decided upon the facts as they existed at the time of the injury. What the defendants did afterward was immaterial, unless their acts could be construed as equivalent to their declaration that they were negligent at the time of the injury. But the question appears to be settled by authority and not open for discussion in this court."

In *Payne v. Troy & Boston R. Co.*, 9 Hun, 526, the action was to recover damages for an injury to plaintiff's horse, received while passing over a cross-

that they saw no other signs of weakness in the bank before the accident, which was caused by earth falling from below the plank. The plaintiff contends that the evidence excluded would tend to qualify the statements of these witnesses. Without intending to intimate that such would be its effect, it is enough to say that as in our opinion the question asked was, both upon principle and the great weight of

authority, properly excluded when offered, if it became competent, in consequence of evidence put in by the defendant, the plaintiff should have offered it in rebuttal.

As we are of opinion that in any aspect of the case the question put to the plaintiff's witness was properly excluded, the order must be—  
*Exceptions overruled.*

ing upon defendant's track. The plaintiff was allowed, against defendant's objection and exception, to show that shortly after the accident the defendant took up the planks at the crossing and replaced them by new ones. This was held to be error. Learned, P. J., writing the opinion, said: "The only way in which such subsequent acts could bear upon the question would be as an admission that they had been negligent. So a jury would be likely to understand such proof. Yet it would plainly be unjust to the defendants that they should not take additional precautions against accidents, without the risk that these precautions should be construed into an admission of prior negligence. To put down a new plank was an act which the defendants might do for various reasons. Yet it would be easy to argue from that act, to a jury, that the defendants themselves knew that the crossing had been badly constructed, or was out of repair. It seems to me that this evidence was improperly admitted, and that a new trial is therefore necessary."

In *Dougan v. Champlain Transp. Co.*, 55 N. Y. 1, plaintiff's intestate slipped from the deck of a steamboat under the outer railing and was drowned, and proof was offered by the plaintiff that after the accident the defendant boarded up the space between the railing and the deck; and this court held that the evidence was properly excluded. Grover, J., writing the opinion, said: "This was immaterial; its negligence is to be determined by what was known before and at the time of the accident."

In *Dale v. Delaware, L. & W. R. Co.*, 73 N. Y. 468, the plaintiff was a passenger in one of defendant's cars and was seated near an open window with his elbow on the window-sill, and while passing over a bridge his elbow was struck by some substance and his arm broken. It appeared that some months after the accident the bridge was removed and replaced by an iron one with trusses that did not rise as high as the window-sill. Testimony was received under objection to the effect that on the new bridge the distance between the rails and the sides of the trusses was greater than the old one. The court charged the jury that they might take that fact into consideration in determining whether the defendants were not guilty of negligence in allowing the old bridge to remain. This charge was held to be erroneous. See the opinion of Earl, J., in *Corcoran v. Peekskill*, 10 Cent. Rep. 422, 108 N. Y. 151.

The authorities are collected and discussed in the case of *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, and it was there said: "The fact that an accident has happened and some person has been injured, immediately puts a party on a higher plane of diligence and duty, from which he acts with a view of

preventing the possibility of a similar accident, which should operate to commend rather than condemn the person so acting."

The question received consideration in the very recent case of *Hodges v. Percival*, 123 Ill. 53, and in the course of the discussion the court said: "The happening of an accident may inspire a party with greater diligence to prevent a repetition of a similar occurrence, but the exercise of such increased diligence ought not, necessarily, to be regarded as tantamount to a confession of past neglect."

The rule asserted in the cases from which we have quoted is declared in many other cases. *Dougan v. Champlain Transp. Co.*, 55 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; *Dale v. Delaware, L. & W. R. Co.*, 73 N. Y. 468; *Salters v. Delaware & H. Canal Co.*, 3 Hun, 338; *Payne v. Troy & B. R. Co.*, 9 Hun, 526; *Cramer v. Burlington*, 45 Iowa, 527; *Hudson v. Chicago & N. W. R. Co.*, 59 Iowa, 581; *Ely v. St. Louis, K. C. & N. R. Co.*, 77 Mo. 84.

Views expressed in the context have been given further expansion by the Supreme Court of Indiana, in a very recent case. *Mr. Justice Elliott*, writing for reversal, says: "The rule stated and enforced in the cases referred to is the only one that can be defended on principle." *Terre Haute & I. R. Co. v. Clem*, 7 I. R. A. 568, 123 Ind. 15. This case contains an elaborate cogent argument for the position it seeks to establish.

A recent Massachusetts case indicates the same view with that delineated in the previous adjudication here cited. The judge presiding at the trial refused to allow the plaintiff's counsel to comment in argument upon the fact that the defendant had stationed a flagman at the crossing since the accident and this ruling on appeal was affirmed by the full court. The court says: "Its adoption of a particular safeguard at any time, whether an accident had previously occurred or not, could not be deemed an admission that taking any less precaution would be negligence." *Menard v. Boston & M. R. Co.*, 150 Mass. 386.

#### *The contrary view.*

It remains to consider, the judicial attitude of the Pennsylvania Supreme Court, which is in opposition to that of the authorities previously cited. In the case of *West Chester & P. R. Co. v. McElwee*, 67 Pa. 311, the precise question involved in this discussion came under review. The action is for damages occasioned by death of plaintiff's son through the alleged negligence of the company. Evidence was offered at the trial to show that immediately after the accident the defendant company removed its tracks, and *Mr. Justice Mitchell*, writing the opinion of an undivided court, very pertinently asks, if the proximity of the track to the building did not increase the danger, why was it moved?



James H FREELAND *et al.*

v.

Ernest F. RITZ *et al.*

(....Mass.....)

1. A series of papers appearing to relate to the same contract may constitute a sufficient memorandum within the Statute of Frauds, although only one of them is signed by the party to be charged.
2. A written agreement for a sub-lease, "to be made subject" to a lease not yet in existence, but which is to be obtained, is not, for that reason, insufficient under the Statute of Frauds after such lease is obtained in writing.
3. Objection to a variance between a lease agreed upon and the one delivered is waived by refusal to accept any lease.
4. Waiver as a defense for nonperformance of a contract must be pleaded.

(July 23, 1891.)

**R**EPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of an action brought to recover damages for the breach of an agreement to lease certain rooms in the Boylston Building, Boston, in which a verdict had been directed in favor of defendants. *Verdict set aside.*

The facts appear in the opinion.

*Messrs. Causton Browne and G. A. O. Ernst* for plaintiffs.

*Mr. H. W. Bragg* for defendant Ritz.

*Messrs. W. F. Slocum and W. S. Slocum* for defendant Glines.

**Lathrop, J.**, delivered the opinion of the court:

This is an action of contract, brought by the members of the firm of Freeland, Loomis & Co. against the members of the firm of Ritz & Glines, for the breach of an agreement, under seal and signed by the parties, to accept a lease of certain rooms in a building.

The agreement declared on recited that a building was then in process of erection by the Boylston Market Association, on the corner of Washington Street and Boylston Street, in Boston; that Freeland, Loomis & Co. had entered into an agreement with said association for a lease of said building as soon as the same should be completed; and that Ritz and Glines were desirous of obtaining from Freeland, Loomis & Co. a lease of part of said building, "to wit, rooms on the sixth floor thereof, as marked on plan of said floor, in the possession of Freeland, Loomis & Co. containing about 2,500 square feet, more or less, and situated in the northeasterly corner of said building, for the purpose of there conducting the photographing business." Freeland, Loomis & Co. agreed, as soon as the building should be ready for occupancy, and a lease thereof executed and delivered to them, to execute and deliver, and Ritz & Glines agreed to accept, "a lease of the rooms aforesaid, to be used solely and exclusively for the business aforesaid, for a period of five years from the date of the com-

pletion of said building, at an annual rental of \$2,500, payable in equal monthly installments, the lease to be in substantial accordance with the blank form hereunto annexed, and to be made subject in all respects to the terms and conditions of the said agreement and lease between said Freeland, Loomis & Co. and said Boylston Market Association."

1. The defendants contend that, inasmuch as the agreement provides that the lease is "to be made subject in all respects to the agreement and lease between" the plaintiffs and their lessor, which lease was not then in existence, there is no sufficient agreement or memorandum to satisfy the Statute of Frauds, Pub. Stat. chap. 78, § 1, cl. 4.

The agreement declared on is dated April 17, 1888, and it is clear that, considered alone, it is insufficient to satisfy the Statute, for some of its terms were then uncertain and might never be made certain. *May v. Ward*, 184 Mass. 127; *Ashcroft v. Butterworth*, 186 Mass. 511. What was then uncertain has, however, since been made certain, as it appears by the report, upon which the case comes before us, that in January, 1889, before this action was brought, a lease, in writing, of the entire building was delivered to the plaintiffs by their lessor.

It is a well-settled rule of law that while the memorandum must express the essential elements of the contract with reasonable certainty, these may be gathered either from the terms of the memorandum itself or from some other paper or papers therein referred to. If one of a series of papers which appear to have relation to the same contract is signed by the party to be charged, this is enough, as all the papers are to be considered together, as forming one contract or memorandum. There is no doubt, also, that parol evidence is admissible to identify any paper referred to. *Atwood v. Cobb*, 16 Pick. 227, 280; *Lerned v. Wannemacher*, 9 Allen, 412; *Rhoades v. Castner*, 12 Allen, 180; *Beckwith v. Talbot*, 95 U. S. 289, 24 L. ed. 496; *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 866; *Ryan v. United States*, 186 U. S. 68, 88, 34 L. ed. 447, 453; *Peck v. Vandemark*, 99 N. Y. 29; *Louisville Asphalt Varnish Co. v. Lorick*, 29 S. C. 533, 2 L. R. A. 212; *Ridgway v. Wharton*, 6 H. L. Cas. 288; *Fitzmaurice v. Bayley*, 8 H. L. Cas. 78, 102; *Baumann v. James*, L. R. 3 Ch. 508; *Shardlow v. Cottrell*, L. R. 18 Ch. Div. 280, L. R. 20 Ch. Div. 90; *Strudds v. Watson*, L. R. 28 Ch. Div. 805; *Oliver v. Hunting*, L. R. 44 Ch. Div. 205; *Long v. Millar*, L. R. 4 C. P. Div. 450; *Cave v. Hastings*, L. R. 7 Q. B. Div. 125.

The defendants, however, contend that these principles apply only to papers already in existence when the instrument signed by the party sought to be charged is executed, and, in support of this view, rely upon the case of *Wood v. Midgley*, 2 Sm. & G. 115, 8 C. on app. 5 De G. M. & G. 41. This was a bill for specific performance of a contract of sale of land. Some of the terms had been reduced to writing but not signed. The purchaser paid his deposit money to the auc-

**NOTE.**—As to when several papers may constitute a sufficient memorandum within the Statute 12 L. R. A.

of Frauds, see *note* to *Louisville Asphalt Varnish Co. v. Lorick* (S. C.) 2 L. R. A. 212.

ioneer who sold the land, and he signed the following receipt: "Memorandum. Mr. Thomas Midgley has paid to me the sum of \$50 as a deposit and in part payment of \$1,000 for the purchase of the Ship & Camel public house at Dockhead, the terms to be expressed in an agreement to be signed as soon as prepared." *Vice-Chancellor* Stuart overruled a demurrer to the bill, on the ground that the memorandum to be prepared and signed was only the fair copy of the draft as settled and agreed to. On appeal, the demurrer was sustained by *Lord Justice* Turner and *Lord Justice* Knight Bruce, on the ground that the agreement referred to, although it fixed the price, left other points to be determined. "The conditions of sale were to be adapted to a sale by private contract, and were to be subject to a future agreement." The case is therefore one of an agreement incomplete when made and which never was completed. See also *Ridgway v. Wharton and Fitzmaurice v. Bayley*, *supra*; *Rumens v. Robins*, 8 De G. J. & S. 88.

In *Brown v. Bellows*, 4 Pick. 179, the plaintiff and the defendant were owners of a water privilege, with the buildings thereon, etc. The plaintiff agreed to sell his interest, and the defendant agreed to buy it, "at such prices as shall be agreed on and awarded by three men, one chosen by the plaintiff, one by the defendant, and the third by the two thus chosen, which award shall be final and binding on the parties." After the price had been thus determined in writing, the defendant refused to perform his agreement. The plaintiff brought an action for covenant broken, to which the defendant set up the Statute of Frauds, contending that the referees were not named in the agreement, and that it depended wholly upon parol evidence to determine who they were. This objection was disposed of by the court saying that the contract had been performed in this respect. The defendant further contended that the price should have been fixed by the agreement, whereas it was to be ascertained by the referees. But this objection was overruled. The last point decided in this case, therefore, is a direct authority for the proposition that it is no objection to a written contract that some of the terms are to be fixed by something to be done in the future, if that something is done before action is brought; and that, if it is in writing, the provisions of the Statute of Frauds are complied with.

We are therefore of opinion that the Statute of Frauds is no defense to this action.

2. The defendants further contend that the plaintiffs are not entitled to recover because they have not performed their part of the agreement. It appears from the report that the plaintiffs on February 11, 1889, sent to the defendants a letter in regard to the rooms in the new building, and in regard to their lease, to which letter the defendants made no reply. There was evidence that duplicate leases were sent to the defendant Ritz about

February 15, 1889; that he afterwards sent one of them to the defendant Glines; that these leases were in the possession of the defendants at the time of the trial; that the plaintiffs had not seen or heard from Ritz after sending the leases; that, two or three weeks after February 15, Glines had called on the plaintiffs and said that he was ready to sign but Ritz would not, and that Ritz would not go in company with him; that neither defendant had signed the lease, or offered to sign any form of lease. Glines, who was called as a witness by the plaintiffs, testified that Ritz declined to have anything to do with him in this matter; and that he, Glines, had said that he could not sign because Ritz would not, as he had not the money to carry it out if he did sign. It was agreed that prior to the bringing of the writ the defendants had said to the plaintiffs that they should not sign the lease, and the plaintiffs might go ahead and let the rooms.

The defendants' counsel pointed out, at the argument, several particulars in which, as they contended, the lease sent to the defendants differed from the form annexed to the agreement. We do not find it necessary to consider these, as we are of opinion that, on the evidence, the jury might well have found that the defendants made no objection to the lease sent them, were not willing to accept a lease in any form, and therefore waived a strict compliance by the plaintiffs with the terms of the agreement. See *Gerrish v. Norris*, 9 Cush. 167, as modified by *Holds-worth v. Tucker*, 148 Mass. 869, 875, 8 New Eng. Rep. 499; *Brewer v. Winchester*, 8 Allen, 889; *Curtis v. Aspinwall*, 114 Mass. 187, 198; *Love v. Harwood*, 139 Mass. 183.

3. At the trial the presiding judge ruled that the action in its present form could not be maintained, and ordered a verdict for the defendants, reserving the right to the plaintiffs to move to amend, upon such terms as the superior court might order, if, in the opinion of the Supreme Judicial Court, the plaintiffs, upon the evidence, would have a right to recover in any form of action at law, in which event the verdict was to be set aside, and the case to stand for trial. At the argument in this court, no objection was made either to the form of the action or to the declaration. We have not, therefore, carefully scrutinized either. It is obvious, however, that as the contract declared on is incomplete in itself, the terms of the lease to the plaintiffs from their lessor, as far as they are material to complete the contract, should be set forth with appropriate allegations; and that if the plaintiffs rely upon a waiver by the defendants, it should be pleaded as an excuse for non-performance. *Palmer v. Sawyer*, 114 Mass. 115. Whether the substitute declaration, so called, sufficiently sets forth a waiver need not be considered, as the point has not been argued.

The result is, therefore, that *the verdict is to be set aside* and the case stand for trial.

*So ordered.*

## GLOUCESTER ISINGLASS &amp; GLUE CO.

v.

## RUSSIA CEMENT CO

(....Mass.....)

1. An agreement to prevent competition between two corporations in the manufacture of fish glue under a patent whereby an article nearly worthless is to be converted into one of large value is not against public policy.
2. The invalidity of a patent does not destroy the consideration for a contract, based on its supposed validity, to settle litigation under it and fix the respective rights of the parties, especially where the contract includes mutual covenants as to the conduct of their business and is partly executed before the invalidity is discovered.
3. Specific performance of a contract will not be defeated for failure of consideration, where, after knowledge of the failure, the defendant has chosen to avail himself of the benefits of the contract and to go on under it.
4. The specific performance of a contract to deliver fish skins may be compelled on the ground that damages for failure to perform would be irreparable where both parties are engaged in manufacturing the skins into glue and complainant would be able to procure them elsewhere, and thus continue its business, only with great difficulty if at all.
5. The modification of a contract in details by common understanding and mutual consent will not defeat a right to specific performance if it is still clear what the rights of the parties are under the contract as modified.

(June 25, 1891.)

**R**EPORT by the Supreme Judicial Court for Essex County (Knowlton, J.) for the opinion of the full court of an action brought to compel specific performance by defendant of a contract by which it was alleged to have undertaken to permit complainant to receive from producers a certain quantity of fish skins, needed by it in its business of making glue. *Decree in favor of complainant.*

The facts sufficiently appear in the opinion.

*Mr. Causten Browne*, for complainant:

The continuing injury which the bill seeks to avert could not be compensated in damages. It involves the practical destruction of the business in which the complainant is engaged.

*Florence Sewing Mach. Co. v. Grover & B. Sewing Mach. Co.* 110 Mass. 11; *Ballou v. Hopkinton*, 4 Gray, 328.

The agreement in the case at bar is clearly legal.

*Central Shade Roller Co. v. Cushman*, 3 New Eng. Rep. 505, 148 Mass. 353.

*Messrs. Charles H. Drew and Payson E. Tucker*, for defendant:

A conveyance of a void patent, or an interest under a void patent, is not sufficient con-

sideration to sustain a contract, even if both parties at the time the contract was made believed the patent to be valid.

*Dickinson v. Hall*, 14 Pick. 217; *Lester v. Palmer*, 4 Allen, 145; *Nash v. Lull*, 102 Mass. 60; *Harlow v. Putnam*, 124 Mass. 558.

Where the interest under the void patent is the main consideration of the contract, the contract will not be enforced, although there may be some other considerations for the contract, which would not exist had the invalidity of the principal consideration been recognized.

*Bliss v. Negus*, 8 Mass. 46; *Bierce v. Stocking*, 11 Gray, 178.

Where the consideration fails in part after conveyance made the contract may be avoided *pro tanto*.

*Dyer v. Homer*, 22 Pick. 253, 261.

The contract is void as contrary to public policy.

Any agreement whose object is to depress articles in the market, or prevent their increase in price by stifling competition, is void, as in restraint of trade.

*Gibbs v. Smith*, 115 Mass. 592; *Phippen v. Stickney*, 8 Met. 884; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 187; *Arnot v. Pittston & H. Coal Co.* 68 N. Y. 558; *Raymond v. Leavitt*, 46 Mich. 447; *Stanton v. Allen*, 5 Denio, 484; *Western U. Telog. Co. v. American U. Telog. Co.* 65 Ga. 160; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 66, 68, 22 L. ed. 815, 818; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598; *Craft v. McConoughy*, 79 Ill. 846.

It is against public policy because it enables the plaintiff, if he chooses, to tie the hands of the defendant and stop its works altogether, either by forcing the price of fish skins so low that they cannot be bought, or so high that they cannot be purchased and made into glue except at a loss.

*Central Ohio Salt Co. v. Guthrie*, 85 Ohio St. 667; *Hilton v. Eckerley*, 6 El. & Bl. 47.

Courts of equity will never enforce a contract which tends to restrict labor and trade, except in the few cases where it has been held that a partial restriction may properly be made.

*Keeler v. Taylor*, 53 Pa. 468; *Gibbs v. Smith* and *Central Ohio Salt Co. v. Guthrie*, *supra*.

**Knowlton, J.**, delivered the opinion of the court:

The plaintiff and defendant corporations which had been engaged in litigation with each other as to the alleged infringement of a patent owned by the plaintiff, supposing the validity of the patent fully established, and believing that they would be able practically to control the profitable manufacture of fish glue, entered into a contract with each other by which the defendant was to pay a certain sum for damages and one half of the costs of the suits, and to be allowed the use

**NOTE.**—Contracts in restraint of trade are against public policy and void. See *notes to People v. Chicago Gas Trust Co.* (Ill.) 8 L. R. A. 497; *Adams County v. Hunter* (Iowa) 6 L. R. A. 615; *Chippewa Valley & S. R. Co. v. Chicago*, St. P. M. & O. R. Co. (Wis.) 6 L. R. A. 601; *Richardson v. Buhl* (Mich.) 6 L. R. A. 457; *Bowman v. Phillips* (Kan.) 3 L. R. A. 681; *People v. North River Sugar Ref. Co.* (N. Y.) 2 12 L. R. A.

L. R. A. 38; *Leslie v. Lorillard* (N. Y.) 1 L. R. A. 456.

Contracts in partial restraint of trade may be valid. See *notes to Carroll v. Giles* (S. C.) 4 L. R. A. 154.

Contracts to regulate competition in trade are not illegal. See *note to National Benefit Co. v. Union Hospital Co.* (Minn.) 11 L. R. A. 437.

of the patent. Each party was to conduct its own establishment and they were to unite in the purchase of fish skins, an article of which the supply was limited and from which the fish glue is manufactured, so that there should be no competition between them. The plaintiff was to fix the price of all skins purchased, the parties were to have certain places assigned to them by two persons named, of which they were respectively to have the product; from the proprietors of certain other places mentioned the defendant was to have the entire product and to allow the plaintiff to receive from it one third thereof, and the two parties were to divide equally between them the skins which might be obtained from new producers. They were both to sell the glue at the same price, to be agreed upon from time to time, and the contract contained other stipulations, the effect of which was to prevent competition between them. The contract was made in February, 1884. After they had conducted the business in this manner until early in 1887, it became evident to both that the patent was invalid, although no formal judgment was rendered declaring it so. Thereupon, Mr. Brooks, the manager of the defendant Company, made a large number of what are known as the long-term contracts for the purchase of all skins to be produced until the year 1900, with nearly all the producers of fish skins known to the parties. The plaintiff received its share of these skins and no difficulty arose between the two Companies, until early in July, 1890, when the defendant notified the producers of skins by whom the plaintiff had been supplied up to that time not to deliver it any more skins, and notified the plaintiff of its abandonment of the contract. Until then the parties had gone along under the contract as modified by mutual consent, and no intimation had been given the plaintiff of any intention to abandon it. The object of the bill is to compel the defendant to permit the plaintiff to obtain directly from the producers, or through the defendant, what it deems its share of the fish skins. The defendant rests its defense on several grounds. It contends that the contract as originally made was void as contrary to public policy; that it cannot be enforced because, the patent being invalid, there was no sufficient consideration for it; that if it is binding the plaintiff has a complete and adequate remedy at law; that if the plaintiff is entitled to any relief at all it should be compelled to take its proportion of the waste received by the defendant under the long-term contracts with third parties; and, finally, that if the plaintiff had a right to specific performance of the contract it has lost it by reason of its own conduct and the conduct of the defendant to which it has assented since the original contract was made.

The original purpose of the contract was to regulate the business of manufacturing a product under what was supposed to be a new invention on which letters-patent of the United States had been issued, whereby an article then nearly worthless might be converted into an article of large value. The use to which the fish skins were put under this invention gave them their market value.

12 L. R. A.

The plaintiff and defendant sought to unite with each other in the purchase of the raw material, so that they might not be tempted to overbid each other and thus to raise it to an unreasonable price, and also to agree on the price at which the manufactured article should be sold so that they might be secure in a reasonable profit. Even if they hoped for gain by their joint exertions or by the possession of a patent as to the value of which they were subsequently disappointed, their contract had no relation to an article of prime necessity, or to staple commodities ordinarily bought and sold in the market, but to a particular article of which both were manufacturers under the same process, and to an article used in the manufacture which was of little value for any other use; that the agreement was not obnoxious to the objection made by the defendant is shown by the case of *Central Shade Roller Co. v. Crushman*, 143 Mass. 353, 8 New Eng. Rep. 505.

The next inquiry is whether the contract is incapable of enforcement for want of consideration. If there were no consideration for it but a transfer of an interest in a void patent it would be invalid. *Nash v. Lull*, 102 Mass. 60; *Harlow v. Putnam*, 124 Mass. 558.

The parties had been engaged in extended litigation involving several suits. As between them and for that litigation the validity of the patent had been established by a decision of the circuit court of the United States; and a judgment for damages in favor of the plaintiff against the defendant was about to be rendered. An important part of the consideration of the contract was a compromise and adjustment of the controversy which had taken form in the suits then pending and a liquidation of the damages which the plaintiff was about to recover under the decision of the court. Moreover, the parties were competitors in business, and for mutual advantage they entered into mutual covenants as to the mode of conducting their business, and the covenants of each in that particular were a consideration for the covenants of the other. Before the invalidity of the patent was discovered they had performed the contract in part, and what each had done in the management of its business was a part of the consideration for what remained to be done by the other. The belief that the patent was valid was one of the causes of making their agreement, but it was not the consideration of it in any sense in which it can be separated from the other objects and promises which formed a part of the consideration. Both parties are disappointed in regard to a fact upon which they supposed they could rely, but the contract cannot therefore be avoided so far as it is executory when so many other elements entered into it, and when the parties have for a long time been deriving advantage from it, not only in their dealings with each other but with the public.

If it should be held that the right to use the patent formed so large a part of the consideration for the defendant's undertaking that after the discovery of the mistake of the parties in this particular a court of equity would decline to decree specific performance

against the defendant if he had seasonably sought to avoid the contract on the ground of mistake, there are reasons why such a defense should not avail the defendant in this case. After both parties knew that the patent was void the defendant still chose to avail itself of the benefits of the contract and to go on under it. There had been no adjudication that the patent was invalid and the existence of the patent and the arrangement under which the plaintiff and the defendant were acting was probably somewhat advantageous to the parties long after they discovered that the patent would not protect them if put to the test of litigation. The report finds that "both parties attempted in good faith to do what the contract called for, and no complaint has been made of a breach of any of its provisions by either of them until July, 1890, a few days before the commencement of this suit." In making the long-term contracts Mr. Brooks, the defendant's treasurer and manager, acted without the knowledge of the other officers of either of the corporations in order that he might make the contracts quickly; but it must be inferred that he intended that the plaintiff should have the benefit of them as well as the defendant, so far as might be necessary to carry out in substance the provisions of the contract existing between them. This is apparent from the fact that before buying the skins of Shute & Merchant, John Pew & Son and Cunningham & Thompson he executed agreement "C" in the name of the defendant corporation, which was professedly a contract for the protection of the plaintiff in regard to the right to purchase skins after the expiration of the agreement between the plaintiff and the defendant, and until the year 1900. Perkins, who was president of the plaintiff corporation, and who controlled the sale of the skins and waste of the above-mentioned firms, would not consent to a sale of the skins unless the defendant would sign a contract for the protection of the plaintiff after the expiration of the agreement, and it was assumed by both parties that the plaintiff would have the benefit of these purchases, and would need no protection during the continuance of the original agreement. "The action of Brooks in buying the skins was afterwards approved and ratified by the officers of both corporations, and the plaintiff has received the skins purchased under some of these contracts, and paid for them at the rate of \$20 per ton until July, 1890." The action so ratified and approved must be deemed to have been for the benefit of both corporations, at least until the expiration of their original contract. The conduct of the parties was, in effect, an affirmation and renewal of the contract after the invalidity of the patent was well known. It would be most inequitable to permit the defendant, after having induced the officers of the plaintiff to consent to its purchase of nearly all the skins which would be likely to come into the market for a long term of years, on the faith of an understanding that the plaintiff was to share in the benefits of the purchase, to repudiate the contract, and leave the plaintiff without the means of procuring

skins to carry on its business. We are of opinion that if the defendant might successfully have defended against a suit for specific performance on the ground of the invalidity of the patent, if it had sought to repudiate the contract on the discovery of the mistake, it has so far affirmed the contract since that it cannot do so now.

The next objection of the defendant is that even if it violates its contract it is not shown that the plaintiff has not an adequate remedy at law. The only remedy which the plaintiff could have at law would be by a recovery of damages for the failure of defendant to deliver, or to allow those to deliver with whom it had made contracts in its own name but for the benefit of both, to the plaintiff its due proportion of the fish skins. It sufficiently appears that the principal market for them is in Gloucester, that most of the skin producers there are under contract with the defendant, and that the article is of very limited production. "If the plaintiff is unable to obtain skins produced by firms which have contracts with the defendant" it is found that "it will be very difficult if not impossible for it to carry on its business." This continuing injury, leading to difficulties in the management of the plaintiff's business, and possibly to its utter destruction, is one that could not be computed in damages. It would be practically impossible to estimate the amount of the injury or to repair it. The amount of the plaintiff's property invested in the manufacture must lose a considerable but uncertain amount of its value. The injury thus threatened would be practically irreparable. *Florence Sewing Mach. Co. v. Grover & B. Sewing Mach. Co.* 110 Mass. 11.

It is urged that if the plaintiff is entitled to any relief at all it should be compelled to take its proportion of the waste as well as of the skins, including in the computation the waste and skins of George Perkins & Son. In addition to the fish skins, which were the most valuable product for the manufacture of glue which is left in the business of cutting and packing salt fish, there remain fins, bones, tails, etc., which go by the technical name of waste. A fish glue of an inferior character is made therefrom. As to certain firms with whom the "long-term" contracts for fish skins were made by Brooks, it appears that they would not sell the skins unless the defendant would agree to buy the waste also and pay a fixed price therefor. While the contracts made by Brooks were ratified so far as the purchase of skins was concerned, the plaintiff has neither recognized nor been required to recognize them so far as waste is concerned. The plaintiff does not use waste nor has it been requested by the defendant to take it. The defendant has manufactured this itself, and it does not appear that such manufacture is unprofitable. The business was thus conducted and the plaintiff received its allotted portion of skins from 1887 until July, 1890, when the defendant announced that it should retain all the skins for which it had made contracts. While there has been no formal fixing of prices at which the skins should be bought, this had been substantially arranged between the parties without

disagreement, but it nowhere appears that the waste was at any time made the subject of negotiations. In regard to the mode of delivery of the skins, it had been arranged that the plaintiff should receive, as its fair proportion, those contracted for with Tarr & Bro., and with Wanson & Co., paying the producers therefor, the charge being made directly to the plaintiff. It was also arranged that the establishment of Shute & Merchant should be allotted to defendants, the charge for the skins produced there being made by plaintiff to defendant and by it to Shute & Merchant. Nowhere was there a suggestion that the plaintiff should pay for waste, although there was a provision for the sale of it in the contract with Shute & Merchant. We are of opinion that the defendant cannot compel the plaintiff to take any portion of the waste. The conduct of the parties is quite conclusive that there was no bargain between them as to this.

The defendant further contends that if the plaintiff had a right to have the contract specifically enforced it has lost it by its own conduct since the contract was made. It is found that both parties have attempted in good faith to do what the contract called for. The licenses granted by the plaintiff to other parties to manufacture under the patent were assented to by the defendant, two of them by giving certificates under seal, and one orally, by its president and general manager acting in its behalf. The purchase by the plaintiff at one time of four or five tons of extra fish skins in a neighboring State at a price a little higher than they were paying at home did not injure the defendant, and it is not contended in argument that the contract can be avoided for that reason. But in some other particulars the parties have not literally followed the terms of the contract but by a common understanding and mutual consent have modified the execution of it in details. It sometimes happens that by such variations from an agreement the parties leave their rights so uncertain that specific performance of the contract cannot be decreed. But if after changes are assented to it is still clear what the rights of the parties are under the contract as modified, there is nothing to prevent the enforcement of those rights by a decree for specific performance. Even if the agreement were wholly oral it might be specifically enforced. *Somerby v. Buntin*, 118 Mass. 287. Whatever uncertainties and difficulties might arise if the plaintiff sought literally to enforce the original provisions of the contract, the parties have by their acts so applied the contract to the new conditions which they have created as to make it clear that the plaintiff is entitled to have the skins purchased of Tarr & Bro., Wanson & Co. and Shute & Merchant, under the contract as interpreted, modified and applied by the parties by mutual consent and for their common benefit. Of course third parties who have made contracts with the defendant cannot be compelled to act otherwise than in conformity with their agreements. But the relief to which the plaintiff is entitled, and all that it asks for, will be ob-

13 L. R. A.

tained by an order that the defendant deliver to the plaintiff on demand the fish skins received from the three firms named on payment to it of what the skins cost the defendant, so long as these shall not exceed the proportion which the plaintiff is entitled to receive.  
*Decree accordingly.*

Richard T. JAKUES *et al.*, *Appts.*,

William H. SWASEY, *Exr.*, *etc.*, of Anna Jaques, Deceased.

(....Mass.....)

1. A payment of money by a testator to a legatee several years before the execution of the will cannot operate as an ademption, payment or advancement *pro tanto* of a legacy provided for in the will, unless it was received under a promise that it should be so applied.
2. A receipt for money advanced by a testatrix, to be deducted from a legacy in a will of a certain date, does not authorize any deduction from a legacy of the same amount in a will executed subsequently to the giving of the receipt.
3. Silence of a legatee who had said she was to receive \$10,000, on the reply of the testatrix that \$8,000 of it had been paid, is not an admission of such payment.

(May 20, 1891.)

## REPORT by the Supreme Judicial Court for Essex County (Devens, J.) for the

NOTE.—*Doctrine of advancements to heirs.*

The doctrine of advancements is confined to cases of intestacy; and perhaps never applies where there is a will of any of the property. *Arthur v. Arthur*, 10 Barb. 24.

Upon the naked fact that a father buys and pays for land, and has the deed made to his child, the inference of law is that it is an advancement to the child. *Partridge v. Havens*, 10 Paige, 618, 4 L. ed. 1115; *Sanford v. Sanford*, 61 Barb. 299, 5 Lans. 491; *Proseus v. McIntyre*, 5 Barb. 424; *Walton v. Divine*, 20 Barb. 9; *McClintock v. Loiseau*, 2 L. R. A. 816, 31 W. Va. 865.

Where the father purchased land and directed the conveyance to be made to his daughter, who is *non compos*, also assigning as a reason his wish to exclude certain persons from enjoyment of the property and expressing the opinion that he will enjoy its use as guardian of his daughter, it will be presumed an advancement rather than a trust resulting in his favor. *Eastham v. Powell*, 51 Ark. 580; *McClintock v. Loiseau*, *supra*.

A provision that the legatee's debts to testator should be deducted and balance paid to them, and, if they exceeded the legacies, the surplus to be discharged,—makes such debts advancements. *Taylor's App.* 5 New Eng. Rep. 268, 145 Mass. 288, citing *Hall v. Davis*, 8 Pick. 450; *Bacon v. Gassett*, 18 Allen, 387; *Cummings v. Bramhall*, 120 Mass. 532; *Treadwell v. Cordis*, 5 Gray, 341; *Poole v. Poole*, L. R. 7 Ch. App. Cas. 17.

An advancement is the giving by a parent to a child, by way of anticipation, that which it is supposed the child will be entitled to on the death of such parent. *Ruch v. Biery*, 9 West. Rep. 215, 110 Ind. 444; *McMabill v. McMabill*, 69 Iowa, 115; *Wallace v. Reddick*, 8 West. Rep. 703, 119 Ill. 151.

That an advancement is what it may be supposed

opinion of the full court, of an appeal from a decree of the Judge of Probate for Essex County allowing the executor of the will of Anna Jaques the full sum of \$10,000 paid by him to Harriet M. Downs as a legacy bequeathed to her by the will, appellants claiming that he should be allowed only \$7,000. *Affirmed.*

The facts sufficiently appear in the opinion.

*Messrs. William H. Moody and Horace L. Bartlett*, for appellants:

Whether an advance made by a testator to his legatee is an ademption or satisfaction or not is a question of intention in all cases, whether the advance preceded or followed the execution of the will.

2 Wms. Exrs. [1896] note b; *Rogers v. French*, 19 Ga. 816; *Hopwood v. Hopwood*, 23 Beav. 498; *Povey v. Mansfield*, 8 Myl. & C. 359.

This principle should be acted upon notwithstanding apparent difficulties.

*Hopwood v. Hopwood*, 7 H. L. Cas. 741; *Upton v. Prince*, Cas. t. Talb. 71.

Where the donor of a benefit stands *in loco parentis* to the beneficiary and gives him a legacy not stating any particular object for which it is given, the law presumes it to be a portion and presumes against double portions.

Pom. Eq. Jur. § 554; *Ex parte Pye*, 18 Ves. Jr. 140; *Chichester v. Coventry*, L. R. 3 H. L. App. Cas. 90.

Here in the absence of evidence presumptive intent governs.

Pom. Eq. Jur. § 561.

And evidence is admissible for and against the presumption to show the intent.

2 Redf. Wills, 2d ed. 448.

The foregoing equitable presumptions are directly derived from the assumed natural duty of the parent.

Pom. Eq. Jur. § 553.

Miss Jaques was *in loco parentis* to Mrs. Downs.

*Povey v. Mansfield*, 8 Myl. & C. 359.

The presumptions should apply in the case at bar.

See Roper, Leg. 369.

And if they do, the parol evidence is admissible.

1 Pom. Eq. Jur. p. 690; 1 Roper, Leg. 408.

Where a payment by a father to a child prior to the will is made in pursuance of a contract by the child that it shall be in satisfaction of a subsequent legacy, or where it is the intention of the testator known and assented to by the legatee, a prior payment will so operate.

Pom. Eq. Jur. § 560, note 1; *Upton v. Prince*, *supra*; *Taylor v. Cartwright*, L. R. 14 Eq. 167, 178; *Cummings v. Bramhall*, 120 Mass. 552.

*Mr. Amos Noyes*, for appellee:

There is no such thing as an advancement to anyone except a child or descendant—at common law—and the Statute especially confined it to a child or descendant.

Rev. Stat. 1886, chap. 61, §§ 6-11; Gen. Stat. 1860, chap. 91, § 6; Pub. Stat. 1882, chap. 128, §§ 1, 3; 4 Kent, Com. 8th ed. (Lecture LXV.) pp. 418, 448.

Advancements cannot apply to testate estates—to legacies. Payments during the lifetime of testator on account of legacies may act as ademption, but not as advancements, even to children.

8 Redf. Wills, 8d ed. p. 432.

the donee will inherit on the death of the donor does not make it any the less a present gift. Pott's App. (Pa.) 10 Cent. Rep. 415.

To constitute an advancement the ancestor must, in his lifetime, divest himself of all interest in the property set apart to the heir. *Crosby v. Covington*, 24 Miss. 619; *Smith v. Smith*, 5 Ves. Jr. 721; Wms. Exrs. 150.

#### *Distinction between advancement and gift.*

The very act of giving to an heir by way of anticipation implies the exercise of judgment which distinguishes an advancement from a gift, in which no exercise of judgment as to future results is involved. *Wallace v. Reddick*, 6 West. Rep. 709, 119 Ill. 151.

Where gifts are not expressed or charged in writing as advancements, they cannot be deemed such, under the statute. *Ibid.*

They must be expressed in writing as an advancement or acknowledged in writing to be accepted as such by the recipient. *Long v. Long*, 6 West. Rep. 491, 118 Ill. 688; *Wallace v. Reddick*, *supra*.

So a deed from a father for an express money consideration and for love and affection is not made an advancement by a recital, in the father's will, that the child has received land, in the view of the Statute which requires the gift to be made in writing. *Wilkinson v. Thomas*, 128 Ill. 368.

*Intention determines whether an act constitutes a gift or an advancement.*

Nothing is better settled than that the intention of the parent determines whether a conveyance or transfer of money or property to a child is to be regarded as a gift or an advancement. The nature of the transaction, in these respects, follows the intention. L. R. A.

tion of the donor. *Woolery v. Woolery*, 20 Ind. 249; *Duling v. Johnson*, 32 Ind. 155; *Frey v. Heydt*, 9 Cent. Rep. 380, 116 Pa. 601.

The intention of the donor is to be gathered from attending circumstances. *Wallace v. Reddick*, 6 West. Rep. 709, 119 Ill. 151; *Jakolet v. Danielson* (N. J.) 12 Cent. Rep. 231.

It should appear in some way that it was intended as an advancement, before the child's part will be charged with it. *Comer v. Comer*, 6 West. Rep. 72, 119 Ill. 170.

The law will ascribe to the donor that intention most favorable to an equal distribution of his property among his children. *Ruch v. Blery*, 9 West. Rep. 218, 110 Ind. 444, citing *Parks v. Parks*, 19 Md. 823; *Clark v. Willson*, 27 Md. 698. See *Weaver's App.* 68 Pa. 309; *Dilley v. Love*, 61 Md. 608.

Sums received by the heir during the lifetime of the testator should be treated in equity as advancements. Rev. Stat. 1881, § 1189. *Foltz v. Wert*, 1 West. Rep. 363, 108 Ind. 404.

As between a loan, a gift and an advancement, the presumption is in favor of the advancement. *Patterson's App.* (Pa.) Oct. 7, 1889.

Money furnished by a father with which lands were purchased and the title taken in the name of his son, without any contemporaneous understanding of agreement concerning repayment of the purchase money, will be presumed to have been intended as an advancement with no present purpose to treat it as a debt. *Higham v. Vancodal*, 101 Ind. 160.

Payments by a father of his son's debts are presumed, in the absence of anything to the contrary, to be made as advancements to the son, and will be treated as such in the settlement of the father's estate. *Steele v. Frierson*, 85 Tenn. 480.

Land purchased by a father and placed in the

Even in the case of an advancement a subsequent will and testament has been held to extinguish it.

*Jones v. Richardson*, 5 Met. 253; *Hartwell v. Rice*, 1 Gray, 594.

An advancement cannot be proved by parol. *Bulkeley v. Noble*, 2 Pick. 337; *Barton v. Rice*, 22 Pick. 509.

The time when the advancement was made is the essential fact in determining whether it applies to a legacy or not. If the payment was made to a child after the will was made it is presumed to be an advancement, and if made to a legatee (who is a stranger) after the will is made it is sometimes an ademption.

*Paine v. Parsons*, 14 Pick. 320; *Clarke v. Percival*, 2 Barn. & Ad. 660.

Ademption can only be of a legacy given in a will dated prior to the payment of the money regarded as an advancement.

*Shudal v. Jekyll*, 2 Atk. 516; *Powell v. Cleaver*, 2 Bro. Ch. 516; *Ravenscroft v. Jones*, 4 De G. J. & S. 224, 33 Beav. 669; *Jones v. Richardson*, *supra*; *Clark v. Kingsley*, 37 Hun, 246; *Arnold v. Haronn*, 48 Hun, 278.

A gift made to a stranger is not an ademption, not presumed to be such, but there must be clear proof that it was intended as part of the legacy.

*Shudal v. Jekyll* and *Powell v. Cleaver*, *supra*; *Ex parte Pye*, 18 Ves. Jr. 152; *Evans v. Beaumont*, 4 Lea, 599; *Wetherby v. Dixon*, Coop. Ch. 281.

Courts cannot resort to the declaration of the testator, either before or after the execution of the will, to control and construe its provisions.

*Brownfield v. Wilson*, 78 Ill. 467.

name of his son is presumptively an advancement. *Nallor v. Nallor*, 3 Cent. Rep. 777, 5 Mackey, 98.

Whether a purchase in the name of a wife or child is an advancement is a question of intention, though presumed in the first instance to be a provision or settlement. *Parker v. Newitt*, 18 Or. 274.

A transaction between a father and son, which amounts to an advancement at the time it takes place, cannot afterwards be converted into a debt without the intervention of some new consideration. *Higham v. Vancodal*, 101 Ind. 160.

A voluntary conveyance of land by a parent to a child is presumed to have been intended as an advancement, and the burden of proof is upon the party claiming it to be anything else. *Ruch v. Biery*, 9 West. Rep. 215, 110 Ind. 444, citing *McCaw v. Burk*, 31 Ind. 56; *Dille v. Webb*, 61 Ind. 85; *Dutch's App.* 57 Pa. 451. And see *White v. White* 52 Ark. 133.

A stipulation for an annuity or interest during the lifetime of the grantor will not change the rule. *Ruch v. Biery*, 9 West. Rep. 215, 110 Ind. 444; *Norman v. Norman*, 11 Ind. 238; *Sherman v. Sherman*, 8 Ind. 337; *Peabody v. Peabody*, 59 Ind. 553.

To constitute an advancement, the ancestor must, during his lifetime, divest himself of all interest in the property set apart to the heir. *Joyce v. Hamilton*, 9 West. Rep. 663, 111 Ind. 163.

A transfer of property by a parent to a child is prima facie an advancement, and not a gift; but it may be shown by parol that it was intended as a gift. *Wolfe v. Kabie*, 5 West. Rep. 689, 107 Ind. 563, citing *Dillman v. Cox*, 23 Ind. 440; *Duling v. Johnson*, 32 Ind. 155; *Stokesberry v. Reynolds*, 57 Ind. 456.

A deed of land by a father to his son, expressing no consideration or only nominal consideration, is presumed to be an advancement. *Jakobite v. Danielson* (N. J.) 12 Cent. Rep. 231, citing *note* to *Miller's App.* 80 Am. Dec. 555.

12 L. R. A.

**W. Allen, J.**, delivered the opinion of the court:

The appellants contend that the sum of \$3,000 paid by the testatrix in her lifetime to Mrs. Downs should be deducted from the legacy of \$10,000 to her. The payment was made several years before the will was executed and cannot operate as an ademption or payment or advancement *pro tanto* of the legacy. To give such an effect to it would be to vary the terms of the will and to show by parol that the testatrix intended a legacy of \$7,000 and not \$10,000. Payment of a legacy provided for in a will made by the testator before the will takes effect by his death is regarded as consistent with and carrying out the intention expressed in the will; but to apply a gift made before the execution of the will in full or part satisfaction of a legacy given by the will necessarily varies the terms of the legacy, and allows the intention expressed in the will to be controlled by a different intention proved by parol. If a gift is made by a parent to a child it may be presumed to be an advancement of a portion of the parent's estate which he has given to the child by will, or which the law may give if the parent dies intestate, but if after making such gift the parent by will fixes the portion of the child, the former gift cannot be taken as a part of the portion unless made so by the will. It cannot by possibility be an ademption of the legacy. If it can operate as a satisfaction of the legacy it must be upon other grounds than the right of the testator to adeem a legacy. *Paine v. Parsons*, 14 Pick. 318; *Richards v. Humphrey*, 15 Pick. 133; *Jones v. Richardson*, 5 Met. 247, 253; *Hartwell v. Rice*, 1 Gray, 597,

Where it is afterwards discovered that the father had made a mortgage upon it, the heir receiving the advancement may recover against the estate the amount of the mortgage upon the land. *Polley v. Polley*, 32 Ky. 64.

But the heir must contribute his share towards satisfying the mortgage. Asking equity, he must do equity. *Ibid.*

In such case the possession of the son cannot be adverse to the father. *Ibid.*

Where a son receives a conveyance as an advancement, and executes a release of all claim as heir of his father's estate, it is a bar from the date of acceptance of the conveyance. *Scott, J., dissents.* *Simpson v. Simpson*, 1 West. Rep. 332, 114 Ind. 608; *Parsons v. Ely*, 25 Ill. 232; *Bishop v. Davenport*, 53 Ill. 105; *Galbraith v. McLean*, 84 Ill. 379; *Kershaw v. Kershaw*, 103 Ill. 307.

It is competent for the Legislature to enact that in such case the children of the son shall be equally barred from inheritance. *Simpson v. Simpson, supra.*

The fact that the owner of a tract of land divides it and conveys one part to his son and the other to his son-in-law, taking a note from each for the consideration agreed upon, he keeping the notes separate from the other notes, shows his intention to make an advancement to the son-in-law. *Sadler v. Huffheimer* (Ky.) 11 Ky. L. Rep. 670.

#### *Gifts, not advancements.*

That donor required a judgment note to be given for the sum advanced, which he bequeathed to the maker, rebuts the presumption that an advancement was intended. *Pott's App.* (Pa.) 19 Cent. Rep. 415.

A will provided that if there should be due from the legatees "obligations of any kind, or evidence of debt of any kind," they should be deducted from



594. See authorities collected in *note to Chauncey's Case*, 1 P. Wms. 408, 2 Lead. Cas. in Eq. 4th Am. ed. p. 782 *et seq.*

It has been held that a payment by a father to a child will operate as a satisfaction *pro tanto* of a legacy to the child in a subsequent will when it is received by the child under a promise by him that it shall be so applied. In that case the money is received by the child as a part of the portion to be designated in the will, and it would be fraudulent in him not to allow it in satisfaction *pro tanto* of the legacy given in pursuance of the understanding. *Upson v. Prince*, Cas. 4. Talb. 71; *Taylor v. Cartwright*, L. R. 14 Eq. 167, 176; *Fundt's App.* 13 Pa. 575; *Musselman's Estate*, 5 Watts, 9; *Kreider v. Boyer*, 10 Watts, 54; *Rogers v. French*, 19 Ga. 822.

The real question in the case at bar is whether it was understood between Miss Jaques, the testator, and Mrs. Downs, when the \$3,000 was given by the former to the latter, that that sum was paid and received as part of a portion to be given to Mrs. Downs by will, and as *pro tanto* in satisfaction of the subsequent legacy.

In the year 1874 Mrs. Downs, then Miss Smith, went to live with Miss Jaques, who was a single woman well advanced in life, as her daughter, with the understanding that if she continued to live with Miss Jaques during her life Miss Smith would be treated as a daughter, and would be provided for in the will of Miss Jaques by a legacy of \$10,000. As regards advancements of a portion Miss Jaques stood practically *in loco parentis* to Miss Smith, and it may be assumed that the rules that apply to advancements and legacies

between parent and child applied to them. Miss Jaques made a will about the time Miss Smith went to live with her, in which she gave "To Harriet M. Smith, my adopted daughter, provided she lives with me until my decease, ten thousand dollars." In January, 1876, Miss Jaques made another will in which she gave to Miss Smith "the sum of ten thousand dollars in cash provided she lives with me until my decease." In the same year Miss Smith was married, and after her marriage the \$3,000 was paid to her, and she gave the following writing:

"Newbury, Nov. 29, 1876.

"Whereas Miss Anna Jaques has intimated to me that in her will of January 31, A. D. 1876, she has devised a certain sum of money on certain conditions, now being desirous of purchasing a house and land adjoining the same, she (Miss Jaques) has kindly advanced to me the sum of three thousand dollars, by the hands of Edward F. Shaw this day. I hereby acknowledge to have received the said sum of three thousand dollars in advance of and on account of said legacy, and in settlement of said estate if the conditions above mentioned are fulfilled it shall be deducted from the said legacy aforesaid, and I bind myself by this receipt to perform above agreement, to allow the deduction to the executors of the said estate."

This was signed by Mrs. Downs and attested by a witness. Mrs. Downs continued to live with Miss Jaques until her death in January, 1885. In August, 1885, Miss Jaques made a new will which expressly revoked former wills, and contained this clause. "Item 7. I give

the legacies. It was held that promissory notes and receipts for advances of money were intended. *Hill v. Bloom*, 4 Cent. Rep. 845, 41 N. J. Eq. 376.

A gift to one entitled as a child to share in the donor's estate will not be held an advancement, when it expressly appears to have been the intention of the father that the gift should not be considered as such. *De Caumont v. Morgan*, 6 Cent. Rep. 385, 104 N. Y. 73.

The recitation in a deed, as to the consideration or execution of a note, is not conclusive that the transaction was a sale and not an advancement. *Sadler v. Hufthelmer* (Ky.) 11 Ky. L. Rep. 670.

Mining stock purchased by a parent, who caused it to be placed in his name as trustee, for certain of his children, and which he subsequently sold, converting the proceeds to his own use, will not be charged to such children as an advancement, since the gift was revocable, and was revoked by the subsequent sale and conversion by the parent. *Herkimer v. McGregor*, 126 Ind. 247.

Such a disposition of the property is conclusive evidence of a revocation of the advancement. *Ibid.*

#### *Advancement creates no debt.*

An advancement creates no debt to the person making it. *Dawson v. Macknet*, 7 Cent. Rep. 456, 42 N. J. Eq. 633.

In the absence of evidence of intention, mortgages executed by a son to a testator, to secure money received and notes indorsed and paid by the testator for the accommodation of the son, are evidence of debt, and not of advancement. *Ibid.* *Speer v. Speer*, 14 N. J. Eq. 240; *Battor v. Allen*, 5 N. J. Eq. 99; *Bruce v. Grisoom*, 9 Hun, 280; *High's App.* 21 Pa. 285. See *Wannamaker v. Van Buskirk*, 1 N. J. Eq. 665, a peculiar case.

13 L. R. A.

#### *Ademption of legacy.*

Where the thing, debt, security, stock, etc., has been totally or partly sold, transferred or otherwise disposed of by the testator, before his death, there is an ademption, total or partial; and this result is the same even though with the proceeds of the thing sold—say stock, and the like—he purchases others of the same kind which he holds at his death. If the testator, having sold shares of stock, should repurchase the same identical shares, perhaps there would be no ademption. *Re Gibson*, L. R. 3 Eq. 699; *Oliver v. Oliver*, L. R. 11 Eq. 506; *Watts v. Watts*, L. R. 17 Eq. 217; *Macdonald v. Irvine*, L. R. 8 Ch. Div. 101; *Castle v. Fox*, L. R. 11 Eq. 542, 551; *Miles v. Miles*, L. R. 1 Eq. 462; *Douglas v. Douglas*, Kay, 400, 404; *Drinkwater v. Falconer*, 2 Ves. Sr. 623, 625; *Partridge v. Partridge*, Cas. t. Talb. 226; *Philson v. Moore*, 23 Hun, 152; *Langdon v. Astor*, 16 N. Y. 2, 37; *Blackstone v. Blackstone*, 8 Watts, 336; *Alsop's App.* 9 Pa. 374; *Whitlock v. Vann*, 38 Ga. 562; 3 Pom. Eq. Jur. 69.

Ademption is a satisfaction of a legacy by some act of testator which is equivalent to its revocation. *Burnham v. Comfort*, 11 Cent. Rep. 448, 108 N. Y. 535.

The rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of real estate. *Story*, Eq. Jur. §1111; 2 Wms. Exrs. 5th ed. 1202; 1 Roper, Leg. 365; *Davys v. Boucher*, 3 Younge & C. 397; *Langdon v. Astor*, 16 N. Y. 84, cited in *Burnham v. Comfort*, *supra*.

A receipt in full by a son of his distributive share in his father's estate, for a sum of money received from his father in his lifetime, adeems a general legacy given him. *Cowles v. Cowles*, 6 New Eng. Rep. 467, 56 Conn. 240, citing 1 Swift, Dig. 455; *Hartop v. Whitmore*, 1 P. Wms. 681; *Clarke v. Burgoine*, 1 Dick. 368; *Clarke v. Percival*, 2 Barn. & Ad. 660.

and bequeath to Harriet M. Downs, wife of Willard O. Downs, the sum of ten thousand dollars, if she shall survive me, but if she shall not survive me, in such case I give and bequeath the same (ten thousand dollars) to her children who may be living at the time of my decease." This will was admitted to probate. Unquestionably the payment of the \$3,000 would have been an advancement of so much of the legacy given by the will of 1876 and an ademption *pro tanto* of it had the instrument which contained it become the will of Miss Jaques. But the will was revoked, and a subsequent will executed, and the intention of Miss Jaques that the payment should be in satisfaction of a legacy given by the subsequent will cannot of itself be given in evidence to control the plain terms of the actual will. Unless that intention was understood and assented to by Mrs. Downs when the payment was made it cannot be taken as satisfaction *pro tanto* of the subsequent legacy. The paper signed by Mrs. Downs does not show a contract or understanding that the payment should be in satisfaction of a subsequent legacy. It refers and is limited to the legacy in the will of 1876. The fact that it was understood that Mrs. Downs should have a portion of the estate of Miss Jaques can have no greater effect than to place her in the position of a child who expected a portion. The fact that \$10,000 had been mentioned when the relation of the parties commenced as the amount of the portion, and was the amount of the legacy in the existing will does not show that Mrs. Downs in accepting an advancement of a part of that legacy agreed to receive it in satisfaction of an equal amount of any future legacy that might be given to her. There was nothing in the transaction which

could prevent Miss Jaques from revoking the legacy and giving a new legacy for any amount she might choose, nor that could prevent Mrs. Downs from receiving the full amount of a subsequent legacy. The writing is limited to the legacy mentioned in it, and cannot of itself affect any subsequent gift.

The only other evidence upon which the appellants rely for proof that Mrs. Downs agreed to receive the \$3,000 in satisfaction of a future legacy is conversations between Miss Jaques and Mrs. Downs after the last will was executed. So far as these go only to show the intention of Miss Jaques in advancing the \$3,000 they are immaterial, unless they also show an admission by Mrs. Downs that she received the payment in satisfaction of the subsequent legacy. They do not show any such admission. On the contrary, Mrs. Downs said that she was to have the \$10,000, and Mrs. Jaques said that \$3,000 of it had been paid. The fact that Mrs. Downs made no reply to this cannot be taken as an admission of its truth. She had already stated her understanding of it, and the remark of Miss Jaques was in answer to her. She cannot be held to have assented to Miss Jaques' statement because she did not continue the discussion.

The report does not find that Mrs. Downs accepted the advance of \$3,000 with the understanding that it should be in satisfaction *pro tanto* of a future legacy, and the facts and evidence reported do not show that she received it with such understanding, or that she agreed that it should be so applied. As no contract is found or can be inferred, it is not necessary to consider the further objection made by the executor that the legacies are substantially different. The legacy which

In ademption of legacies, it is immaterial that a document given by a recipient of the payment was made by a *feme covert* incapable of making a binding contract. *Ibid.*

When after the will was made the testator paid the son a certain sum of money, and took from him a writing in which the son acknowledged that a sum of money was received by him in full satisfaction and discharge of the legacies given him in the will, the legacies were adeemed. 1 Swift, Dig. 455; Hartop v. Whitmore, 1 F. Wms. 681; Clarke v. Burgoine, Dick. 853; Clarke v. Percival, 3 Barn. & Ad. 660; Cowles v. Cowles, 6 New Eng. Rep. 497, 56 Conn. 245.

Unless the very thing bequeathed is in existence at the death of the testator, and then forms a part of his estate, the legacy is wholly inoperative; the legatee has no right or claim; the executors are under no obligation to replace the thing by purchasing another one of the same kind as described in the will by means of other assets in their hands, belonging to the estate. 3 Pom. Eq. Jur. 76; Ashburner v. Macgwire, 2 Bro. Ch. 108; 2 Eq. Lead. Cas. 4th Am. ed. 600, 630, 634, 662-674; Badrick v. Stevens, 8 Bro. Ch. 431; Barker v. Rayner, 2 Russ. 122; Sidebotham v. Watson, 11 Hare, 170; Hayes v. Hayes, 1 Keen, 97; Gilliat v. Gilliat, 23 Beav. 481; Jones v. Southall, 32 Beav. 81; Ford v. Ford, 23 N.H. 212; Blackstone v. Blackstone, 8 Watts, 835, 837; Ludlam's Estate, 1 Pars. Eq. 116, 13 Pa. 188, 3 Pa. L. J. Rep. 332; Philson v. Moore, 23 Hun, 152; Walton v. Walton, 7 Johns. Ch. 258, 2 L. ed. 286.

The question of ademption by the death, or destruction, or sale, of the thing devised, or payment of a specific bequest, is not one of intention, but an

ademption is thereby effected, upon the principle that the subject is annihilated, or its conditions so altered that nothing remains to which the terms of the bequest can apply. Ross v. Carpenter, 9 B. Mon. 367, 50 Am. Dec. 514; Walton v. Walton, *supra*.

Where a particular debt, or the security of a debt, such as a mortgage, bond or note, or a public debt secured by governmental bonds, or other governmental security, has been specifically bequeathed, and the same has been paid to the testator, so that the debt is discharged, there is an ademption. See 3 Pom. Eq. Jur. 86, *note*.

So exercising an option and surrendering up the stock bequeathed and accepting an entirely different stock of the same company in lieu thereof will operate an ademption. Ludlam's Estate, *supra*; Cuthbert v. Cuthbert, 8 Yeates, 493; Beck v. McGills, 9 Barb. 35.

If the father, at the time of the advancements, reserved the right to demand repayment, they must be considered loans, and will not adeem a legacy. Wallace v. Dubois, 3 Cent. Rep. 211, 65 Md. 158. See Harley v. Harley, 57 Md. 340.

A bequest to testator's housekeeper is not adeemed by the mere fact of a purchase on the day of his death of a house and lot which he had deeded to her. Sprengle's App. (Pa.) Oct. 1, 1893.

Deposits by a father, made in the presence of his daughter, of money in bank in her name and for her use, and further deposits entered in a pass-book and delivered to her, although partly made after the execution of his will giving the daughter a pecuniary legacy, will not operate as an ademption of any portion of the legacy. *Re Crawford*, 5 L. R. A. 71, 113 N. Y. 560.

was deemed in part was to Miss Smith alone and would lapse by her death and was on condition that she lived with the testator until her decease and it conformed to the original agreement between the parties. The subsequent legacy was without condition and included children of Mrs. Downs if she did not herself survive the testatrix. Without deciding that a promise to accept a present sum in satisfaction of a future legacy in the terms of the former could not be extended to the different legacy actually given, we think that it does not appear that the payment was received in satisfaction *pro tanto* of any future legacy.

*Decree affirmed.*

Alonzo M. BUTTERFIELD

v.

Napoleon L. BYRON *et al.*

(....Mass....)

1. On the destruction by fire of a building towards the erection of which a contractor is to contribute only part of the labor and materials, while the owner is to do the grading, excavating, stone and brick work, painting and plumbing, the contractor is discharged from his obligation and can recover on an implied assumpsit for the value of what he had already done.
2. Advancements to a contractor, made by the owner of a building, may be recovered for failure of consideration on its destruction by fire before completion, although the contractor can set off his claim on an implied assumpsit for the value of what was already done, where he is discharged by the fire and entitled to such compensation because the contract was for part only of the labor and materials.

(May 19, 1891.)

**R**EPORT by the Superior Court for Hampden County for the opinion of the Supreme Judicial Court of an action brought to recover damages for an alleged breach by defendant of his contract to erect a building on plaintiff's land, in which a verdict had been directed to be returned in defendant's favor. *Verdict set aside.*

Butterfield and Byron entered into a contract by which Byron undertook to build an hotel on Butterfield's land according to certain specifications to be furnished him and to have the same completed by May 30, 1889.

Butterfield agreed to pay Byron for the same

\$8,500 as follows: seventy-five per cent of the amount of work done and materials furnished during the preceding month, to be paid for on the first of the following month, and the remaining twenty-five per cent to be paid thirty days after the entire completion of the building.

From the specifications referred to in the contract it appeared that Butterfield was himself to do all grading, excavating, stone and brick work, and painting and plumbing.

The time for completion of the building was subsequently extended, and on May 25, 1889, Byron had complied with his contract so far as he had gone, and the building could have been completed within a week or ten days from that time. He had on that date received \$5,652.80 under his contract. On that day the building was completely destroyed by fire, without the fault of either party. Byron claimed that the fire was caused by lightning. Butterfield had prior to the fire insured his interest in the building in two companies. They paid the amount of his loss and took an assignment from him of his claim against Byron for any and all sums to which he was entitled by reason of Byron's failure to complete the building, and this action was brought for the benefit of the insurance companies.

After the fire there remained unconsumed some bundles of shingles which had been purchased for the job and charged into the bills, 75 per cent of which had been paid.

Byron took and carried away these shingles, and also the window weights which he found in the ruins. The value of Butterfield's interest in the material carried away was fixed at \$38.

*Messrs. Robinson & Robinson*, for plaintiff:

The defendant's obligation arose, not by force of law, but under his own contract. The act of God did not release or relieve him.

6 *Walt*, Act. and Def. 432; 1 *Am. & Eng. Encyclop. Law*, 178; *School Dist. No. 1 v. Dauchy*, 25 Conn. 580; *Lord v. Wheeler*, 1 Gray, 283, 288.

If the defendant desired to be relieved, he should have provided for it in his contract.

*Adams v. Nichols*, 19 Pick. 275; *Mill Dam Foundry Proprs. v. Hovey*, 21 Pick. 441; *Wells v. Calnan*, 107 Mass. 514, 517.

This was not a case of part performance. It was total failure. The plaintiff got no benefit.

*Dermott v. Jones*, 64 U. S. 28 How. 220, 16 L. ed. 442.

**NOTE.**—*Building contract; destruction of building by accident.*

If the contract is entire for the performance of a specific work for a specific sum, so that performance is a condition precedent to payment for any part of it, the workman is deprived of all legal right to remuneration if the work is destroyed by accident before its completion (*Appleby v. Myers*, L. R. 2 C. P. 651, 38 L. J. C. P. 831); but if the workman is entitled to payment from time to time as the work proceeds, the destruction of the work before its completion will not deprive the workman of his hire. *Menetone v. Athawes*, 3 Burr. 1502; *Tripp v. Armitage*, 4 *Mess. & W.* 600, cited in 2 *Adison*, Cont. 552.

So in the Roman law if the builder was employed to build a house and the building was destroyed by an earthquake or by lightning during the progress 12 L. R. A.

of the work, the employer was accountable for the loss; otherwise if there was an express contract, and payment was conditioned on completion of the work. Dig. lib. 19, title 3, lex. 59; Dig. lib. 6, title 1, lex. 39.

Where a contractor undertakes to build a house upon the land of another, and the house before its completion is destroyed by fire without his fault, he is not thereby relieved from his obligation to fulfill the contract. The duty in such a case is to be distinguished from one imposed by law. The obligation to build is founded upon and in his own voluntary contract, and its non-performance is not excused by inevitable accident. *Adams v. Nichols*, 19 Pick. 275; *Tompkins v. Dudley*, 25 N. Y. 272; *School Dist. No. 1 v. Dauchy*, 25 Conn. 580; *School Trustees v. Bennett*, 17 N. J. L. 513; *Ingle v. Jones*, 69 U. S. 2 Wall. 1, 17 L. ed. 702.

There was no acceptance by plaintiff that relieved the defendant.

*Sedgw. Dam. 4th ed. 242, and note; Faxon v. Mansfield, 2 Mass. 147.*

*Mr. George M. Stearns, for defendants:*  
The defendants must aver performance on their part.

*Newcomb v. Brackett, 16 Mass. 161.*

Only refusal on the part of the defendants could excuse the plaintiff.

*Mill Dam Foundry Proprs. v. Hovey, 21 Pick. 417.*

In contracts containing mutual agreements, if either would charge the other upon it, he must put him in default. If both parties remain inactive there is no breach by either.

*Gardiner v. Corson, 15 Mass. 500; Dana v. King, 2 Pick. 155; Hunt v. Livermore, 5 Pick. 295; Tinney v. Ashley, 15 Pick. 546; Parker v. Perkins, 8 Cush. 318; Cook v. Doggett, 2 Allen, 489; Smith v. Boston & M. R. Co. 6 Allen, 262; Hapgood v. Shaw, 105 Mass. 276; Cadwell v. Blake, 6 Gray, 402; Eliot Nat. Bank v. Beal, 2 New Eng. Rep. 846, 141 Mass. 566.*

When the performance of a contract becomes impossible by an act of God, no action will lie for the breach of it.

*Baylies v. Pettyplace, 7 Mass. 325; Harrington v. Dennis, 18 Mass. 98; Harrington v. Fall River Works Co. 119 Mass. 82; Badlam v. Tucker, 1 Pick. 284; Fuller v. Brown, 11 Met. 440; Caden v. Farwell, 98 Mass. 137; Bailly v. De Orespigny, L. R. 4 Q. B. 185, 38 L. J. Q. B. 98.*

Incapacity by reason of the intervention of act of God to perform personal service in cases where the covenants to serve were absolute is an excuse for non-performance.

*Boast v. Pirith, L. R. 4 C. P. 1, 38 L. J. C. P. 1; Robinson v. Davison, L. R. 6 Exch. 269, 40 L. J. Exch. 172; Jones v. How, 9 C. B. 19, 7 Hare, 287.*

*Adams v. Nichols, 19 Pick. 275, was a case of fire through ordinary human instrumentalities. In no case in Massachusetts has there been any extension of its doctrine to cases where an act of God was the preventing cause.*

See Addison, Cont. Morgan's Am. ed. 1875, § 827.

**Knowlton, J.**, delivered the opinion of the court:

It is well-established law that where one contracts to furnish labor and materials and construct a chattel or build a house on land of another he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building without his fault before the time fixed for the delivery of it. *Adams v. Nichols, 19 Pick. 275; Wells v. Calnan, 107 Mass. 514; Ingle v. Jones, 69 U. S. 2 Wall. 1, 17 L. ed. 763; School Trustees v. Bennett, 27 N. J. L. 513; Tompkins v. Dudley, 25 N. Y. 272.*

It is equally well settled that where work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties

will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other. *Taylor v. Caldwell, 8 Best & S. 826; Lord v. Wheeler, 1 Gray, 282; Gilbert & B. Mfg. Co. v. Butler, 146 Mass. 82, 5 New Eng. Rep. 573; Eliot Nat. Bank v. Beal, 141 Mass. 566, 2 New Eng. Rep. 846, and cases there cited; Dexter v. Norton, 47 N. Y. 63; Walker v. Tucker, 70 Ill. 527.*

In such cases, from the very nature of the agreement as applied to the subject matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract as if it were written into it, and by its terms the contract is not to be performed if the subject matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.

The fundamental question in the present case is, What is the true interpretation of the contract? Was the house while in the process of erection to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest as the builder of a part of it? Was the defendant's undertaking to go on and build and deliver such a house as the contract called for even if he should be obliged repeatedly to begin anew on account of the destruction again and again of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building when nearly completed should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it; and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house on land of the plaintiff, towards the erection of which the plaintiff was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stone work, brick work, painting and plumbing were to be done by the plaintiff.

Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract. The fact that the house was not in existence when the contract was made is immaterial. *Howell v. Coupland, L. R. 1 Q. B. Div. 258.*

It seems very clear that after the building

was burned, and just before the day fixed for the completion of the contract, the defendant could not have compelled the plaintiff to do the grading, excavating, stone work, brick work, painting and plumbing for another house of the same kind. The plaintiff might have answered: "I do not desire to build another house which cannot be completed until long after the date at which I wished to use my house. My contract related to one house. Since that has been destroyed without my fault, I am under no further obligation." If the plaintiff could successfully have made this answer to a demand by the defendant that he should do his part towards the erection of a second building, then certainly the defendant can prevail on a similar answer in the present suit. In other words, looking at the contract from the plaintiff's position, it seems manifest that he did not agree to furnish the work and materials required of him by the specifications for more than one house, and if that was destroyed by inevitable accident just before its completion he was not bound to build another, or to do anything further under his contract. If the plaintiff was not obliged to make his contribution of work and materials towards the building of a second house, neither was the defendant. The agreement of each to complete the performance of the contract, after a building, the product of their joint contributions, had been partly erected, was on an implied condition that the building should continue in existence. Neither can recover anything of the other under the contract; for he has not performed the contract so that its stipulations can be availed of.

\*The case of *Cook v. McCabe*, 53 Wis. 250, was very similar in its facts to the one at bar, and identical with it in principle. There the court, in an elaborate opinion, after a full consideration of the authorities, held that the contractor could recover of the owner a *pro rata* share of the contract price for the work performed and the materials furnished before the fire. *Clark v. Franklin*, 7 Leigh, 1, is of similar purport.

What are the rights of the parties in regard to what has been done in part performance of a contract in which there is an implied condition that the subject to which the contract relates shall continue in existence, and where the contemplated work cannot be completed by reason of the destruction of the property without fault of either of the parties, is in dispute, upon the authorities. The decisions in England differ from those of Massachusetts and of most of the other States of this country. There the general rule, stated broadly, seems to be that the loss must remain where it first falls, and that neither of the parties can recover of the other for anything done under the contract. In England, on authority, and upon original grounds not very satisfactory to the judges of recent times, it is held that freight advanced for the transportation of goods subsequently lost by the perils of the sea cannot be recovered back. *Allison v. Bristol M. Ins. Co.* L. R. 1 App. Cas. 209, 226; *Byrnes v. Schiller*, L. R. 6 Exch. 319. In the United States and in continental Europe the rule is different. *Griggs v. Austin*, 8 Pick. 20, 22; *Brown v. Harris*, 12 L. R. A

2 Gray, 359. In England it is held that one who has partly performed a contract on property of another, which is destroyed without the fault of either party, can recover nothing, and on the other hand, that one who has advanced payments on account of labor and materials furnished under such circumstances cannot recover back the money. *Appleby v. Myers*, L. R. 2 C. P. 652; *Anglo-Egyptian Nav. Co. v. Renne*, L. R. 10 C. P. 271. One who has advanced money for the instruction of his son in a trade cannot recover it back if he who received it dies without giving the instruction. *Whincup v. Hughes*, L. R. 6 C. P. 78. But where one dies and leaves unperformed a contract which is entire, his administrator may recover any installments which were due on it before his death. *Stubbs v. Holywell R. Co.* L. R. 2 Exch. 811.

In this country where one is to make repairs on a house of another under a special contract, or is to furnish a part of the work and materials used in the erection of a house, and his contract becomes impossible of performance on account of the destruction of the house, the rule is uniform, so far as the authorities have come to our attention, that he may recover for what he has done or furnished.

In *Cleary v. Sohler*, 120 Mass. 210, the plaintiff made a contract to lath and plaster a certain building for 40 cents per square yard. The building was destroyed by fire, which was an unavoidable casualty. The plaintiff had lathed the building and put on the first coat of plaster, and would have put on the second coat, according to his contract, if the building had not been burned. He sued on an implied assumpsit for work done and materials found. It was agreed that if he was entitled to recover anything, the judgment should be for the price charged. It was held that he could recover. See also *Lord v. Wheeler*, 1 Gray, 232; *Wells v. Calnan*, 107 Mass. 514, 517. In *Cook v. McCabe*, *supra*, the plaintiff recovered *pro rata* under his contract,—that is, as we understand, he recovered on an implied assumpsit at the contract rate. In *Hollis v. Chapman*, 86 Tex. 1, and in *Clark v. Franklin*, 7 Leigh, 1, the recovery was a proportional part of the contract price. To the same effect are *Schwartz v. Saunders*, 46 Ill. 18; *Rawson v. Clark*, 70 Ill. 656, and *Clark v. Busse*, 52 Ill. 515. The same principle is applied to different facts in *Jones v. Judd*, 4 N. Y. 411, and in *Hargrave v. Cinroy*, 19 N. J. Eq. 281. If the owner in such a case has paid in advance he may recover back his money, or so much of it as was an overpayment. The principle seems to be that when, under an implied condition of the contract the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for it its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable.

Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure completely to perform it is a failure of the entire consideration, leaving each party, if there has been no breach nor fault on either side, to his implied assumpsit for what he has done.

The only question that remains in the present case is one of pleading. The defendant is entitled to be compensated at the contract price for all he did before the fire. The plaintiff is to be allowed for all his payments. If the payments are to be treated merely as advancements towards a single entire consideration, namely the completion of the whole work, the work not having been completed, they may be sued for in this action, and the defendant's only remedy is by a declaration in set off. If, on the other hand, each installment due was a separate consideration for the payment made at the time, then, as to those installments and the payments of them, the contract is completely executed, and the plaintiff can recover nothing, and the implied assumpsit in favor of the defendant can be only for the part which remains unpaid.

We are of opinion that the consideration which the defendant was to receive was an entire sum for the performance of the contract, and that the payments made were merely advances on account of it, and that, on his failure to perform the contract, there was a failure of consideration which gave the plaintiff a right to sue for money had and received, and that the like failure of consideration on the other side gave the defendant a right to sue on an implied assumpsit for work done and materials found.

The \$38 due from the defendant to the plaintiff cannot be recovered in this action. The report and the pleadings show that the suit was brought under an assignment for the benefit of the insurers, to recover damages for a breach of the contract for the erection of the building, and not to recover the value of the shingles or weights carried away from the ruins.

According to the terms of the report, the ruling being wrong, such order may be made as this court shall direct. A majority of the court are of opinion that the verdict should be set aside, and the defendant be given leave to file a declaration in set-off, if he is so advised, on such terms as the superior court deems reasonable.

*Verdict set aside.*

William RAND

Hattie F. HANSON, Admx., etc., of Sarah E. Hanson, Deceased, Appt.

(....Mass....)

**The presumption in favor of the validity**

**NOTE.**—*Judgment; constitutional provision as to full faith and credit.*

Under a very familiar constitutional clause, full faith and credit must be given to the judicial process of a sister State. Under legal interpretation this has been construed to mean such judicial determinations as have been rendered by a competent court having full jurisdiction of

of a judgment does not extend to a case of personal service on a defendant, who is a non-resident where the proof does not show whether or not the service was made within the State and the order of notice would be complied with as well by service out of as in the State.

(June 25, 1891.)

**A**PPPEAL by defendant from a judgment of the Superior Court for Essex County in favor of plaintiff in a case submitted to the court upon an agreed statement of facts for its opinion as to plaintiff's right to enforce a judgment recovered by him in the State of New Hampshire against defendant's intestate. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. I. E. Pearl for plaintiff.

Mr. W. H. Moody for defendant.

Knowlton, J., delivered the opinion of the court:

The judgment rendered against the defendant's intestate by the Supreme Court of New Hampshire was void for want of jurisdiction unless a proper process was served on her in that State. *Elliot v. McCormick*, 144 Mass. 10, 8 New Eng. Rep. 871; *Needham v. Thayer*, 147 Mass. 586; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 585; *Eaton v. Badger*, 83 N. H. 228.

There is a presumption in favor of the regularity of the proceedings of any court of general jurisdiction. *Bissell v. Wheelock*, 11 Cush. 277; *Stockwell v. McOracken*, 109 Mass. 84. But it is always a good defense against a suit brought on a judgment recovered in another State to show that the defendant was not a resident of that State and that no proper service was made on him there. The presumption in favor of the validity of a judgment does not extend to a case where it appears from the record that the defendant was a nonresident and it does not appear that service of process was made upon him within the State. *Downer v. Shaw*, 23 N. H. 277; *Morse v. Presby*, 25 N. H. 299.

In *Galpin v. Page*, 85 U. S. 18 Wall. 350, 21 L. ed. 959, it is said that "where the special powers conferred are exercised in a special manner not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the jurisdiction of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

The facts agreed by the parties and the facts disclosed by the record itself show that the court had no jurisdiction of the defendant's intestate when the order of notice was issued at the February Term in 1878. The record showing that there was no jurisdiction without a service of this order upon her in New Hampshire, the question arises whether the agreed statement shows that the order was served there, or whether there is any evidence in the case which, under the stipulation in the agreement that the

ceedings of the courts of a sister State. Under legal interpretation this has been construed to mean such judicial determinations as have been rendered by a competent court having full jurisdiction of

court may draw inferences of fact, would warrant the superior court in making a finding to that effect. Unless this question can be answered in the affirmative the judgment must be for the defendant. The order of notice directed a service either by publication, or by giving a copy in hand to the original defendant, or by leaving it at her last and usual place of abode. It did not require or contemplate a personal service in the State of New Hampshire, but treated a service by leaving a copy at her place of abode in Massachusetts, or by giv-

ing it in hand to her there, as of equal effect with a personal service within the jurisdiction of the court.

The fact that the order was served "either in New Hampshire or Massachusetts" has no tendency to prove that it was served in New Hampshire rather than in Massachusetts. The return of the officer that he gave the defendant a copy is entirely silent in regard to the place where the copy was put into the possession of the original defendant, and it has no affirmative force in favor of the proposition which

the subject matter or the thing without reference to whether they are superior courts of record or inferior tribunals. *Aldrich v. Kinney*, 4 Conn. 330; *Bissell v. Briggs*, 9 Mass. 433; *Taylor v. Barron*, 39 N. H. 78; *Silver Lake Bank v. Harding*, 5 Ohio, 545; *Pelton v. Platner*, 13 Ohio, 209.

Under this clause of the Constitution, if a decree is enforceable in the State where rendered, it is enforceable in any State (*Caldwell v. Carrington*, 84 U. S. 9 Pet. 83, 9 L. ed. 60); but it does not give validity to a void decree (*Ogden v. Saunders*, 25 U. S. 13 Wheat. 214, 6 L. ed. 603; *Vanuxem v. Haslehurst*, 4 N. J. L. 182); its object was to preclude judgment from being disregarded in other States when a proper tribunal having jurisdiction had rendered them. *People v. Dawell*, 23 Mich. 247.

This clause of the Federal Constitution is subordinate to one dominant principle, and but one, that is, the principle which requires the jurisdictional status of the court to be clearly shown. A court acting without jurisdiction spreads upon its records a mere nullity. *Virginia Public Works v. Columbia College*, 84 U. S. 17 Wall. 521, 21 L. ed. 637; *Watts v. Waddle*, 31 U. S. 6 Pet. 339, 8 L. ed. 437; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627-633, 24 L. ed. 858-861; *Davis v. Headley*, 23 N. J. Eq. 115-121; *Nelson v. Potter*, 50 N. J. L. 324.

#### *Presumption of validity.*

Superior courts are presumed to act by right, not by wrong, and their acts and judgments are consequently conclusive in themselves unless plainly beyond the jurisdiction of the tribunals where they emanate. This is an indirect affirmation of the principle contended for *i. e.*, that want of jurisdiction can be shown. *Peacock v. Bell*, 1 Sand. 78; *Grignon v. Astor*, 43 U. S. 2 How. 519, 11 L. ed. 233; *Briggs v. Clark*, 7 How. (Miss.) 457; *Pender v. Felts*, 3 Smedes & M. 535; *Venable v. McDonald*, 4 Dana, 339; *Huntington v. Charlotte*, 15 Vt. 45; *Wells v. Mason*, 5 Ill. 84; *State v. Kimbrough*, 3 Dev. L. 431; *State v. Seaborn*, 4 Dev. L. 305; *Wright v. Watson*, 11 Humph. 529; *Morgan v. Burnet*, 13 Ohio, 535; *Pennington v. Gibson*, 67 U. S. 16 How. 65, 14 L. ed. 347; *Hall v. Law*, 2 Watts & S. 135; *Foot v. Stevens*, 17 Wend. 435; *Alderson v. Bell*, 9 Cal. 321; *Cook v. Darling*, 13 Pick. 393; *Crane v. Brannan*, 3 Cal. 193.

#### *Right of court to inquire into jurisdictional facts.*

The tenacity with which courts assert their right to inquire into the jurisdictional facts accompanying a judgment is familiar law. Jurisdiction both over the person and over the subject is always open to inquiry. *Lawrence v. Jarvis*, 32 Ill. 304.

In the celebrated *Dred Scott* decision the court went to the extreme of holding that consent even could not confer jurisdiction (*Dred Scott v. Sandford*, 60 U. S. 19 How. 402, 15 L. ed. 700; *Grocers Nat. Bank v. Clark*, 31 How. Pr. 123); and where the statute prescribes the mode of acquiring jurisdiction, that mode must be complied with, or the judgment is a nullity. *Bloom v. Burdick*, 1 Hill, 130; *Stanton v. Ellis*, 19 N. Y. 575; *Miller v. Brinkerhoff*, 4 Denio, 130; *Kerr v. Kerr*, 41 N. Y. 372; *Winship v. Winship*, 16 N. J. Eq. 107.

13 L. R. A.

The attitude of the New York judiciary as to the question raised in the principal case is a faithful reflex of that obtained in other jurisdictions; and until 1813 the courts of that State held that the judgment of a sister State stood on the same footing as other foreign judgments. *Shumway v. Stillman*, 6 Wend. 447, and cases there cited.

But in *Mills v. Duryee*, 11 U. S. 7 Cranch, 481, 3 L. ed. 411, it was decided that a *nil debet* was not a good plea to such a judgment and that it had the same conclusiveness in every other State as in the State where it was rendered. Since that time, the decisions have been modified so as to conform to that case.

In *Shumway v. Stillman*, *supra*, Savage, J., says: "An examination of the cases results in the establishment of the following proposition: That the judgment of a court of general jurisdiction, in any State of the Union, is equally conclusive upon the parties in all the other States, as in the State in which it was rendered. This, however, is subject to qualification. If it appear, by the record, that the defendant was not served with process, and did not appear in person, or by attorney, such judgment is void."

*If there is no appearance in fact, there is no judgment; it is a nullity.*

Since that time, the courts have steadily adhered to this position. In *Bicknell v. Field*, 8 Paige, 445, 4 L. ed. 497, the chancellor said: "It is at least doubtful whether any court of this State has any right or power to inquire into the regularity of a judgment recovered in one of the superior courts of a sister State, after a personal service of the process upon the party against whom such judgment was obtained;" but due personal service is here made the controlling prerequisite. In both of the cases last above cited it affirmatively appears that jurisdiction is dependent upon the due service of process.

#### *Application of the constitutional provision to the case.*

The 14th Article of the Amendments of the Constitution of the United States provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

The Supreme Court of the United States has held in recent decisions that, under this provision, it is not competent for a state court to render a judgment *in personam* against a person who is not a resident of the State, who does not appear in the suit, and who is not served personally with process within the State. It is held that, where property of a nonresident defendant is found within the State, the state court may attach it on the writ, and may proceed to a judgment so far as to apply the property to the debt; but, if there is no appearance of the defendant, and no personal service on him, a judgment rendered against him personally is void, and has no effect beyond the property

must be established before the judgment can be treated as valid. Nothing is agreed upon outside of the record from which an inference of fact can be drawn in regard to the place where the service was made, and there is nothing in the record itself which furnishes a foundation for such an inference. If the order of notice called for a service within the State there might be a presumption of regularity in favor of the service although the language of the return was as consistent with a delivery of the copy in Massachusetts as in New Hampshire. But the order assumes that no personal

service within the jurisdiction is necessary to the judgment which is contemplated, and would be complied with as well by leaving a copy at the place of abode of the original defendant in Haverhill, or by delivering it to her in hand there, as by a personal service in New Hampshire.

We find nothing in the case to make the stipulation in the agreed statement that the court may draw inferences of fact of any importance. Upon the material point there is nothing but the question, what is the true legal construction of a record, which is always a question of

attached, and no suit can be maintained on such a judgment, either in the same or in any other court. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 373.

#### *Judgment deemed valid until set aside.*

Ordinarily, when it appears that proceedings have been regularly commenced before a court of competent jurisdiction, the principle applies, that however irregular or erroneous the proceedings may be, they are valid until they are reversed or set aside, on motion, if irregular, or on error or appeal, if erroneous. They are in no case to be regarded as nullities, nor to be impeached by plea or proof in any collateral proceeding. *Gorrill v. Whittier*, 3 N. H. 205; *Smith v. Knowlton*, 11 N. H. 191; *Wesson v. Chamberlain*, 3 N. Y. 331; *Embury v. Conner*, Id. 511; *Newman v. Cincinnati*, 18 Ohio, 323; *Smith v. Keen*, 26 Me. 411; *Callahan v. Griswold*, 9 Mo. 734; *Wight v. Warner*, 1 Dougl. (Mich.) 390; *Pierson v. Catlin*, 18 Vt. 77; *Cook v. Darling*, 18 Pick. 393; *Kittredge v. Emerson*, 15 N. H. 232.

This principle does not intend to exclude any inquiry relative to the jurisdiction of the court, since a judgment rendered by a court which has not jurisdiction is entirely void. *Gorrill v. Whittier*, *supra*; *Borden v. Fitch*, 15 Johns. 141; *Bissell v. Briggs*, 9 Mass. 464; *Barrett v. Crane*, 16 Vt. 246; *Westervelt v. Lewis*, 2 McLean, 611; *Swiggart v. Harber*, 5 Ill. 364; *Boynton v. Foster*, 7 Met. 415; *Bigelow v. Stearns*, 19 Johns. 39; *Smith v. Knowlton*, *supra*; *Latham v. Edgerton*, 9 Cow. 237; *Hill v. Robertson*, 1 Strobb. L. 1.

Any fact upon which the jurisdiction depends may be denied, unless, perhaps, in the case where the objection has been taken in the court whose jurisdiction is questioned, and it has been made the subject of an express decision of the court. *Shumway v. Stillman*, 4 Cow. 202; *Walker v. Moseley*, 5 Denio, 102; *Noyes v. Butler*, 6 Barb. 613; *Hickey v. Stewart*, 44 U. S. 3 How. 750, 11 L. ed. 814.

Any fact may be alleged or proved, which goes to take away the jurisdiction; for example, jurisdiction of the person is acquired by due service of the process prescribed by law, or by such notice as the law prescribes, and in the absence of such notice a judgment will be voidable. *Wort v. Finley*, 8 Blackf. 335; *Knos v. Smith*, 7 Smedes & M. 85; *Gilman v. Thompson*, 11 Vt. 643; *Clark v. Grayson*, 2 Ark. 149; *Ford v. Babcock*, 1 Denio, 158.

#### *The recent adjudications on this point.*

The pith and marrow of this discussion is admirably summarized by *Chief Justice Morton* in *Needham v. Thayer*, 147 Mass. 583, cited in the principal case. If the court has no jurisdiction its judgment has no force, either in the State in which it was rendered, or in any other State. This being so, the judgment cannot be enforced by a suit upon it, and the nonresident defendant cannot be deprived of his right to show by plea and proof, if such suit is brought, that the judgment is void, without an abridgement of his privileges and immunities, to protect which was the object of the 14th article of 12 L. R. A.

Amendment. To compel him to resort to our courts by a writ of error, in which he must file a bond if he would obtain a stay of the execution, is to impose a burden upon him, and thus to abridge his privileges and immunities. It has been held, in many cases, that a domestic judgment cannot be impeached by plea and proof in a suit brought upon it, because the proper remedy is a writ of error. *Hendrick v. Whittemore*, 105 Mass. 23, and cases cited. But while a State may make laws binding its own citizens, requiring them to resort to a writ of error, it cannot so bind citizens of other States.

The case of *Martin v. Kittredge*, 3 New Eng. Rep. 375, 144 Mass. 13, sustains many affinities with the one under review. The plaintiff prosecuted a writ of error to reverse a judgment rendered in the superior court, in favor of the defendant in error in an action brought by him upon a promissory note against the plaintiff in error. It appeared from the record that the defendant in that action was a resident in another State; that he was not served with process; that the only notice was by publication in a newspaper, and he did not appear; that one Rhodes was summoned as trustee, but did not appear and filed no answer; that the defendant and the trustee were defaulted, and judgment was entered against the defendant on his default. Upon this state of facts, as disclosed by the evidence, the judgment was reversed, the court holding that the principle underlying the law as decided in *Elliot v. McCormick*, 3 New Eng. Rep. 371, 144 Mass. 10, was decisive of the case.

#### *Extract from the opinion of Mr. Justice Field.*

As this topic seems enveloped in some obscurity, and as the adjudications upon the exact point in controversy are very rare at the expense of space and in the interest of perspicuity, we quote from the very recent decision of the United States Supreme Court in which *Mr. Justice Field* delivered the opinion: "The State has jurisdiction over property within its limits owned by nonresidents, and may therefore subject it to the payment of demands against them of its own citizens. It is only in virtue of its jurisdiction over the property that its tribunals can inquire into the nonresident's obligations to its own citizens; and the inquiry can then proceed only so far as may be necessary for the disposition of the property. If the nonresident possesses no property in the State, there is nothing upon which its tribunals can act." *Pennoyer v. Neff*, 95 U. S. 723, 24 L. ed. 569.

This doctrine is clearly stated in *Cooper v. Reynolds*, 77 U. S. 19 Wall. 303, 19 L. ed. 931, where it became necessary to declare the effect of a personal action against an absent party without the jurisdiction of the court, and not served with process or voluntarily appearing in the action, and whose property was attached, and sought to be subjected to the payment of the demand of the resident plaintiff.

For an extended review of the authorities, see *note* appended to the case of *Cumington v. Belcher-town* (Mass.) 4 L. R. A. 121.



law for the court. We therefore have no occasion to determine whether we should further approve the practice, which has sometimes been permitted, of presenting to the court certain agreed facts as a case stated, accompanied by a stipulation that the court may draw any proper inferences of fact, and then asking the full court to treat as a question of law apparent on the record the question whether the facts agreed will warrant an inference of fact that will support the judgment appealed from, on the assumption, without proof, that the court below drew the strongest inferences of fact possible in favor of the result reached. It is clear that such a statement is not like a special verdict, and is not a proper case stated, because it can never be known from the record whether the court below drew any inferences of fact or not. If it is desired to present to the full court the question of law whether the facts agreed will warrant a particular inference of fact, it can best

be done by an exception taken at the hearing. See *Mayhew v. Duffee*, 138 Mass. 584; *Old Colony R. Co. v. Wilder*, 187 Mass. 586; *Hecht v. Batcheller*, 147 Mass. 835, 839, 6 New Eng. Rep. 610; *Fitzsimmons v. Carroll*, 128 Mass. 401; *Charlton v. Donnell*, 100 Mass. 229; *Kee-gan v. Cox*, 116 Mass. 289; *West v. Platt*, 120 Mass. 421; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *Powers v. Provident Sav. Inst.* 122 Mass. 443; *Hovey v. Crane*, 10 Pick. 440; *Com. v. Cutter*, 18 Allen, 393.

In deciding the case on the ground that the plaintiff has failed to show that service was made in New Hampshire we do not intimate that the court there had jurisdiction, in the absence of a valid attachment of property, to issue a process requiring the defendant to answer in that State, or that the judgment would be good if service of the order had been made there.

*Judgment for the defendant.*

### OHIO SUPREME COURT.

COLUMBUS & HOCKING COAL & IRON CO., *Plff. in Err.*,  
v.

John H. TUCKER.

(48 Ohio St. —.)

\* **In an action brought by a riparian owner to recover of a mining company damages to his lands, and for polluting the water of a stream which runs through them, by depositing on its own lands coal slack, dirt, and refuse, in places from which the same had been washed down and onto the lands of plaintiff, the evidence showing substantial injury to have been produced thereby; that the deposits were made intentionally; and that such result might, at the time the deposits were made, have been anticipated by a person of ordinary intelligence and prudence,—a right to recover is established; and it is not a defense to show that the operation of the mines, and the deposit and disposal of the slack, etc., was conducted in the mode in general practice in the operation of similar coal mines in the surrounding mining districts, and that such deposits were made without malice, and upon the only feasible place or places the company could deposit the same, and carry on the business of mining coal.**

(January 12, 1891.)

\* Head note by the Court.

**NOTE.—***Damages for pollution of water of stream.*

If one carries on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages therefor. See note to *Bohan v. Port Jervis Gaslight Co.* (N. Y.) 9 L. R. A. 711.

Where the cause of action is the pollution of a watercourse by water from a coal mine, and where the injury was caused by a combination of mine water which flowed naturally from the mines, which was *damnum absque injuria*, and water pumped from the mines, if, as to the latter there would be a liability for injury inflicted, where the injury is estimated without distinguishing between these sources, the judgment will be reversed. Mer. 12 L. R. A.

**E**RROR to the Circuit Court for Hocking County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for injuries alleged to have resulted to plaintiff's land and for the pollution of the waters of a certain stream by reason of the deposit by defendant on its own land of slack, dirt and refuse from its coal mines. *Affirmed.*

**Statement by Spear, J.:**

For an understanding of the points decided, the following statement of facts will be found sufficient:

On April 24, 1886, John H. Tucker, defendant in error, commenced an action in the Court of Common Pleas of Hocking County against the Columbus & Hocking Coal & Iron Company, seeking to recover damages for injury to his lands by reason of the acts of the Company. Among other things, the petition alleged that the defendant is an Ohio corporation; that the plaintiff is the owner of a tract of land through which flows a stream called "Monday Creek," whose channel, prior to the wrongs complained of, had always been sufficient to hold and carry the water of the stream, except during unusual freshets. On the 1st day of March, 1883, and continuously thereafter, the defendant was and had been

cur. Ch. J., Gordon and Trunkey, JJ., dissenting. *Pennsylvania Coal Co. v. Sanderson*, 4 Cent. Rep. 475, 113 Pa. 126.

The right to mine coal is a right incident to the ownership of coal property; and, when exercised in the ordinary manner and with due care, the owner cannot be held liable in damages to a riparian owner for permitting the natural flow of mine water over his own land into the watercourse, the result being a mere personal injury, not affecting the community. *Ibid.*

Damages are recoverable for the pollution of water of a stream. See note to *Barton v. Union Cattle Co.* (Neb.) 7 L. R. A. 457.

Pollution of waters as a nuisance. See note to *Chapman v. Rochester* (N. Y.) 1 L. R. A. 296.

the owner and operator of large coal mines situated along Sugar Run, and its tributaries, which run empties into Monday Creek above and near plaintiff's lands. Since the above date defendant has continually and intentionally thrown and deposited, and knowingly permitted to remain, the coal dirt, coal slack and coal refuse from its mines, in large heaps upon the immediate banks of said run and its tributaries, in such manner and with the purpose that the same should, during rains and freshets, be washed into said streams, and carried away thereby. Said slack, dirt and refuse was, during the time mentioned, carried by Sugar Run and its tributaries into and along Monday Creek, filling up the channel thereof through plaintiff's farm, causing Monday Creek to overflow its banks, inundating plaintiff's lands, covering about seven acres thereof with slack and refuse, and rendering it valueless; also destroying a valuable spring, rendering about nine acres of the lands swampy and unhealthy, and befouling and poisoning the water in Monday Creek, thus rendering it unfit for stock. The defendant, by answer, denied that it deposited its slack and other refuse on the margin of Sugar Run, or in any other place, or permitted the same to remain on the bank of said stream, for the purpose of having it washed away by the stream. It denied specifically the allegations of damage to plaintiff by reason of the coal slack and other refuse. It averred that the mining at and operation of the mines, and the deposit and disposal of the slack and all refuse, was conducted in a prudent and careful manner, and in the mode in general practice in the operation of all similar coal mines in the Hocking Valley and the surrounding mining districts near thereto, without malice or negligence, but with due regard to plaintiff's legal rights; and the deposits were made upon its own lands, and upon the only feasible places it possibly could deposit the same, and carry on the business of mining coal. Plaintiff, for reply, denied that the deposits were made in a careful and prudent manner, and without negligence, and that the deposits were made in the only feasible places compatible with carrying on the business of mining coal. At the trial the defendant offered to prove "that the mines were properly located; that the operation of them was properly conducted; that the coal slack was deposited upon the land of the Company without malice or negligence, in the ordinary way in common usage in the mining regions of the Hocking Valley and its surroundings, and in the only possible and feasible way that the defendant could deposit the same." Objection to this was sustained, to which defendant excepted.

In varying forms of expression the defendant requested the court to charge the jury that the defendant was a corporation duly empowered by its charter to mine coal, and the power to mine coal carried with it the power to do all things made necessary by the natural conformation of the land, or whatever else is included in the reasonable and proper use of mining lands. So that, if the jury should find that the defendant has confined itself to the necessary means of the lawful enjoyment of its lands; that it deposited its coal slack from its mines on its

own lands, upon the only feasible place or places it could possibly deposit the same, taking into account the natural conformation of the land where the coal banks were located, and the slack was deposited in order to carry on its business of mining coal, and that the deposits were made without malice or negligence, and without intent to have it carried away by water,—then there can be no recovery. The court declined to charge as requested, but did charge, among other things, as follows: "The first principal question that will demand your attention is whether or not the defendant intentionally threw and deposited, and permitted to be thrown and deposited, the coal dirt, slack and refuse from its coal mines into Sugar Creek, or in the immediate vicinity of such creek, with the purpose and intention of having the same, by operation of rain falling upon it, wash into the said creek. This is averred in the petition, and denied in the answer; and before the plaintiff will be entitled to a verdict at your hands he must satisfy you, by preponderance or greater weight of the evidence, of the truth of such averment. If he shall fail to satisfy you of the truth of this averment, that will be an end of your labors, for in that event your verdict must be for the defendant, for, though the defendant says in its answer that it was guilty of no negligence or carelessness in the operation of its coal mines, and deposited its slack upon the only feasible place for its deposit, etc., and this is denied in the reply, yet the plaintiff can only recover because of the fact of his petition; and the only wrong conduct complained of in the petition is this intentional deposit of slack, etc., into the stream, or in such proximity thereto that it was intended it should wash in said creek; and it is for the consequence of this wrongful conduct upon the part of the defendant that the plaintiff may recover. . . . The question that you have to deal with is as to whether the defendant, during the time complained of in the petition, did the acts therein charged, and whether injuries resulted to the plaintiff's land therefrom. You will observe the defendant must have intentionally, during the time complained of in the petition,—March 1, 1888, to April 24, 1888, the date of filing the petition,—deposited this slack or refuse from its mines in this creek, or at some place that it would naturally and necessarily be carried into said creek, or it must have intentionally permitted the same to be done. And by 'permission' here is meant that, having the power and control over the operation of said mines, and knowing said slack and refuse was being so deposited, failed and neglected to prevent the same. Where the slack and refuse is not thrown or deposited directly in the creek, but at a place where it is claimed it will be washed into such stream, the defendant's intention must be gathered from the circumstances under which the same was deposited. One is presumed to have intended the natural consequence of his act purposely done; and if this slack or refuse was deposited at such a place by the defendant that it must naturally and necessarily be washed into the creek or stream, the intention that it would be so washed must be presumed. This is a practical question, and the defendant must be held to the exercise of care and caution in the deposit of its slack, to

avoid its being washed into the stream; and that is such care and caution that a man of ordinary prudence and intelligence, desirous of preventing such slack being washed into said stream, would exercise in making such deposits; and if it could not be deposited upon said land without its being necessarily washed in the stream, as must be apparent to any man of ordinary intelligence, then it was the duty of the defendant not to cause its deposit upon said land. Upon the other hand, the defendant cannot be held liable for any unusual result, or one that would not be anticipated by a man exercising ordinary intelligence, while depositing the slack upon his own land; and if injury resulted from such deposit to another, it must be held an accident for which the defendant is not responsible. So you will look into this testimony, and determine: Did the defendant deposit, or permit to be deposited, the slack and refuse from its coal mines in this stream, or did it deposit such slack and refuse at some place or places, whether upon its own land or elsewhere, from which it was its legal duty to know that such slack and refuse would be washed into the stream, and was such slack and refuse washed from thence into the stream? To which refusals, and to the charge as thus given, the defendant excepted.

A verdict having been given for the plaintiff, and judgment rendered thereon, error was prosecuted to the circuit court, where the judgment was affirmed. To reverse these judgments the present proceeding in error is prosecuted.

**Messrs. Seth Weldy, George K. Nash, F. W. Merrick and L. D. Vickers** for plaintiff in error:

**Messrs. Samuel H. Bright and Robert F. Price**, for defendant in error:

Section 6925, Rev. Stat., makes the acts and doings of the defendant below, as charged in the petition in the court of common pleas, criminal. Plaintiff has a right of action against the wrong-doer, in addition to the remedy the State has by indictment and punishment.

Chitty's Bl. bk. 4, pp. 4, 5; Cooley, Torts, pp. 7, 357; 1 Thomp. Neg. pp. 72, 76, and cases cited, p. 114; 1 Hilliard, Torts, p. 101; Bishop, Non-Contract Law, §§ 70, 71, and cases cited, §§ 132, 141; *Hayes v. Michigan Cent. R. Co.* 111 U. S. 228, 28 L. ed. 410.

Even if section 6925 has nothing to do with the case, still it was competent to call the attention of the jury to the Statute, because it "characterizes the acts" of the plaintiff in error.

*Meek v. Pennsylvania Co.* 38 Ohio St. 632.

The Statute of Ohio has said, these acts constitute a nuisance, and the common law says, for injuries arising from a nuisance the injured party shall have an action.

*Bepley v. State*, 4 Ind. 264; *Sangamon Dist. Co. v. Young*, 77 Ill. 197.

Upon the broad principles of the common law, the plaintiff below had a right of action, based upon well-recognized principles. *Sic utere tuo ut alienum non laedas*. Nuisance comprehends whatsoever unlawfully annoys or does damage to another in contravention of 12 L. R. A.

that great rule of right, so use your own as not to injure others, and damages may be recovered at law for the injury sustained.

Walker, Am. Law, pp. 573, 574; 3 Sutherland, Dam. p. 423; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392; *Woodyear v. Schaeffer*, 57 Md. 1, 40 Am. Rep. 419; *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. 302; *Canfield v. Andrews*, 54 Vt. 1; Bishop, Non-Contract Law, §§ 411, 412, note 2; *Robinson v. Black Diamond Coal Co.* 57 Cal. 412, 40 Am. Rep. 118; Addison, Torts, § 19, and cases cited; *Sanderson v. Pennsylvania Coal Co.* 86 Pa. 401, 27 Am. Rep. 711, cases cited; *Washburn v. Gilman*, 64 Me. 163, 18 Am. Rep. 246. See Cooley, Torts, pp. 556, 569, 588, 657.

A riparian owner has a right to the natural flow of water, not increased nor diminished in quantity, and unpolluted in quality, and for any infraction of this right at least nominal damages may be recovered.

1 Sutherland, Dam. p. 12; Addison, Torts, § 223; Cooley, Torts, p. 587, and notes; *Pennsylvania Coal Co. v. Sanderson*, *supra*. See *Crausford v. Rambo*, 4 West. Rep. 445, 44 Ohio St. 279; *Railroad Co. v. Carr*, 88 Ohio St. 448.

The act itself, being obviously dangerous to a neighbor, no matter how carefully executed, becomes *per se* a wrong, for which the perpetrator is liable.

Wood, Nuisance, pp. 125, 127, 185-188; Addison, Torts, § 1368, *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *Elton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147; *Hannem v. Pence*, 40 Minn. 127; 1 Thomp. Neg. pp. 72, 76, 96, 107, 108, 1232 *et seq.*; *Fletcher v. Rylands*, L. R. 1 Exch. 285; *Shipley v. Fifty Associates*, 101 Mass. 251, 106 Mass. 194.

**Spear, J.**, delivered the opinion of the court:

We are admonished that the case is one of great practical importance. In view of this consideration, the counsel favored the court with able and elaborate argument, and the oral argument has been supplemented by intelligent and exhaustive briefs, presenting the question in a very full and comprehensive manner. We agree that the case is an important one, and, recognizing this, the court has given to it full and patient consideration. We think, nevertheless, that the real issue is narrowed by the pleadings to a small compass, and may be determined by the application of simple and well-settled rules of law. By its answer, the Company denied that the deposits of slack and refuse were made or permitted with the purpose of having them washed down onto plaintiff's lands, and denied negligence; but did not deny that it made the deposits and permitted them to remain at the places in the petition charged, or that they were deposited in such manner as that they would be and were carried away by the streams. In the view of the trial court, therefore, there was practically but one question for the jury to pass upon in determining the liability of the Company in case damages were proved as the result of the defendant's acts, and plaintiff's own acts did not prevent a recovery, and that was whether or not, in making and continuing the deposits, the Com-

pany's managers knew, or ought, as reasonable men, to have known, that they would be washed down by the streams and thus injure the plaintiff. It is fundamental, we presume, that an owner of land has the right to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring landowner; and where the land is located along the margin of a stream he is, as a riparian owner, entitled, as an incident to his estate, to the natural flow of the water of the stream in its accustomed channel, undiminished in quantity and unimpaired in quality, except where his estate is servient to one which dominates it, and except as to injury which may be done to it by one in the performance of an act lawful in itself, and done in a manner which does not involve malice or negligence. Washb. Easem. 4th ed. p. 816; *Johnson v. Jordan*, 2 Met. 284.

This was the position of plaintiff as to his land on Monday Creek, and as to the waters of that stream. It is not claimed that the plaintiff's land is, in any legal sense, servient to that of the Coal Company. But, broadly stated, the claim of the Company is that, being a corporation authorized to mine coal in the State, and owning the lands upon and in which its mines are situate, and conducting a business which is of great importance to the public as tending to develop the natural resources of the country, it has the right to place its slack and refuse upon the surface of its own land at such points as is necessary for its convenience in the carrying on of its current and future mining operations; and that, if it makes such deposits carefully, without malice, but solely with a view to the reasonable and successful mining of its coal, this is no more than is warranted by the common usage of other coal companies and operators of the Hocking Valley and that section of the State, and is but a lawful and proper use of its own lands; and, although the slack and refuse so deposited in the ordinary course of things may, when placed there, be expected to wash down and finally reach the lands of the plaintiff, to his damage, yet it is *damnum absque injuria*, and there can be no recovery. Of course the right of the Coal Company, as a landowner, to the natural and full use of its soil is measured by the same rule as that applied to the like right of the plaintiff. But the right it insists upon is something different from the natural and ordinary use of the soil. While not an unusual one, perhaps, with those engaged in the same business in the locality, it is an exceptional rather than a common and ordinary one. It is not incidental to the use of the soil itself as such; indeed, is destructive of what is the most common use of the soil, viz., for agricultural purposes. Yet it is not necessarily an improper or unlawful use. Whether it is so or not depends upon the circumstances. The course of business is to take the coal in a body from the inside of the mines to the surface, there screen it, and dump the slack and refuse on i's own land, but in such places that, owing to the conformation of the ground, it may be carried down the tributaries, and into Monday Creek. If the Company may lawfully do this, even though the probable and natural effect, known to the Company's managers at the time, is that the deposits will wash down onto and injure

12 L. R. A.

the plaintiff's lands, or pollute the water of Monday Creek, then there can be no recovery, and the judgment below should be reversed.

That the Coal Company is a corporation can make no difference in the case. Its rights are just as great, and no greater, than those of a private person in the same business. That it is authorized by its charter to mine coal generally in the State cannot enlarge its rights in any particular locality. Even had its charter empowered it to establish a business and carry it on in a particular place, it cannot be presumed that the State has intended to authorize it to carry on the business in a manner destructive of the property rights of others without compensation. While the thing to be done may be lawful in a general way, there are and must be limitations upon the means by which it is to be done. Nor is it of consequence that the operation of the Company's mines tends to the development of the natural resources of the country. But few enterprises, the product of which is useful, fail to advance the general good. Along with many evils attending the working of this class of organizations, valuable services have been rendered to the public by them, and many comforts and necessities are afforded the people by them which the capital of single individuals would be inadequate to produce. At the same time they are not, in the eye of the law, public enterprises, but, on the contrary, are organized and maintained wholly and entirely for private gain; and so soon as gain ceases to follow their operation, just so soon do the operations themselves cease.

Equally immaterial, as we think, is the matter of custom among coal operators in the Hocking Valley and the surrounding mining districts near thereto of depositing slack and refuse on their own lands, when such custom is invoked to justify deposits so placed as to naturally allow them to wash down to the injury of lands lying below them. The rights of the plaintiff to the uninterrupted use of his land, and the unimpaired use of the water of Monday Creek, being secured to him by the common law, how is it possible that a custom can deprive him of them? Why should a usage, the effect of which, if recognized, is to permit one man to take from another his property rights without compensation, be sanctioned? If it be assumed that the custom is a general one, then it is a part of the common law itself; and there would be presented an instance of two rules of law, equally binding, and yet wholly inconsistent the one with the other. If it be claimed that the custom is a particular one, then we have the anomaly of a landowner's common-law right in his land taken from him by a usage of a particular trade, established by strangers, which it is not pretended he has ever been cognizant of, much less assented to. To have affected the plaintiff the custom must have been shown to be reasonable and certain, known to him, or to have been so general and well established that knowledge would be presumed, peaceably acquiesced in, and not unjust, oppressive, or in conflict with an established rule of public policy. The alleged custom possessed scarcely one of these attributes. Even though it had been common throughout the State, it would not avail. A

usage which is not according to law, though universal, cannot be set up to control the law. *Meyer v. Dresser*, 16 C. B. N. S. 646; *Stocser v. Whitman*, 6 Binn. 416; *Inglebright v. Hammond*, 19 Ohio, 837. Nor could the testimony offered avail the defendant on the question of negligence. Evidence of a particular custom is sometimes admitted to explain a contract, to ascertain the intention of the parties when it has not been fully expressed in the contract, to interpret the otherwise indeterminate intentions and acts of the parties, or to show that the mode in which a contract has been performed is the one customarily followed by others engaged in the same calling or trade; but, as a general proposition, one "charged with negligence will not be allowed to show that the act complained of was customary among those engaged in a similar occupation, or those placed under like circumstances, or owing similar duties. Such an offer is, in effect, to show, as an excuse for defendant's negligence, a custom of others to be equally negligent." *Deering*, Neg. § 9; *Cleveland v. New Jersey Steam-Boat Co.* 5 Hun, 523; *Judd v. Fargo*, 107 Mass. 264; *Hinckley v. Barnstable*, 109 Mass. 126; *Miller v. Pendleton*, 8 Gray, 547; *Basley v. New Haven & N. Co.* 107 Mass. 496; *Littleton v. Richardson*, 33 N. H. 59; *Sewall's Falls Bridge Co. v. Fisk*, 23 N. H. 171; *Crocker v. Schureman*, 7 Mo. App. 858.

That others engaged in like business have been accustomed to disregard the rights of their neighbors can furnish no justification to the defendant to do so.

The further claim of the Company that it had the right to make the deposits in the places complained of because it was necessary to the successful conduct of its own business to so place them, seems no less wanting in substance. The effect is to measure the rights of the plaintiff in his lands and in the waters of Monday Creek by the convenience or necessity of the Company's business. An owner of land in Ohio is not subject to any such narrow and arbitrary rule. If the injury complained of were merely a fanciful wrong, or produced simply personal discomfort, such as any dweller in a town is necessarily subjected to by reason of the operations of trade which may be there carried on, and which are actually necessary, not only for the enjoyment of property, but for the benefit of the inhabitants of the town and the public at large, there might be no real ground of complaint; but where the result of the acts of one on his own land is a direct and material injury to the property and property rights of another, a very different question arises, and, in such case, the maxim *sic utere tuo ut alienum non laedas* applies. Upon reason we think the proposition sound that, where no right by prescription exists to carry on a particular business in a particular manner at a particular place, and the natural and necessary result of the place selected and the manner adopted is to cause material injury to the property rights of another, it is not a sufficient defense to an action for damages to show that the locality where it is carried on is one generally in use by persons in such business, and the manner in which it is carried on is commonly adopted by others in such business, even though it appears that the use made of the land, while

not the common and ordinary use of land as such; is not an unnatural nor improper one in and of itself, nor even an unusual one; and the proposition will be found sustained by abundant authority.

From the scores of cases we are content to cite *Tipping v. St. Helen's Smelt. Co.*, 4 Best & S. 608, 615, 11 H. L. Cas. 642; *Barnford v. Turnley*, 3 Best & S. 62, 82. In the latter case defendant was the owner of land on which was clay well adapted to the making of brick. He dug the clay, moulded it, and proceeded to burn it on the land, to the damage of the plaintiff. The court held that an action for a nuisance would lie. Attention is specially called to the opinion of Bramwell, B. Attention is also called to *Shearman & Redfield on Negligence*, §§ 783, 784. "It is a general principle that any person who, without authority, diverts the whole or any part of the water of a stream from its natural course, or interferes with its natural current, is responsible absolutely, and without any question of negligence, to anyone who is entitled to have the water flow in its natural state." "Any use of the land near a stream, or of the water of a stream itself, which renders the water unwholesome, offensive or unfit for the purposes for which it is used, is unlawful; and any riparian owner who is damaged by such unlawful acts has an action for his damages against the author of the wrong." If this view of the law be correct, it is clear that the question as to the Company's liability, in case damages were proved as the result of the defendant's acts, and the plaintiff's own conduct did not prevent a recovery, was, as held by the trial court, merely a question whether or not, in making and continuing the deposits, the Company's managers knew, or ought to have known, as reasonable men, that the deposits would be washed down by the stream, and might injure the plaintiff. No obstacle was placed by the court to the making of proof by the Company touching this point. The offer of proof in regard to negligence did not embrace this idea, however, and was therefore too general to be of service to the jury. Besides this, it embraced propositions as to matters wholly immaterial, as heretofore shown. It was not error, therefore, to exclude the testimony. For like reasons there was not error in refusing to charge as requested. Some of the propositions embraced correct principles of law in the abstract, but were not, as stated, wholly applicable to the case made, and might have been misleading, inasmuch as they were in the line of the defendant's theory of the case, which, we think, was wrong. Nor was there error in the charge as given. The rule given the jury as to negligence was in strict consonance with the doctrine laid down by this court in *Crawford v. Rambo*, 44 Ohio St. 279, 4 West. Rep. 445. It is there held that "where a riparian owner constructs an embankment upon his own lands that occasions substantial injury to the lands of a neighbor upon the stream, and which might, at the time, have been anticipated by a man of ordinary prudence and intelligence, he is liable in damages for the injury as occasioned." The rule, we think, applies to the case at bar.

The case of *Rugner v. Cincinnati H. R. Co.*, 34 Ohio St. 96, is cited as sustaining the Com-

pany's claim. With due respect, we think it fails to do so. The question was whether, where a railroad company is authorized to propel its trains and operate its road by steam locomotives, an inference of negligence arises from the mere fact that an injury to adjoining property was caused by sparks emitted by such locomotives, which question the court answered in the negative. The railroad company was authorized by the State to construct its railroad and operate it by locomotives, and the only way by which it was possible for the locomotives to be driven was by the creation of steam by means of fire, and sparks would necessarily follow. It was not only the natural and common way, but the only practical way. Negligence must be shown; it will not be presumed. Hence, when the only fact present was that sparks had been emitted from the smoke-stack, which caused damage, the court would not infer that the fire was carelessly conducted, nor that the appliances of the railroad company were defective. But whether or not, at common law, the action could be maintained, there seems to be no question but that the acts charged against the defendant company, if done intentionally, constituted a nuisance punishable by the criminal statute, and that a right of action on the part of a person injured would follow. By the Act of April 15, 1857 (1 Swan & C. Stat. 880), "the obstructing or impeding, without legal authority, the passage of any navigable river, harbor or collection of water; or the corrupting or rendering unwholesome or impure any watercourse stream or water; or unlawfully diverting any such watercourse from its natural course or state, to the injury or prejudice of others,"—was declared a nuisance, made punishable by fine, and a right of action given to any person injured for civil damages. The Act of March 27, 1876 (73 Ohio Laws, 87), provided "that if any person or persons shall intentionally throw or deposit, or permit to be thrown or deposited, any coal dirt, coal slack, coal screenings, or coal, or other refuse from coal mines, into or upon any of the rivers, lakes, ponds, streams, or any place adjacent to the same, from which such coal dirt . . . will wash into any of the rivers, lakes, ponds or streams of this State, every such person or persons shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined," etc., "and shall moreover be liable to the party or parties injured in treble the amount of damages by him, her, or them sustained." This Act was codified the following year, and made part of the Penal Code (74 Ohio Laws, 364), under the head of "Nuisances," and is section 7 of that chapter. In this codification, which is now, in substance, section 6925 of the Revised Statutes, the provision for treble damages is omitted. It does not follow, however, that civil damages may not be recovered. The acts charged in this case against the

13 L. R. A.

Company came within the statutory definition of "nuisances." This legislation shows a legislative intent to give the injured party a civil action. But, aside from this, it is settled law, we presume, that for injuries arising from a nuisance the injured party may have an action. Judge Cooley, in his work on Torts (2d ed. p. 790), says: "It is sufficient to say of the authorities that they recognize the rule as a general one that, when the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy if the Statute gives none." See also cases cited, and *Cardington v. Fredericks*, 46 Ohio St. 442. If, therefore, the evidence showed that the Statute had been intentionally violated, a statutory nuisance was shown to have been committed, and those engaged in producing it would be liable. Let it be assumed that the Company, on account of its artificial character, could not be indicted and punished, yet the persons in its employ who did the acts could be held both criminally and civilly; and, whenever the acts of an employé are such as to make him liable personally, the employer, whether a natural person or a corporation, may be held civilly where it is shown that the acts of the employé were performed in the line of his duty. So that, in this case, if the acts done would have rendered the employé amenable to the criminal statute, no rule of law forbids the reaching beyond them, and visiting responsibility in civil damages upon the corporation itself. Its liability will be measured by the same rules of law which determine the liability of the employé. Applying this test, we suppose the rule to be well settled that persons of intelligence are presumed to have intended the natural consequence of their deliberate acts. If, therefore, the natural result of placing slack and refuse in the stream, or on the margin or bank, is that they will be washed down by heavy rains onto the lands of plaintiff, and this would be apparent to the ordinary observer, it is but just to assume, in the absence of a contrary showing, that the expectation was that it should so wash; and this state of facts would show that the Company exercised its right negligently. But if such washing was not a natural consequence, and would not have been anticipated as a natural result by persons of usual intelligence in the exercise of ordinary care, no intent would be presumed, nor negligence imputed; and, if damage ensued to persons having property on the streams below, by the washing of slack, etc., no liability would attach to those who made the deposits. And, in substance, the foregoing was given by the trial judge to the jury. The charge upon other questions presented is an accurate statement of the law of the case. An examination of the record fails to show any error therein.

*Judgment affirmed.*

## IOWA SUPREME COURT.

Oliver BROWN, Appt.,  
v.  
W. A. CUNNINGHAM.

(...Iowa...)

1. A ruling on a demurrer does not bind the court to follow it in deciding whether or not the facts proved as alleged in the petition demurred to entitle the plaintiff to recover.
2. The breach of an injunction bond requires the question of a right to recover at least nominal damages thereon to be submitted to the jury.
3. Ice on a non-navigable stream which was meandered in the government survey and the ice of which has never been transferred by the United States may be cut and property thereon acquired by any person who can get access to it without trespassing upon the lands of riparian owners.
4. The same rights exist in ice upon a stream that exist in the waters of a stream.

(May 31, 1891.)

**A**PPEAL by plaintiff from a judgment of the District Court for Jones County in favor of defendant in an action upon an injunction bond. *Reversed.*

The facts are stated in the opinion.

*Meers, Shearn & McCarn, C. M. Brown and E. Keeler, for appellant:*

The overruling of the demurrer should have settled the law of the case in favor of plaintiff.

*Allen v. Platt*, 79 Iowa, 118; *Frentress v. Mobley*, 10 Iowa, 450.

The plaintiff in the injunction suit had no right to the ice in the river. The title to the

bed of the stream remained in the government. *Serrin v. Grigs*, 87 Iowa, 196; *Wood v. Chicago, R. I. & P. R. Co.* 60 Iowa, 456.

Ice already formed is to be regarded as personal property whether in or out of water when sold.

*Higgins v. Kusterer*, 41 Mich. 318, 83 Am. Rep. 160, and *note*, 164.

The right of cutting and taking ice, either for use or for sale, in the public waters of the Commonwealth, is a public right, which may be exercised by any citizen who can obtain access to the pond without trespassing upon the lands of other persons, and who does not by the exercise of this right unreasonably interfere with its similar exercise by others.

*Paine v. Woods*, 108 Mass. 160.

Plaintiff and Atkinson had the right in common with others to go upon the river and cut and remove ice therefrom, and were entitled to protection in the lawful exercise of this right, which was similar to that of the public to take fish from navigable waters, to take sea-weed cut upon the shore between high and low water mark, and others of a like character.

See *Mather v. Chapman*, 40 Conn. 382, 18 Am. Rep. 46; *People's Ice Company v. Steamer Excelsior*, 44 Mich. 239, 38 Am. Rep. 246, 255, *note*, citing *Bowell v. Doyle*, 131 Mass. 474; *Gage v. Steinkrauss*, *Id.* 232. See also *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116; *Packard v. Ryder*, 4 New Eng. Rep. 245, 144 Mass. 440, 59 Am. Rep. 101; *Woodman v. Pitman*, 4 New Eng. Rep. 699, 79 Me. 456, 1 Am. St. Rep. 342; 2 Bl. Com. 14; 2 Kent, Com. 348.

In those States where navigable rivers are held to be public property, the riparian pro-

**NOTE.—Common right to use of ice on river.**

The right of traveling upon the ice of a river, and the right of cutting and taking the ice, are natural and common rights. *Woodman v. Pitman* 4 New Eng. Rep. 699, 79 Me. 456; *State v. Wilson*, 43 Me. 25; *Brastow v. Rockport Ice Co.* 77 Me. 100.

The privilege of gathering ice upon waters which are public property is a common right, as from the great ponds in Massachusetts. *Gould, Waters*, § 191, citing *Hittinger v. Eames*, 121 Mass. 539; *Poore, Charters and Constitutions*, pt. 1, p. 321; *Cummings v. Barrett*, 10 Cuah. 136; *West Roxbury v. Stoddard*, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 160; *Com. v. Vincent*, 108 Mass. 441; *Fay v. Salem & D. Aqueduct Co.* 111 Mass. 27; *Gage v. Steinkrauss*, 131 Mass. 232; *Tudor v. Cambridge Water Works*, 1 Allen, 164.

So the owners of lands bordering on navigable streams in those States where they are held to be public property have no title to the ice which forms in such streams; the ice belongs to the first appropriator. *Wood v. Fowler*, 26 Kan. 683; *Hickey v. Hazard*, 3 Mo. App. 430.

An appropriation of ice on these streams is made by surveying, marking and staking off the ice unappropriated by others. See *Wood v. Fowler* and *Hickey v. Hazard*, *supra*.

**Right to take ice.**

The right to take ice results from and grows out of the title to the bed of the stream, and such right to the use of the water as results therefrom. This 12 L. R. A.

right is well settled by authority, as well as by principle. *Gould, Waters*, § 191; *Ham v. Salem*, 100 Mass. 350; *Paine v. Woods*, 108 Mass. 172.

The owner of land flowed by a millpond may cut ice therefrom for market, provided it does not appreciably diminish the head of water at the lower dam. *Searle v. Gardner (Pa.)* 12 Cent. Rep. 430; *Cummings v. Barrett*, 10 Cuah. 136.

When the State appropriates the fee of the land for construction of canals the former owner has no right to take the ice therefrom. *Indianapolis Water Works Co. v. Burkhardt*, 41 Ind. 364; *Cromie v. Wabash & E. Canal Trustees*, 71 Ind. 208; *Carr v. McCaleb*, 69 Ill. 314, cited in *Gould, Waters*, § 191.

A lessee with the exclusive right to cut and carry away ice from a pond may sue a stranger for cutting the ice. *Richards v. Gaufrét*, 5 New Eng. Rep. 396, 145 Mass. 436.

He can also sue lessor if he interferes with his rights. *Idid.*

**Riparian owner; right to ice.**

Uncut ice is an accession or increment to the land. *Washington Ice Co. v. Shortall*, 101 Ill. 54. See also *Bigelow v. Shaw*, 8 West. Rep. 733, 65 Mich. 341; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 463; *State v. Pottmeyer*, 38 Ind. 402; *Lorman v. Benson*, 3 Mich. 18; *Brown v. Bowen*, 30 N. Y. 519.

Riparian ownership of the bed of the stream will carry with it the right to the ice forming upon the surface of such stream, as far as the riparian right to the soil extends. *Bigelow v. Shaw*, *supra*.

The riparian owner on an unnavigable stream 12

prietor has no title to the ice forming in such streams as an incident to his ownership of the bank, but the ice belongs to the first appropriator, such appropriation being effected by marking, surveying and staking off the ice, and these acts give sufficient possession to support trespass.

*Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Hickey v. Hazard*, 8 Mo. App. 430.

*Mr. J. W. Jamison*, for appellee:

The case of *Allen v. Pratt*, 79 Iowa, 118, relied upon by appellant in support of his position, is grounded wholly upon a question of pleading under the Code.

See § 2650.

The rule of pleading is too well settled to admit of controversy. That a party waives any objection he might have to the overruling of his demurrer to the pleading of the adverse party by pleading over has been repeatedly held by this court in numerous cases, and the case of *Allen v. Pratt*, *supra*, is to the same effect. No new principle is announced in the case, nor does the opinion enlarge the office of a demurrer. No case can be found where this court has held that the party whose pleading has been assailed by a demurrer, and a favorable ruling had in favor of the pleading, can thereby insist that such ruling is an adjudication of the law of the case estopping both the court and the party upon an issue joined by pleading over.

See *Games v. Robb*, 8 Iowa, 193; *Lyon v. O'Kell*, 14 Iowa, 238; *Smith v. Henry County*, 15 Iowa, 365; *Frasman v. Hart*, 61 Iowa, 525.

One acquires no right of property in ice formed in the public waters simply by going upon the river and staking it out or preparing it for removal by cutting.

*Serrin v. Grafe*, 67 Iowa, 197; *Wood v. Fowler*, 26 Kan. 682; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 324.

All rights to the land between high and low

water mark, except that of absolute title subject to the public right of navigation, belong to the riparian owner.

*St. Paul & Pac. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 287, 19 L. ed. 78; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 934.

Plaintiff could acquire no right of property to the ice by merely going upon the river and staking it out or cutting it. The only right he could maintain as against another was the right to the ice actually appropriated.

*Turley v. Tucker*, 6 Mo. 583; *Murphy v. Sioux City & P. R. Co.* 55 Iowa, 475; *Hungerford v. Redford*, 29 Wis. 845; *Lewis v. Chicago, M. & St. P. R. Co.* 57 Iowa, 130; *Welch v. Jenks*, 58 Iowa, 696.

**Beck, Ch. J.**, delivered the opinion of the court:

1. The plaintiff and another were engaged in cutting and putting up ice obtained in the Wapepicon River,—not a navigable stream, but meandered in the government surveys of the public lands, and therefore its bed was never disposed of by the government by sales of the adjacent lands. It does not appear that the government ever transferred in any manner the bed of the river. The plaintiff and his business associate, not being the riparian owners, entered upon the river, and cut and put in an icehouse a large quantity of ice, and cut and made preparations for moving other ice to their icehouse. It is not claimed or shown that they were trespassers upon the lands of the riparian owners, or that they did not rightfully and lawfully obtain access to the river. The defendant in this suit brought an action to enjoin plaintiff and his associate from gathering the ice, on the ground that he was the owner of the ice. This claim of ownership, we gather from the abstract and arguments, was based upon the fact that he was the ripa-

the owner of the ice formed upon the water, though the icefield is made by fowage caused by a milldam of a riparian owner below; and the latter, maliciously and unnecessarily drawing the water from the pond, and thus destroying the ice privilege, is liable in damages to the former. *Stevens v. Kelley*, 3 New Eng. Rep. 230, 73 Me. 445.

The owner of land bordering upon a flowing stream may detain a reasonable portion until it freezes, and cut and sell the ice. But he cannot interfere with the beneficial enjoyment of the water by owners below him. *Myer v. Whitaker*, 5 Abb. N. C. 176; *Stevens v. Kelley*, *supra*.

The grantee of lands under navigable water in front of his uplands cannot restrain the grantee of similar adjoining lands under water from erecting thereon dykes which will prevent him from towing ice cakes across them to his own premises; nor can he question the legality of such structure. *Knick-erbocker Ice Co. v. Shultz*, 116 N. Y. 382.

#### *Title to ice formed on private waters.*

The title to ice is the same as the title to the water before it is congealed. *Elliot v. Fitchburg R. Co.* 10 Cush. 191.

Ice forming on a navigable fresh-water stream, the bed of which belongs to the riparian proprietors, is their property. *Washington Ice Co. v. Shortall*, 101 Ill. 46.

Ice forming on private fresh-water streams and ponds belongs exclusively to the riparian proprietors, who may prevent its removal by others without license. *Mill River Woolen Mfg. Co. v. Smith*, 19 L. R. A.

34 Conn. 462; *Edgerton v. Huff*, 26 Ind. 35; *State v. Pottmeyer*, 30 Ind. 387, 68 Ind. 402; *Bates v. State*, 31 Ind. 72; *Lorman v. Benson*, 8 Mich. 18.

The owner of an artificial mill-pond is entitled, as against the riparian owners, to have the ice which forms thereon remain if its removal will appreciably diminish the head of water at his dam. *Seeley v. Brush*, 35 Conn. 419; *Myer v. Whitaker*, 55 How. Pr. 376; *Marshall v. Peters*, 19 How. Pr. 213.

A grant of the right to flow land by damming a stream gives to the grantee the exclusive right to gather the ice which forms on the pond so made. *Myer v. Whitaker*, 5 Abb. N. C. 173, criticised in *Dodge v. Berry*, 26 Hun, 245, 25 Alb. L. J. 303.

A license to take ice from a pond does not pass title to the ice until it is executed, and then only to the extent to which it is executed or enjoyed. *Balcom v. McQuestion*, 65 N. H. 81.

#### *Damages for trespass on rights.*

Damages are recoverable for the wanton destruction of ice while in process of formation. *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229.

The measure of damages for a wrongful taking of ice from another's waters is the value of the ice when converted and ready for removal and sale. *Washington Ice Co. v. Shortall*, 101 Ill. 46, 25 Alb. L. J. 106.

#### *Parol sale of ice.*

Ice upon a pond or stream is of such an ephemeral nature that like personal property it may be sold by parol. *Higgins v. Kusterer*, 41 Mich. 322.



riar owner, and his rights as such extended to and covered the ice in the stream. The cause was tried on the merits, and a decree entered dismissing the petition and dissolving the injunction. Plaintiff herein has acquired all rights in the subject of litigation held by his associate. The defendant herein demurred to plaintiff's petition on the ground that the facts stated do not entitle plaintiff to relief; that the petition fails to show that the plaintiff had any special right to cut the ice other than what is possessed by the public generally, or that he owned the land adjacent to the river at the locality where the ice was cut, and that he acquired no right to the ice by cutting the same. The demurrer was overruled, defendant excepting; but he afterwards pleaded over by answer denying the allegations of the petition. The cause was submitted upon the evidence of plaintiff establishing the facts as we have stated them. Thereupon the court instructed the jury to return a verdict for defendant, holding that upon the undisputed facts plaintiff could not recover.

2. Counsel for plaintiff think that, as defendant did not stand upon his demurrer, the decision thereon was conclusive in this case, and that the district court erred in not holding that the facts proved, which conformed to the allegations of the petition, entitled plaintiff to recover; that a contrary holding conflicts with the decision on the demurrer, which should be regarded as the law of the case. We think that a court is not bound by a prior decision in a case where no rights have been acquired under it, and may change, modify or overrule it if convinced of its error. Decisions are not to be regarded as unalterable without regard to their correctness. However desirable it may be to have consistency in the decisions of a court in the same case, it is better that the court correct its errors, if in its judgment any have occurred. In this case we shall presume the court below declined to follow the ruling on the demurrer. That ruling will not be regarded as conclusive. *Jenkins v. Shields*, 86 Iowa, 526; *Standish v. Dow*, 21 Iowa, 368; *Norton v. Knapp*, 64 Iowa, 112. This rule is applicable when different judges make successive rulings in a case. The last judge making a ruling ought not to be bound by a prior ruling of another judge when he would not be bound by the prior ruling had he made it himself. It is here that courtesy would appear to require the second judge to conform his views to those of the first. But justice may demand quite the contrary, and its demands must overcome the requirements of courtesy.

3. If the facts alleged in the petition do not entitle plaintiff to recover, the defendant may demur (Code, § 2648, par. 5), or move in arrest of judgment (Code, § 2650; *Smith v. Burlington, C. R. & N. R. Co.* 59 Iowa, 75; *Edgerly v. Farmers Ins. Co.* 43 Iowa, 587); and when the allegations of the petition are supported by proof, but do not constitute a cause of action, it is competent for the court to instruct the jury that plaintiff cannot recover. *Seaton v. Hinnehan*, 50 Iowa, 895.

We are advised of no rule prevailing in this State which will authorize a judgment on petition and proof which shows no legal liability on the ground that a demurrer to the petition

was overruled, and defendant answered over, denying the allegations of the petition. This is the point presented in the case.

4. We are to determine whether, upon the facts we have recited, defendant is liable upon the injunction bond. It very clearly appears that, as there was a breach of the bond which is not disputed, plaintiff is entitled to at least nominal damages, though he suffered no special injury from being deprived of the ice, for the reason that he had no right to it. The question of plaintiff's right to recover at least nominal damages should have been submitted to the jury.

5. But in our opinion, upon the facts of the case above recited, plaintiff did have a right to and property in the ice he had prepared to remove, and a property right to obtain ice out of the stream pursuant to the plan upon which he was working. The river, while not navigable, was meandered in the government survey. The bed of the stream—the land—never passed out of the proprietorship of the United States government, and the riparian owners had no right or interest therein, and therefore had no exclusive rights to the ice found upon the stream. In support of this position, see *Serrin v. Grefe*, 67 Iowa, 197.

6. The United States retains the title to the bed of the stream, which it holds, not for disposition nor for use in any way that will interfere with the rights of the riparian owners and the public to the water of the stream and its uses for all proper purposes. It cannot be claimed that the government can prevent riparian owners from using the water to evolve power for mechanical purposes, for domestic use, for supplying towns and cities, and for all the purposes for which water may be lawfully used. Of course, such use must be so limited and restricted that the rights of riparian owners and of all others holding rights to the water shall not be interfered with. It cannot be thought the government has the power or authority to divert the stream, dry up the water, or so contaminate it that it could not be used for proper purposes. The government has no more property in the water than a riparian owner or the public. The beneficent Creator opened the fountains which filled the stream for the benefit of His creatures, and has bestowed no power upon man or governments created by man to defeat His beneficence. Of course, the use of the water may be regulated by the State, but the State may not forbid its use to the people. As streams of water begin *ex jure natura*, they are subject, as to course and use, only to Nature's laws. The maxim of the common law intended to protect all people in the enjoyment of Nature's watercourses, namely, "*aqua currit et debet currere ut currere solebat*," is as obligatory upon the government as upon the citizen. Under this maxim there can be no restriction upon the use and enjoyment of water when flowing in Nature's stream. Whoever has lawful access to the stream flowing over a bed owned by the government, and held in trust for the benefit of the people, may use the water as regulated by law. In the case before us it is not shown nor claimed that plaintiff did not have lawful right to go upon the stream. It is plain that the same rights to the ice exist which may be held to the water, for

the ice is water in another form,—is congealed water. Its uses for comfort, luxury and health are known and demanded everywhere. It cannot be doubted that, in accord with the views we have expressed, any citizen who may lawfully go upon the stream may gather ice from it under the regulations prescribed by law. He is entitled to the ice he prepares by his labor to be removed. It is plain that if he cuts ice for transportation to his ice-house, another cannot rob him of his labors by carrying away his ice; and it is plain that when he makes preparations to use the ice upon a certain part of the stream, prepares its surface for cutting, erects machinery to handle the ice, makes walks or ways for workmen, or in any other proper manner indicates the part of the stream which he occupies in his operations, which must be reasonable in extent and in all other respects, he has a property right to the occupation of such locality during the ice season, and to the ice formed there. When men are thrown together without government or established rules to regulate their possessions and use of the land they occupy, they tacitly assent to just such rules as follow from the doctrines we have announced. This has been done by settlers and miners in every Territory of the Union, as well as in every land where the ideas of civilized justice, and especially the Anglo-Saxon ideas of the protection of individual property, prevail. Shall not the courts, where there is established government, recognize, protect and enforce rights which are instinctively recognized by our people? Indeed, courts are established to enforce and protect all rights held by men not surrendered to the State, thereby promoting order and peace of the State. In support of these views we cite the following authorities: *Woodman v.*

*Pitman*, 79 Me. 456, 4 New Eng. Rep. 699; *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 226, 38 Am. Rep. 246, and notes; *West Roxbury v. Stoddard*, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 160; *Angell, Watercourses*, §§ 74, 93, 185, 536, and notes to each section; *Hickey v. Hazard*, 3 Mo. App. 480; *Wood v. Fowler*, 26 Kan. 682; *Brastors v. Rockport Ice Co.* 77 Me. 100; *Gage v. Steinkrause*, 181 Mass. 222; *Roswell v. Doyle*, Id. 474; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435, and notes; *Brooklyn v. Smith*, 104 Ill. 429; *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 184; *Higgins v. Kusterer*, 41 Mich. 318. See 27 Am. L. Reg. p. 240, for notes to the case of *Woodman v. Pitman*, *supra*, citing some other cases.

7. This case is distinguishable from *Murphy v. Sioux City & P. R. Co.*, 55 Iowa, 478, and *Turley v. Tucker*, 6 Mo. 583, and other cases cited upon the same point by counsel, by its facts. In these cases it was held that trespassers upon land,—government or private,—who cut grass or timber for removal, acquired no property therein. The grass and timber are a part of the realty, and are permanent, and not subject, as water, to movement and change. The owner of the land owns the grass and trees. But the owner of the land over which a stream flows does not own the water so as to appropriate it to his own exclusive use and stop its flow. He may lawfully enjoy it while it is flowing over his land. When it enters the land of another he loses all interest in it. The cases cited above are not applicable to the facts of the case before us. These considerations lead us to the conclusion that the court below erred in withdrawing the case from the jury, and directing a verdict for defendant.

*Reversed.*

## MARYLAND COURT OF APPEALS.

Richard D. FISHER *et al.*, *Appts.*,

*v.*

Hiram G. DUDLEY *et al.*, Supervisors of Election.

(....Md....)

**A candidate nominated independently** by the requisite number of voters under Code Gen. Laws, § 131, who has also been nominated by a party convention, is entitled by implication to another place on the official ballot in addition to that in the group of candidates of the political party which has nominated him in convention.

(June 16, 1891.)

**APPEAL** by petitioners from an order of the Baltimore City Court denying their application for a writ of mandamus to compel defendants to place the name of a candidate for office nominated by them upon the official ticket in a different place than that assigned to him as a nominee of the Republican party. *Reversed.*

**NOTE.**—For decisions as to the proper form of ballots under the recent Election Laws, see *note to Talcott v. Philbrick* (Conn.) 10 L. R. A. 150 12 L. R. A.

The facts are stated in the opinion.

Argued before Alvey, *Ch. J.*, and Irving, Robinson, Bryan, Briscoe, Miller, McSherry and Fowler, *JJ.*

*Messrs. Joseph Packard, Jr., Charles J. Bonaparte and John C. Rose* for appellants.

*Messrs. William S. Bryan, Jr., and Peter J. Campbell* for appellees.

*Irving, J.*, delivered the opinion of the court:

By section 128 of article 38 of the Code of Public General Laws, as enacted by chapter 588, page 615, of the Acts of the General Assembly of 1890, all ballots to be used and cast at any election in the State are to be printed and furnished at public expense; and upon those ballots are to be printed the names of the several candidates, according to directions given in succeeding sections enacted by the same Act; and the refusal of the board of supervisors of Baltimore City to place the name of Edward Stabler, Jr., as a candidate for the first branch of the City Council of Baltimore City as an independent candidate in a separate place and column other than the column containing

the names of candidates of the Republican party has given rise to this proceeding. The appellants filed their petition in the Baltimore City Court, representing that Edward Stabler, Jr., had been nominated by more than 200 citizens, including the petitioners, all of whom are registered voters, as an independent candidate for the first branch of the city council of Baltimore City; that they are not Republicans, and that they have not nominated Mr. Stabler because he is a Republican, but wholly irrespective of the question of political association; and that they have requested that the name of Mr. Stabler should be put upon the ballot in a different place from the column containing the nominations of the Republican party, which party had also nominated Mr. Stabler as a candidate for the same place, as the petitioners and others had done, by a paper containing more than 200 names; but that the Supervisors of Election had refused to comply with their request, and would not put Mr. Stabler's name anywhere but in the Republican group and under the Republican emblem; wherefore the appellants ask for a mandamus upon the Supervisors of Election, compelling them to print the name of Mr. Stabler on the official ballots in the independent group of candidates for the place already mentioned. The appellees answered, denying the right of petitioners to have Mr. Stabler's name printed elsewhere on the ballot than in the Republican group. The court agreed with the appellees, and overruled the petitioners' demurrer to the defendants' answer, and refused the mandamus; hence this appeal, which raises the following questions under the new Election Law: (1) If two or more political parties, or bodies of citizens, calling themselves by a party name, nominate, either by conventions, primary elections or nomination papers, the same man as a candidate for the same office, has each of the parties who nominated him the right to have his name printed on the official ballots under the name of such party and its emblem, if it has selected one? (2) If the same man is nominated by a political party, and by a nomination paper, in which no party name is set forth, have the persons signing the nomination papers the right to have the name of their candidate printed on the official ballot in another place than under the party name and emblem of the political party by which such candidate was then nominated? The questions thus raised depend upon the proper construction of section 181 of article 33, as enacted, by the Act of 1890, chapter 583, page 615, already mentioned, in conjunction with sections 129 and 180. Section 129 provides that any convention, as hereinafter defined, held for the purpose of making nominations to public office, and also registered voters to the number hereinafter specified, may nominate candidates for public offices to be filled by election within the State or any parts thereof. A "convention" is then defined, and it is also declared in that section that nominations may then be made by means of primary elections without the intervention of any convention. A convention under this section must represent an organized body which polled at the late general election at least 1 per cent of the entire vote cast in the State, county, ward, or other division for which the nomination is made.

12 L. R. A.

Section 180 provides how a nomination by a convention or by a primary election shall be certified and for the addition of a party emblem, and what that may be. Section 181 says: "A candidate for public office may be nominated otherwise than by a convention or primary election in the manner following: A nomination paper containing the name of the candidate nominated, his residence, and the office for which he is nominated, shall be signed by registered voters" residing within the political division for which he is nominated; and, stating the number of signatures necessary for various offices, it names not less than 200 names as necessary where the candidate seeks the office which Mr. Stabler does. This nomination paper must be verified by affidavit before a justice of the peace that the signers are registered voters of the district or precinct in which they respectively state they reside. In this case the petitioners' paper nomination was so verified, and was so stated to be in their petition. The appellees contend that the application of the appellants was unreasonable, and asked that which the law did not provide for, and which, in their judgment, might lead to great inconvenience, and result in a candidate's name being indefinitely repeated in sundry columns, which they contend might greatly enlarge the size of the ballots to be used for voting. They insist that the law does not in express terms entitle a party nominated independently, who may also have been nominated by a political party, to appear but once on the ballot, and that place they decided in this case should be under the party name and emblem. They also say that there is no reasonable implication of such right. A majority of this court, however, is of opinion that a reasonable construction of the law does, by implication, entitle such candidate, when nominated independently by the requisite number of voters, to a place on the ticket in a place other than in the group of candidates of the political party which may also have nominated him. The law does not design to make a party nomination and emblem superior in weight or respectability to the nomination of a number of citizens who disregarded party, and not desiring to be considered partisans, have selected a man as their candidate for office wholly for his worth, and entirely irrespective of his party affiliation. Desiring to rise above party, and to disown relation and allegiance to it, they ought not to be compelled to vote for a man as a Republican, Democrat, or of any other party name, and to use the ticket of such party and its emblem to accomplish their desire. And a man who has accepted the nomination of a Republican party or Democratic party or any other party ought not to be denied the privilege and benefit of accepting the nomination of registered voters who do not desire to vote a partisan ticket. We think, therefore, that when the Legislature gave to registered voters in certain numbers the right to nominate a candidate by paper signatures and affidavit, as hereinbefore mentioned, it was intended to give them the same right to an independent place, separate from a party place, as was given to the several political parties. If it should so happen that two political parties should nominate and indorse the same person for a particular place (which has sometimes

happened), can it be doubted that each party so nominating should be and would be entitled to have such persons' names printed in the place assigned to each party? Can it be possible that the Legislature intended to give the supervisors the right of restricting the appearance of such persons' names to a place on the ballot, and selecting under which party name it should so appear? Certainly not; and, if not, surely there is no greater reason for their insisting that a person nominated as Mr. Stabler was shall be voted for only as a partisan, and not also as an independent candidate of the persons nominating him by paper, who are not partisans, and not Republicans as they say in their petition, and do not desire to vote as if they were. We do not see that this construction of the law will be likely to lead to any such inconvenience as is suggested by the appellees; for, no matter by how many independent papers of the requisite number of registered voters persons may be nominated, still, having no party name or emblem, they are all

to be classed as independents, and the insertion of the candidates' names in an independent column would seem to meet all the requirements of the law, and all the reasonable demands of the candidates so nominated; and a separate column for each independent candidate so nominated would not seem to be necessary. The object of the Legislature would seem to be to give any person nominated in the way suggested, and as done here, a place other than in a group of party nominations, with which the voters making the nomination did not desire to co-operate.

The election being long passed before this appeal reached this court, a reversal of the order and the granting of mandamus will be nugatory, because the order cannot be executed; but as the question is one of public concern, and the opinion of this court is desired for the future guidance of the Supervisors, we have expressed our views, and in accordance with them *the order must be reversed.*

## NEW JERSEY COURT OF ERRORS AND APPEALS.

HOPPER, Receiver of Universal Rubber Co.,  
*Appt.,*  
v.

Susan C. LOVEJOY, *App*

Susan C. LOVEJOY, *Appt.,*  
v.

HOPPER, Receiver of Universal Rubber Co.

(....N. J. Eq.....)

**\*Under our act respecting conveyances,** the deed of a corporation aggregate may be lawfully acknowledged by the representative of the corporation having authority to execute the deed on its behalf.

(February 2, 1891.)

**CROSS-APPEALS** from a decree of the Chancery Court in a suit brought to enforce certain mortgages executed by the Universal Rubber Company against its property in the hands of a receiver. *Reversed in part. Affirmed in part.*

The case sufficiently appears in the opinion. *Messrs. A. Q. Garretson and Carlisle Norwood, Jr.,* for the receiver.

*Messrs. Collins & Corbin and Estes* for Susan C. Lovejoy.

\*Head note by DIXON, J.

DIXON, J., delivered the opinion of the court.

We are satisfied with the decision of the learned advisory master respecting all the instruments in dispute, except the chattel mortgage made September 15, 1889, by the Universal Rubber Company, for \$7,000. This he held to be inoperative against the receiver of the Company, representing its creditors, because it was not, in his opinion, lawfully recorded. The supposed illegality of the record arose from the fact that it had not been proved, but merely acknowledged, the master thinking that our Statutes require all corporate deeds to be proved by a subscribing witness in order to be recorded. The pertinent statutes are a supplement to the Act concerning mortgages (Pub. Laws 1881, p. 226), which provides that no chattel mortgage shall be recorded, unless the execution thereof shall be first acknowledged or proved, and such acknowledgment or proof certified thereon, in the manner prescribed by the Act respecting conveyances; and the Act respecting conveyances (Rev. p. 152), which provides that any deed may be recorded, if it "shall be acknowledged by the party or parties who shall have executed it, the officer having first made known the contents thereof to the person making such acknowledgment, and being also satisfied that such person is the grantor mentioned in said

**NOTE.—Corporation; execution of deed by.**

The seal of a corporation aggregate affixed to a deed is of itself prima facie evidence that it was affixed by the authority of the corporation, especially if proved to have been put to the deed by an officer who was intrusted by the corporation with the custody of such seal. *Union Bridge Co. v. Troy & L. R. Co.* 7 Lans. 245; *Bowen v. Irish Presby. Cong.* 6 Bosw. 263.

When the common seal is affixed, and the signatures of the proper officers are proved, courts will presume that the officers did not exceed their authority, and the seal itself is prima facie evidence that it was affixed by proper authority. *Canandagua Academy v. McKechnie*, 30 N. Y. 629; *Hoopes v. Auburn Watch Works*, 37 Hun, 568; *Morris v. Keil*, 20 Minn. 584; *Conine v. Junction & B. W. R. Co.* 8 Houst. (Del.) 297; *New England Iron Co. v. Gilbert Elev. R. Co.* 91 N. Y. 164.

It lies with the party objecting to the instrument so sealed to show that the seal was improperly affixed. *Whitney v. Union Trust Co.* 65 N. Y. 577; *Sheehan v. Davis*, 17 Ohio St. 581. See *Jackson v. Campbell*, 5 Wend. 572; *Kelly v. Calhoun*, 35 U. S. 714, 24 L. ed. 545.

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deed, . . . or if it be proved, by one or more of the subscribing witnesses to it, that such party or parties signed, sealed and delivered the same as his, her or their voluntary act and deed." We have not, as in some States, *e. g.*, Maryland and Missouri, a statute relating to the acknowledgment or proof of corporate deeds particularly; but no doubt exists that, under the Act respecting conveyances, the deeds of corporations aggregate can be lawfully recorded, and therefore can be lawfully either acknowledged or proved. The opinion adopted by the master is that they may be proved, but cannot be acknowledged. This opinion rests, I suppose, on the notion that the corporation, the party executing the deed, cannot, *in propria persona*, appear before the officer, be informed by him of its contents, and thereupon acknowledge its execution. But a similar difficulty exists with regard to proving the execution. A subscribing witness cannot swear that the party, the corporation, *in propria persona*, signed, sealed and delivered the deed, for each of these three acts must be done by a representative of the corporate body. If, then, the Statute implies that the representative of a corporation is the party executing a corporate deed for the purpose of proof by a subscribing witness, why may it not also imply that such a representative is the party for the purpose of acknowledgment? The Statute must receive such a construction as will attain its manifest object, which is that all conveyances, whether by natural or artificial persons, may be recorded. Hence we find that in *Den v. Tunis*, 25 N. J. L. 683, this court, speaking by Chief Justice Green, said: "A corporate deed can be proved only by proving that the seal affixed is the seal of the corporation, or that it was affixed as the corporate seal by an officer of the corporation, or other person thereunto duly authorized." Such proof deviates widely from the language of the Statute, which calls for proof of acts that are visible, that are done by the party himself, and that *per se* constitute the execution of the

deed; while the opinion is complied with by proof of matters which are largely the inferences of the witness, which are the acts merely of an agent of the party, and which constitute *per se* only evidence of the execution of the deed. Applying similar liberality of construction to the clause of the Statute authorizing acknowledgments, it will embrace corporate deeds. The act says the officer taking the acknowledgment must be satisfied that the person executing and acknowledging the deed is the grantor mentioned in it. With regard to corporate deeds, he must therefore be satisfied that such person is, in the eye of the law, the grantor mentioned in it; that is, authorized to represent the corporation in executing and acknowledging the conveyance. Being so satisfied, he accepts the acknowledgment of the representative as that of the grantor itself. This accords with the view expressed in other States upon like enactments. Thus in *Merrill v. Montgomery*, 25 Mich. 73, the court said, as to corporate deeds: "The acknowledgment is to be made by the person representing the corporation in that act." And in *Lootti v. Steam Sawmill Assn.*, 6 Paige, 54, 3 L. ed. 696, Chancellor Walworth, speaking of the New York Registry Act, which required deeds to be acknowledged by the party executing the same, said: "The officer or agent of a corporation, who executed a deed in the name of the corporation, by affixing thereto the impression of the common or corporate seal intrusted to his care, is the party executing the deed, as it is impossible that a corporation aggregate should execute or acknowledge a deed in person."

Our conclusion is that, on the appeal of the receiver, those parts of the decree of which they complain should be affirmed, and on the appeal of Susan C. Lovejoy, that part of the decree which holds her chattel mortgage above mentioned invalid against the receiver *should be reversed*, and that part which relates to the amount due upon her mortgages of October 27, 1887, *should be affirmed*.

Unanimous on both points.

## UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS.

Ex Parte Mary Inez McCABE.

(46 Fed. Rep. 363.)

1. A warrant to compel a person demanded as a criminal by a foreign government to appear and submit to a preliminary examination when issued by a county judge under Rev. Stat., § 5370, although he styles himself also an extradition agent, is not invalid because it does not recite the source of his authority to issue it.
2. A complaint made under oath is necessary to authorize a warrant to compel a preliminary examination of a person demanded by a foreign government as a criminal.
3. Courts must take judicial notice of a treaty with a foreign government.
4. The law of nations does not require the surrender of a fugitive, whether citizen or alien, to a foreign government in the absence of a treaty stipulation requiring it.

12 L. R. A.

5. A citizen of the United States cannot be surrendered to Mexico as a fugitive under the Treaty with that country which provides that "neither of the contracting parties shall be bound to deliver up its own citizens;" the surrender is not to be made according to the will or discretion of the executive, but only when required by the Treaty.

(April 2, 1891.)

PETITION for a writ of habeas corpus to discharge petitioner from the custody of the sheriff of Nueces County, Texas, by whom she was detained in accordance with certain proceedings instituted for the purpose of having her returned to Mexico as an alleged fugitive from justice. *Petitioner discharged.*

The facts are stated in the opinion. Messrs. George R. Scott and F. R. Graves for petitioner.

**Maxey, J.**, delivered the following opinion:

On the 26th of February, 1891, a petition, duly verified by affidavit, was presented to the court on behalf of Mrs. Mary Inez McCabe, stating that she had been arrested by the sheriff of Nueces County, Tex., and was now illegally detained and restrained of her liberty. It is alleged in the petition that the petitioner was born in Bandera County, Tex., of parents of American birth; that her husband, H. T. McCabe, was born in the State of Illinois, of parents of American birth, and that both she and her husband have continued to be and are now citizens of the United States. The further allegations are made:

"That since the 18th day of February, A. D. 1891, she has been unlawfully and illegally restrained of her liberty by one Patrick Whelan, sheriff of Nueces County, and who pretends to be acting under and by the authority of a certain Treaty and convention between the United States of America and the republic of Mexico, of date the 11th of December, 1861, and by virtue of certain telegraphic and other pretended writs and papers from a pretended officer, who styles himself the county judge of Cameron County, and extradition agent, County of Cameron, and the copies of the which said papers and process are hereto attached."

After reciting other facts, not necessary to consider, the petition prays for the issuance of a writ of habeas corpus. Among the papers attached as exhibits to the petition, the only one deserving of notice is the writ issued by Judge Forto in the following form:

**"THE UNITED STATES OF AMERICA.**

"The State of Texas to the Sheriff or any Constable of Nueces County, Texas, greeting: Whereas, pursuant to the existing treaty between the United States of America and the republic of Mexico for the extradition of criminal fugitives from justice under certain circumstances, the *Hon.* Lamón F. Flores, judge in and for the Third Judicial District of the state of Tamaulipas, and extradition agent in and for said district in said state of Tamaulipas, republic of Mexico, has made requisition and application in due form to me, E. C. Forto, county judge of Cameron County, Texas, and extradition agent, for the arrest of Maria Inez McCabe, who stands charged with the crime of murder, alleged to have been committed in the Town of Reynosa, within the Third Judicial District, as aforesaid, on the 18th day of August, 1890, by feloniously killing one Max Stein, at such time and place, and that the said Maria Inez McCabe has fled from the custody of the proper officers in the City of Matamoros, in said state of Tamaulipas, and has taken refuge in this State of Texas, from the laws and justice of the state of Tamaulipas as aforesaid. And whereas, it appears proper that the said Maria Inez McCabe should be apprehended, as requested in said requisition and application made by the said judge of the Third Judicial District of the said state of Tamaulipas, and extradition agent as aforesaid, on the 14th day of February,

1891, and that the said charge preferred against her, the said Maria Inez McCabe, be examined in the manner provided for by law: Now, I, E. C. Forto, county judge of Cameron County, Texas, and extradition agent, do hereby command you to arrest the said Maria Inez McCabe, if to be found in your county, and bring her before me as such county judge of said Cameron County, Texas, and extradition agent, at my office in the City of Brownsville, in the said County of Cameron, and State of Texas, forthwith, then and there to answer the said requisition and application for arrest and extradition, as aforesaid, and that the necessary proceedings may be had in pursuance to law, in order that the criminality of the said Maria Inez McCabe may be heard and considered, and, if deemed sufficient to sustain the charge, that she may be surrendered under the law. Herein fail not, but of this writ make due return, showing how you have executed the same.

"Witness my official signature, and the seal of the County Court of the County of Cameron, at my office in the City of Brownsville, Texas, on this 16th day of February, A. D. 1891.

(Signed)

"E. C. Forto.

"County Judge and Extradition Agent, Cameron County, Texas."

On the day the petition was presented, a writ of habeas corpus was directed to be issued to Sheriff Whelan, and a certiorari to Judge Forto, and the order of court further directed the clerk to transmit a copy of the order, by registered mail, to the consul of the republic of Mexico, resident at Brownsville. The writs to the county judge and sheriff, respectively, were made returnable the 17th of March, 1891, on which day the sheriff produced the prisoner before the court, and made return to the habeas corpus, the material portion of which is in the following words:

"In obedience to the within writ, I hereby produce before the Hon. District Court of the United States for the Western District of Texas Mary Inez McCabe, and attach hereto the writ of E. C. Forto, county judge of Cameron and extradition agent, upon which authority I had and held the said Mary Inez McCabe at the time of service upon me of the within writ of habeas corpus."

The writ of certiorari was not served upon the county judge in Cameron County, but in Austin, and only a few days before the day set for the hearing. His sworn answer shows that it was impracticable for him to procure copies of the proceedings had before him in time for the 17th; and, to avoid further delay, the following statement made by Judge Forto, and on file among the papers of the cause, was accepted as a sufficient return to the writ:

"That the warrant for the arrest of Mrs. M. I. McCabe was based on a requisition made by the district judge and extradition agent at Matamoros, Mexico. That said requisition charges the said M. I. McCabe with having committed the crime of murder, as recited in said warrant. That said requisition is not certified to by the American con-

sul residing at Matamoras, Mexico, and that it came to me through the Mexican consul at Brownsville.

"As directed by the order of court, the clerk transmitted by registered mail a copy of the order before mentioned to the Mexican consul at Brownsville, and his reply, acknowledging receipt, is now on file."

It will thus be seen that the warrant for the arrest of the prisoner was predicated upon the requisition made by *Hon. Lamon F. Flores*, federal judge of the Third District of the state of Tamaulipas and acting as extradition agent for said district. And the sheriff of Nueces County was commanded by the warrant to arrest Mrs. McCabe, and take her before the county judge of Cameron County, "then and there to answer the said requisition and application for arrest and extradition." Judge Forto had before him no "complaint made under oath" charging the prisoner with crime, nor was there in fact presented to him any complaint, document or other paper as a predicate for the warrant, except the requisition of Judge Flores. The only step taken by the county judge was the issuance of the warrant of arrest. Thenceforth he performed no official act in relation to the proceeding. At the hearing on the 17th inst., which was *ex parte*, no one appearing for the Mexican government, the only evidence introduced by the prisoner was on the question of citizenship, and from the proof it clearly appears that both she and her husband are now, and have been continuously since their births, citizens of the United States. The court desires here to state that the expression of its views will be limited solely to the objections urged by counsel for petitioner. Other questions, as those affecting the regularity and validity of the requisition emanating from Judge Flores, and the competency of the sheriff of a county to execute a warrant of arrest issued pursuant to the extradition statutes, and perhaps some others, which are suggested by the proceedings in this case, will be passed over, and their consideration reserved. Upon the foregoing record the question arises, Shall the prisoner be discharged, or remanded to custody to be dealt with by the proper authorities, as the laws of extradition and the Treaty between the United States and the republic of Mexico direct? Her counsel insist upon an immediate discharge, and assign in support of their contention three specified grounds: (1) the warrant which issued for the arrest of the petitioner is void, because it fails to disclose upon its face that the officer issuing it was duly authorized for that purpose by the chief executive of Texas; (2) the warrant is without validity for the further reason that it was not based upon a complaint made under oath; (3) the petitioner, being a citizen of the United States, cannot lawfully be surrendered to the authorities of Mexico for punishment for crime committed withip the jurisdiction of the latter republic.

The first point requiring the consideration of the court is whether the questions suggested by the objections of counsel are raised in such manner as to be reviewable on a writ of habeas corpus. It is settled law that a

writ of habeas corpus in a case of extradition cannot perform the office of a writ of error. Employing the language of the supreme court: "The main question to be considered upon such a writ of habeas corpus must be, 'Had the commissioner jurisdiction to hear and decide upon the complaint made by the Mexican consul?'—and, also, Was there sufficient legal ground for his action in committing the prisoner to await the requisition of the Mexican authorities?" *Benson v. McMahon*, 127 U. S. 462, 33 L. ed. 286.

It is not deemed necessary to enter upon a discussion of the proposition, and the court will content itself, after a careful examination of the authorities, with the statement of the conclusion that the questions in this case are properly presented, and require a distinct ruling. *Re Luis Oleisay v. Cortes*, 136 U. S. 330, 34 L. ed. 464; *Benson v. McMahon*, *supra*; *Re Macdonnell*, 11 Blatchf. 170; U. S. Rev. Stat. § 761.

The objections of counsel will be treated in the order of their presentation.

1. Should it appear upon the face of the warrant for the apprehension of the petitioner that the county judge was duly authorized by the chief executive of Texas to act as a committing magistrate? This contention of counsel originates in a misconception of the respective duties of a judicial officer, prescribed by the Statute, and those of a purely executive or administrative officer, as contemplated by the Treaty between the United States and republic of Mexico, concluded at Mexico December 11, 1861, and proclaimed by the President of the United States June 20, 1862. 13 Stat. at Large, 1199. The functions of the two officials are altogether distinct and different in their character. The judicial officer acts in obedience to the general laws regulating the international extradition of fugitives from justice, which supply the requisite judicial machinery to enable the national chief executive to discharge the obligations resting upon our government pursuant to treaty stipulations, thus investing him with the necessary power to preserve the national faith and protect the honor and dignity of the government. On the other hand, that state executive officer, under the Treaty with Mexico, is indebted solely to the Treaty for whatever power or authority he may possess, and his rights and corresponding duties are plainly limited and prescribed by its stipulations. While by force of the Statute and Treaty combined the functions of both officers may devolve upon, and be exercised by, one and the same individual, as appears to be the case here, there is no necessary relation between them. The individual may act in a dual capacity, but not necessarily. The two high contracting parties deemed it wise, in stipulating for the requisition and surrender of fugitives who had committed crimes in the frontier States, to clothe, in addition to the president, certain state officers with authority to act in that behalf. While thus acting, they are in no proper sense judicial officers, nor performing a judicial duty. In making the requisition they simply demand the surrender of a fugitive, and in effecting the surrender they de-

liver him up to the proper authorities after a prior judicial preliminary examination. It may be said—and at this day the soundness of the assertion will scarcely be doubted—that neither national nor state executive possesses the power, under the Treaty with Mexico, to surrender a fugitive to the Mexican authorities until a warrant has been judicially issued for his arrest, and an examination had, to the end that evidence of criminality may be heard and considered. No such extraordinary power will be found in the Treaty, and none such has place in the Statutes passed in aid of and to enforce our treaty obligations with foreign powers for the extradition of fugitive criminals. Reference to the Statutes and Treaty will verify the correctness of the foregoing views, and demonstrate the fallacy of the position assumed by counsel. “Whenever,” the Statute provides, “there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the supreme court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.” Rev. Stat. § 5270.

As provided by the Statute, three classes of judicial officers may issue warrants for the apprehension of fugitives in proper cases arising under treaties,—federal judges, judges of state courts of record of general jurisdiction, and commissioners authorized so to do by any of the courts of the United States. In the absence of treaty provisions upon the subject, the warrant of arrest must be issued by the official designated in the Statute. The Treaty with Mexico is silent upon the point. But counsel invoke article 4 in support of their contention. It is there provided:

“On the part of each country, the surrender of fugitives from justice shall be made only by the authority of the executive thereof, except in the case of crimes committed within the limits of the frontier States or Territories, in which latter case the surrender may be made by the chief civil authority thereof, or such chief civil or judicial author-

ity of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories; or if, from any cause, the civil authority of such State or Territory shall be suspended, then such surrender may be made by the chief military officer in command of such State or Territory.”

As before explained, the authority conferred by article 4 upon state officers is of an executive character; and it may be that, when the final act of surrender is made, which is the only duty contemplated by the article, the order issued for the purpose by the “chief civil or judicial authority of the districts or counties bordering on the frontier,” should affirmatively show that the officer effecting the surrender was duly authorized by the chief executive of the State. But in this case no order for the surrender of the petitioner has been issued, nor was one necessary or appropriate. The exigency had not arisen which demanded it. The warrant which was issued by the county judge was for the purpose of compelling the petitioner to appear and submit to a preliminary examination; and the fact that it was issued by an officer who styles himself “county judge and extradition agent, Cameron County, Texas,” is of no consequence. In performing the act the function was judicial, not executive. No extradition agent, as such, could issue a warrant of that nature; and, when the duty is performed by a proper state judge, the Statute makes it no more incumbent upon him to recite in the warrant the source of his authority than it does in those cases where the warrant issues by an associate justice, circuit or district judge of the United States. To sustain their views counsel refer to the case of *Re Kelley*, 25 Fed. Rep. 268. In that case it is held that the proceeding instituted under the Statute and Treaty with Great Britain is special, “and the fact that the commissioner (meaning United States commissioner) who issued the warrant is authorized so to do is jurisdictional, and must appear upon the face of the warrant.” See also *Re Perez*, 7 Blatchf. 34; *Ex parte Lane*, 6 Fed. Rep. 84; Spear, Extradition, 252, 258.

The correctness of the doctrine announced in the cases cited is not challenged. It applies strictly to commissioners, who have statutory power to act only when “authorized so to do by any of the courts of the United States.” It has already been shown that no limitation of that kind applies to state judges of the class designated in the Statute. The authorities invoked by counsel are altogether inapplicable, having no reference to the precise point here involved. Upon the first question submitted, the court is of opinion that the position taken by counsel for the petitioner is manifestly untenable.

2. The second ground of objection assumes that the warrant cannot legally issue by the committing magistrate in the absence of a complaint made under oath. The Statute, which names the state judge as a proper officer to issue the warrant, also, in the same section, makes the sworn complaint a prere-



quisite to its issuance. It is provided by the Statute that the officer designated "may, upon complaint made under oath, charging any person, . . . issue his warrant for the apprehension of the person so charged." "This shows," says Judge Mitchell, "that without a sufficient complaint on oath there is no jurisdiction to issue the warrant." Further, he says: "It was argued that on habeas corpus the judge should not go beyond the warrant, and if that were regular he should not remand the prisoner. The answer to this is that the commissioner has no power to issue the warrant, and no jurisdiction under the Act of Congress, until a complaint on oath be made before him. Those, therefore, who oppose the discharge of the prisoner in order to show that there is a valid warrant are bound to show that it was issued on such complaint on oath, and to show this, they must produce the complaint. If when produced it shows its original invalidity, it must fall to the ground and the warrant with it." *Re Heilbroun*, 1 Park. Crim. Rep. 486. See also *Re Flores*, *supra*; *Re Henrich*, 5 Blatchf. 414; *Ex parte Lane*, *supra*; *Re Roth*, 15 Fed. Rep. 507; Whart. Conf. Law, § 848; Spear, Extradition, p. 250; 7 Am. & Eng. Encyclop. Law, 623, and *note*.

Authorities to show that the warrant should be supported by affidavit would seem to be superfluous. The language of the Statute is susceptible of but a single construction, and that, by its terms, a sworn complaint is indispensable as a basis for the warrant, admits of no question. In this respect the warrant cannot be aided by the Treaty, for the sufficient reason that the latter does not supply or provide for the machinery necessary to carry into effect the obligations of the respective governments. It is immaterial to the present inquiry that an extradition agent may have authority, under articles 2 and 4 of the Treaty, to make a requisition and effect a surrender. Neither these articles nor others of the Treaty give him, as such, or otherwise, power to issue warrants for the apprehension of a fugitive, the authority in that behalf being derived from the Statute. No complaint having been made under oath charging the petitioner with crime, the warrant issued by the county judge must be held invalid.

8. Does the Treaty with Mexico authorize the surrender of an American citizen to the Mexican government for punishment for crime committed within the jurisdiction of that republic? The judiciary is rarely called upon to decide questions of more magnitude and importance than those arising under treaty engagements involving the reciprocal rights and duties of independent governments. The court therefore approaches with diffidence the performance of so delicate a duty, and has exercised in this case unusual care and diligence in the endeavor to reach a just conclusion,—just to the two high contracting parties, and just to the petitioner, whose liberty is imperiled. It is believed that this precise question has not been determined by any of the courts, state or federal. In the case of *Benson v. McMahon*, *supra*, the supreme court had under con-

sideration certain clauses of the Treaty with Mexico, but this point was not involved. The report of that case fails to disclose the citizenship of Benson, who was committed for extradition, and, presumably, he was not a citizen of the United States. The subject of the extradition of criminals has been a prolific source of discussion by jurists, publicists, writers upon international law and the executive departments of independent states; and, while the discussions disclose a conflict of opinion as to the duty imposed by the laws of nations touching the surrender by one nation to another of fugitives from the justice of the latter, the almost unbroken current of American authority and the practice of our own government go to show that the obligation to surrender does not exist in the absence of treaty engagements to that effect. In 1835 Judge Barbour, afterwards associate justice of the supreme court, had occasion to consider the question in the case of *José Ferreira dos Santos*, 2 Brock. 493. Referring to the opinions of Grotius, Burlamaqui, Heineccius, Vattel, Puffendorf and other writers and publicists, the learned judge adopts the view of Puffendorf, which he declares to be, "that the obligation to deliver up a criminal is rather in virtue of some treaty than in consequence of a common and indispensable obligation." On page 609, after a reference to certain treaties between France and other foreign powers, he proceeds: "Why, let me ask, were all these treaties in ancient and modern times? I answer, either because the opinion of Puffendorf was considered right, that without a treaty stipulation there was no obligation to surrender, or, at least, the question was so unsettled, the respective rights and obligations of nations so indeterminate, and the refusal on the part of nations to surrender so frequent, that without a treaty there was no obligation at all, or none of any sort of practical value; for what is this imperfect obligation of which the writers speak? It is the right of one to ask, which involves the right of the other to refuse, and, as applied to this particular subject, the refusal had become so common as to be almost the habitual practice, until treaties were formed concerning it."

He then examines the practice of our own and foreign governments, in reference to the subject of extradition of fugitives, and concludes, on page 513, with the expression of opinion "that the government of the United States are not under any obligation to deliver the prisoner, in the absence of any treaty stipulation."

*Holmes v. Jennison* came before the Supreme Court in 1840, two years before the Extradition Treaty with Great Britain in 1842. Discussing that case, Mr. Chief Justice Taney says: "Since the expiration of the Treaty with Great Britain, negotiated in 1793, the general government appears to have adopted the policy of refusing to surrender persons who, having committed offenses in a foreign nation, have taken shelter in this. It is believed that the general government has entered into no treaty stipulations upon this subject since the one above mentioned, and in every instance where there was no en-

gagement by treaty to deliver, and a demand has been made, they have uniformly refused, and have denied the right of the executive to surrender, because there was no treaty, and no law of Congress to authorize it. And, acting upon this principle throughout, they have never demanded from a foreign government anyone who fled from this country in order to escape from the punishment due his crimes." 89 U. S. 14 Pet. 574, 10 L. ed. 598.

In 1845 *Judge Woodbury*, in the *Case of the British Prisoners*, holds a similar view: "But without such a stipulation, however fit it might seem in point of morals to surrender citizens of other countries to answer for offenses committed at home against their own laws, it is usually considered that there is no political obligation under the laws of nations to do it." *Re Sheazle*, 1 Woodb. & M. 688.

In the same year (1845) the question was considered by Mr. Buchanan, secretary of state, in a communication to Mr. Wise, in which the following language is employed: "But the practice of nations tolerates no right of extradition. Whatever elementary authors may say to the contrary, one nation is not bound to deliver up persons accused of crimes who have escaped into its territories on the demand of another nation against whose laws the alleged crime was committed. The government of the United States has from the very beginning acted upon this principle. Mr. Jefferson, when secretary of state under the administration of General Washington, declared that 'the laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender, coming within their pale, is received by them as an innocent man, and they have authorized no one else to seize and deliver him up.' . . . The truth is that it has been for a long time well settled, both by the law and practice of nations, that without a treaty stipulation one government is not under any obligation to surrender a fugitive from justice to another government for trial." 2 Wharton, Int. Law Dig. pp. 745, 746.

In the year 1847, in *Re Metzger*, Mr. Justice McLean, as the organ of the Supreme Court, says: "The surrender of fugitives from justice is a matter of conventional arrangement between States, as no such obligation is imposed by the laws of nations. 46 U. S. 5 How. 188, 12 L. ed. 109.

In a communication of Mr. Cushing, attorney-general, to the President, in 1853, he thus states the principle: "It is the settled politic doctrine of the United States that, independently of special compact, no State is bound to deliver up fugitives from the justice of another State. . . . It is true any State may, in its discretion, do this as a matter of international comity towards the foreign State, but all such discretion is of inconvenient exercise in a constitutional republic organized as is the Federal Union; and accordingly it is the received policy of this government to refuse to grant extradition except in virtue of express stipulations

to that effect." *People v. Wing*, 6 Ops. Atty-Gen. 86; Id. 432.

"The ancient doctrine," says the Court of Appeals of Kentucky, in 1878, "that a sovereign state is bound by the laws of nations to deliver up persons charged with or convicted of crimes committed in another country, upon the demand of the State whose laws they have violated, never did permanently obtain in the United States. It was supported by jurists of distinction, like Kent and Story, but the doctrine has long prevailed with us that a foreign government has no right to demand the surrender of a violator of its laws, unless we are under obligations to make the surrender in obedience to the stipulations of an existing treaty. . . . As said by Mr. Cushing, in *Re Hamilton*, a fugitive from justice of the State of Indiana: 'It is the established rule of the United States neither to grant nor to ask for extradition of criminals as between us and any foreign government, unless in cases for which stipulation is made by express convention.'" *Com. v. Hawes*, 18 Bush, 708, 709.

Mr. Spear, in his work, already cited, page 18, after reviewing the authorities, expresses his conclusion in the following words: "The preponderance of authority derived from practice, the legislation of Congress, the opinions of the attorney-generals of the United States, and the deliverances of the judiciary, both state and federal, clearly show that no department of the general government is either bound or authorized to deliver up fugitive criminals from other countries, except in those cases for which provision is made by treaty. The powers of the government are bestowed by the Constitution; and, except as it may be clothed with the extradition power through treaties, no such power is found among the express or implied grants to Congress, or among those to the executive department, or among the powers given to the federal judiciary. There can be no discretion in the exercise of the power, since it does not exist at all. See also *Blandford v. State*, 10 Tex. App. 627; *United States v. Watts*, 14 Fed. Rep. 180; Wharton, Conf. Laws, § 885; Woods, Int. Law, § 79; 2 Wharton, Int. Law Dig. § 268; Wheaton, Int. Law, 9th ed. pp. 176, 177; *Hawes v. United States*, 16 Alb. L. J. 861, 866; 7 Am. & Eng. Encyclop. Law, p. 600, and notes.

In 1886, the Supreme Court, discussing the question of extradition of fugitives, observes: "It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated, as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another; and, though such delivery was often made, it was upon the principle of comity, and within the discre-

tion of the government whose action was invoked, and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law." *United States v. Rauscher*, 119 U. S. 411, 412, 80 L. ed. 426.

In this connection it is worthy of remark that, since the opinion of Mr. Chief Justice Taney was written, in which the belief is expressed that the United States, "in every instance where there was no engagement by treaty to deliver," have uniformly refused and denied the right of the executive to surrender, the exceptional case is reported of the surrender, in the absence of a treaty, of Don José Augustin Argüelles by Mr. Seward to the Spanish government. Referring to this case it is said by Mr. Wharton (2 Int. Law Dig. p. 746) that "in *Argüelles Case*, 1864 [U. S. Dip. Corr. 1864, pt. 2, 60-74] (cited in Wharton, Conf. Laws, § 941; Spear, Extradition, 1), the defendant was delivered to the Spanish government by Mr. Seward without a treaty, and the proceedings were so summary as to prevent a review on habeas corpus." In his comments upon the case Mr. Spear says:

"The delivery of Argüelles, being wholly without any legal authority, was not at all excusable by the fact that the alleged fugitive was supposed to be guilty of a heinous offense. This supposition, if true, does not change the principle or the nature of the act. Rules of law do not vary with the merits or demerits of the particular case to which they are applied." Spear, Extradition, p. 18.

While, therefore, investigation discloses that Chancellor Kent, of our own country, and several distinguished publicists and writers upon international law of foreign countries, assert, apart from treaty engagements, the obligation to surrender a fugitive from justice, the overwhelming weight of American authority and the practice of our government are clearly in the opposite direction, and deny the existence of any obligation to surrender arising out of the law of nations. What, then, was the result? Treaties for the extradition of fugitive criminals, under certain circumstances, were concluded by the United States with foreign powers, and these treaties, in the terms of article 6 of the Constitution, are declared to be the supreme law of the land; and as such supreme law they are to be construed as other laws. "A treaty," says the Supreme Court, "then, is a law of the land as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined; and when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Head Money Cases*, 112 U. S. 598, 599, 28 L. ed. 803, 804; *United States v. Rauscher*, *supra*. In interpreting treaties, "we are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and, having found that, our duty is to follow it as far as it goes, and to stop where that stops, whatever may be the im-

perfections or difficulties which it leaves behind." *The Amiable Isabella*, 19 U. S. 6 Wheat. 71, 5 L. ed. 208. See also *Cheong Hoong v. United States*, 112 U. S. 536, 28 L. ed. 770.

It is said: "There is no rule of construction better settled, either in relation to covenants between individuals or treaties between nations, than that the whole instrument containing the stipulations is to be taken together, and that all articles *in pari materia* should be considered as parts of the same stipulation." 2 Wharton, Int. Law Dig. p. 29.

The Treaty with Mexico being supreme law, it is the duty of courts to take judicial notice of it, and to enforce private rights, when appropriately presented, growing out of its stipulations. The court will therefore proceed to inquire into the construction of the Treaty, in order to determine whether our government has authority to surrender the petitioner. If the authority exist, she could not complain of its exercise in a proceeding conforming in all respects to legal requirements. In the absence of such authority, she should not for a moment be restrained by the strong arm of the law, however regular in other respects the proceedings might be, or however heinous the offense of which she is accused. Agreeably to its caption, the Treaty is one "between the United States of America and the United Mexican states for the extradition of criminals." The introductory clause is as follows:

"The United States of America and the United Mexican states, having adjudged it expedient, with a view to the better administration of justice and to the prevention of crime within their respective territories and jurisdiction, that persons charged with the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a treaty for this purpose.

"Article 1. It is agreed that the contracting parties shall, on requisition made in their names . . . deliver up to justice persons who, being accused of the crimes enumerated in article third of the present Treaty, committed within the jurisdiction of the requiring party, shall seek an asylum or shall be found within the territories of the other.

"Art. 3. Persons shall be so delivered up who shall be charged, according to the provisions of this Treaty, with any of the following crimes, whether as principals, accessories or accomplices, to wit: murder (including assassination, parricide, infanticide and poisoning).

"Art. 6. The provisions of the present Treaty shall not be applied in any manner to any crime or offense of a purely political character, nor shall it embrace the return of fugitive slaves, nor the delivery of criminals who, when the offense was committed, shall have been held in the place where the offense was committed in the condition of slaves, the same being expressly forbidden by the constitution of Mexico; nor shall the provisions of the present Treaty be applied in any

manner to the crimes enumerated in the third article committed anterior to the date of the exchange of the ratifications hereof.

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this Treaty." 12 Stat. at L. pp. 1199-1202.

The foregoing extracts embrace all the treaty stipulations which in any manner affect the present inquiry. What, then, was the purpose and intention of the two governments in inserting the stipulation: "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this Treaty?" We have seen that, with substantial unanimity, American jurists and statesmen recognized, under the law of nations, no obligations to surrender a fugitive, whether citizen or alien, and that by our government it was never done except in few, if more than one, isolated instances. Hence the resulting necessity to enter into treaty engagements for that purpose. Hence the Extradition Statute of 1848 and amendments, embodied in Rev. Stat., § 5270 *et seq.*, which, in conjunction with treaties, the Supreme Court affirms in *Rauscher's Case*, *supra*, "are in their nature exclusive." If there were no pre-existing obligation to extradite a fugitive, the obligation must necessarily grow out of either statute law or treaty engagement. It is therefore apparent that the purpose of the treaty was to authorize the parties to do something which they had no previous authority to do. The parties come together through their respective representatives, and make an agreement,—an obligatory, binding agreement—to surrender, under certain circumstances, persons who commit crimes and flee from offended justice. They are authorized to act as they bind themselves. The agreement is mutual, the rights and obligations reciprocal. If power to surrender be not affirmatively given, the right to demand a fugitive can have no existence. The right to demand implies, *ex vi termini*, the corresponding authority and obligation to surrender. But both to exist should be founded upon express stipulations. The agreement here is, in article 1 of the Treaty, that the contracting parties shall, on requisition made in their name, deliver up persons, who, being accused of crimes, etc. "Persons," without qualification, would necessarily include all persons, citizens and aliens alike; and, under that general designation, the executive, it is believed, could not lawfully withhold the surrender of an American citizen upon requisition made by the republic of Mexico. But the Treaty does not stop there. A subsequent limiting clause denies the obligation to surrender a citizen: "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this Treaty." The obligation to deliver being denied, upon what can rest the authority? It did not exist in our government, as already shown independent of treaty engagements, or, if existing as a mere matter of comity or courtesy, there was no lawful mode of enforcing it; and certainly it finds no countenance either in the Constitution or Laws of Congress. The

former is silent as to extradition, considered from an international stand-point, and simply confers the general power to make treaties, from which springs the right of the treaty-making power to negotiate with foreign governments for the extradition of fugitives. All the inferences and deductions to be drawn from the statutes would seem clearly to support the view taken by the court; that is, there should be a binding treaty stipulation to authorize the executive to surrender a fugitive. The first Act of Congress on the subject was approved August 12, 1848. Its caption reads: "An Act for Giving Effect to Certain Treaty Stipulations between This and Foreign Governments, for the Apprehension and Delivering up of Certain Offenders." 9 Stat. at L. 802. Section 5270, Rev. Stat., which is, in substance, the same as the first section of the Act of 1848, provides that, if the officer upon the preliminary hearing deems the evidence sufficient to sustain the charge, "he shall certify the same . . . to the secretary of state, that a warrant may issue upon the requisition of the proper authorities for the surrender of such person, according to the stipulations of the Treaty or convention." The warrant for surrender does not issue according to the will or discretion of the executive, but agreeably to the stipulations of the Treaty; that is to say, according as the parties have obligated themselves by treaty engagements. If it were otherwise, if the executive could at his option and in his discretion transport for trial to a foreign country a person accused of crime, he would in such cases exercise a power which, it is thought, finds no sanction under our constitutional form of government. While nations are not careful to screen criminals seeking an asylum in their midst, personal liberty is so jealously guarded by the American Constitution that its safety and security should not be dependent upon the exercise of the arbitrary will and discretion of any official, however lofty his official station. The Statute, therefore, employing apt words to confine the warrant of surrender to that class of persons and offenses as to which the parties have entered into binding treaty stipulations, should be held to exclude other classes, and to deny authority or discretion to surrender where the obligation is by treaty expressly denied. *United States v. Rauscher*, *supra*, is referred to in support of this view. While the questions in the two cases are dissimilar, the general principles underlying the *Case of Rauscher* have direct application to the case before the court.

It will not be amiss to refer, as germane to the proposition discussed, to the extradition treaties concluded between the United States and foreign nations. By the author, 7 Am & Eng. Encyclop. Law, published in 1889, it is stated there were at that time in force thirty-three of such treaties. They are chronologically arranged as follows: Great Britain, 1843; France, 1843; Hawaiian Islands, 1849; Swiss Confederation, 1850; Prussia and other states, 1852; Bremen, 1853; Bavaria, 1853; Wurtemberg, 1853; Mecklenburg-Schwerin, 1853; Mecklenburg-Strelitz, 1853; Oldenburg, 1853; Schaumburg-Lippe,

1854; Hanover, 1855; Two Sicilies, 1855; Austria, 1856; Baden, 1857; Sweden and Norway, 1860; Venezuela, 1860; Mexico, 1861; Hayti, 1864; Dominican Republic, 1867; Italy, 1868; Republic of Salvador, 1870; Nicaragua, 1870; Peru, 1870; Orange Free State, 1871; Ecuador, 1872; The Ottoman Empire, 1874; Spain, 1877; Netherlands, 1880; Belgium, 1882; Grand Duchy of Luxemburg, 1883; Empire of Japan, 1896. Those with Prussia, Bremen, Bavaria, Wurttemberg, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg, Schaumburg-Lippe, Hanover, Austria, Baden, Hayti, Peru, The Ottoman Empire, Spain, The Netherlands, and Belgium contain a stipulation substantially in the very words (the meaning being precisely the same) of the concluding clause of the sixth article of the Treaty with Mexico, to wit: "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this Treaty." The corresponding clause in the Treaties with the Two Sicilies, Sweden and Norway, and the republic of Salvador, is as follows:

The Two Sicilies. "Art. 24. The citizens and subjects of each of the high contracting parties shall remain exempt from the stipulations of the preceding articles, so far as they relate to the surrender of fugitive criminals."

Sweden and Norway. "Art. 4. Neither of the contracting parties shall be bound to deliver up, under the stipulations of this convention, any person who, according to the laws of the country where he shall be found, is a citizen or a subject of the same at the time his surrender is demanded."

Republic of Salvador. "Art 5. In no case and for no motive shall the high contracting parties be obliged to deliver up their own subjects." Spear, Extradition, 575-628; Rev. Stat., relating to District of Columbia post-roads and public treaties.

A similar clause is not contained in any of the other Treaties above mentioned. The preamble to the Treaty with Prussia and several other states contains the recital:

"Whereas, the laws and constitution of Prussia and of the other German states, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the government of the United States, with the view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States."

It is apparent the recital, which is but the reason assigned by Prussia for refusing to extradite her citizens, does nothing more than relieve the United States from the obligation to surrender. But the clause in article 3, already quoted, which embodies the agreement of the parties, the binding part of the compact, goes further, and, in effect, denies the right of either party to deliver up its own citizens. Such is the view entertained of this particular clause by Mr. Wharton. "If a German," he asserts, "comes to us, commits a crime, and then returns to his own land, though we cannot demand his surrender, yet he may be punished, and restitution awarded, under proceedings from his

own sovereign. But if an American goes to Germany, and there is guilty of a crime against the territorial law, and returns to America, his offense goes unpunished. He cannot be punished by us, because our courts take no jurisdiction of offenses committed abroad against foreign laws. He cannot be surrendered to Germany, because our Treaties with Germany expressly prohibit such surrender." Wharton, *Conf. Laws*, 2d ed. § 841, *note 3*. And in the text, same section, he further says: "An exception to this effect exists in our Treaties with Prussia and the North-German states, with Bavaria, Baden, with Norway and Sweden, with Mexico, with Austria, and with other states to be hereafter specified."

As indicating the construction given by Mr. Lawrence, a writer of distinction, to the clause of the Treaty in question, he makes the following classification of our Extradition Treaties: "(1) those excepting the subjects of the other contracting power; (2) those containing no such exception." Under the first are embraced the Treaties with Mexico, Prussia and others. The second includes those with Great Britain, Switzerland, etc. Wharton, *Conf. Laws*, § 857, *notes*. To the same effect see 7 *Am. & Eng. Encyclop. Law*, pp. 616, 617, par. 11. "Some of the Extradition Treaties of the United States," says Mr. Spear, "expressly provide that neither party shall be required to deliver up its own citizens, which is equivalent to saying that neither will, in respect to such citizens, furnish any facility to the other for bringing them to justice for any offense which they may commit against its laws; and hence, if, under such a treaty, either party should by mistake deliver up one of its citizens, it clearly would not be allowable for the other to put that citizen on trial upon the pretext that the terms of the treaty relate only to the extradition, and have no relation whatever to the trial, either as to the person or to the offense to be tried." Spear, *Extradition*, 79.

All of our law-writers, without an exception, brought to the attention of the court, concur in the opinion that the sixth article of the Treaty with Mexico forbids the United States from surrendering their own citizens. Nor is there less uniformity in the practical construction given that article by the department of state. And such construction by a department of the government charged with the administration of a law, although not binding upon the courts, should properly receive great weight when the law is sought to be judicially construed. The rule should apply with special force to that class of cases where, like the one before the court, the national chief executive, acting through the state department, is endued with the ultimate power of withholding the final warrant for surrender of the fugitive. Rev. Stat. §§ 5270, 5272; *Re Stupp*, 11 *Blatchf.* 125, and *note*; Spear, *Extradition*, 245, 246. The proposition asserted is sustained by numerous authorities. Mr. Justice Harlan, in *United States v. Johnston*, clearly states the principle: "In view of the foregoing facts, the case comes fairly within the rule, often announced

by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous." 124 U. S. 253, 81 L. ed. 398.

Says the court in *United States v. Hill*: "In the construction of a doubtful and ambiguous law, the contemporary construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." 120 U. S. 182, 80 L. ed. 632. *United States v. Philbrick*, 120 U. S. 59, 80 L. ed. 561.

The same doctrine was applied in *Brown v. United States*, where it is said: "It must be conceded that, were the question a new one, the true construction of the section would be open to doubt. But the findings of the court of claims show that soon after the enactment of the Act the president and the navy department construed the section to include warrant as well as commissioned officers, and that they have since that time uniformly adhered to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale." 118 U. S. 570, 571, 28 L. ed. 1079; *Galveston, H. & S. A. R. Co. v. State*, 77 Tex. 388; *United States v. Payne*, 8 Fed. Rep. 893.

To the consideration, then, of the practice of the state department in construing the last clause of the sixth article of the Treaty the attention of the court will be next briefly directed.

(1) In 1874, says Mr. Frelinghuysen, in discussing the *Trimble Case*, a Mexican, Francisco Perez, charged with the murder of Joseph Alexander, an American, at Brownsville, Tex., escaped into Mexico, and Mr. Fish, secretary of state, declined to prefer a formal requisition to the Mexican government for the surrender of the fugitive.

(2) The Mexican authorities in 1884 made demand on our government for the extradition of Alexander Trimble, a citizen of the United States, who was accused of crimes committed in the republic of Mexico. The secretary of state, Mr. Frelinghuysen, construing the Treaty as inhibiting the surrender of an American citizen, refused to deliver up Trimble. In a carefully prepared opinion in that case he states his conclusion in the following words: "I understand the Treaty with Mexico as reading thus: 'The president shall be bound to surrender any person guilty of crime, unless such person is a citizen of the United States.'" Senate Ex. Doc. No. 98, 1st Sess. 48th Cong.

(3) Charles Hudson, an American citizen, was held in Texas, in 1888, for extradition to Mexico on a charge of robbery committed in that republic. In response to a letter from the governor of Texas, Mr. Bayard, secretary of state, replies:

12 L. R. A.

"I have the honor to acknowledge the receipt of your letter of the 18th instant in relation to the case of Charles Hudson, held in Texas for extradition to Mexico on a charge of robbery. It being alleged that Hudson is a citizen of the United States, you request to be informed whether the department will adhere to its former ruling in the *Trimble Case*, since that ruling, if applied to the case in question, might prevent the extradition of the prisoner, and render futile the efforts and expenditures of the Mexican government to obtain his surrender. As the decision of the department in the *Trimble Case* is understood, it was held that as, under the Extradition Treaty between the United States and Mexico, 'neither of the contracting parties shall be bound to deliver up its own citizens,' the president would not be authorized, in the absence of an express grant of power under the laws of the United States, to surrender to Mexico a citizen of the United States. The treaty provision referred to, which is found similarly stated in many of our extradition treaties, was held to negative any obligation to surrender, and thus to leave the authorities of this government without authority to act in such a case. After due consideration, the department is of opinion that the construction given to the *Trimble Case* is correct." (See letter on file in department of state, Austin, Tex.)

(4) More recently, and within the past sixty days, the question was considered by Mr. Blaine, present secretary of state, whose letter to Hon. W. H. Crain is published in the public prints. Dr. Martinez, it is said, was basely assassinated on the streets of Laredo, Tex., by persons who fled to Mexico. On behalf of citizens of Laredo, Mr. Crain requested the state department to take steps looking to the extradition of the assassins. That portion of the secretary's letter deemed pertinent to the present question reads as follows:

"The department regrets that the present conventional relations between the United States and Mexico do not admit of a demand for the extradition of the assassins, since it is stated they are citizens of Mexico. Present Treaty provides that neither of the contracting parties shall be bound to deliver up its citizens, and, as this clause has been held to preclude the surrender of a citizen of the United States, Mexico refuses to give up her citizens. This question was last agitated in the well-known case of Alexander Trimble and his associates, who were charged with murder and robbery in 1884. They were arrested in Texas with a view of their extradition by authorities of that State, and when the case was reported to their government, and the fact of their citizenship of the United States was disclosed, this department interfered and they were discharged. In view of this, and several prior and subsequent cases in which a similar construction has been given to the Treaty, this government is precluded from demanding the extradition of the fugitives in the present instance."

Thus it appears that, extending through a period of seventeen years, four different administrations of the federal government

have invariably held that no authority was conferred upon the executive, by the sixth article of the Treaty, either to demand of the Mexican authorities the extradition of their subjects committing crimes in the United States, or to surrender an American citizen upon demand made by the republic of Mexico. Following the construction so consistently applied to the Treaty, the executive department, whose appropriate duty it is to execute the Treaty pursuant to its stipulations and statutory requirements, has uniformly refused to surrender our own citizens; and it may be well said, if doubt exist as to the true construction of the Treaty, which the court freely admits is not entertained in the present case, this contemporaneous and uniform interpretation "ought to turn the scale." So far as the court is advised, there is but one opinion of the question by law-writers and the executive department of our own country. Nor can it be accurately said that the Mexican courts have authoritatively placed a different construction upon the Treaty. There is but a single instance known to the court where the question was brought to the attention of their judicial tribunals. That is a case referred to by Mr. Foster, minister to Mexico, in a communication to Mr. Evarts, secretary of state, which will be found but imperfectly reported in 1 Ex. Doc. (3d Sess. 45th Cong.) 1878-79, pp. 560-567. It appears therefrom that in 1877 two persons, Dominguez and Barrera, accused of murder in Texas, fled to Mexico, and the authorities of Texas applied to those of the state of Tamaulipas for their extradition. "They were arrested, and their delivery ordered by the federal executive through the department of war. But the prisoners applied to the district judge of Matamoras for amparo, or protection, a proceeding somewhat similar to our writ of habeas corpus, which application the judge sustained; a decision based upon the ground that, as Mexican citizens, extradition would be a violation of the individual guaranties of the Federal Constitution. An appeal was taken by the prosecuting attorney from this decision and the case was thus brought before the federal supreme court. After a lengthy discussion of the case, and a consideration of all the constitutional, international and political questions either involved or introduced, in which almost all of the magistrates of the court participated, the decision of the district judge of Matamoras was reversed, and the court decided by a vote of 9 to 5, that the individual guaranties of the Mexican Constitution would not be violated by the extradition of the criminals." See Mr. Foster's letter, p. 560. Whether the prisoners were eventually delivered up to the Texas authorities is not disclosed by the report. But it does appear that there was no order made for their surrender, nor for their discharge. They were simply held for the purpose of inquiring into the question of their citizenship. Mr. Foster inclosed with his report opinions of only two of the judges, *Chief Justice Vallarta* and *Magistrate Ramirez*, and a brief extract from the opinion of *Magistrate Bautista*. No other opinions

appear in the volume referred to. *Chief Justice Vallarta* and *Magistrate Ramirez* discussed the question, among others, of the authority of the Mexican government, under the sixth article of the Treaty, to surrender its citizens to the United States upon demand made by the proper officers. Upon that point *Magistrate Ramirez* says: "I think, also, that while our Federal Constitution and the Extradition Treaty of December 11, 1861, are in force, the executive power cannot consent to the extradition of any Mexican citizen." The chief justice maintained the contrary view, holding a Mexican citizen to be subject to extradition. The reasoning and conclusions of both judges are entitled to respectful consideration, but they are in no manner controlling upon our courts; and certainly in no event would the mere expression of opinion upon a collateral question establish a precedent to be followed by other tribunals. What was said was mere dicta, obviously apparent from the language of the chief justice: "A case," says he, "of the extradition of Mexicans, as I have said, is not treated here. The evidence of documents exists to the effect that the order issued by the department of war was given in the understanding that Dominguez and Barrera were American citizens, and that General Canales consulted the government in regard to this point." The interpretation of the Treaty by the executive branch of our government, and its unbroken practice in obedience thereto, the opinions of our law-writers, the logical deductions fairly drawn from the application of established rules of construction, and finally all these, supplemented by a protesting minority of the Federal Supreme Court of Mexico, stand opposed to the views of *Chief Justice Vallarta*. That criminals should be punished, and that nations should render to each other all lawful assistance in their power to effectuate that end, may be readily conceded. But ours is a government of law, and the rights, powers and prerogatives of the executive are derived from the Constitution and statutes and treaties made in pursuance thereof. If these deny, or do not confer, authority to surrender a citizen to a foreign state, then its exercise would be but the exertion of usurped power. Borrowing the words of Mr. Frelinghuysen: "It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify an usurpation of power." Nor is judicial usurpation less reprehensible. Both are wrong; both defy the law, and are repugnant to the genius of our institutions.

It is cause for regret that this case cannot reach the supreme court, to whose judgment the questions involved should be remitted for final and conclusive determination. But that fact should not deter the trial court from the performance of its duty. If the prisoner be unlawfully restrained of her liberty, an order for her enlargement should be entered without hesitation.

Being of opinion, for the reasons given, (1) that the warrant issued by the county judge for the arrest of the petitioner is void;

(3) that her surrender is not authorized by the Treaty with Mexico,—it results that her detention is illegal, and she should therefore be discharged from custody; and it is so ordered.

## VERMONT SUPREME COURT.

R. D. WHEELER

v.

E. SELDEN.

(.....Vt.....)

**On an exchange by husband and wife** of his wagon for her sleigh, which were both kept before and after in a barn leased by him, there is no such change of possession as will uphold her title to the wagon against the husband's creditors.

(March 20, 1891.)

**EXCEPTIONS** by defendant to a judgment of the City Court for the City of Burlington in favor of plaintiff in an action brought to recover damages for the alleged wrongful conversion of a wagon. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. L. F. Wilbur and D. J. Foster,* for defendant:

There is nothing in the case to show, nor is any claim made, that the exchange was in fraud of the husband's creditors; it therefore vested a perfect title in the wife. She owned the wagon from the time of the exchange, and as no other question is raised the defendant is entitled to judgment.

*Leavitt v. Jones*, 54 Vt. 428.

So long as the wagon remained in the barn in Burlington, there was an apparent concurrent possession, but under the circumstances disclosed by the case, a candid observer would be bound to say that Mrs. Arnold had the chief control, and that is all that is necessary to protect her title. So far as appears from the case, Mr. Arnold owned nothing in Burlington but the wagon, at the time of the exchange, and after the exchange he owned nothing there.

*Flanagan v. Wood*, 38 Vt. 332; *Hall v. Parsons*, 17 Vt. 271.

The transaction being a bona fide one, she acquired the property at the time of the exchange, and nothing further is required under sec. 3 of No. 140, Acts of 1884.

*White v. Waisie*, 47 Vt. 502; *Spooner v. Reynolds*, 50 Vt. 487.

All the law requires is that such a change of possession be had as the circumstances of the

parties and the property sold render practicable, and such a change was had in this case.

*Murray v. Chadwick*, 53 Vt. 293; *Lyndon v. Belden*, 14 Vt. 428.

*Messrs. W. L. Burnap and J. J. Enright*, for plaintiff.

*Tyler, J.*, delivered the opinion of the court:

The case shows that Arnold and his wife resided in Burlington, upon premises owned by the latter; that Arnold was the lessee of a barn situated in another part of the city, in which were kept a sleigh, owned by the wife, and the wagon in controversy, owned by Arnold; that, while the property was thus situated, they made an exchange by which the sleigh became Arnold's and the wagon the wife's, the wagon, when not in use, remaining in the barn, as before. Previous to the exchange Arnold had been accustomed to use the wagon in going to and returning from his farm in South Burlington, and for other purposes. Mrs. Arnold also frequently used it after the exchange, as she had done prior thereto. On an occasion when Arnold had the wagon at his farm, it was attached by the plaintiff as a deputy-sheriff on a writ in favor of a creditor of Arnold, and while in the officer's possession, by virtue of the attachment, it was taken away by the defendant, acting as Mrs. Arnold's agent, and upon claim of her title to the property. Judgment was obtained by the creditor against Arnold in the suit upon which the attachment was made, and an execution was issued and returned by the plaintiff unsatisfied. It is conceded that the wife acquired a good title to the wagon as against her husband. As we construe the exceptions, the question raised is in relation to her ownership of it as against her husband's creditors. The defendant's counsel refer to *Leavitt v. Jones*, 54 Vt. 428; but in that case it was only held that a wife, purchasing personal property with her own money from her husband can hold it as her separate property, and that her title is only liable to be defeated by her husband's creditors if all the requirements of the law necessary to render the sale and transfer valid as against such creditors are not complied with. The rule in this State is well understood by the profession

**NOTE.**—*Fraudulent transactions between husband and wife.*

Where a husband gave to his wife a carriage, a sleigh and a billiard table, but there was no recorded conveyance, and no visible change of possession, and the property continued to be used by all the members of the family as such articles are ordinarily used, it was held that the conveyance was invalid as against existing creditors of the husband. *McAfee v. Busby*, 69 Iowa, 328; *Smith v. Hewett*, 12 Iowa, 94; *Odell v. Lee*, 14 Iowa, 411.

Transfers of property and contracts made directly between the husband and wife are regarded as void. *Porter v. Wakefield*, 5 New Eng. Rep. 492, 146 Mass. 25, citing *Motte v. Alger*, 15 Gray, 322; *Ed- 12 L. R. A.*

*gerly v. Whalan*, 106 Mass. 7507; *Stetson v. O'Sullivan*, 8 Allen, 321; *Butler v. Ives*, 139 Mass. 205; *Roby v. Phelon*, 118 Mass. 541; *Atlantic Nat. Bank v. Tavener*, 130 Mass. 407; *Fowle v. Torrey*, 135 Mass. 87; *Knell v. Eggleston*, 1 New Eng. Rep. 455, 140 Mass. 202; *Woodward v. Spurr*, 3 New Eng. Rep. 232, 142 Mass. 283.

In New York, husband and wife are authorized to make conveyances and contracts of and concerning personal property to and with each other, in the same manner and to the same effect as if they were strangers. *Waterman v. Mackenzie*, 139 U. S. 252, 34 L. ed. 223, 54 Pat. Off. Gaz. 1562, citing *Armitage v. Mace*, 95 N. Y. 538; *Adams v. Adams*, 91 N. Y. 381. See note to *Deshon v. Wood* (Mass.) 1 L. R. A. 519.



that, to render a sale of personal property valid against the vendor's creditors, there must be a change of possession of the property from the vendor to the vendee; that the vendee's possession must be exclusive and apparent. *Weeks v. Prescott*, 53 Vt. 57.

Where there is a joint possession by the vendor and the vendee, the property is liable to attachment upon the vendor's debts if a candid observer would be at a loss to determine which of the two has the chief control and possession of it; and, in case of doubt, the law resolves the doubt against the party who should make the change of possession open and visible. *Flanagan v. Wood*, 83 Vt. 382.

The reason of the rule, which is to prevent fraudulent transfers of property, applies more strongly to transactions between husbands and wives than to those between other persons because of the greater facility for the commission

of frauds of this character between the former. No. 140, Acts 1884, is cited by the defendant's counsel as affording ground for his claim that there was a sufficient change of possession of this property. That Act was designed to enable married women to make contracts the same as if sole, and to protect their personal estate from their husband's creditors. It is true, however, that prior to the passage of this Act a husband could make a valid sale of personal property to his wife, and that a married woman could acquire as perfect a title to such property from her husband as she could from a stranger. *Leavitt v. Jones*, *supra*. The Act referred to does not prescribe what shall be a sufficient change of possession of property in case of such sale, and it in no wise relaxes or varies the rule above stated.

*Judgment affirmed.*

## MICHIGAN SUPREME COURT.

Elsie A. HARVEY

v.

Lauren H. CRANE, *Plff. in Err.*

(....Mich.....)

**A fence may be maintained along a statutory private road across the farm of another person when necessary to the owner's reasonable enjoyment of the road, as for instance where it is used as a passageway for stock, especially where the owner of the soil has land only on one side of the road.**

(April 17, 1891.)

**NOTE.—Statutory provisions on the subject of fencing.**

It is a fundamental principle of the common law, as indicated in numerous decisions, that no man is bound to fence his close against the encroachments of his neighbor's cattle; and that the owner of animals must restrain their trespassing upon his neighbor. In effect, however, this rule has no application in this country as by statutory innovation, regulations are prescribed for the control and adjustment of these matters. These statutory provisions, while employing a widely variant phraseology, are expressive of the same intent, and require substantially that the occupants of lands which are inclosed by fences must maintain such fences between their own and abutting inclosures, in equal shares, in order to protect each from the depredations of the other's stock. In support of this proposition, see Ala. Rev. Code 1887; Dig. 1888, chap. 78; Laws 1878, chap. 87; Ark. Rev. Stat. chap. 96; Conn. Gen. Stat. Rev. 1886, 448 *et seq.*; 1 Hittell's Dig. Cal. § 8086.

This is not affected by Code. See § 19, subd. 28, Pol. Code 1872; Ill. Stat. Rev. Code 1882, p. 158; 1 Ill. Gross Stat. chap. 51; 1 Ind. Rev. Stat. 1882, chap. 62; Iowa Code 1873, title 11, chap. 4; Kan. Gen. Stat. art. 3, chap. 40; Ky. Gen. Stat. chap. 55; La. Rev. Code, 1870; Civil Code, art. 1, chap. 8; Me. Rev. Stat. 1871, title 1, chap. 8; Mass. Gen. Stat. chap. 25; 1 Mich. Comp. Laws 1871, chap. 4; Minn. Rev. Stat. 1866, chap. 18; Miss. Rev. Stat. 1870, chap. 33; 1 Wagner, Stat. (Mo.) chap. 71; Neb. Gen. Stat. 1873, chap. 2; Nev. Comp. Laws 1873, p. 459; N. H. Gen. Stat. 1867, chap. 128; Nixon, Dig. N. J. Laws. 4th ed. 331; 13 L. R. A.

**E**RROR to the Circuit Court for Washtenaw County to review a judgment in favor of plaintiff in an action brought to recover damages for an alleged trespass by defendant in entering upon plaintiff's private way and removing a fence. *Affirmed.*

*Mr. A. J. Sawyer*, with *Mr. F. Hinckley*, for plaintiff in error:

When the owner of the easement attempts to make an inclosure thereof, where his stock may pasture as well as pass over it, and to exclude the owner of the fee from all use thereof, he has converted it to uses and purposes other than a road.

8 Kent, Com. 432, 433.

Rev. Stat. N. Y. pt. 1, chap. 11; 1 Ohio Rev. Stat. chap. 45; Brightly's Purd. Dig. Pa. 168, 608-609; R. I. Gen. Stat. 1872, chap. 94; Tenn. Code, § 4632; Acts 1870-71, chap. 38, § 8; Vt. Gen. Stat. chaps. 23, 102; Va. Code 1860, chap. 99; W. Va. Code 1868, chap. 60; 1 Taylor, Stat. (Wis.) chap. 17.

Where one party ceases to improve his land, or throws it open to the commons, he must not take away any part of his partition fence adjoining the next improved inclosure if the owner or occupant of such inclosure elects to pay its value within a reasonable time, which is generally fixed by statute. Thompson, Law of the Farm, § 237, *note*.

The statutes of the several States have provisions more or less explicit to this effect.

It has been held by the Supreme Court of Illinois that a partition fence, whether existing by agreement, acquiescence or statutory provision, cannot be removed until the parties interested in its remaining are properly notified of the intended removal. McCormick v. Tate, 30 Ill. 384.

### *Rights of the owner of the fee.*

The plaintiff, as owner of the soil, has all the rights and benefits of ownership consistent with such an easement (*Atkins v. Bordman*, 2 Met. 457; *Bakeman v. Talbot*, 31 N. Y. 371); among others must be the right to have his lands fenced or unfenced at his pleasure. In the absence of fences his horses and cattle must not obstruct the defendant's way; and the defendant is bound to the exercise of due and reasonable care by his own methods to prevent his cattle or other animals from tres-

The owner of the soil is under no obligation to fence along a highway unless he pleases, except as required by statute.

*Williams v. Michigan Cent. R. Co.* 2 Mich. 259; *Wood v. La Rue*, 9 Mich. 159; *Gardner v. Smith*, 7 Mich. 410.

The owner of the soil over which an easement exists, either as a right of way, or a right to flow, has all the rights and benefits of ownership consistent therewith. He has the right to the herbage growing thereon, and can use it for raising crops or for pasturing cattle.

*Smith v. Langevald*, 1 New Eng. Rep. 449, 140 Mass. 205.

Action, in one form or another, by the owner of the dominant estate, to restrain the owner of the servient estate from destroying his right of way by placing gates and fences across it, depositing substances in it, building buildings upon it, cutting it up and rendering it impassable by drawing heavy loads over it and the like, are common in the books. But this and the case of *Brill v. Brill*, 11 Cent. Rep. 305, 106 N. Y. 511, are the only cases we have found where the owner of the right of way attempted by suit to increase the burden upon the fee.

The right acquired by the plaintiff by his proceeding to lay out a private way is the right of passage, that is, the right to use the surface of the soil for the purpose of passing and repassing, and the incidental right of properly fitting the surface for that use, and of keeping the same in repair, and the right to maintain an action for the redress of any injury to these rights. The defendant, as owner of the soil, has all rights and benefits of ownership consistent with such easement. Among others he has the right of possession, and the actual possession, and the right to have his land fenced or unfenced at his pleasure.

*Brill v. Brill*, *supra*; *Durfee v. Garvey*, 78 Cal. 546; Washb. Easem. \* 188, 264, 265; *Short*

*v. Divine*, 5 New Eng. Rep. 593, 146 Mass. 119; *Adams v. Emerson*, 6 Pick. 57; *Bakeman v. Talbot*, 31 N. Y. 886; *Mansell v. McAtee*, 9 B. Mon. 20; *Huson v. Young*, 4 Lans. 63; *Baker v. Frick*, 45 Md. 337; *Amy v. Shaw*, 83 Me. 379.

Mr. J. Willard Babbitt for defendant in error.

McGrath, J., delivered the opinion of the court:

This is trespass for tearing down a fence on the line of a private road. The cause was tried by the court, and comes here upon findings of fact and conclusions of law. Defendant owned a parcel of land lying between plaintiff's land and the public highway. Plaintiff in August, 1887, applied to the highway commissioner, under the statute, to lay out a private road twenty-four feet wide, at one side of defendant's premises, extending from the public highway to plaintiff's land, upon which application the necessary proceedings were had, and the road was laid out and opened, taking less than one third of an acre of land, for which the jury awarded, and plaintiff paid, \$75. The defendant did not signify his intention of making use of said private road pursuant to section 1393, How. Stat. Since the opening of said highway in August, 1887, the plaintiff has been accustomed to use her said land as pasture; that during the seasons of pasture the plaintiff has daily driven her stock, cattle and horses over and along said private road; that the lot of the defendant lying adjacent to this private road on the south side thereof embraces some nine acres of land, and is arable soil, used by the defendant for crops and pasture; that, shortly after the opening of said private way, the defendant said to the plaintiff that he did not know as he, the defendant, wished for any fence on the south side of said right of way; that at some later period the defendant

passing on the plaintiff's premises. An inclosed road might be a convenience, but its creation is not imposed upon the plaintiff by the terms of the grant; it is not an actual or direct necessity to the full enjoyment of the privilege reserved, and it cannot be implied as incident thereto. *Brill v. Brill*, 11 Cent. Rep. 305, 106 N. Y. 511.

The defendant certainly has no right to preclude the plaintiff from availing himself of the right of passage, or to render the exercise of that right unusually or unreasonably difficult or burthensome. *Bakeman v. Talbot*, 31 N. Y. 886.

#### *Owner liable for injuries occasioned by defective fence.*

One who erects and maintains a barb-wire fence, although entirely upon his land, the wires of which are not properly stretched, but are left hanging loose in such a way that stock are not likely to see them, and are liable to run upon them and be injured, is guilty of negligence in creating a liability for such injuries. *Loveland v. Gardner*, 4 L. R. A. 305, 79 Cal. 317.

A failure to keep a lawful fence around a growing crop which in its nature cannot be regarded as dangerous to stock cannot be regarded as such negligence as will render the owner of the ground liable for injury resulting to animals running at large, that entered and were injured by eating the crop. *Fennell v. Seguin Street R. Co.* 70 Tex. 870. 12 L. R. A.

#### *Effects of the unlawful removal of fence.*

Where a division fence has been unlawfully removed by the owner, leaving the crops of the adjoining owner exposed, the latter has the legal right to avert the danger by again connecting his fence with that of the former, and the latter is guilty of an offense, under Tex. Pen. Code, art. 684, if he pulls down the fence so erected to close the gap caused by his removal of the division fence. *Jamison v. State*, 37 Tex. App. 443.

The sole owner of a division fence cannot lawfully withdraw or separate it from the connecting fence of the adjoining owner without first giving notice in writing of his intention to do so, under Tex. Stat. 1897, p. 80, § 2, for at least six months prior to so doing. *Jamison v. State*, 37 Tex. App. 442.

It is the duty of a landowner to take notice of the natural propensity of domestic animals, and to exercise reasonable care to prevent his fence from becoming dangerous. The fact that the fence was constructed entirely upon defendant's land is no defense, if negligently constructed or maintained. *Loveland v. Gardner*, 4 L. R. A. 305, 79 Cal. 317.

"Under the statute of Indiana," both parties to a partition fence are equally bound to maintain it. Either may repair, and enforce contribution from the other; but failure to do so leaves them upon their respective common-law rights and obligations. *Myers v. Dodd*, 9 Ind. 390. And see *Cook v. Morea*, 33 Ind. 497.

instructed the plaintiff that she must lead her stock when they passed along this way; that thereafter, in the summer of 1888, the plaintiff erected a post and wire fence along the south side of said way, and about one foot within the limits of the same; that said fence was sufficient to turn the said stock of cattle and horses and keep them within the way while passing through the same; that in the month of May, 1889, the defendant entered upon said way, and tore down and removed the said fence as aforesaid erected by the plaintiff; and this action is brought to recover for the alleged trespass; that the damage to said fence was \$2; that the defendant did not consent or object to the building of the fence by the plaintiff along the said right of way; that the wires composing the said fence so built by the said plaintiff along the said way were, to some extent, at one or two points, down and on the defendant's land; that there was no evidence that defendant, Crane, interfered with plaintiff's use of the said right of said road. The court found, as a conclusion of law from the above and foregoing facts, that the plaintiff had the right of way or private passage over the land of the defendant; that, as an incident thereto, she had the right to whatever may be necessary for the reasonable and proper enjoyment thereof; that it is unreasonable, while the defendant crops or pastures his land adjacent to said right of way, to forbid or prevent the plaintiff from employing the usual and reasonable methods of protecting herself from the hazards and danger attending the driving of stock along said way, with the fields of the defendant inviting and uninclosed; that to withhold such right of protection from the plaintiff, and at the same time to hold her responsible for all damage which her stock may unavoidably do to the property of the defendant, is practically to destroy the value of the right which the plaintiff has purchased, or, if there be no liability except for want of due care, yet with the growing grain lying adjacent thereto, unfenced, it would be impossible to enjoy to any reasonable extent this right of way. The right, therefore, of the plaintiff to erect and maintain a suitable fence adapted to the object sought, and within the right of way, must be deemed an incident necessary to the reasonable enjoyment of the easement obtained, and the court finds, as a conclusion of law, that the plaintiff is entitled to recover in this action, and assesses the damages of the plaintiff at the sum of \$2, with costs of suit to be taxed.

The defendant insists that he is still the owner of the soil over which the easement exists; that as such he is entitled to the herbage growing thereon, and to use the land for raising crops, or for pasturage, subject only to plaintiff's right of way over it; and the defendant cannot be excluded from it by the construction of a fence on the line of the way. "Action in one form or another," says counsel for defendant, "by the owner of the dominant estate, to restrain the owner of the servient estate from destroying his right of way, by placing gates and fences across it, depositing substances in it, building buildings upon it, cutting it up, and rendering it impassable by drawing heavy loads over it, and the like, are common in books. But this, and the case of

*Brill v. Brill*, 106 N. Y. 511, 11 Cent. Rep. 805, are the only cases we have found where the owner of the right of way attempted by suit to increase the burden upon the fee." While it is true, is it not because the right to an inclosed way is generally conceded? It cannot be denied that as a rule public highways, private rights of way, and ways or lanes maintained upon agricultural lands for the convenience of private owners, are in fact inclosed. This is not a case where the owner of the dominant estate seeks to compel the owner of the servient estate to maintain a fence, for here the owner of the dominant estate seeks only to establish her right to inclose the way to protect herself in its enjoyment. It is well known that private roads are invariably inclosed, and no case can be found in the books where the right to inclose a statutory private road has been assailed. In several of the adjudicated cases the existence of boundary-line fences appears. Whether inclosed by the owner of the fee or the owner of the way we are not advised, but the fact of inclosure remains. When a right of way exists by virtue of a license or grant, the incidents of that right are determined by reference to such grant or license, and when that is uncertain or ambiguous, the circumstances surrounding the grant or license and the situation of the parties must be inquired into with a view of arriving at the intention of the parties. When acquired by prescription, it is largely a question of the nature of the prior use. The right here insisted upon is not one acquired by grant, license, or prescription. It is one acquired and paid for under the Statute. It is not simply a right of way over defendant's land, nor a right of ingress or egress merely. It is a statutory private road, twenty-four feet in width, all or any part of which may be used by plaintiff for any and all purposes for which any highway may be used. It may be planked, paved, macadamized or graveled by plaintiff for its entire width. The Statute contemplates not only a record of the description and laying out, but an actual opening of the road, involving the taking down of cross-fences, excluding the presumption that the possession was to remain in the owner of the fee.

It appears from the adjudications: (1) That the conveyance of a right of way gives to the grantee not only a right to an unobstructed passage at all times over defendant's lands, but also such rights as are incident or necessary to the enjoyment of such right or passage. *Maxwell v. McAtee*, 9 B. Mon. 21; *Bliss v. Greeley*, 45 N. Y. 671; *Herrman v. Roberts*, 119 N. Y. 87, 7 L. R. A. 226. (2) The owner of the way, where its limits are defined, has not only the rights of a free passage over the traveled part, but also to a free passage on such portions of the way as he thinks proper or necessary. *Herrman v. Roberts*, *supra*. (3) The owner of the fee, subject to an easement, may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement. *East Tennessee, V. & G. R. Co. v. Telford* (Tenn.) 14 S. W. Rep. 778; *Herrman v. Roberts*, *supra*; *Cooley*, Const. Lim. 691. (4) The rights of the owner of the easement are paramount, to the extent of the grant, to those of the owner of the soil. *Herrman v. Roberts*,

*supra*; *East Tennessee, V. & G. R. Co. v. Telford*, *supra*; *Kansas Cent. R. Co. v. Allen*, 22 Kan. 285. (5) The owner of the soil is under no obligation to repair the way, as that duty belongs to the party for whose benefit it is constructed. *Herrman v. Roberts*, *supra*. (6) What may be considered a proper and reasonable use by the owner of the fee, as distinguished from an unreasonable and improper use, as well as what may be necessary to plaintiff's beneficial use and enjoyment, are questions of fact to be determined by the trial court or jury. *Bakeman v. Talbot*, 81 N. Y. 366; *Huson v. Young*, 4 Lana. 64; *Prentice v. Geiger*, 74 N. Y. 842; *Herrman v. Roberts* and *Kansas Cent. R. Co. v. Allen*, *supra*.

In *Herrman v. Roberts*, *supra*, decided in 1880, the court says: "It cannot be assumed, in the absence of any provision looking thereto in the grant, that the grantor intended to reserve any use of the land which should limit or disturb the full and unrestricted enjoyment of the easement granted. The purpose contemplated by the grant was the creation of an easement for the plaintiff's use, and not the reservation to the owner of the use of his land. Every use by the owner was abandoned, except such as might be made in a mode entirely consistent with the full and undisturbed enjoyment by the grantees of the easement. The idea of a joint use of the land by both parties, in the sense that a use by the grantee should at any time give way to a use by the grantor, is contrary to the plain meaning and intent of the grant. The use of the land, says the court, for agricultural purposes, is clearly inconsistent with the rights acquired by plaintiff."

In *Bakeman v. Talbot*, *supra*, the lands of defendant, divided into several lots, lay between two parcels of land owned by plaintiff, one of which was a wood-lot. Defendant had constructed a fence on the lines of his several lots, but had provided a set of bars at each point crossed by the right of way. The right of way rested in a decree of partition, which gave to the plaintiff "the right of way to enable him to pass to and from his wood-lot, for the purpose of obtaining wood;" and it was held that nothing passed as an incident to such grant but what was requisite to its fair enjoyment; that the present arrangements were suitable and sufficient under existing circumstances; that, if the passage was made as convenient as the mode of access which a farmer usually provides for himself to get to and from his wood-land, it was sufficient; that after the circumstances have changed, and the question shall then arise as to what shall then be proper, it may be then determined that an open way may be necessary.

In *Brill v. Brill*, *supra*, defendant sold to plaintiff, and reserved the right of free ingress and egress across the premises conveyed, and plaintiff complained because defendant left the gates open, and defendant complained because plaintiff refused to maintain fences along the road. Although the court said that the owner of the soil has the right to have the way fenced or unfenced at his pleasure, yet the question there was whether plaintiff could be compelled

to maintain a fence, and the court held that he was not obliged to maintain a fence; that an inclosed fence was not an actual or direct necessity to the full enjoyment of the privilege reserved. The court in that case found that the necessity for the fence did not exist. The right was one of ingress and egress merely, over an open way, which had been used before the land had been divided. No specific number of feet was set apart. Fences, under such circumstances, would increase the burden by actually taking the additional land necessary for a fence each side of the way. The right of way in that case was through the farm, separating it into two parcels, in which case fences would necessarily seriously inconvenience the owner of the fee. The court says: "The plaintiff's lands were thus made servient to the convenience and pleasure of the owner of the other parcel of land to the expressed extent, and no further. No case has been found which imposes a duty upon the owner of the lands so burdened to do any positive act, as, in this instance, erect or maintain a fence for the benefit of the owner of the dominant estate. The plaintiff was no more bound to define by fences the course they should take than he was to prepare the surface of the way for their safe travel." As we have already said, plaintiff does not seek to impose the duty of any positive act upon defendant. She seeks simply to be allowed, at her own expense, to make this way as convenient as the modes of passage which farmers usually provide for themselves upon their own premises. This is a road laid out and opened twenty-four feet wide. It is laid across one end of defendant's farm. Defendant owns no land beyond it. The fence is within the twenty-four feet. It is built, not for ornament, or to mark the line of the way merely, but for utility, because actually necessary. Applying the rules laid down by these adjudications, it seems clear to me that plaintiff is entitled to make use of this way for any and all purposes for which a road may be used; that defendant is under no obligation either to improve the bed of the way, or to protect its use; that plaintiff is entitled to do any act which may be necessary to promote its beneficial use, to the extent of inclosing the same; that the only limit to the servitude which she is entitled to impose upon the fee is what may be deemed necessary and essential to her enjoyment of the rights acquired; that the rights of defendant in this way are subject to plaintiff's necessities arising from the legitimate use of the road; that the necessity and reasonableness of the means made use of to adapt the road to her use are questions of fact, to be determined by the trial court; and that the findings of the trial court in that regard are conclusive upon us. The court below finds that the plaintiff has been accustomed daily to drive her cattle and horses through this private road, and that a fence along the same is an incident necessary to the reasonable enjoyment thereof.

*The judgment is therefore affirmed, with costs to plaintiff.*

The other Justices concurred.

## ILLINOIS SUPREME COURT.

Elijah C. FINNEY, *Appt.*

v.

George F. HARDING.

(.....):

**A landlord's lien on crops for rent under Rev. Stat., chap. 80, can give him no right to maintain a personal action for damages against a bona fide purchaser from the tenant although he may follow the goods and distrain for his rent.**

(Ortolg, J., *dissentia.*)

(March 30, 1891.)

**A PPEAL** by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Douglas County in favor of plaintiff in an action brought to recover damages from defendant for having purchased from plaintiff's tenant crops subject to a landlord's lien. *Reversed.*

The facts are stated in the opinion.

Messrs. Eckhart & Moore for appellant.  
Mr. William J. Ammen for appellee.

Shope, J., delivered the opinion of the court:

The following statement of fact, taken from the opinion of the appellate court, will be sufficient to present the single point arising on this record: Appellee, a resident of Chicago, made a lease, in writing, to Matthias Klien, of a quarter-section of land in Douglas County,

for one year from March 1, 1886, at a cash rent of \$480, payable on or before the 1st day of January next following, and providing, among other things, that the crops should not be removed until the rent was paid. In August and December, 1886, appellant for his firm, which then was, and for some years had been, engaged in the business of buying and shipping grain at Tuscola, about three miles from the demised premises, purchased of the tenant oats and corn raised on said premises, of the value of \$227.16, and paid him therefor in good faith, and without any notice that he was a tenant, or that the grain had been raised on demised premises, or that any rent was unpaid; about the 1st of January, 1887, Klien left the farm and the county wholly insolvent, and with \$380 of the rent unpaid. Appellee brought this suit to the October Term, 1887, in assumpsit, on the common counts, and a special count setting out the facts, to which the defendant pleaded the general issue, which was tried by the court without a jury, under a stipulation that the form of action might be disregarded, and any legal claim or defense shown. Judgment was given for the plaintiff for \$227.16.

The single point for decision is stated by the counsel for the appellant to be "whether a bona fide purchaser, without notice, of crops grown on rented premises, for a valuable consideration, is protected in law;" and, as stated by counsel for appellee, "Does the statutory lien of the landlord on the crops hold against the purchaser of the crop from the tenant, who purchases within the six months named by the

**NOTE.**—Express legislation on the subject of landlords' liens.

By express legislation, in several States, an attempt has been made to regulate the rights of a landlord to secure his unpaid rental by a statutory lien upon growing crops.

The language of this legislation has assumed a variant phraseology, but its substantial requirements have been found embodied in the Act of Congress, passed February 23, 1867, §§ 13, 14 (Stat. at L.) 404.

The Act referred to is in entire harmony with the various legislative provisions in the different States, and any judicial interpretation it may receive is peculiarly applicable as an exposition to any of the state enactments of similar import. Especially is this true of the Illinois Statute under construction in the principal case.

*The conclusions of the authorities.*

The courts of Iowa, Missouri, Alabama and Arkansas, interpreting the Statutes of those States (Iowa Code, §§ 1270, 1271; Mo. Rev. Stat. 618; Ark. Rev. Stat. 979, and Clay's Ala. Dig. 505), which are nearly similar in their provisions to the Act now under consideration, have adjudged as follows:

1. The landlord's lien attaches at the commencement of the tenancy, or where the goods are carried on the rental premises, and not from the time of the commencement of proceedings to enforce it. *Grant v. Whitwell*, 9 Iowa, 158; *Powell v. Hadden*, 21 Ala. 745; *Sevier v. Shaw*, 25 Ark. 417; *Smith v. Meyer*, 25 Ark. 608.

2. The landlord's lien is upon the stock in mass and not in detail, and when goods are sold in the usual course of trade carried on, in or upon the rental premises, they are sold discharged of the 12 L. R. A.

lien, and the lien continues on those remaining. *Grant v. Whitwell*, *supra*, re-affirmed in *Carpenter v. Gillespie*, 10 Iowa, 562, and again in *Doane v. Garretson*, 24 Iowa, 361.

3. This lien continues eight months, and during that time the landlord may take steps to subject the crop to the payment of the rent. If the property remains *in specie* in the hands of an assignee, he may, during the continuance of the lien, seize it under protest; or might, if it was consumed, hold the assignee accountable for its value, if the assignment was taken with a knowledge of the existence of the lien. *Knox v. Hunt*, 18 Mo. 243.

4. Statutory liens without possession have the same virtue that existed in common-law liens accompanied by possession. *Grant v. Whitwell*, *supra*.

At common law, a purchaser of goods and chattels takes them subject to the same lien which existed against the vendor. *Man v. Shiffner*, 2 East, 523; *Godin v. London Assur. Co.* 1 Burr. 489; *Burton v. Smith*, 28 U. S. 13 Pet. 464, 10 L. ed. 248.

In the case of *Webb v. Sharp*, 80 U. S. 18 Wall. 15, 20 L. ed. 473, the court in part construed the Act of 1867, and adopted substantially the same rules of construction which guided the court of last resort of Iowa.

Repeated decisions in other jurisdictions have settled the question that the lien in such cases attaches at the commencement of the tenancy, or whenever personal chattels owned by the tenant and subject to execution for debt are brought on the rented premises. *Grant v. Whitwell*, 9 Iowa, 158; *Carpenter v. Gillespie*, 10 Iowa, 562; *Doane v. Garretson*, 24 Iowa, 361; *Powell v. Hadden*, 21 Ala. 745; *Sevier v. Shaw*, 25 Ark. 417; *Smith v. Meyer*, Id. 608.

Statute, but whose purchase, however, is in good faith, for value, without actual notice of the existence of the facts contemplated by the provisions of statute" creating the lien? By stipulation a jury was waived, and under the declaration and plea of general issue filed proof was admissible that would sustain the plaintiff's right of recovery in any form of action or maintain any defense available. Propositions of law were asked and refused, properly raising the question stated. The question is therefore broadly presented, whether a right of action is shown in the plaintiff, irrespective of the form of action. The plaintiff is not seeking in this action to enforce his lien upon the crops grown upon the demised premises, but to charge the defendant as purchaser thereof, in a personal action for their value. Appellant was engaged in the business of buying and selling grain at Tuscola, and in August and December, Klien, the tenant of appellee, sold to appellant oats and corn in the regular course of business, amounting to \$227.16, which was paid for at the time. The suit was brought in October, 1887. It is conceded that the grain was purchased in the ordinary way, without notice by appellant of Klien's relation to appellee, or that the grain was raised upon rented premises, nor are there any facts and circumstances shown which, it is claimed, would put appellant upon inquiry, or which, if followed, would lead to the fact. The 81st section of the Landlord and Tenant Act (Rev. Stat. chap. 80) is as follows: "Every landlord shall have a lien upon the crops grown or growing upon the demised premises for the rent thereof, whether the same is payable wholly or in part in money, or specific article of property or

products of the premises, or labor, and also for the faithful performance of the term of the lease. Such lien shall continue for the period of six months after the expiration of the term for which the premises were demised." Cases involving this section of the Statute, in various forms, have frequently been before the court, but in none of them has this question been determined. In *Miles v. James*, 86 Ill. 899, it was held that the lien of the landlord was paramount to that of an execution. In *Thompson v. Mead*, 67 Ill. 895, and *Wetzel v. Mayers*, 91 Ill. 497, it was held that the lien of the landlord was prior to that execution and attachment. Substantially the same question was presented in *Prettyman v. Unland*, 77 Ill. 206. In *Watt v. Scofield*, 76 Ill. 261, it was found that Watt, the purchaser from the tenant of Scofield, had full knowledge of the landlord's lien for rent, and was chargeable with notice that the rent was unpaid. The case, however, went off upon the ground that trover would not lie; and the action being trover, the judgment below was reversed. In *Hunter v. Whitfield*, 89 Ill. 229, the court expressly found that the purchaser was chargeable with notice of the landlord's lien, and expressly declined to determine the question as to whether an action would lie against a bona fide purchaser for value and without notice. In *Prink v. Pratt*, 26 Ill. App. 223, the question was simply whether trover would lie by the landlord against the purchaser of the crop. It therefore follows that the question may be regarded substantially as one of first impression in this court.

The appellate court of the second district, in *Hous v. Clark*, 28 Ill. App. 145, held that no action would lie by the landlord against a

liens of this nature are upon the chattels in bulk or the stock in mass and not in detail, or rather the lien is displaced where the goods are sold in the usual course of trade carried on by the tenant, provided they are duly delivered and do not remain on the premises. *Grant v. Whitwell*, *Carpenter v. Gillespie* and *Doane v. Garretson*, *supra*.

Purchasers of goods and chattels take them at common law subject to the liens which existed against the vendor, and the same rule applies in a case arising under the Act of Congress in question, where the purchase is of the stock in mass, which is not removed from the premises, or with knowledge of the lien, and not in the usual course of trade. *Man v. Shifner*, 2 East, 523; *Godin v. London Assur. Co.* 1 Burr. 489; *Burton v. Smith*, 38 U. S. 13 Pet. 483, 10 L. ed. 248.

Sales of the stock in mass which is not removed, or not made in the ordinary course of trade on the premises and with knowledge of the lien, are subject to that rule under this provision, and the landlord may have his remedy for the same "in whose hands they may be found." Personal chattels sold in the ordinary course of trade on the premises without knowledge of the lien are not subject to the lien, or, in other words, the lien in respect to such sales where the goods are removed from the premises is displaced and the purchaser takes a perfect title to the property discharged of the lien. "Goods sold in the ordinary course of trade," says the United States Supreme Court (*Webb v. Sharp*, 80 U. S. 13 Wall. 15, 20 L. ed. 478), "undoubtedly become discharged from the lien, because if it were not so business could not be safely carried on; but the court held in the same case that the lien created by that Act of Congress commences with the tenancy and contin-

ues for three months after the rent is due, which cannot be true for any practical effect if it be admitted that the sale of the personal property in bulk when not removed from the premises and not in the usual course of trade prevents the landlord from levying on the chattels in whose hands they may be found." Unquestionably the lien, when it once attaches, continues to attach to the chattels into whose hands the chattels may come during the time allowed for instituting proceedings, unless the lien is displaced by the removal of the goods or by the sale of the chattels by the tenant in the ordinary course of mercantile transactions. Support to that view is found in the fact that the Act of Congress, in providing a personal remedy by action against the purchaser with notice of the lien, evidently intends to permit the landlord to reach the chattels in whose hands they may be found, if the chattels were not sold in the usual course of business. *Knox v. Hunt*, 18 Mo. 243.

It was not the intention of this Statute to impose additional burdens upon purchasers of personal property. It gives the power to the landlord to prevent a sale at any time by attaching the goods, and thus secure his rent. But when a bona fide sale of the chattels has been consummated the lien of the landlord is at an end as to the chattels sold. *Webb v. Sharp*, 80 U. S. 13 Wall. 14, 20 L. ed. 478.

The Statute declares positively that the remedy shall be against a purchaser of such chattels with notice of the lien, and gives no remedy against the purchaser without notice. This necessarily leads to the construction that a bona fide sale, without notice, discharges the property from the operation of the lien. *Webb v. Sharp*, *supra*, which case must be regarded as decisive of the question.

bona fide purchaser of the crop from the tenant; while in the Appellate Court of the Third District in the present case it was held that the landlord may maintain an action for money had and received, if the purchaser has converted the crops into money, and, if not, case may be maintained. We are also referred to decisions of other States, arising under statutes more or less variant, presenting a contrariety of construction and opinion. Among these are *Nesbitt v. Bartlett*, 14 Iowa, 485; *Westmoreland v. Wooten*, 51 Miss. 825; *Seafie v. Stovall*, 87 Ala. 287; *Fowler v. Bapley*, 83 U. S. 15 Wall. 328, 21 L. ed. 35; *Beall v. White*, 94 U. S. 362, 24 L. ed. 178; *Fraser v. Jackson*, 46 Ga. 621; *Thornton v. Carver*, 80 Ga. 397; *Hasley v. Haynes*, 87 Mich. 585; *Smith v. Shell Lake Lumber Co.* 68 Wis. 89,—which, with more or less pertinency, sustain the view that the lien of the landlord does not follow the crops into the hands of a bona fide purchaser without notice. On the other hand, the cases mainly relied upon are *Kennard v. Harvey*, 80 Ind. 87; *Mathews v. Burke*, 83 Tex. 419; *Davis v. Wilson*, 86 Tenn. 519; *Richardson v. Petersen*, 58 Iowa, 724; *Holden v. Cox*, 60 Iowa, 449, and perhaps others,—the holding in which, more or less directly, is that the lien of the landlord is paramount as against a bona fide purchaser.

It must be observed, however, that in many of the latter cases it was sought to enforce the lien as against the property in the hands of a purchaser, and not to charge the purchaser for its conversion. Such was the case in *Mathews v. Burke*, *Richardson v. Petersen*, *supra*, and others. While in others, as in *Holden v. Cox*, it does not appear that the purchaser purchased without notice of the landlord's lien. A review of these authorities will be unnecessary, but an examination will disclose but few cases where the precise question at issue here was involved. It may be conceded that the lien given by the Statute would enable the landlord, by the issue of his warrant, to follow the property, and to seize it wherever found, as long as it could be identified, as a sheriff or other officer having an execution may follow property subject to the lien of his execution, and the pivotal question in this case would remain undetermined. It seems to be well settled that a purchaser from a judgment debtor of personal property subject to the lien of an execution, if made for value, will not be liable in an action by the plaintiff in execution for the value of the property. It is said in *Kerr, Fraud and Mistakes*, 201: "Though there be a judgment against the vendor, and the purchaser has notice of it, that fact will not, of itself, affect the validity of the sale of personal property." And so in *Powers v. Wheeler*, 63 Ill. 29, where it was sought by a plaintiff in execution to charge the purchaser of personal property with the value thereof, it was alleged in the second count of the declaration that, at the time the execution came into the hands of the officer, the defendant therein was the owner thereof, and had in his possession certain property, *i. e.*, 800 hogs, which were liable to execution and subject to the lien thereof, and that the defendant purchased the same after they became so subject to said lien, etc.; and

it was said by this court that the want of allegation of the knowledge of the judgment and execution, and of a fraudulent purpose on the part of the defendant to defeat the execution on the part of the purchaser at the time of purchasing the hogs, clearly rendered this count insufficient, and that a demurrer thereto was properly sustained.

Without further citation of authority to sustain this view, it is manifest from the authorities that the principle upon which a purchaser for value may be charged rests solely upon the ground of fraud. It was said by *Lord Mansfield in Cadogan v. Kennet*, Cowp. 432, quoted in *Powers v. Wheeler, supra*: "If a man knows of the judgment and execution, and, with a view to beat it, purchases the debtor's goods, it is void, because the purpose is iniquitous," and continuing the quotation from *Kerr, supra*, it is said: "But if the purchaser, knowing of the judgment, purchases with the view and purpose to defeat the creditors' execution, it is iniquitous and fraudulent, notwithstanding he may have given a full price, for it is assisting the debtor to injure the creditor." And it was held in the *Powers Case* that the first count of the declaration, which alleged knowledge of the judgment and execution, and that the purchase was made with the purpose of aiding the defendant in execution in defrauding the plaintiff in the collection of his debt, was sufficient to charge the defendant, and that the demurrer thereto was improperly sustained. Further illustration of the distinction we are seeking to make might be given, but not without unduly extending this opinion. Much light, it seems to us, however, may be cast upon this lien by a consideration of the relation of the landlord to the property in respect of which the lien attaches. Thus it has been held, in *Watt v. Scofield* and *Frink v. Pratt, supra*, that trover will not lie by the landlord against one who has converted the crop, for the reason that the landlord is not, by virtue of his lien, either the owner or entitled to possession thereof. No better statement, perhaps, can be found in our Reports than that made in the separate opinion of *Justices McAllister and Craig, in Watt v. Scofield*. It is there said: "It is true, the plaintiff had a lien given by the Statute, but it is a mere lien. The landlord had not, by virtue of the lien alone and without levy of a distress warrant, a right of possession. He could not take possession of the tenant's crops at any time he chose, before the rent was due, nor could he after it was due, by virtue of the lien alone. The Statute gives no such authority. The remedy is therefore by action on the case for a fraudulent act, intended to impair the landlord's security, when the circumstances warrant, like the cases of a lien by mortgage or execution,"—citing *Powers v. Wheeler, supra*. It is true, as said in *Thompson v. Mead, supra*, that the lien of the landlord does not depend upon a levy of a distress warrant; but it has been uniformly held that until such levy the landlord had no right of possession or right of property in the crop. In many of the cases, as in the two already cited, the lien is likened to the lien of an execution, which gives to the officer no right in the property itself, nor will it enable him to maintain

replevin, trover or trespass prior to the levy of his writ; and this is the current of the authority everywhere.

It should be observed that the decision in the case of *Holden v. Cox*, *supra*, is predicated upon the assumption "that whoever consumes or destroys personal property upon which another has a lien becomes liable to the lienholder in damages." Which, without qualification, is, as we have seen, unwarranted in respect of many liens. We are unable to distinguish the lien of the landlord, under this Statute, from that of any other "mere lien" created or given by statute, as that given to execution liens, or the lien given by the Statute of Michigan upon logs cut to the persons employed in cutting them, as shown in *Hatley v. Haynes*, 87 Mich. 585, and by the like Statute in Wisconsin, construed in *Smith v. Shell Lake Lumber Co.*, 68 Wis. 89, and like cases.

The argument *ab inconvenienti* is pressed with force, not only in argument, but in several of the cases touching upon the character of the lien given. On the one side, it is urged that the Statute was intended to give real security to the landlord, and that the effect of so construing the Statute, as that the landlord shall not have the right of action against a bona fide purchaser, will render the lien valueless; and it cannot, therefore, be presumed that the Legislature intended to subordinate the lien to the right of an innocent purchaser. The force of this argument is much weakened by the consideration: *first*, that the landlord may pursue the property and seize it under his distress warrant, notwithstanding its alienation; and, *second*, that the landlord may, by the exercise of ordinary diligence, protect himself against the threatened loss. By an Act of the Legislature of this State, in force July 1, 1877, which, being *in pari materia* with the section already quoted, must be considered therewith, provides "that if any tenant shall, without the consent of his landlord, sell and remove, or permit to be removed, or be about to sell and remove, or to permit to be removed, from the demised premises, such part or portion of the crops raised thereon, or shall endanger the lien of the landlord upon such crops, for the rent agreed to be paid, it shall or may be lawful for the landlord to institute proceedings by distress before the rent is due," etc. It would seem to have been within legislative contemplation that the tenant had the right to sell the crops, reserving enough to satisfy his landlord's rent. But, be this as it may, it is apparent that the landlord has the ready means of protecting his lien, and securing himself against loss by the sale and removal of the crop, by the exercise of ordinary diligence and oversight. It must be admitted, on the other hand, that the purchaser of the crop, after its severance, and at a distance from the demised premises, is without such means of protection. It is a familiar principle that bona fide purchasers are favorites of the law, and the policy has ever been to protect them. The rule in respect of the construction of statutes was stated at an early day to be, "Acts of Parliament are to be so constructed as that no man who is innocent or free from injury or wrong be punished or endangered." 1 Co. Litt. 31. And the rule has been that a statute will not be so

construed as to be violative of this fundamental principle, unless the language employed admitted of no other reasonable construction. But this Statute requires no construction. It is plain and unambiguous. It creates a lien upon the crops grown or growing for the rent of the demised premises, which no one denies. The only question is as to the effect which shall be given to the lien thus created. We are asked to extend by construction the force and effect of this lien beyond that of any other mere lien known to the law. In respect of chattel mortgages, there is constructive notice by its record. The lien created in favor of mechanics and materialmen is upon immovable property, in respect of which the purchaser can readily discern any recent improvements or changes; and yet the lienor, by express statute, to protect himself against subsequent purchasers or incumbancers, is required to file notice of his lien in a public office. The lien of an execution is at least based on the fact that there is a judgment rendered, by some court of competent jurisdiction, where the record thereof remains. The Legislature has in every such case taken precaution that notice should be given for the protection of bona fide purchasers; but, in respect of the lien created in favor of landlords, no provision is made, but it is left to be governed by the same rules applicable to the liens of executions and the like liens.

As we have seen, actual knowledge that the execution is a lien upon property, and that the purchaser has interfered with the same, with a fraudulent intent and purpose, is necessary to the maintenance of an action against said purchaser for damages. It was said in *Grant v. Whitwell*, 9 Iowa, 158, that statutory liens have all the force and effect of common-law liens accompanied by possession, and some other of the cases seem to have followed in holding the same doctrine upon the authority of that case. It is apparent from what has preceded that, whatever may be the rule elsewhere, such is not the rule in this State, or in respect of the lien being considered. A lienor, at common law, in possession, could maintain a trespass against a wrong-doer, or trover against one who should convert the goods, by virtue of his special property therein. It is unnecessary to pursue the want of analogy further, for the possession of the lienor would be notice to the world of his rights, whatever they might be. Here it is manifest, there being no actual possession by the landlord, and no record of which the public are required to or can take notice, the lien, although not a secret lien within the meaning of that term as used in judicial writings, and which is created by contract or act of the parties, is nevertheless secret, in the sense that it is unknown by any public record, or by the *indicia* of possession, and rests in the breasts of the landlord and tenant. An examination of the Iowa cases relied upon will show that an exception was created to the lien, and it was made subject to the course of business of the tenant, "so as not to interfere with sales of property contemplated by the character of the business prosecuted by the tenant, to which the landlord is presumed to have assented upon the leasing of the premises. Thus, a retail dealer may



sell goods in the ordinary course of business, free from the landlord's lien, and the tenant of a farm may sell marketing, produce and live stock, which are usually kept for sale by farmers. In such cases the landlord's lien does not follow the property." *Richardson v. Petersen, supra*. It is to be remembered that that court is speaking only of the right to follow the specific property. Can it be said that where the landlord contracts for the payment of his rent the 1st day of January subsequent to the raising of the crops, and demises the premises to be planted in a crop which will mature and must be marketed months prior to that time, that it was within the contemplation of the parties that the lien should attach to such crops? It is a matter of common knowledge that in many parts of the State, in the vicinity of canning establishments, crops are raised in large quantities, which must be harvested and disposed of during the summer months. If A rents of B a tract of land to be put into tomatoes, sweet-corn and the like products, with a contract to pay rent the 1st of January, when the crops must be marketed and sold not later than August, and the rule contended for is to prevail, A must consent to the payment of his rent months in advance of the time it is due under the contract, or lose his crops; or, if the tenant sells such crops to an innocent purchaser without notice, for their full value, although perishable, the purchaser will be called upon to respond to the landlord, who, with complete power to protect himself, has stood by and permitted the sale. In this case it was admitted that the tenant was insolvent. A portion of the demised premises were put in oats, which must have been harvested in July, and ready for market and in fact sold in August. The expense of the tenant's living and of the raising of the crop must be paid, yet he may not sell a bushel of these oats, although the rent was not due until January, and though ample of the crop was then retained to more than satisfy the landlord's lien, without rendering the purchaser, who bought in good faith and for full value, liable to the landlord for the amount purchased. To extend by judicial construction the effect of the lien created by this Statute, to this extent would be unjust and inequitable. It follows from what has been said, the landlord having no right of property in the crop sold to appellant, and, as said in *Watt v. Scofield, supra*, no right to its possession, no action could be maintained by the landlord, except an action on the case for fraudulent acts intended to impair the landlord's security. The gist of the right of recovery in this action is the wrongful or tortious act of the defendant, or the omission of some legal duty, in consequence of which injury has resulted to the plaintiff. Here there was no fraudulent act, no knowledge of the lien of the landlord, or any intention to deprive him of his security, or to do any wrongful act; but defendant was a purchaser in good faith and for value from the tenant, who is not only the owner of the property, but clothed with the *indicia* of ownership. The suggestions by the appellate court that assumpsit for money had and received, if the defendant has reduced the property to money, would lie against him is equally untenable. Ordinarily this action

12 L. R. A.

will lie when one person has received money which in good conscience belongs to another, and where there is color or pretense of a contract relation existing, and will also lie in some cases where the money has been received or taken tortiously. There is here no contract relation, express or implied, and no tortious taking or receiving. Moreover, the rule as stated by Mr. Chitty is: "In order to maintain money had and received, either the money, or the goods for which the plaintiff claims the proceeds, must originally, or at the time of action brought, have belonged to the plaintiff." 1 Chitty, Pl. 858. And such has been the holding. Here, as we have seen, the landlord was not the owner of the property, or, by virtue of his lien only, entitled to its possession. Appellant was an innocent purchaser, without any notice of right or lien of appellee thereon; and while, as we have seen, the appellee, by virtue of his lien, may follow the property into the possession of the appellant, and distrain for his rent, he cannot maintain a personal action for damages.

*The judgments of the Appellate and Circuit Courts are reversed, and the cause remanded for proceeding not inconsistent with this opinion.*

**Craig, J., dissenting:**

I do not concur with the majority of the court in the decision of this case. In my judgment, the law is correctly declared by the Appellate Court in 82 Ill. App. 98.

Warren SPRINGER, *Appt.*,

v.

CITY OF CHICAGO.

(...Ill....)

1. An offer to sell property at a certain price may be proved against the owner as an admission of its value at or near the time of the offer.

*NOTE.—Evidence is admissible to show an offer to sell at a certain time and price.*

The decision as to the competency of the evidence introduced as formulated in the case under review was upon both principle and authority entirely competent. The decisions cited in the prevailing opinion have sustained the most critical scrutiny; but it should be borne in mind that declarations by the owner of real estate as to its value, to be competent as evidence, should be so recent in point of time as to be presumptively applicable at the time of the taking. *Central Branch U. Pac. R. Co. v. Andrews*, 37 Kan. 162; *Lewis*, Em. Dom. § 439; *Mills*, Em. Dom. § 172.

The case of *Ottawa. O. & C. G. R. Co. v. Adolph*, 41 Kan. 600, decided by the Supreme Court, of Kansas in 1899, and cited in the principal case is of direct adjudication in the point. *Commissioner Holt*, reading for reversal, after stating that the testimony of a co-defendant as to the value of certain premises had been evidenced by an offer to receive a certain sum in lieu of damages incident upon the construction of a railway over his land, says, in reference to this offer: It was in the nature of an admission of a party to the action, who, although not the owner of the land, yet as the husband of the owner, had a homestead interest therein.

2. The whole improvement must be taken into consideration in determining whether property is damaged by a public improvement, such as the change of grade of a street.
3. No damages can be recovered on account of a public improvement where no property is actually taken, if its fair market value is as much immediately after as before the improvement.
4. Courts have power to permit a view by the jury of premises, the damage to which is the subject of controversy in a civil action.
5. A statute making it obligatory on a court to permit a jury in eminent domain proceedings to view the premises on application of either party does not preclude the common-law right of a court in other cases to permit a view in its discretion.

(January 22, 1891.)

**A**PPPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendant in an action brought to recover damages for injuries alleged to have resulted to plaintiff's property by reason of a change by defendant in the grade of a street. *Affirmed.*

The facts are stated in the opinion.

**Messrs. Knight & Brown and E. H. Gary**, for appellant:

The court erred in permitting the jury to inspect the premises.

*Doud v. Guthrie*, 18 Ill. App. 656.

The court improperly permitted the option given by Mr. Springer to Mr. Hurlbut to be

given in evidence. The evidence clearly shows that this sale was a forced sale and that the option was two or three times the real market value of the property.

*Pierce, Railroads*, 2d ed. p. 226; *Mills, Em. Dom.* par. 170; *Lewis, Em. Dom.* §§ 446, 447; *Fowler v. Middlesex County Comrs.* 6 Allen, 92; *Dickenson v. Fitchburg*, 18 Gray, 546; *Davis v. Charles River B. Co.* 11 Cush. 506; *Tyrrell v. Eastern R. Co.* 111 Mass. 546; *Chapin v. Boston & P. R. Corp.* 6 Cush. 423; *Drury v. Midland R. Co.* 127 Mass. 571; *Montclair R. Co. v. Benson*, 86 N. J. L. 557; *Upton v. South Reading Branch R. Co.* 8 Cush. 600; *Watson v. Milwaukee & M. R. Co.* 57 Wis. 332; *Lehmicks v. St. Paul & S. R. Co.* 19 Minn. 484; *Louisville, N. O. & T. R. Co. v. Ryan*, 64 Miss. 399; *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *St. Joseph & D. C. R. Co. v. Orr*, 8 Kan. 419; *Rose v. Taunton*, 119 Mass. 100; *Kelkher v. Miller*, 97 Mass. 71; *Presbrey v. Old Colony & N. R. Co.* 103 Mass. 1; *Fall River Print Works v. Fall River*, 110 Mass. 428; *Cobb v. Boston*, 112 Mass. 181; *Springfield v. Sahmook*, 68 Mo. 894; *Brunswick & A. R. Co. v. McLaren*, 47 Ga. 546.

The court improperly modified instructions asked on behalf of the appellant. A property owner cannot be paid in benefits.

*Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290.

No benefits should be offset in any case except special and peculiar benefits to the property itself, and in the nature of physical benefits.

*St. Louis, J & S. R. Co. v. Kirby*, 104 Ill.

347; *Hyde Park v. Washington Ice Co.* 117 Ill. 233; *Chicago & E. R. Co. v. Blake*, 116 Ill. 163;

He was also a witness in the case, and had stated that the difference in value by reason of the appropriation of the strip was more than \$5,000. This testimony should have been admitted to show that his opinion of the value of the land at the trial was quite different from what it was shortly before the land was taken. *Leroy & W. B. Co. v. Butts*, 40 Kan. 159; *Central Branch U. Pac. R. Co. v. Andrews, supra*; *East Brandywine & W. R. Co. v. Ranck*, 78 Pa. 454; *Mills, Em. Dom.* 2d ed. § 172.

#### *Admissions of a party to the record.*

In the principal case now under review the admissions affected a party to the record, and were made by one who was privy in law, who had an inchoate interest in the realty to be affected by the admission. Under such circumstances it is a familiar application of the Law of Evidence to attach great weight to such evidence, and a formidable array of authority sustains the admissibility of such proof. *McNight v. McNight*, 20 Wis. 446; *Smith v. Maine*, 25 Barb. 32; *Tilton v. Emery*, 17 N. H. 536; *Emerson v. Thompson*, 16 Mass. 429; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Mueller v. Rebham*, 94 Ill. 142. See *Gibney v. Marchay*, 34 N. Y. 301.

Another rule of extended application allows admission to affect a party to the record, if made by a person jointly interested with said party, and there are no *indicia* of fraud. *Bank of United States v. Lyman*, 20 Vt. 606; *Dickinson v. Clark*, 5 W. Va. 280; *Barriok v. Austin*, 21 Barb. 341; *Camp v. Dill*, 27 Ala. 558; *Tyler v. Ulmer*, 12 Mass. 163; *Milton v. Hunter*, 18 Bush, 163; *Bigelow v. Foss*, 59 Me. 162.

Generally it may be observed the declarations of a party to the record or of one identified in interest with him, are, as against such party, admissible in evidence. If they proceed from a stranger and cannot be brought home to the party, they are admissible, unless upon some of the other grounds 13 L. R. A.

already considered. *Haines, Treatise*, 12th ed. 1887, 657.

The rule of law with respect to self-regarding evidence is that when in the self-serving form it is not in general receivable; but that in the self-harming form it is, with few exceptions, receivable, and is usually considered proof of a very satisfactory kind. *Gilbert, Ev.* 4th ed. 112.

On the subject of admissions, it may be laid down as a first principle that the whole of the statement containing the admission is to be received together. This is necessary in order to enable the court and jury to judge of the true extent of the admission which, when taken entire, will often have a different import from that which a partial account might convey. *Thompson v. Austin*, 2 Dowl. & R. 368; *Trammell v. Bassett*, 24 Ark. 499; *Barnes v. Allen*, 1 Abb. App. Dec. 111; *Searies v. Thompson*, 18 Minn. 316; *People v. Murphy*, 39 Cal. 52; *Barry v. Davis*, 38 Mich. 515.

This entire subject received very careful consideration from the New York Court of Appeals in the case of *Rouse v. Whited*, 25 N. Y. 170.

Federal courts vindicate the decisions of the state tribunals in relation to this topic of admission, and in a very recent case it has been decided by the supreme bench that every admission of a party given in evidence is to be taken as an entirety of the fact which makes for the one side with the qualifications which limit, modify or destroy its effect on the other side. *Mutual Benefit L. Ins. Co. v. Newton*, 39 U. S. 22 Wall. 32, 22 L. ed. 798.

#### *Market value defined.*

Market value means the fair value of the property as between one who wants to purchase and one who wants to sell an article; not what could be obtained for it under peculiar circumstances nor its speculative value, nor a value obtained in the

*Washburn v. Milwaukee & L. W. R. Co.* 59 Wis. 376; see also *Roberts v. Brown County Comrs.* 21 Kan. 247; *Peoria, P. & J. R. Co. v. Black*, 58 Ill. 34; *Carpenter v. Jennings*, 77 Ill. 250; *McReynolds v. Burlington & O. R. Co.* 106 Ill. 158; *Chesapeake & O. R. Co. v. Patton*, 6 W. Va. 147; *Central Ohio R. Co. v. Holler*, 7 Ohio St. 235; *Chicago, M. & St. P. R. Co. v. Melville*, 66 Ill. 829; *Hill v. Mohawk & H. R. Co.* 5 Denio, 206; *Lewis, Em. Dom.* §§ 476-508.

#### On petition for rehearing.

The Constitution of 1870 provides: "Private property shall not be taken or damaged for public use without just compensation."

Art. 2, § 18.

Under the Act of 1845, Rev. Stat. 1845, chap. 92, p. 447, the court held that the Legislature never contemplated the payment of damages to the owner of a tract of land when the additional value to be given to the land by the improvement was fully equal to the injury which it would occasion.

*Alton & S. R. Co. v. Carpenter*, 14 Ill. 190.

The Legislature, seeing the injustice of this law, passed the Act of 1852 (Laws 1852, p. 146), since which the policy of the State has been that common or general benefits shall not be offset against the damages.

*Curry v. Mt. Sterling*, 15 Ill. 321; *Hayes v. Ottumwa, O. & F. R. V. R. Co.* 54 Ill. 878; *Peoria, P. & J. R. Co. v. Black*, 58 Ill. 33; *Toledo, P. & W. R. Co. v. Darst*, 61 Ill. 331; *Peoria, P. & J. R. Co. v. Laurie*, 68 Ill. 264.

Under the Eminent Domain Law of 1872, the

court has uniformly announced that general benefits could not be set off against the damages to the remaining portion of the property not taken by the proceeding under that Act.

The cases permitting the jury in arriving at their verdict to ascertain the value before and after the construction of the improvement have no application to the case at bar, where the question of benefits is involved, since such question was not involved in them.

*Elgin v. Eton*, 88 Ill. 535; *Chicago & P. R. Co. v. Francois*, 70 Ill. 288; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42; *St. Louis, V. & T. H. R. Co. v. Haller*, 82 Ill. 209; *St. Louis, V. & H. H. R. Co. v. Capps*, 67 Ill. 607, 614; *Eberhart v. Chicago & St. P. R. Co.* 70 Ill. 847; *Chicago & R. R. Co. v. Maher*, 91 Ill. 813; *Chicago & E. I. R. Co. v. Loeb*, 5 West. Rep. 887, 118 Ill. 208; *Chicago & P. R. Co. v. Stein*, 75 Ill. 41, 47; *Page v. Chicago, M. & St. P. R. Co.* 70 Ill. 324.

The passage of the Eminent Domain Law of 1872 is an expression of the will of the Legislature, that in no case for an injury to property arising from the taking or damaging of the same for public improvement, general benefits shall not be set off.

*Keithsburg & E. R. Co. v. Henry*, 79 Ill. 201; *Harwood v. Bloomington*, 18 West. Rep. 878, 124 Ill. 48; *Carpenter v. Jennings*, 77 Ill. 250; *St. Louis, J. & S. R. Co. v. Kirby*, 104 Ill. 347; *Chicago, P. & St. L. R. Co. v. Aldrich*, 184 Ill. 9; *Schaller v. Omaha*, 28 Neb. 325; *Geneva v. Peterson*, 21 Ill. App. 456; *Culbertson & B. P. & P. Co. v. Chicago*, 111 Ill. 651.

As to the view by the jury—

necessity of another; nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale when one party wanted to sell and the other to buy. *Pittsburgh, V. & C. R. Co. v. Vance*, 115 Pa. 325. See also *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381; *Lawrence v. Boston*, 119 Mass. 123.

In estimating the value of property taken for public use, it is the market value of the property which is to be considered, — that is the market value as defined in the preceding paragraph. *Everett v. Union Pac. R. Co.* 59 Iowa, 243; *Central Branch U. P. R. Co. v. Andrews*, 26 Kan. 702; *Burt v. Wigglesworth*, 117 Mass. 302; *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491; *Virginia & T. R. Co. v. Elliott*, 5 Nev. 368; *Shenango & A. R. Co. v. Braham*, 73 Pa. 447; *Cummings v. Williamsport*, 84 Pa. 472; *Woodfolk v. Nashville & C. R. Co.* 2 Swan, 422; *Lewis, Em. Dom.* § 478.

Market value of property under judicial interpretation is construed to mean its value for any use to which it may be put; and if its natural or acquired advantages of situation, surroundings, or character are particularly adapted to some special use, all these circumstances are deemed to give intrinsic value to it, and should be taken into consideration in estimating its value. *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 408, 25 L. ed. 306.

An express line of adjudication sustained with substantial unanimity the propositions of the text, that the fair market value is to control the question of compensation, and that value must be estimated from the knowledge of the most advantageous uses to which the property might be applied. *Brisbane v. St. Paul & S. C. R. Co.* 23 Minn. 114; *Goodin v. Cincinnati & W. W. Canal Co.* 18 Ohio 12 L. R. A.

*St. 169; Re New York Cent. & H. R. R. Co.* 6 Hun, 149; *Shenango & A. R. Co. v. Braham*, 73 Pa. 447; *Harrison v. Young*, 9 Ga. 369; *Young v. Harrison*, 17 Ga. 30; *Robb v. Maysville & Mt. S. Turnp. Co.* 3 Met. (Ky.) 117; *Henderson & N. R. Co. v. Dickerson*, 17 B. Mon. 178; *Trustees of College Point v. Dennett*, 5 Thomp. & C. 217.

The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in the several cases cited by counsel. Thus, in *Re Furman Street*, 17 Wend. 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the City of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry is, "What is the value of the property for the most advantageous uses to which it may be applied?"

In *Goodin v. Cincinnati & W. W. Canal Co.*, 18 Ohio St. 169, where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or for any other particular use, but generally for any and all uses for which it might be suitable. *Young v. Harrison*, 17 Ga. 30.

#### Viewing premises by the jury.

In case of trials before common-law juries, statutes usually provide for a view of the premises, either as matter of right or in the discretion of the court. If the Statute is silent as to the stage of the trial at which the view shall be made, it rests in

See Thompson, Trials, p. 664; 26 Cent. L. J. 436, 92 Am. Dec. 843; *Smith v. State*, 42 Tex. 446.

*Messrs. Jonas Hutchinson, Clarence S. Darrow, Byron Boyden and H. H. Martin*, for appellee:

An offer by the owner of property to sell it at a certain price, or an actual sale by him, is competent evidence against him as an admission in determining its value at or about the time of the offer or sale.

Lewis, Em. Dom. §§ 439, 446; Mills, Em. Dom. 2d ed. § 173; 6 Am. & Eng. Encyclop. Law, 619, 620; *East Brandywine & W. R. Co. v. Ranck*, 78 Pa. 454; *Concord R. Co. v. Greeley*, 28 N. H. 237; *Ottawa, O. O. & C. G. R. Co. v. Adolph*, 41 Kan. 600; *Springfield v. Schmoock*, 68 Mo. 394; *Watson v. Milwaukee & M. R. Co.* 57 Wis. 383; *Fogg v. Hill*, 21 Me. 529; *Leroy & W. R. Co. v. Butte*, 40 Kan. 159; *Patch v. Boston*, 5 New Eng. Rep. 472, 146 Mass. 52; *Central B. U. P. R. Co. v. Andrews*, 87 Kan. 641; *Rorer, Railroads*, p. 379, note 2; *Pierce, Railroads*, 225, note 3; *Wood, Railways*, p. 944, and note; *Tuckwood v. Hanthorn*, 67 Wis. 326, 336, 337; *Power v. Savannah S. R. Co.* 56 Ga. 471.

The effect of the whole improvement should be considered, and not the effect of the approach alone, or of the bridge alone, or of any other portion of the structure.

the discretion of the court, and the viewers may be sent at any time before the instructions are given. *Galena, S. & S. R. Co. v. Haslan*, 73 Ill. 494; *Kankakee & S. R. Co. v. Straut*, 108 Ill. 603; *Lewis, Em. Dom.* § 424.

Viewers should be attended, in the view, by an officer. *Patchin v. Brooklyn*, 3 Wend. 377.

A jury of view do not decide, necessarily, on evidence furnished by the parties, but may find on their own judgment. *Harper v. Lexington & O. R. Co.* 3 Dana, 237; *Mills, Em. Dom.* § 264.

As previously stated, the object of the view is to enable the jury better to understand and apply the evidence to the end that they may proceed intelligently in the discharge of their function. *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545; *Heady v. Veay & Mt. S. Turnp. Co.* 52 Ind. 117, overruling *Evansville, I. & C. S. L. R. Co. v. Cochran*, 10 Ind. 500; *Close v. Samm*, 27 Iowa, 509; *Harrison v. Iowa Midland R. Co.* 36 Iowa, 323; *Washburn v. Milwaukee & L. W. R. Co.* 59 Wis. 364.

For an exhaustive résumé of the reason applicable in cases of this nature, see *Washburn v. Milwaukee & L. W. R. Co.* 59 Wis. 364. See also *Close v. Samm*, *supra*.

The right to send the jury out to have a view, although it may have had a common-law origin, is regarded now as statutory, and it is not now the practice to grant a view, except pursuant to an express statute or by consent. *Abbott, Trial Brief*, p. 72.

It is declared by the Act of Congress of June, 1872 (17 Stat. at L. 197, § 5), "that the practice, pleadings and forms and modes of proceeding, in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be" to the same things "existing at the time in the courts of record of the State within which such circuit and district courts are held."

A logical corollary of this enactment enforces the conclusion that the mode of proceeding in cases where view of the premises is desired is regulated 12 L. R. A.

*Lehigh Valley O. Co. v. Chicago*, 26 Fed. Rep. 415.

In suits like the present one, it is proper to instruct the jury that the right of recovery depends on whether the abutter's property has been depreciated in value by the public improvement.

*Elgin v. Eaton*, 88 Ill. 535; *Chicago & P. R. Co. v. Francis*, 70 Ill. 388; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42; *St. Louis, V. & T. H. R. Co. v. Haller*, 82 Ill. 208; *St. Louis, V. & T. H. R. Co. v. Capps*, 68 Ill. 607, 614; *Eberhart v. Chicago & St. P. R. Co.* 70 Ill. 347; *Chicago & A. R. Co. v. Maher*, 91 Ill. 812; *Chicago & E. L. R. Co. v. Loeb*, 5 West. Rep. 887, 118 Ill. 208; *Chicago & P. R. Co. v. Stein*, 75 Ill. 41, 47; *Page v. Chicago, M. & St. P. R. Co.* 70 Ill. 324; *Lehigh Valley O. Co. v. Chicago*, 26 Fed. Rep. 415; *Atlanta v. Green*, 67 Ga. 886; *Moore v. Atlanta*, 70 Ga. 611; *Atlanta v. Word*, 78 Ga. 376; *Montgomery v. Townsend*, 80 Ala. 489; *Re Brooklyn Elev. R. Co.* 8 N. Y. Supp. 78; *Illinois Cent. R. Co. v. Grabbill*, 50 Ill. 241, 246; *Ottawa G. L. O. Co. v. Graham*, 28 Ill. 78.

The court had power to order the view. Evidence as to the value of property before and after the date when the damages are to be ascertained is admissible, and the limits of time within which such evidence shall be confined rest in the discretion of the trial court.

exclusively by the practice methods in vogue in the various state jurisdictions.

#### *Legislation in the code States on the subject.*

In most of the so-called code States, legislative enactment has established adequate provision for meeting this class of cases, and the recital is to be found in the various codes which are designed to regulate the subject. Without attempting to discriminate among the variety of efficient enactments, section 610 of the California Code of Civil Procedure may be deemed typical of all the legislation upon this subject. The section in question employs the following language: "When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial."

Under judicial interpretation this section does not convert the jury into silent witnesses, as they are required to decide on the evidence, not upon their view. The only object of the view is to enable them to understand the evidence. *Wright v. Carpenter*, 49 Cal. 608.

The exercise of the authority to direct the jury to view the premises rests in the judgment and discretion of the court, and the refusal to exercise it will not constitute reversible error where it is not made to appear that the decision was not correct or that the discretion of the court in the matter was abused. *King v. Iowa Midland R. Co.* 34 Iowa, 458; *Clayton v. Chicago, I. & D. R. Co.* 67 Iowa, 228.

Both of the cases last cited were expository of section 3997 of the Iowa Code, which regulates the subject for that jurisdiction. The New York Code of Civil Procedure gives statutory effect to similar regulations to section 1563.

*Roberts v. Boston*, 149 Mass. 347; *Shattuck v. Stoneham B. R.* 6 Allen, 115; *Whitman v. Boston & M. R.* 7 Allen, 313; *Northeastern N. R. Co. v. Frasier*, 25 Neb. 42.

It being clear that we were at liberty to show by oral testimony the condition of the property at the time of the trial, there must be strong reasons shown, before this court will hold that the trial judge could not permit the jury to themselves see the premises.

See 1 Best, Ev. Morgan's ed. § 197; Bentham, Rationale of Jud. Ev. Book V. chap. 8, § 1; 1 Taylor, Ev. 8th ed. § 554; 1 Wharton, Ev. 3d ed. § 845.

This court has held, in a personal injury case, that it is discretionary with the trial court to admit in evidence the torn clothing worn by the plaintiff at the time of the accident.

*Tudor Iron Works v. Weber*, 129 Ill. 585. See also *American Exp. Co. v. Spellman*, 90 Ill. 455; *Jupia v. People*, 34 Ill. 516; *Patterson, Railway Accident Law*, § 867; *Barker v. Perry*, 67 Iowa, 146; *Louisville, N. A. & O. R. Co. v. Wood*, 18 West. Rep. 319, 118 Ind. 548, 549; *Mulhade v. Brooklyn City R. Co.* 30 N. Y. 370; *Hatfield v. St. Paul & D. R. Co.* 83 Minn. 180; *People v. Gonzalez*, 35 N. Y. 49; *Drake v. State*, 75 Ga. 418; *Wynne v. State*, 56 Ga. 118; *La Beau v. People*, 34 N. Y. 238; *People v. Buddensieck*, 4 Cent. Rep. 787, 103 N. Y. 487; *Philadelphia v. Rule*, 98 Pa. 15; *Earl v. Lefter*, 46 Hun. 9; *Ruloff's Case*, 11 Abb. Pr. N. S. 309, 310; *State v. Arnold*, 18 Ired. L. 184; *Com. v. Brown*, 131 Mass. 69, 81; *State v. Wiener*, 66 Mo. 13; *Gardiner v. People*, 6 Park. Crim. Rep. 155; *State v. Mordecai*, 68 N. C. 207; *People v. Larned*, 7 N. Y. 452; *State v. Woodruff*, 67 N. C. 89; *Osborne v. Detroit*, 32 Fed. Rep. 36; *Com. v. Webster*, Webster Case, Bemis' ed. 80. 81, 204-210; 1 Thompson, Trials, §§ 850-872.

A court may, in its discretion, at the trial, require the plaintiff in a personal injury suit to show his injuries in the presence of the jury to the defendant's witnesses, so that they may testify as to their extent, etc.

41 Am. & Eng. R. R. Cas. 216-218; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169; *White v. Milwaukee City R. Co.* 61 Wis. 536; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466; *Hatfield v. St. Paul & D. R. Co.* 83 Minn. 180; *Sibley v. Smith*, 46 Ark. 275.

Reference may also be made to the inherent power of courts of equity, wholly independent of statute, to order an inspection of real property for the purpose of determining the issues between the parties.

*Bennett v. Griffiths*, 30 L. J. Q. B. 98, 101; *Lonsdale v. Curwen*, 3 Bligh. O. S. 163; *Walker v. Fletcher*, Id. 173; *Browne v. Moore*, Id. 178; *East India Co. v. Kynaston*, Id. 153, 162, 168; 1 Wharton, Ev. 8d ed. § 845; *Nutter v. Ricketts*, 6 Iowa, 92; 1 Hale, P. C. 635, 636.

A real picture or photograph of the premises, appealing to the sense of sight, would clearly be competent evidence, in the judge's discretion.

*Cassens v. Higgins*, 3 Keyes, 206; *German Theological School v. Dubuque*, 64 Iowa, 736. See also *Blair v. Pelham*, 118 Mass. 420; *Locke v. Sioux City & P. R. Co.* 46 Iowa, 109; *Rockford v. Russell*, 9 Ill. App. 229; *Richmond v. Atkinson*, 58 Mich. 418; *Udderzook v. Com.* 76 Pa. 12 L. R. A.

340; *Ruloff's Case*, 11 Abb. Pr. N. S. 245, 309, 310; *Alberti v. New York, L. E. & W. R. Co.* 6 L. R. A. 765, 118 N. Y. 77; *Owley v. People*, 88 N. Y. 465, 476; *Marion v. State*, 20 Neb. 238; *People v. Buddensieck*, 4 Cent. Rep. 787, 103 N. Y. 487.

No inference can be drawn from the Eminent Domain Act that the Legislature either supposed that the discretionary right to grant a view did not exist before the Statute, or that, if they thought it did so exist, they intended by the Statute to take it away.

See *Atchison, T. & S. F. R. Co. v. Schneider*, 2 L. R. A. 423, 127 Ill. 144; *Galena & S. W. R. Co. v. Haslam*, 78 Ill. 494; *Kankakee & S. E. Co. v. Strout*, 102 Ill. 666; *Kiernan v. Chicago, S. F. & O. R. Co.* 11 West. Rep. 632, 128 Ill. 188; *Chicago & I. R. R. Co. v. Hopkins*, 90 Ill. 316; *McReynolds v. Burlington & O. R. Co.* 106 Ill. 152; *Peoria & F. R. Co. v. Barnum*, 107 Ill. 160; *Mitchell v. Illinois & St. L. R. & O. R. Co.* 85 Ill. 566; *Chicago & E. R. Co. v. Jacobs*, 110 Ill. 414.

Confusion has been introduced into this subject by confounding the view by jury with the technical writ of view at common law.

At common law, in a real action, the tenant might be ignorant as to what the land was which was claimed by the demandant. In such a case the tenant had a right to a writ of view, so that he might see the land and learn what was demanded.

Stearns, Real Actions, 2d ed. 102; Cowell, Interpreter, title *View*; Blount, Law Dict. title *View*; 1 Britton, Nichols' ed. 298-303; 1 Reeves, History of Eng. Law, Finlason's ed. 420-422; *Astmal v. Astmal*, 2 Lev. 117; Finch, Discourse, p. 866; 4 Marriott, Law Dict. title *View*; Booth, Real Actions, 36 *et seq.*; Roscoe, Real Actions, 247-257; Brown, Law Dict. title *View*.

But, in real actions, where the tenant actually knew, or for any reason was held bound to know, what premises were claimed, he could not have a view.

Booth, Real Actions, p. 37; Roscoe, Real Actions, 247; *Astmal v. Astmal*, *supra*.

This subject of writs of view by a jury at common law is involved in the greatest confusion as to the cases in which it was allowed, but it is certain that they were not confined, as was the tenant's view, to real actions.

Stearns, Real Actions, 2d ed. 102; *Kempster v. Deacon*, 1 L. D. Raym. 76; *Sir James Burrows' note*, 1 Burr. 258-258 (1765); 1 Sellon, Pr. in K. B. 449, 450; 2 Tidd, Pr. 3d Am. ed. 795.

Craig, J., delivered the opinion of the court:

This was an action to recover damages alleged to have been caused to the property of appellant by the construction of Jackson Street Bridge and viaduct, and the approach on Canal Street, by the City of Chicago. On a trial the jury returned a verdict in favor of defendant, the City of Chicago. The court overruled a motion for a new trial, and rendered judgment on the verdict. On appeal to the appellate court the judgment was affirmed.

The improvement was completed by the City in July or August, 1888. During the month the improvement was completed Horace A.

Hurlbut commenced negotiations with the plaintiff for the purchase of a portion of the property claimed to have been damaged. The negotiations resulted in an option given by the plaintiff to Hurlbut for the property for a certain time at a stipulated price. Hurlbut did not, however, close the contract within the time specified in the offer, and plaintiff advanced the price of the property, and subsequently, within three or four months, sold to Hurlbut at the advanced price. On the trial the court permitted the defendant to prove the price placed on the property by the plaintiff in his offer to Hurlbut, and this decision is relied upon as error. In order to determine whether the plaintiff had been damaged by the construction of the improvement, it was proper to show the value of the property before and after the improvement had been made. Evidence of what the property was worth in July and August, 1888, was therefore competent for the consideration of the jury. This is not, however, disputed or denied, but it is claimed that the offer of plaintiff is not evidence of the value of the property. While we do not think the offer of an owner of property to sell at a certain price would be conclusive evidence of the value of the property, yet we do think that an offer by the owner to sell is competent evidence against him as an admission in fixing the value at or near the time the offer was made. *Lewis, Em. Dom. §§ 439, 446; Mills, Em. Dom. 2d ed. § 172; 6 Am. & Eng. Encyclop. Law, 619, 620; East Brandywine & W. R. Co. v. Ranck, 78 Pa. 454; Concord R. Co. v. Greely, 28 N. H. 287; Ottawa, O. C. & O. G. R. Co. v. Adolph, 41 Kan. 600; Springfield v. Schmook, 68 Mo. 394; Watson v. Milwaukee & W. R. Co. 57 Wis. 382; Fogg v. Hill, 21 Me. 529.*

In *Lewis on Eminent Domain*, 439, the author says: "In regard to the proof of admission of the parties the same general rules apply as in other cases. It is competent to prove the declarations of the owner of the property in question as to its value, and the price at which he has offered to sell it, and other admissions which are pertinent to the issue." See also § 446.

In *6 Am. & Eng. Encyclop. Law, 620*, the law on the question is stated as follows: "The declarations of the owner as to the value of his land, and his offer of it at a fixed price, may competently be introduced in evidence against him, and, if the landowner dies while the proceedings are pending, his declarations and admissions are competent evidence against his trustees."

The Supreme Court of Wisconsin, in considering the question in *Watson v. Milwaukee & M. R. Co.*, 57 Wis. 382, said: "This evidence was introduced for the purpose of showing that the land was in fact of greater value after the road was located across it than the value placed upon it by the appellant's witnesses. We think the evidence was competent, not only as tending to prove its real value after the railroad was located across it, but as an admission on the part of the appellants of such value. *Whitman v. Boston & M. R. Co.* 7 Allen, 318-318; *Shattuck v. Stoneham B. R.* 6 Allen, 117."

In *East Brandywine & W. R. Co. v. Ranck*, 78 Pa. 454, the court said: "As evidence bear-

ing on the value of this property, Ranck's own declarations were certainly competent, when offered by the company. His offer of it at a fixed price, and the sale of a portion of it, were facts proper to go the jury as constituting his estimate of its value. It is true the sale of a portion of the property does not fix with certainty its market value as a whole, but it is an element fair to be considered by the jury."

In *1 Rorer on Railroads, 379*, and in *Pierce on Railroads, 225*, the doctrine is laid down that the admissions of the owner are competent evidence on the question of value. It is, however, said the sale to Yerkes was a forced sale; that Springer, knowing that Yerkes was bound to have the property for a particular purpose, placed a larger price on the property than it was really worth. Whether Yerkes was so situated that he was compelled to purchase this property, and on that account might pay more for it than it was really worth, was a question which no doubt might be considered by the jury in arriving at its value; but at the same time such fact, if it existed, affords no reason why the jury might not also consider the statements and declarations of the plaintiff in connection with the other evidence in arriving at the value of the property. The option placed on the property by the plaintiff, as an admission of the value of the property, was competent evidence for the jury. Whether it proved the value was a question for the jury to determine after a due consideration of all the evidence introduced on the question.

It is next claimed that the court erred in modifying plaintiff's first and third instructions. In the first instruction the jury were directed that if they find from the evidence the defendant had raised the grade of the street in front of plaintiff's property, and thereby damaged the property, they will find defendant guilty and assess damages at such sum as they believe from the evidence he sustained, resulting directly from changing the grade in front of said property, taken in connection with the whole improvement. The court added the following: "In case you believe from the evidence that plaintiff's property was damaged by said improvement taken as a whole." The modification was so slight that it did not materially change the meaning of the instruction, but, if it did, the modification was right, and could not mislead the jury. The plaintiff claimed that he was damaged by the improvement, and in passing upon the question it was the duty of the jury to take into consideration the whole improvement. A part of the improvement standing alone may have resulted in damage to plaintiff, but, when the entire improvement is taken into consideration, a benefit, rather than a loss, may have been the result; hence the necessity of the attention of the jury being directed to the whole improvement. What has been said in reference to the first modification will apply to the others.

Complaint is also made of appellee's instructions that they directed the jury that "if, by the improvement as a whole, the property is benefited as much as it is damaged by the construction of the approach alone, then there can be no recovery." The last part of plaintiff's first instruction, prepared by him and given to the

jury on the question of the measure of damages, is as follows: "The measure of damages to the property will be the difference, as shown by the evidence, between the fair cash market value of the plaintiff's property without said improvement and change of grade and the fair cash market value of said property with said improvement, taken as a whole, and change of grade completed." This was given as asked by plaintiff, except the words "taken as a whole," were added by the court, and it contains the same principle introduced in defendant's instructions, which plaintiff now undertakes to condemn. A party cannot complain of an instruction given in behalf of his adversary like one given at his own request. But, aside from this, we perceive no objection to defendant's instructions. Where an action is brought to recover damages, where no part of the plaintiff's property has been taken but merely damaged by a public improvement, the law is well settled that a recovery cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of the improvement as it was before the improvement was made, no damage has been sustained and no recovery can be had. *Elgin v. Eaton*, 88 Ill. 535; *Chicago & P. R. Co. v. Francis*, 70 Ill. 238; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42; *St. Louis, V. & T. H. R. Co. v. Haller*, 83 Ill. 206; *St. Louis, V. & T. H. R. Co. v. Capps*, 67 Ill. 607, 614; *Eberhart v. Chicago & St. P. R. Co.* 70 Ill. 347; *Chicago & A. R. Co. v. Maher*, 91 Ill. 812; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 5 West. Rep. 887; *Chicago & P. R. Co. v. Stein*, 75 Ill. 41, 47; *Page v. Chicago, M. & St. P. R. Co.* 70 Ill. 324.

After the jury was impaneled, and before the trial commenced, the court, on motion of defendant, permitted the jury, in charge of an officer, to go upon and view the premises in controversy, and this ruling is relied upon as error. It is not claimed that in the conduct of the men there was any misbehavior on the part of the officer in charge, or on behalf of any of the jury, or on behalf of either representative of the respective parties who accompanied the jury. The naked claim is a want of power on the part of the court to permit the view. The viaduct was completed in August, 1888, and the trial occurred, and the view was had, in December, 1889. Evidence of the condition of the property at the time of the trial was competent, and the parties had the right to show the value of the property at the time of the trial, as such evidence would have a bearing on the value of the property before and after the alleged damage. The rule seems to be well established that evidence of the value of the property before and after the time when the damages are alleged to have been sustained is admissible, and the time within which such evidence shall be enforced is a matter in the sound discretion of the trial court. *Roberts v. Boston*, 149 Mass. 347. If the parties had the right to prove by oral testimony the condition of the property at the time of the trial (and upon this point we think there can be no doubt), upon what principle can it be said the court could not allow the jury in person to view the prem-

ises and thus ascertain the condition thereof for themselves? The premises in view may be regarded, as it is termed in the books, "real evidence," and oral testimony in reference to the premises could not be as satisfactory in its character as the real evidence. In 1 Best, Ev. Morgan's ed. § 197, it is said: "Real evidence is either immediate or reported. Immediate real evidence is where the thing which is the source of evidence is present to the senses of the tribunal." In section 198 it is said: "Reported real evidence is where the thing which is the source of the evidence is not present to the senses of the tribunal, but the existence of it is conveyed to them through the medium of witnesses or documents. This sort of proof is, from its very nature, less satisfactory and convincing than immediate real evidence." See also Taylor, Ev. 8th ed. § 554; 1 Wharton, Ev. 3d ed. § 845.

It is a common practice in the trial of causes in the circuit court to permit parties to produce things before the jury for their inspection, and that practice has been approved. Thus, in *Tudor Iron Works v. Weber*, 129 Ill. 535, which was an action to recover for a personal injury, we held that the torn clothing which plaintiff was wearing when injured might properly be shown to the jury. In *American Exp. Co. v. Spellman*, 90 Ill. 455, — an action against a carrier for the loss of a can of yeast, — it was held to be proper to allow plaintiff to put in evidence a can similar to the one in which the yeast was shipped for the examination of the jury. In *Jupia v. People*, 34 Ill. 516, when defendant was on trial for receiving stolen brass couplings, a brass coupling similar to those alleged to have been received was allowed to be submitted to the jury. In other States numerous cases may be found where the same rule of evidence has been adopted. Thus in an accident case, it is held to be within the discretion of the court to allow the plaintiff to exhibit to the jury his injured limb or body. *Barker v. Perry*, 67 Iowa, 146; *Louisville N. A. & C. R. Co. v. Wood*, 118 Ind. 543, 549, 12 West. Rep. 803; *Mulhado v. Brooklyn City R. Co.* 30 N. Y. 870; *Hatfield v. St. Paul & D. R. Co.* 33 Minn. 180. The clothes of the accused were held admissible in *People v. Gonzalez*, 35 N. Y. 49, and *Drake v. State*, 75 Ga. 418; the weapon used by the accused, in *Wynns v. State*, 56 Ga. 118; surgical instruments on a trial under an indictment for illegal operations on a woman, — *Com. v. Brown*, 121 Mass. 69; the stick with which a burglar struck the prosecutor in a trial on charge of burglary, — *State v. Mordeas*, 68 N. C. 207; tools used, where a burglary has been committed, — *People v. Larned*, 7 N. Y. 445. In *State v. Woodruff*, 67 N. C. 89, it was held, in a bastardy case, that the mother of a bastard child might hold it up for the inspection of the jury. It was also held in *Hatfield v. St. Paul & D. R. Co.*, 33 Minn. 180, on the trial of an accident case, the trial court had the power to require the plaintiff to walk across the court-room in the presence of the jury, in order that the jury might see how he had been affected by the injury. It is there said: "As the object of all judicial investigations is, if possible, to do exact justice, and obtain the truth in its entire fullness, we have no doubt of the power of

court, in a proper case, to require the party to perform a physical act before the jury that will illustrate or demonstrate the extent and character of his injuries. This is in accordance with analogous cases in other branches of the law. When a view of real estate will aid the jury in reaching a conclusion, it is within the discretion of the court to permit it. When an inspection of an article of personal property will aid them, it is not infrequent to cause the article to be brought into court for the same purpose. *Lins v. Taylor*, 8 Post. & F. 781; *Lewis v. Hartley*, 7 Car. & P. 405. The practice in patent and in certain equity cases, of allowing tests to be applied before the court, is somewhat analogous in principle. So is the practice of divorce courts, of ordering an examination of the person of the party in certain cases. It is a common practice to allow plaintiffs, in actions for personal injuries, to exhibit to the jury their wounds, in order to show their extent, or to enable a surgeon to demonstrate their nature and character. This has been held proper. *Mulhade v. Brooklyn City R. Co.* 30 N. Y. 870. If for these purposes, a plaintiff may exhibit his injuries, there would seem to be no reason why, under proper circumstances, he may not be required to do the same thing for a like purpose upon request of the defendant." See also 1 Wharton, Ev. 8d ed. § 845. In *Nutter v. Ricketts*, 6 Iowa, 92, where there was a controversy in regard to two horses, and the trial court allowed the jury to go in the court-house yard and inspect the horses, the action of the court was sustained. It is there said: "There is no objection, in principle, to a jury seeing an object which is the subject of testimony. By this means they may obtain clearer views, and be able to form a better opinion." See also 1 Hale, P. C. 635. In *Cozens v. Higgins*, 8 Keyes, 206, in an action of trespass *quare clausum*, the court of appeals held that it was not error to permit the plaintiff to put in evidence a photographic view of the plaintiff's cellar after the trespass. In *German Theological School v. Dubuque*, 64 Iowa, 788, a stereoscopic view of property injured by water was held admissible evidence.

Other cases might be cited where the same doctrine is laid down, but we have referred to enough to establish the rule that on a trial, in a proper case, things may be exhibited to the jury. And, if evidence of that character may be brought before the jury, upon the same principle we perceive no good reason why a jury may not, under proper regulations established by the court, go upon and view premises which are the subject matter of the litigation. Had the plaintiff procured a careful survey and plat of the premises, showing the location with reference to streets and alleys, showing the location of all buildings, and showing the improvement made by the city, such a paper would have been competent evidence to go to the jury. Had a photograph or picture of the premises been taken, it would have been competent evidence to go to the jury. If a plat or photograph of the premises would be competent evidence, why not allow the jury to look at the property itself instead of a picture of the same? There may be cases where a trial court should not grant a view of the premises, where it would be expensive, or cause delay, or where

a view would serve no useful purpose. But this affords no reason for a ruling that the power to order a view does not exist or should not be exercised in any case. If the appellant desired to control the effect the view might have on the jury in connection with the other evidence introduced, that might have been done by an appropriate instruction; but, as no instruction was asked on that point, he is in no position to complain.

In what cases a view was allowed at common law is a subject upon which the authorities we have examined are not yet very clear. But a view by jury, as we understand the subject, is sanctioned by the common-law practice. In *Stearns on Real Actions*, 102, the author says: "In the ancient practice there were two kinds of view on real actions: (1) view by the party; (2) view by the jury." The author further says: "View by the jury was allowed in several real actions, as assize of novel disseisin, waste, and assize of nuisance. In these cases, therefore, a view by the party, being rendered unnecessary, was not permitted by the law. 8 Hen. VI. 27; 50 Edw. III. 11. The design of this proceeding was to enable the jury better to understand the matter in controversy between the parties. It was not confined to real actions, but was allowed in several personal actions for an injury to the realty, as trespass *quare clausum fregit*, trespass on the case, and nuisance." In *Burrows' note* in 1 Burr. 253, the practice in regard to jury views, as settled upon by the king's bench, is stated by the reporter: "Before 4 and 5 Anne, chap. 16, § 8, there could be no view till after the cause had been brought on to trial. If the court saw the question involved in obscurity, which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the court or judge, at the trial, 'that the nature of the question made a view not only proper, but necessary;' for the judges at the assizes were not to give way to the delay and expense of a view, unless they saw that the cause could not be understood without them. However, it often happened in fact that upon the desire of either party causes were put off for want of a view, upon specious allegations from the nature of the question that 'a view was proper,' without going into the proof, so as to be able to judge whether the evidence might not be understood without it. This circuitry occasioned delay and expense; to prevent which 4 and 5 Anne, chap. 16, § 8, empowered the courts at Westminster to grant a view in the first instance previous to the trial. As a view might be of use, and in this shape was attended with no delay and with but little expense, it became the practice to grant them of course upon the motion of either party." In 2 Tidd, Pr. 795, in speaking on the subject, the author says: "In actions of waste, trespass *quare clausum*, and other actions where it appears to the court in vacation to be proper and necessary that the jurors . . . who are to try the issue should for the better understanding of the evidence have a view of the . . . lands or place in question, the court or judge will grant a rule for such view, pursuant to the Statute 4 Anne and 6 Geo. IV. chap. 50, § 23. . . . Before the making of the above Statute, there



could have been no view till after the cause had been brought on to trial, when, if the court saw the question involved in any obscurity which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on again." See also Sellon, Pr. 449. If at common law, independent of any English statute, the court had the power to order a view by jury, as we think it plain the court had such power, as we have adopted the common law in this State our courts have the same power.

It is argued by the counsel, because the Legislature has provided for a view in condemnation cases, that it should be held that a view was unauthorized in all other cases. We do not regard this position well taken. The Eminent Domain Act does not merely permit the court in a condemnation proceeding to allow the jury to view the premises, but the Statute

absolutely requires the court to do so on the application of either party. The Statute is imperative. It declares said jury shall, at the request of either party, go upon the land. Rev. Stat. chap. 47, § 9. The fact, therefore, that the Statute makes it obligatory on the court to permit the jury on the application of either party to view the premises on the trial of a case under the Eminent Domain Act, has no bearing whatever on the question whether the court has the power in the exercise of this discretion to order a view. Here it is apparent that the jury could obtain a much better understanding of the issue presented by the pleadings by a view of the premises, and, in the exercise of a sound legal discretion, we think the court did not err in allowing the view.

*The judgment of the Appellate Court will be affirmed.*

Petition for rehearing denied.

### MASSACHUSETTS SUPREME JUDICIAL COURT.

John HASTINGS

v.

William C. GRIMSHAW.

(.....Mass.....)

**The right to a dock between low-water mark and the channel of Acushnet River may be reserved, under Acts 1806, chap. 18, authorizing owners to build and extend wharves below low-water mark in said river, on the conveyance by the owner of the adjacent land to low-water mark or a point below it.**

(May 19, 1891.)

**R**EPORT by the Superior Court for Bristol County (Staples, J.) for the opinion of the Supreme Judicial Court of an action brought to recover damages because of defendant's alleged trespass upon plaintiff's wharf and dock property, in which a verdict had been directed in plaintiff's favor. *Judgment on the verdict.*

Plaintiff built and maintained a wharf, with an adjoining dock, extending into the Acushnet River, at the east end of Grinnell Street in New Bedford. Defendant, claiming to act under a license derived from the City Manufacturing Company, on May 1, 1889, placed in the dock wooden floats or stagings, one of which had a boat-house erected on it, and all of which were used in connection with defendant's business of letting boats for hire. The floats and boats were in part at least attached to defendant's wharf and moorings.

Plaintiff brought this action to recover damages for this alleged trespass on his property, and defendant put in evidence a deed of certain property from plaintiff to Wilcox, whose title had become vested in the City Manufacturing Company.

Defendant asked a ruling that upon all the evidence plaintiff was not entitled to recover, and also one that by a proper construction of the deeds in evidence the title to the *locus in*

**NOTE.—Right of riparian owners to dock to low-water mark.**

The Massachusetts Ordinance of 1647, which gave to the proprietor of the upland property in the shore between high and low water mark, secured to such proprietor, not merely an easement, but a property in the land in fee, with power to reclaim it by building wharves so as to exclude navigation, provided he did not cut off his neighbors' access to their houses or lands. *Henry v. Newburyport*, 5 L. R. A. 179, and notes, 149 Mass. 582; *Poore*, Const. Ancient Charter of New England, pt. 1, p. 921.

An invasion of the owner's right to soil between high and low water mark, and his subsequent dispossession, is trespass to real estate and disseisin, the same as though it were upland. *Ladies Seamen's Friend Soc. v. Halstead*, 58 Conn. 144; *Nichols v. Lewis*, 15 Conn. 187.

The riparian proprietor has an exclusive right to the soil between high and low water mark for the purpose of erecting wharves and storehouses thereon. *East Haven v. Hemingway*, 7 Conn. 186.

The subsisting right to construct such improvements as wharves, piers, landings, etc., is not incompatible with the State's licensing the soil cov-

ered by water for uses not subversive of such right, and which must yield to the riparian owners' paramount right of making improvements, when actually exercised. *Hess v. Muir*, 8 Cent. Rep. 891, 65 Md. 586.

A riparian proprietor cannot be deprived of his paramount right to improve and occupy the land covered by water to the line of navigability without due process of law, nor can it be taken from him and devoted to public use without compensation. *Brisbane v. St. Paul & S. C. R. Co.* 23 Minn. 114; *Carli v. Stillwater*, S. R. & T. Co. 28 Minn. 373; *Union Depot S. R. & T. Co. v. Brunswick*, 31 Minn. 297; *Bell v. Gough*, 28 N. J. L. 624; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 314; *Lyon v. Fishmonger's Co.* L. R. 1 App. Cas. 662.

Until the State has claimed its right and taken possession of them, such owner may assert his private right to such structures as against third persons. The mere fact that such structures are on state land does not make them free to the public. *Wetmore v. Brooklyn Gas Light Co.* 42 N. Y. 384.

Right to construct piers, wharves, etc. See *note* to *Miller v. Mendenhall* (Minn.) 8 L. R. A. 91.

The right subject to control by State. *Ibid.*

quo was in the City Manufacturing Company.

The court declined to give these rulings, directed the jury to return a verdict for plaintiff and to assess the damages, and at defendant's request reported the case for the determination of the Supreme Judicial Court.

**Messrs. Charles W. Clifford and Henry H. Crapo** for plaintiff.

**Mr. E. L. Barney** for defendant.

**Knowlton, J.**, delivered the opinion of the court:

In this case it is unnecessary to consider particularly the deeds under which the plaintiff derived his title. It is enough to say that on April 20, 1888, he was the owner of the *locus* described in the declaration so far as there could be private ownership of that property, and that he was also the owner of the land which he conveyed on that day to Thomas B. Wilcox, which was subsequently conveyed to the City Manufacturing Company, under whose license the defendant justifies the alleged trespass. The question presented is whether by that deed the plaintiff's rights in the property which was used as a dock passed to Wilcox, and if not, whether after the conveyance of the adjacent land to low-water mark, or to a point below low-water mark, he could still retain a title in the dock between that land and the channel, such as would enable him to maintain a suit for a trespass.

His title to the property used as a dock was originally acquired under Stat. 1806, chap. 18, which is printed in the margin of page 209 of volume 108 of the Massachusetts Reports. Under that Statute the owners of land on Acushnet River in the neighborhood where his lot is situated are authorized "to erect, continue and maintain wharves parallel with the line of their several lots as they abut upon said river, said wharves to extend to the channel of said river if the owners of said lots think proper;" and they are given like authority to provide docks within the same limits.

In *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51, 2 New Eng. Rep. 143, is the following language in reference to this Act: "This (Statute) operated as a legislative grant to the owners of lots of an interest in the soil between their lots and the channel of the river. Whether it gave them an absolute fee without any restrictions,

or whether since the passage of Stat. 1866, chap. 149, they are subject to the regulations of the harbor commissioners, and to what extent, it is not necessary to consider in this case. The Act certainly gave them a possessory title for the purpose of building wharves, sufficient to enable them to maintain trespass if their rights are invaded." See also, to the same effect, *Haskell v. New Bedford*, 108 Mass. 203. This was an additional right of property outside of the former land of each of the riparian proprietors, created by the Statute in favor of those who then owned the lots. It was a title to the adjacent land, and to the water over it, subject to certain rights in the public. There is no good reason why a large lot held under such a title cannot be carved up and conveyed in different parcels, as flats which are held under a title of a similar kind and originating in a similar way may be separated from the land above and be sold in different parts. *Storer v. Freeman*, 6 Mass. 485; *Mayhew v. Norton*, 17 Pick. 860; *Porter v. Sullivan*, 7 Gray, 441. See also, for adjudications in regard to similar titles, *Goodell v. Larsson*, 42 Md. 348, 378; *Power v. Tassonella*, 25 Gratt. 786; *Norfolk City v. Cooke*, 27 Gratt. 490; *Clement v. Burns*, 43 N. H. 609; *Fitzgerald v. Faunce*, 46 N. J. L. 538, 596, 597.

We are of opinion that the plaintiff might, if he chose, sell the land above high-water mark, or sell that and a part of the land covered with water, and retain his wharf and his dock, or any part of either of them.

It is very clear that he did not intend to sell the dock. His deed to Wilcox described the granted premises by a boundary which plainly excluded the dock. Other rights and privileges were expressly given in connection with the property sold, and it is therefore implied that he did not intend to give any in the dock, except perhaps the right to pass over it to gain access to the property sold.

The plaintiff having a right to retain the dock for himself when he sold the adjacent land, and having intended to retain it, and having used apt words in his deed to express his intention as the owner of it, the defendant was a trespasser in the use which he made of it, and the instructions of the court were correct, and the verdict was rightly returned for the plaintiff.

*Judgment on the verdict.*

## PENNSYLVANIA SUPREME COURT.

Edwin E. CLAPP, *Appt.*,

v.

TOWNSHIP OF PINEGROVE.

(...Pa....)

**1. The Statute of Limitations begins to run, at the date of payment, against the right**

to recover back money paid for lands at a tax sale, which is void because resulting from a double assessment, in the absence of fraud or concealment.

**2. The holder of a tax certificate, who redeems the land from a subsequent tax sale to the county, which is void because of a double assessment, all taxes due having been paid by the**

NOTE.—Taxation; levy of assessment by mistake; remedies.

A sale for taxes will be void, if made for a tax legally assessed, but which in some lawful manner has been discharged. *Gould v. Day*, 94 U. S. 406, 24 L. ed. 232.

12 L. R. A.

If the tax has been actually paid, the lien will thereby be absolutely discharged, and all authority to proceed further against the property will be at an end. *Dougherty v. Dickey*, 4 Watts & S. 144; *Hunter v. Cochran*, 3 Pa. 105; *Montgomery v. Meredith*, 17 Pa. 42; *Ankeny v. Albright*, 20 Pa.

landowner, may recover back the money paid the county for such redemption.

(November 3, 1890.)

**A PPEAL** by plaintiff from a judgment of the A Court of Common Pleas for Venango County in favor of defendant in an action brought to recover back money paid the county for land sold at void tax sales. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. C. Heydrick and Carl I. Heydrick*, for appellant:

A purchaser at treasurer's sale upon a double assessment is entitled to recover from the township taxes paid by him upon such sale, and also the township taxes thereafter paid by him in redemption of the land from a subsequent sale to the county upon a like double assessment, the taxes upon the land having been paid by the owners thereof upon other and proper assessments.

*Bredin v. Cranberry Twp. Road Comrs.*, 87 Pa. 441; *Philadelphia v. Miller*, 49 Pa. 440; *Steiner v. Coxe*, 4 Pa. 26; *Coxe v. Wolcott*, 27 Pa. 158; *Diamond Coal Co. v. Fisher*, 19 Pa. 267; *Thomas v. Brady*, 10 Pa. 164; *Miles v. Stevens*, 8 Pa. 87; *Johnson's App.* 4 Cent. Rep. 892, 114 Pa. 182; *Babcock v. Day*, 104 Pa. 4; *Moses v. Macferlan*, 3 Burr. 1006; *Lee v. Gibbons*, 14 Serg. & R. 105; *Smethurst v. Woolston*, 5 Watts & S. 109; *American L. Ins. Co. v. McAden*, 1 Cent. Rep. 879, 109 Pa. 399; *Goettel v. Sage*, 9 Cent. Rep. 526, 117 Pa. 296; *Miller v. Ord*, 2 Binn. 383; *Musi v. Lorain*, 3 Brown (Pa.) 56; *Tybout v. Thompson*, Id. 27; *Johnson v. Rutherford*, 10 Pa. 455; *McDonald v. Todd*, 1 Grant, Cas. 17; *Gaines v. Miller*, 111 U. S. 395, 28 L. ed. 466; *Pickard v. Bankes*, 13 East, 20; *Johnson v. Rutherford*, 10 Pa. 455.

The Statute of Limitations did not begin to run against the plaintiff as to the moneys paid upon his supposed purchase in 1877 until his discovery of the true state of the facts.

*Parke v. Chadwick*, 8 Watts & S. 96; *Reasick v. Swinehart*, 11 Pa. 240; *Morgan v. Tener*, 83 Pa. 305; *Wickersham v. Lee*, Id. 416; *Hughes v. Waynesburgh Nat. Bank*, 1 Cent. Rep. 349, 110 Pa. 428.

*Messrs. Lee, Criswell & Hastings*, for appellee:

A redemption after five years is voluntary, and not only voluntary, but it cannot be done without permission first sought and obtained for that purpose.

*Kunes v. McCloskey*, 7 Cent. Rep. 601, 115 Pa. 466; *Jenks v. Wright*, 61 Pa. 410; *Steiner v. Cox*, 4 Pa. 18.

Such was the redemption made by the plaintiff in 1884. It was not a purchase of land, and

the Act of 21st of April, 1856, relative to treasurers' sales, has no application. It was a payment of taxes only, and the law governing such payments must control it.

*Cooley*, Taxn. ed. 1876, p. 565; 2 *Dillon*, Mun. Corp. ed. 1881, § 940; *Union Ins. Co. v. Allegheny*, 101 Pa. 256; *Peoples v. Pittsburgh*, Id. 304; *McVickart v. Pittsburgh*, 88 Pa. 183; *Taylor v. Board of Health*, 81 Pa. 78.

The rule that a voluntary payment, under claim of right, precludes recovery, applies generally.

*Harvey v. Girard Nat. Bank*, 11 Cent. Rep. 675, 119 Pa. 212; *Ditman v. Bauls*, 184 Pa. 480.

*Williams, J.*, delivered the opinion of the court:

Prior to the Act of 1856 the rule "*caveat emptor*" was held applicable to the sale of lands for taxes in the same manner as to judicial sales. That Act provided that the rule should not apply to tax sales in certain cases, viz., when the land sold did not lie in the county where the taxes had been actually paid, and where the sale had been made upon a double assessment. Perhaps the Statute was unnecessary. If a sheriff who held no writ against the owner of property, or a writ that had been already satisfied by the payment of the debt, interest and costs in full, should nevertheless proceed to sell the property, his act would be unauthorized and illegal, and, if no other question was involved, would not affect the title of the owner, or confer any right on the purchaser. For the same reason, if the treasurer, who is authorized to collect unpaid taxes by the sale of the land against which they are charged, should receive full payment of the taxes and costs, the lien of the taxes would be discharged, and the power of the officer to make the sale devested. *Laird v. Hiester*, 24 Pa. 452; *Montgomery v. Meredith*, 17 Pa. 42; *Breisch v. Cox*, 81 Pa. 386.

If, notwithstanding such payment and its legal consequences, the treasurer should proceed to sell, the rule *caveat emptor* ought not to apply, for the reason that the treasurer, being without the power to sell, can make no sale, and the attempt to do so can impose no liability and confer no rights on anyone. If the authority to make the sale exists, the rule applies, and the regularity of the preliminary proceedings, the extent of the tract, and the value of the land, are at the risk of the purchaser. Whether he gets his money's worth or not he cannot be heard to complain. If, however, there is no such tract as that offered for sale, or if the taxes have been previously paid the officer has nothing to sell, and no sale can

157; *Laird v. Hiester*, 24 Pa. 452; *Jackson v. Morse*, 18 Johns. 441; *Den v. Terrell*, 3 Hawks, 233; *Rowland v. Doty*, 1 Harr. Ch. (Mich.) 8; *Johnstone v. Scott*, 11 Mich. 232; *Rayner v. Lee*, 29 Mich. 384; *Curry v. Hinman*, 11 Ill. 480; *Morrison v. Kelly*, 22 Ill. 610; *Doe v. Burford*, 26 Miss. 194; *Brown v. Day*, 78 Pa. 129; *Davis v. Hare*, 22 Ark. 386; *Walton v. Gray*, 29 Iowa, 440; *Sprague v. Coenen*, 30 Wis. 209; *Wallace v. Brown*, 22 Ark. 118; *Bennett v. Hunter*, 76 U. S. 9 Wall. 323, 19 L. ed. 672; *Jones v. Dils*, 15 W. Va. 759.

If a deed had been issued, it should be annulled. *Jones v. Dils*, *supra*.

12 L. R. A.

An unauthorized sale passes neither title nor color of title. *McKee v. Lambertson*, 2 Watts & S. 114; *Cranmer v. Hall*, 4 Watts & S. 96; *Knox v. Cleveland*, 13 Wis. 245; *Oconto County v. Jerrard*, 46 Wis. 317; *Allen v. Morse*, 72 Me. 502.

So where land was sold for taxes after they had in fact been paid the sale is invalid. *Sprague v. Coenen*, 30 Wis. 209.

Lien of purchaser of defective tax title. See note to *Wilson v. Butler County* (Neb.) 4 L. R. A. 589.

be made. The conditions on which the law clothes him with the power to sell do not exist. The attempt to make a sale under such circumstances is an unauthorized assumption of power which does not exist, and one who has become a purchaser at such a sale has a right to have his money returned to him. This was held in the recent case of *Bredin v. Cranberry Top. Road Comrs.*, 87 Pa. 441, which was an action by a purchaser at such a sale to recover so much of his bid as was in the hands of the township.

The plaintiff in the case now before us became a purchaser at the tax sales in 1877 of a tract of land in Pinegrove Township, Venango County, assessed as 290 acres in tract No. 2,682, in the name of J. B. Carson & Co., owners. In 1878, the same tract was struck down to the county. They held it until 1884, when they called the attention of the plaintiff to the fact that his time to redeem had expired, and offered to permit him to redeem the tract. This he did. He afterwards discovered on investigation that there was a double assessment of this tract, and that the taxes upon it had been regularly paid by the owners. This suit was then brought to recover so much of the whole amount paid as was in the hands of the township. As to that part of the claim which is for money paid at the sale of 1877, the defendant pleads the Statute of Limitations; and to that part of it which is for money paid by way of redemption in 1884, it relies on the fact that the money was not paid under duress, but voluntarily, and alleges that the plaintiff is bound thereby. This suit was not brought until 1889. There is no evidence showing an intent on the part of the officers to defraud, or to conceal the real facts in the case, such as is necessary to prevent the running of the Statute from the date of the payment. The Statute of Limitations is therefore well pleaded as to the money paid in 1877. That paid in 1884 is not affected by the Statute and we are to inquire into the right of the plaintiff to recover. In a certain sense the money was voluntarily paid, for the plaintiff was under no legal form of duress at the time, but the same thing may be said of the payment of his bid in 1877. The taxes were not assessed against him. He had no interest in the tract, but volunteered to bid

upon it, became the purchaser, and paid his bid. Nevertheless, it is conceded that but for the Statute of Limitations he could recover the amount so paid. Why? Because the taxes in this tract had been paid, and it was subject to no lien or burden that could authorize a sale. The second or double assessment was unauthorized. The taxes assessed under it were illegal, and their nonpayment gave the treasurer no authority to make the sale. The purchaser who paid his money at such sale got nothing for it. The whole transaction was a mistake, —was illegal and void. This is the reason on which the recovery in *Bredin v. Cranberry Top. Road Comrs.* must rest, and on which this plaintiff could have recovered the amount of his bid if the Statute had not run. But the state of things existing in 1877 continued down to 1884. The assessment being unauthorized, under which the sale to the county was made, that sale conferred no title. There was nothing to be paid to the county by way of redemption, therefore, and the accruing taxes under the same illegal assessment were not a charge on the land. When the plaintiff paid his money to the county by way of redemption and settlement of accruing taxes, he discharged no obligation, and he acquired no rights. He simply paid over so much more money under the influence of the unauthorized and illegal acts of the taxing officers. Although in their hands, it was still his money. They had no claim upon it, and no right in law or morals to withhold it from him. The difficulty with the defense is that the plaintiff is not complaining of a mere irregularity, or a neglect of some statutory requirement on the part of the officers against which voluntary payment might relieve, but he complains that the taxes on this tract were paid in full by the owners, and that thereby the demands of the public, and the power of the taxing officers, were alike exhausted. This being true, the double assessment and the taxes charged under it were illegal and void. They impose no liability on the land or its owner, and confer no rights on the county or township. They had no right to take, and they have no right to hold, the money so paid.

*The judgment is therefore reversed, and a venire facias de novo awarded.*

## NEW YORK COURT OF APPEALS.

*Re* Judicial Settlement of the Account of Henry HUSS, Exr., etc., of Sebastian Gehrig, Deceased.

Henry HUSS, Exr., etc., *et al.*, *Respts.*,  
v.

COMMUNITY HOCHHAUSEN, Circuit  
Tauberbischofsheim, Baden, Germany.

(.....N.....)

1. A foreign law proved by a governmental publication is presumed to continue

until the present time in the absence of proof to the contrary.

2. A bequest of personalty to a "community" in a foreign country is valid if it has capacity to take by the laws of that country.

(June 2, 1891.)

**A**PPEAL by the Community Hochhausen from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Surrogate for Westchester County determining that appellant was

*NOTE.*—Of the presumptions of continuance.

The decision as outlined in the principal case proceeds upon that familiar principle of the law of 13 L. R. A.

evidence which allows a thing once proved to exist a continued existence until the contrary is shown, and the case of *Stokes v. Macken*, 62 Barb. 145, de-

not entitled to a legacy given to it by the will of Sebastian Gehrig, deceased. *Reversed.*

The facts are stated in the opinion.

*Messrs. Richard M. Bruno, Nathaniel C. Moak and Edwin Countryman, for appellant:*

The witness Ferrie was shown to be entirely competent to testify to the law of Baden as to the right of appellant to take the legacy.

*Kenny v. Clarkson*, 1 Johns. 886; *American L. Ins. & T. Co. v. Rosenagle*, 77 Pa. 507; *Hall v. Costello*, 48 N. H. 176; *Pickard v. Bailey*, 26 N. H. 152; *Vander Donckt v. Thellusson*, 8 C. B. 812.

The witness was vice-consul of the German Empire, had studied the foreign law, had been a judge in his own country, and was required, by reason of his official position, to be acquainted with the laws.

*Lacon v. Higgins*, 8 Starkie, 179; *Goods of Dest Aly Khaen*, L. R. 6 Prob. Div. 6; *Brush v. Wilkins*, 4 Johns. Ch. 520, 1 L. ed. 921;

oided in the Supreme Court of New York is an adjudication directly in point. It fully sustains the views of the learned judge in the case at bar, and Mr. Justice Mullin, writing for affirmance, in the course of a singularly exhaustive opinion, says: "Having been once a part of the British empire, we take judicial notice that the common law was in force within her dominions at the time of our separation. And we presume, also, that that law remains unchanged, in the absence of proof to the contrary."

#### The general rule.

It is a very general presumption that things once proved to have existed in a particular state shall be understood to retain that state or condition, until competent evidence establishes the contrary. *Littlefield v. Brooks*, 60 Me. 475; *Whilden v. Planters & M. Bank*, 64 Ala. 1; *Blackburn v. State*, 28 Ohio St. 146; *Eames v. Eames*, 41 N. H. 177; *Titlow v. Titlow*, 54 Pa. 216; *Ripley v. Babcock*, 18 Wis. 425; *O'Neil v. New York & S. P. Min. Co.* 3 Nev. 141; *Mullen v. Pryor*, 12 Mo. 307; *Sullivan v. Goldman*, 19 La. Ann. 12; *Rixford v. Miller*, 49 Vt. 819; *Wilkins v. Earle*, 44 N. Y. 172; *Leport v. Todd*, 32 N. J. 124; *Goldie v. McDonald*, 78 Ill. 606; *Jay v. Carthage*, 48 Me. 353; *Daniels v. Hamilton*, 62 Ala. 105.

The rule laid down in *Arayo v. Currell*, 1 La. 541, and *Crozier v. Hodge*, 3 La. 353, is that if the court has no means of information as to what the law of another country or State is, it will act upon its own laws. But if such country once constituted part of the same kingdom or government with that where the court sits, and they were governed by the same laws, the court will take judicial notice of the laws which prevailed in both before their separation, as matter of public history, and presume them unchanged, till the contrary be shown. The court says: "We have looked into the jurisprudence on this subject, and do not discover that the different States of the Union require proof that the common law prevails in each, or that it has ever been deemed necessary to establish by testimony that the same system governs in England. It is true they require proof of British statutes which never were in force in their own State." *Holmes v. Broughton*, 10 Wend. 75, 78; *Monroe v. Douglass*, 5 N. Y. 447; *Cutler v. Wright*, 22 N. Y. 472.

#### Further illustrations of the rule.

The law presumes that a fact continuous in its character as still continues to exist, until a change is shown, as that a life still continues, or that a part-

*Sussex Peerage Case*, 11 Clark & F. 184; *McFadden v. Mitchell*, 61 Cal. 148; *Beaus v. Copley*, 10 N. Y. 98; *Robertson v. Knapp*, 85 N. Y. 91; *Moore v. Westervelt*, 27 N. Y. 241; *Barrows v. Downs*, 9 R. I. 448; *Hynes v. McDermott*, 63 N. Y. 41.

It was not probable that the law of a corporation, which had existed, by the unwritten law of Germany, confirmed by its written law, for nine hundred years, would be likely to have been changed as to powers and duties.

*People v. Calder*, 30 Mich. 88.

It having been shown, without contradiction, what the written law of Baden was in 1832, the law presumes that it has remained so, until legal proof of a change.

*Raynham v. Canton*, 8 Pick. 298.

In the absence of evidence to the contrary, it will be presumed that a foreign law is unwritten, and parol evidence will be received on that assumption.

*Dougherty v. Snyder*, 15 Serg. & R. 84; *Liv-*

nership proved to exist still continues (1 Cow. & Hill's notes, 236); and so a state of war proved to exist three years ago is presumed in law to be still existing, unless the contrary be shown, but the law indulges no presumption at the present time that it will continue three longer. *Covert v. Gray*, 34 How. Pr. 450.

So by parity of reason, when personal property has been shown to belong to a person prior to his death, it will be presumed to have been his property at his death, and to have gone to his executors. *Hanson v. Chistovich*, 13 Nev. 305; *Flanders v. Merritt*, 3 Barb. 201. But see *Adams v. Clark*, 8 Jones, L. 55.

So, proof of residence in a place raises a presumption of continued residence in that place. *Kilburn v. Bennett*, 3 Met. 199; *Rixford v. Miller*, 49 Vt. 819; *Prather v. Palmer*, 4 Ark. 456; *Nixon v. Palmer*, 10 Barb. 175.

So, if insanity is proved to have existed once, it is presumed to continue. *State v. Wilner*, 40 Wis. 304; *Lilly v. Waggoner*, 37 Ill. 305; *Crouse v. Holman*, 19 Ind. 30; *Cook v. Cook*, 53 Barb. 150.

Relations proved to exist between parties are presumed to continue. *Eames v. Eames*, 41 N. H. 177; *Caujolle v. Ferrie*, 23 N. Y. 90; *Smith v. Smith*, 4 Paige, 432, 3 L. ed. 502; *Leport v. Todd*, 32 N. J. L. 124; *Body v. Jewsen*, 33 Wis. 402; *Cooper v. Dedrick*, 22 Barb. 516.

So of life, once proved. *Duke of Cumberland v. Graves*, 9 Barb. 595.

So, ownership of personal property is presumed to continue till a sale is shown. Mere change of possession does not suffice to control the presumption (*Magee v. Scott*, 9 Cush. 148); so a custom is presumed to continue (*Scales v. Key*, 11 Ad. & El. 819); a pauper is presumed to retain his settlement (*Bex v. Tanner*, 1 Esp. 304); coverture is presumed to continue (*Erakine v. Davis*, 25 Ill. 251); a judgment is presumed to remain in force (*Murphy v. Orr*, 32 Ill. 489); a state of mind to continue. *Blackburn v. State*, 28 Ohio St. 146. See also *Farr v. Payne*, 40 Vt. 615; *Leport v. Todd*, 32 N. J. L. 124; 1 Greenl. Ev. § 41, note, § 42, 47, note.

Possession is presumed to continue. The fact that a man was a gambler twenty months since justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and nonresidence. *Walrod v. Ball*, 9 Barb. 271; *Cooper v. Dedrick*, 22 Barb. 516; *Smith v. Smith*, 4 Paige, 432, 3 L. ed. 502; *McMahon v. Harrison*, 6 N. Y. 443; *Sleeper v. Van Middlesworth*, 4 Denio. 431; *Nixon v. Palmer*, 10 Barb. 175.

*ingston v. Maryland Ins. Co.* 10 U. S. 6 Cranch, 274, 8 L. ed. 222.

The statute law of another State having been proved, it must be presumed to exist, until shown by good evidence to have been repealed.

*Hynes v. McDermott*, 82 N. Y. 57.

Where the law is proved to have been once in a particular way, the presumption is that it continues until a change is affirmatively shown.

*Anonymous*, 17 Abb. Fr. 49; *Sleeper v. Van Middlecorth*, 4 Denio, 431; *McMahon v. Harrison*, 6 N. Y. 443; *Wilkins v. Earle*, 44 N. Y. 172, and cases cited; 1 Greenl. Ev. § 41; *People v. Lambert*, 5 Mich. 849; *Merrifield v. Robbins*, 8 Gray, 150; *Woodstock v. Hooker*, 6 Conn. 35; *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 539; *Emery v. Berry*, 28 N. H. 473.

A corporation once shown to exist with certain powers in judgment of law is presumed to continue until the contrary is shown.

2 Morawetz, Priv. Corp. 2d ed. § 775; Ang. & A. Corp. § 757; *People v. Manhattan Co.* 9 Wend. 351; *Darrell v. Hilligoss, M. M. & R. Gravel Road Co.* 90 Ind. 264; *Cobert v. Gray*, 84 How. Pr. 450; *State v. Patterson*, 2 Ired. L. 346; *Arayo v. Ourrell*, 1 La. 528; *Stokes v. Macken*, 62 Barb. 148; *Woodstock v. Hooker*, 6 Conn. 35; *Harryman v. Roberts*, 52 Md. 64; *Hynes v. McDermott*, 82 N. Y. 55.

The community, although unincorporated, could take the legacy bequeathed to it if empowered so to do by the law of its domicile.

*Newland v. Atty-Gen.* 3 Meriv. 684; *Re Fox*, 52 N. Y. 531; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192; *Re Bullock's Estate*, 11 N. Y. S. R. 700; *Chamberlain v. Chamberlain*, 48 N. Y. 424.

**Mr. Jacob F. Miller**, for respondents:

Corporations must, to take by bequest, not only prove their incorporation, but also that the gift may pass to them under their charter.

*Re McGraw*, 2 L. R. A. 387, 111 N. Y. 84; *Chamberlain v. Chamberlain*, 48 N. Y. 432, 433; *Holland v. Atcock*, 108 N. Y. 334; *Owens v. Missionary Soc. of M. E. Church*, 14 N. Y. 380-385.

Whether the community was or was not incorporated and authorized to take, was dependent upon foreign law. For purposes of judicial proceedings foreign laws are facts which must be alleged and proved as any other facts. The fact to be proved is "existing law" (§ 942, Code).

*Hynes v. McDermott*, 82 N. Y. 57.

The surrogate was clearly right in giving no weight to the statements of Mr. Ferrie, as he could not testify, except from hearsay, what the laws of Baden authorized the Community Hochhausen to do in 1886.

Code, § 942; *Toulantou v. Lachenmeyer*, 6 Abb. Fr. N. S. 215-220, 87 How. Pr. 145; *Kenny v. Clarkson*, 1 Johns. 385. See also *Williams v. Williams*, 8 N. Y. 525; *Owens v. Missionary Soc. of M. E. Church*, 14 N. Y. 380; *Levy v. Levy*, 33 N. Y. 100; *Beekman v. Benson*, 23 N. Y. 298; *Rose v. Rose*, 4 Abb. App. Dec. 108; *Bascom v. Albertson*, 84 N. Y. 534; *Burwill v. Boardman*, 43 N. Y. 254; *Holland v. Atcock*, 11 Cent. Rep. 861, 108 N. Y. 325.

**Gray, J.**, delivered the opinion of the court:

The testator gave one fourth of his residuary estate to the community of Hochhausen, a mu-

nicipality situated in the Grand Duchy of Baden, a State of the German Empire; and the question raised upon the settlement of the accounts of his executor was whether it has legal capacity to take its distributive share of the personal estate, no claim being made upon the realty. The surrogate decreed adversely to the claim of the legatee; his decree reciting that the proofs were insufficient to allow it to take any of the property, or to be a legatee under the laws of this State. This decree has been affirmed by the general term. The surrogate expressly found that the legatee had been a municipal body for the past nine hundred years, but refused to find that by the unwritten or by the written law of the country it was authorized to take and hold bequests of personal property, or to hold personal property as a corporation. In so ruling upon the question of the legatee's legal capacity, I think the surrogate has erred. By a competent witness, in the person of the German vice-consul, who, before entering upon the foreign service of the German Empire, had filled a judicial position and was acquainted with the laws of the different States comprising that Empire, it was proved that the Grand Duchy of Baden had an unwritten and a written law. By the unwritten law of the county "communities," by which term a city or township was characterized, had a right to acquire and to manage property, and to take by bequest. A copy of the laws and statutes of the Grand Duchy, printed by governmental authority in the official printing office in 1832, was offered in evidence, and from it proof was given that "every community has a right to administer its affairs as a community, and to manage property independently for itself," and that "all movable and immovable property of communities is the property of the citizens;" as "a corporation," or "as a body," or "as a whole" (the German word in the Act being the equivalent of these terms). This witness gave the only evidence in the case, and nothing was offered in contradiction of it, nor any other proof given upon the question of what was the law of the domicile of this legatee. But because it appears that, since this publication of the Grand Ducal Laws and Statutes in 1832, a Legislature has been in existence, and that the evidence of the witness that these Statutes and the unwritten law, concerning which he had testified, remained in force, was predicated upon the fact that, by virtue of his official position, he would have been made acquainted with any changes by legislative enactment, it was thought that the proofs were insufficient. The surrogate held that it must be shown that the law relied upon to establish the corporate capacity was in force at the time of the testator's death, and that the evidence here was merely hearsay, and therefore incompetent. He also held, upon the authority of *Hynes v. McDermott*, 82 N. Y. 41, that there was no presumption of the continued existence of the earlier law. That case is not controlling upon the question here. The books offered upon the trial in that case, as containing the laws of France, were the publication of a private person. They were not proven nor did they purport to have been published by governmental authority, and were there seen for the first time by the witness. Moreover,

one of the volumes was edited at a date subsequent to the transaction to which they were sought to be made applicable. Nor was it considered that the evidence of the witness as to the reception of these private works in the French courts amounted to proof of that fact. Upon the question of whether the presumption should prevail that a law once shown to have existed continued the same until the time of the event, about which the controversy turned, the court refused to pass definitely, as being unimportant to the decision. *Chief Judge Folger* intimated, however, pretty strongly, on the authority of *Raynham v. Canton*, 8 Pick. 293, that if the question of presumption was in the case, the court would have to make it. In *Raynham v. Canton*, in connection with proofs relating to a marriage in Rhode Island in 1817, a volume of the laws of that State, published by its authority in 1798, was offered; but it was rejected upon the mere objection or denial interposed by counsel that the law so evidenced was not the law at the time of the marriage. *Judge Parker*, delivering the opinion of the supreme court, in reversal of the judgment, held that, "the law being proved to have existed in the manner above stated, it must be presumed to exist until proved by as good evidence to have been repealed." I think the rule in the Massachusetts case should be adopted by us as correct, upon principle. The rule of presumption, as applied to the continuance of a law, may well rest upon the same basis that is found for similar presumptions in many human affairs. In *Greenleaf on Evidence* (vol. 1, § 41), the author states the rule that "when the existence of a person, a personal relation, or a state of things is once established by proof, the law presumes that the person, relation or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." In *People v. Manhattan Co.*, 9 Wend. 351, is an illustration of the rule, where it was held that, a corporation having been shown to have been legally created, it is "in judgment of law supposed to continue to exist until the contrary is shown." If in such instances the presumption should obtain, how much greater the reason for it in the case of a public law in a foreign state or country. In addition to the Massachusetts case of *Raynham v. Canton*, there is to be found authority for the rule in the opinions of the courts of other States. In *People v. Calder*, 30 Mich. 85, the question arose as to the law governing marriage in the State of New York in 1869. A volume of New York Statutes, printed in 1853, was held to be competent proof of what the law was; the court considering that, as no proof was offered to indicate any change in the law, the jury might fairly presume that it continued as it was. In *Harryman v. Roberts*, 52 Md. 64, a volume of Ohio Revised Statutes, published in 1860, was admitted as evidence of the existing law of that

12 L. R. A.

State, when the question to which it was made applicable arose in 1879. And see *State v. Patterson*, 2 Ired. L. 846.

It may be observed that the very notion of a law, as furnishing a rule of government or of conduct, suggests permanence as a characteristic, and does not involve the idea of change. I am led to the opinion that, when proof of a law of a foreign State has been given from a publication made under governmental authority, the rules and principles of evidence entitle it to be considered as the existing law of the land, in the absence of some equally good evidence that it has been changed or repealed.

We have, then, in this legatee a collective body of individuals, which has existed for past hundreds of years as a municipality, under the description of a "community." It had acquired, and by the unwritten or common law it possessed and exercised, certain rights of self-government and powers to acquire and to manage property for itself. By enactment of the Grand Ducal government, its franchises and powers were recognized and confirmed to it. The public statutes, in providing that all the property of a community is the property of its citizens, as a corporation or as a body, in fact, thereby invested the existing municipal body aggregate with an essential attribute of a corporation. This legislation would seem to have amounted to an incorporation by sovereign recognition and grant of powers and franchises. But, whether chartered or incorporated by statute or not, we are bound to consider the community as an artificial legal person. In Germany, in the eye of the law, it is a "judicial person," according to the evidence of the witness in this case, as under the Roman law, in the classification of the writer Savigny, it was a "juristical person." It is conceded by the law such powers and rights as to give it the character of individuality and to enable it to take, hold and administer upon property. The ability to take the testamentary bequest depends upon the law of the legatee's domicile. Our laws do not prohibit the bequest or the taking, and the sole question to be considered relates to the legatee's capacity. See *Chamberlain v. Chamberlain*, 48 N. Y. 424. When we find that by the customary or common law of the place of its domicile, confirmed by a public statute, this "Community" was entitled to take, hold and manage property in the right of its citizens, as a whole, or as an aggregate body incorporate, we need proceed no further in search of capacity to take the legacy.

For the reasons stated, I think that the judgment of the General Term, and so much of the surrogate's decree as has been appealed from, should be reversed, and that it should be decreed that this appellant is entitled to take its share of the personality under the bequest in the will, with costs to the appellant here and in the courts below, to be paid out of the estate.

All concur

## DISTRICT OF COLUMBIA SUPREME COURT.

*Re* Petition of Orville S. WILSON for a Writ of Habeas Corpus.

(.... Mackey....)

1. A peddler to be within a legislative description which includes those who sell and deliver small wares from house to house need not be personally interested in the sales; he may work on a salary.
2. Goods imported from another State become subject to state taxation in the hands of the importer as soon as the original form and package in which they were imported is broken; hence, the agent of a nonresident manufacturer who sells at wholesale merchandise in small packages which are packed in boxes for transportation, under the agreement that he will sell the contents of a certain percentage of the boxes at retail from house to house as an advertisement, and credit the wholesale purchaser with the proceeds, may be compelled to procure a pedler's license before complying with his agreement, and it is immaterial whether the boxes which the agent is to dispose of are shipped directly to him or reach him indirectly through the wholesale purchaser.
3. A license tax on peddlers is not necessarily an unconstitutional regulation of commerce.

(Bradley, J., dissents.)

(December 1, 1890.)

**HABEAS CORPUS** to procure petitioner's release from the custody of the Intendant of the Washington Asylum to which he has been committed for failure to pay a fine imposed upon him for selling merchandise from house to house without a license. *Petitioner remanded to custody.*

The facts are stated in the opinion.

*Mr. Henry Wise Garnett*, with *Mr. W. V. R. Berry*, for petitioner:

The salaried agents of a manufacturing company selling from door to door are not peddlers. The petitioner's claim is that even under the definition in the ordinance he is not a peddler. Nevertheless, if this definition goes beyond the recognized and ordinary meaning of the term the Legislative Assembly exceeded its power in so doing.

*Mays v. Cincinnati*, 1 Ohio St. 268; *Davenport v. Rice*, 75 Iowa, 74, 23 Am. & Eng. Corp. Cas. 97; *Higgins v. Binker*, 47 Tex. 408.

The original meaning of the word "peddler" is an itinerant trader, traveling about from place to place with a pack on his back and dealing in small commodities; one whose whole stock is carried about upon his person.

Wedgwood, Dictionary of Etymology; Chambers, Cyclopædia, *Hawkers and Peddlers*.

A peddler, now, is a small retail trader of cheap articles who travels from house to house, without any fixed business domicile, carrying his entire stock of merchandise with him, either on his back or drawn after him. The main idea is that he is itinerant, ambulatory, without any fixed place of business, irresponsible.

*Randolph v. Yellowstone Kit*, 83 Ala. 472; *Com. v. Gardner*, 7 L. R. A. 666, 133 Pa. 284; *Merrill v. State*, 88 Wla. 438; *Com. v. Morgan*, Pa. Co. Ct. Rep. Dec. 31, 1888.

Agents of permanent and localized merchants are distinguished from itinerant peddlers; the former are not peddlers.

*Com. v. Jones*, 7 Bush, 502.

Salaried agents of a manufacturer, selling

**NOTE.**—*Interstate commerce; supreme power of Congress to regulate.*

The transportation of property from one State to another is interstate commerce. *Ex parte Koehler*, 30 Fed. Rep. 367.

The negotiation of sales of goods situated in another State, for the purpose of introducing them into the State in which said negotiation is made, is interstate commerce. *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 548.

The power to enact laws or establish regulations affecting interstate commerce is exclusive in Congress. *Ibid.*

It is given by the Constitution to Congress, in the most general and absolute terms. *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9.

A state statute which conflicts with the actual exercise of the powers of Congress over commerce must give way before the supremacy of the national authority. *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Pembina Consol. Silver Min. Mill Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650.

In matters of foreign and interstate commerce there are no States. *Stockton v. Baltimore & N. Y. R. Co. supra.*

*Imports in original package subject to state police powers.*

The Act of Congress known as the Wilson Bill, making intoxicating liquors imported in original packages subject to the laws of any State into 12 L. R. A.

which they are carried, is not an unconstitutional delegation of power, as it simply declares when such property shall become subject to state laws, and does not give any power to the states to legislate upon that subject. *Re Van Vliet* (Ark.) 10 L. R. A. 451, 43 Fed. Rep. 761; *Re Spickler* (Iowa) 10 L. R. A. 445, 43 Fed. Rep. 653; *State v. Winters* (Kan.) 10 L. R. A. 616.

State legislation cannot interfere with sale of imports in the original packages. See *State v. Chapman* (S. Dak.) 10 L. R. A. 433; *Kohn v. Milcher* (Iowa) 10 L. R. A. 439; *Re Cooch*, 10 L. R. A. 530, 44 Fed. Rep. 275.

The state power of taxation does not arise until the original package is broken. *Thurlow v. Massachusetts*, 46 U. S. 5 How. 574, 13 L. ed. 236; *Passenger Cases*, 45 U. S. 7 How. 432, 13 L. ed. 761; *Philadelphia & R. R. Co. v. Pennsylvania*, 32 U. S. 15 Wall. 205, 21 L. ed. 168; *Henderson v. Wickham*, 32 U. S. 274, 23 L. ed. 550; *Murray v. Charleston*, 36 U. S. 448, 24 L. ed. 763; *Coe v. Errol*, 116 U. S. 833, 29 L. ed. 718; *Nelson Lumber Co. v. Loraine*, 23 Fed. Rep. 57; *Ex parte Thornton*, 4 Hughes, 223, 13 Fed. Rep. 545; *United States v. Bridleman*, 7 Sawy. 250, 7 Fed. Rep. 901; *Clarke v. Clarke*, 3 Woods, 411. See *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 573, 30 L. ed. 249.

License tax on peddlers, valid within the police power of the State. *State v. Richards*, 3 L. R. A. 705, 32 W. Va. 348; *Com. v. Gardner*, 7 L. R. A. 666, 133 Pa. 284; *Wrought Iron Range Co. v. Johnson* (Ga.) 3 L. R. A. 273, and notes, 3 Inters. Com. Rep. 146.



the goods of the manufacturer from door to door, are not hawkers or peddlers.

*Davenport v. Rice*, 75 Iowa, 74; *Chester v. Larkin*, Delaware County Rep. May 6, 1889.

The Act requiring a license is repugnant to that clause of the Constitution giving Congress power to regulate commerce among the several States, and is therefore void. Interstate commerce cannot be taxed.

*Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 811; *Asher v. Texas*, 138 U. S. 129, 32 L. ed. 368; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 687; *Com. v. Wilson*, Hustings Ct. Richmond, Va. See also *Chester v. Larkin*, *supra*.

*Mr. George C. Hasleton, contra.*

**Hagner, J.**, delivered the opinion of the court:

It is insisted first, upon the part of the petitioner, that he is not amenable to the penalty prescribed by the Act of the Legislative Assembly of this District, because he cannot properly be considered a peddler within the correct meaning of the term. We have been referred to several definitions, as given in dictionaries of authority, to support the contention that the word necessarily signifies an itinerant dealer in a variety of petty wares and articles, which he buys and sells again to make a profit for himself. And it is urged that as Wilson derived no profit by way of percentage or otherwise from the sale of the individual parcels of soapine, but was paid only by a salary for his labor, he is not within the meaning of the law. But we think the fact that the seller was paid in this form, rather than by a special profit on each individual parcel as sold, cannot exempt him from the category of a peddler if he is otherwise within the intent of the Act. If such were to be the result, a merchant might send a number of persons through a city or State, disposing of goods precisely as peddlers do in every other respect, but paying them by salary or wages not regulated by the profits upon the particular sales, and thus escape the operation of the license tax charged to persons who are otherwise no more peddlers than such agents would be. In the language of the supreme court in *Brown v. Maryland*, 25 U. S. 12 Wheat. 444, 6 L. ed. 687: "It is impossible to conceal from ourselves that this is a varying of the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing." Nor does the fact that the petitioner was selling the goods of another, which he himself had never purchased for sale, exempt him from the operation of the Act. These points are expressly decided in the case of *Com. v. Gardner*, 183 Pa. 285, 7 L. R. A. 266, to which we shall hereafter more particularly refer. In the Act before us, the Legislative Assembly distinctly described the class of persons they intended to include in the designation of "peddlers;" and if this person was offering for sale, from house to house, the parcels of soapine and delivering them at the time of sale, he came within that description.

We have no doubt the Legislative Assembly had the power to pass such License Acts. Its 19 L. R. A.

general power to do so has been effectively recognized by Congress in laws amending or modifying them from time to time; and particular parts of them have been repeatedly sustained by our courts. *Cooper's Case*, McArth. & M. 250; *District of Columbia v. Oyster*, 4 Mackey, 285, 1 Cent. Rep. 84; *District of Columbia v. Waggaman*, 4 Mackey, 328, 1 Cent. Rep. 828. In another case, this court held a particular provision of the License Act void. *Re Hennick*, 5 Mackey, 490, 7 Cent. Rep. 357. But the provision then under consideration exacted a license tax from commercial agents, who by clause 8 of sec. 24 of chap. 69 of the License Act of August, 1871, as amended by chap. 49 of the Act of 1872, were taxed as follows:

"Commercial agents shall pay two hundred dollars annually. Every person whose business it is, as agent, to offer for sale goods, wares or merchandise by samples, catalogue or otherwise, shall be regarded as a commercial agent." Of course this only applied to persons who "offer for sale," whether the offer was made "by samples or by catalogues or otherwise," and had no reference to those who sell and deliver the goods at the time of the sale. Such persons are known as drummers, who solicit orders by exhibiting samples, or by catalogue, or in any other way, and not those who actually sell and deliver the goods at the time, as peddlers do and as Wilson was doing. The general power of the Legislative Assembly to pass such Acts was also recognized by the supreme court in *Welch v. Cook*, 97 U. S. 542, 24 L. ed. 1112. Indeed, it seems impossible to question it, unless we are prepared to deny to the District the ordinary powers of a municipality, absolutely indispensable in a city circumstanced like this. That the Legislative Assembly may in some other instances have exceeded its just authority, in passing particular enactments under the general power, may perhaps be; but we are speaking of its general power to enact Acts requiring traders and others to take out licenses, and this we have never heard seriously questioned.

A competent legislative authority has the right to place in a recognized category of offenders, and to punish, persons not previously so classed. Thus Congress denounced persons engaged in the slave trade as guilty of piracy, although that offense had never before been embraced within the definition of piracy; and slavetraders thereafter became punishable as pirates, and prosecutions have repeatedly been had under that law.

Congress, in sec. 3244, subsec. 11, Rev. Stat., 625, describes "peddlers of tobacco" as follows: "Any person who sells or offers to sell manufactured tobacco, snuff or cigars, traveling from place to place, in the town or in the country, shall be regarded as a peddler of tobacco." If this Statute had simply imposed a license tax upon the occupation of a "peddler in tobacco," it would be proper to have recourse to the signification of the word at the time the law was passed, to ascertain whether the person charged was comprehended within the general epithet. But when the Legislature saw fit to declare that a person who commits certain enumerated acts shall be considered a

peddler and treated as such, it is too late to resort to lexicographers to ascertain whether the Legislature observed the dictionary definition of the occupation, according to antecedent usage or strict etymological rules. The legislative definition outweighs the dictum of the lexicographers.

We might refer to numerous cases where the courts have held that the word "peddler" in a statute comprehended persons whose acts were less within the strict limits insisted on by the petitioner's counsel than they are as used in the ordinance before us. Thus, in *State v. Wilson*, 2 Lea, 28, vendors of lightning rods were held to be included in an Act requiring a peddler of merchandise to obtain a license. In *Chicago v. Barte*, 100 Ill. 61, a city ordinance prohibited persons from selling milk from wagons without license. The only authority in the charter of the city relied on for the enactment of the ordinance was a provision that the municipality might tax, regulate, suppress and prohibit hawkers and peddlers. But the court held the word "peddler" was used in the charter in an unrestricted sense, and authorized the city to exact a license from persons who sold milk; and that it made no difference that the accused had regular customers whom he supplied daily.

In *Warren v. Geer*, 117 Pa. 207, 9 Cent. Rep. 307, the court held that a provision in the charter authorizing the borough to require a license for peddling market produce and other articles included sales of books; and that a book canvasser was properly convicted under a borough ordinance for acting without a peddler's license, and that there was nothing unreasonable in this requirement.

Although there are many cases where the courts have held a general expression in a statute included persons further removed from the usual definition of such expression than the petitioner was from the supposed dictionary signification of the word "peddler," we have found no case where the courts have denied to the Legislature the right to give its own statement of the features that should thereafter constitute an offense hitherto unknown to its definition.

We must regard the petitioner as a peddler within the meaning of the Act of the Legislative Assembly; and that he is punishable as such for selling without a license unless he is exempt upon the other ground of defense urged in his behalf.

That defense is that the Act of the Legislative Assembly is void as being repugnant to the third clause of the 8th section of the first article of the Constitution, which declares that "Congress shall have power to regulate commerce with foreign nations, among the several States and with Indian tribes." This involves the consideration of a very important and interesting question, which has repeatedly challenged the attention of the supreme court. In one of the first of these great cases, *Brown v. Maryland*, 25 U. S. 12 Wheat. 436, 6 L. ed. 684, the supreme court decided that a state statute requiring an importer of foreign commodities to take out a state license was repugnant to the constitutional provision referred to, as well as to another provision of the Constitution; and that the conviction of an importer

for having sold a package of foreign dry goods without such license was illegal.

In defining the line of demarcation between the exclusive power of the government to tax foreign goods imported into a State and the power of the State to levy such tax, after they have reached the State's jurisdiction, Chief Justice Marshall in that case laid down a rule which is thus interpreted by the supreme court in the subsequent case of *Wolton v. Missouri* 91 U. S. 281, 23 L. ed. 349:

"There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the State begins. A similar difficulty was felt by this court in *Brown v. Maryland*, in drawing the line of distinction between the restriction upon the power of the States to lay a duty upon imports, and their acknowledged power to tax persons and property; but the court observed that the two, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them; but that, as the distinction exists it must be marked as the cases arise; and the court, after observing that it might be premature to state any rule as being universal in its application, held, that when the importer had so acted upon the thing imported that it had become incorporated and mixed up in the mass of property in the country, it had lost its distinctive character as an import, and became subject to the taxing power of the State; but that while remaining the property of the importer in his warehouses in the original form and package in which it was imported, the tax upon it was plainly a duty on imports prohibited by the Constitution."

This definition has been adopted substantially, if not in exact words, in each of the important cases on the subject since that time. *Robbins v. Shelby County Taxing Dist.* 120 U. S. 490, 30 L. ed. 695; *Corson v. Maryland*, 120 U. S. 502, 30 L. ed. 699; *Brown v. Houston*, 114 U. S. 632, 29 L. ed. 260; *Leloup v. Port of Mobile*, 127 U. S. 646, 32 L. ed. 818; *Asher v. Texas*, 128 U. S. 130, 32 L. ed. 869; *Stoutenburgh v. Hennick*, 129 U. S. 142, 32 L. ed. 638; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128.

The question therefore in the present case is whether the boxes of soapine obtained by Wilson as part of what is said to have been purchased from the Washington merchant, and subsequently sold by Wilson from door to door by retail, can be considered as continuing the property of the person who imported them into the District of Columbia, remaining in the original form and package in which they were imported; or whether the person who so imported them into the District "had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the county (District), as to have lost its distinctive character as an import." If the facts support the first supposition, the tax was illegal; if they support the latter "the goods had become subject to the taxing power of the State (District)."

Upon the statement presented by the petitioner, to which the counsel for the District

have assented for the purposes of this argument, it does not clearly appear whether we are to understand the particular boxes so sold as having been imported by the petitioner Wilson or by the Washington merchant.

The statement in one place says "the box sold at retail from door to door by the agent never passes into the hands of the dealers, but is sent to the agent direct from the manufactory, and is sold by him for the Kendall Manufacturing Company, and the proceeds paid to them." This would seem to indicate that the petitioner is to be considered as the importer of those boxes. On the other hand, the statement shows that the practice of the petitioner, as agent of the company, is "to sell a certain number of boxes, at wholesale prices, to the Washington dealers—therefrom to retain one box from each wholesale purchaser, paying him the retail prices therefor by discount on his bill, the purchaser being charged with six boxes and credited with one in his bill, and then to sell this box at retail from door to door for the purpose of advertising the article, stimulating its sales and thereby obtaining customers for the grocers and dealers." This would certainly imply that the dealer must import the particular box in his original package before it can be retained from the six boxes that had been sold to him and charged on his bill at the wholesale prices and afterward credited to him at the retail prices and sold on the streets to obtain customers for the dealers.

If the former supposition is to be taken as correct, of course the agent must receive his assortment of individual boxes in a package together, as it is ridiculous to assume he would receive each box separately, as a specific shipment to him. On the other hand, if the sixth box reaches the city in the package received by the merchant, that package must be opened before the agent can obtain the sixth box when he buys it at retail price from the merchant.

Hence, in either case, before the agent can take the individual box on the street, the package in which it was imported to the District must have been broken; the article must have "lost its distinctive character as an import," and become incorporated and mixed up in the mass of property in the District. The singular, circuitous and rather mysterious arrangement by which the merchant is charged with a box which it is said he never bought; is allowed a retail price for what it is said he never sold; and is credited with the retail price of what never belonged to him, by a person who never sold it to him,—cannot change the character of the transaction. Repeating the words of the chief justice before quoted from *Brown v. Maryland*, "it is impossible to conceal from ourselves that this is a varying of the form, without a varying of the substance."

The supreme court has contented itself, in the different cases where the point arose, with deciding whether, under the facts in the particular case, the goods upon which it was sought to impose a tax directly or by the exaction of a license had at the time been incorporated and mixed up in the mass of the property of the State, and become subject to its taxing power. In *Brown v. Houston*, 114 U. S. 632, 13 L. R. A.

29 L. ed. 260, it was held that coal mined in Pennsylvania and sent in flat boats to New Orleans, to be sold in open market there on account of the owners in Pennsylvania, when it had reached its destination and come to its place of rest for final disposition or use, had become a commodity in the market, and part of the general mass of property of the State, and subject to taxation under its general laws; although after its arrival it was to be sold from the flat boat, without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port. If the property described in that case, under the circumstances, had become so incorporated with the mass of the property in the State as to be the subject of state taxation, we cannot see why the individual boxes of soapine in the hands of Wilson were not in the same predicament.

We have carefully examined all the decisions of the supreme court on this subject, and have found nothing in either of them to interfere with these conclusions. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 490, 30 L. ed. 695; *Corson v. Maryland*, 120 U. S. 502, 30 L. ed. 699; *Asher v. Texas*, 128 U. S. 180, 32 L. ed. 869; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 687,—were all cases where the person charged was selling by sample goods not yet imported into the State or district; and the courts very reasonably declared that the goods sought to be taxed by means of a license could no more be subjected to a tax by such a sale than they could be if the sale had been conducted by letter through the post-office.

In *Wellton v. Missouri*, 91 U. S. 232, 23 L. ed. 850, from which we have already quoted Justice Field's statement of the definition in *Brown v. Maryland*, the court held that a state law providing that "whoever shall deal in the selling of patent or other medicines, goods, wares or merchandise, except books, charts and stationery, which are not the growth, produce or manufacture of the State, by going from place to place to sell the same, is declared to be a peddler," and exacting a license tax from such dealers, while making no such requirement where such person sold only such commodities as were produced within the State, was in conflict with the commercial clause of the Constitution, and void because of this discrimination against citizens of other States. But the court said nothing to imply that the tax would have been illegal if the Statute had applied (as ours does) to all citizens alike. Nor does it intimate that the accused could not be held as a peddler, though the definition given in the Statute is as open to etymological criticism as the Act of the District Legislature. A similar decision was made in *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449.

The point of these decisions is emphasized by the opinion in *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754. The Howe Machine Company, which manufactures its machines in Connecticut, had an agent in Nashville, Tenn., who went to Lawrence County to sell machines, and a tax was there demanded of him for a peddler's license, under a state law which required all peddlers of sewing machines to pay a tax. He denied the validity of

the Act, but paid the tax to the county clerk, and this suit was brought to recover back the amount so paid. The case was discussed by the court with full examination of authorities; and the opinion concludes as follows: "In all cases of this class, to which the one before us belongs, it is a test question whether there is any discrimination in favor of the State, or of the citizens of the State, which enacted the law. Wherever there is such discrimination, it is fatal. In the case before us the Statute in question, as construed by the supreme court of the State, makes no such discrimination. It applies alike to sewing machines manufactured in the State and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden."

No suggestion was there made that the agent who sold the sewing machines for the foreign manufacturer was not a peddler; and the Supreme Court held he must obtain a peddler's license.

Shortly afterwards the case of *Webber v. Virginia*, 108 U. S. 850, 26 L. ed. 587, was decided, in which a law of that State was held invalid because of the discrimination against nonresidents which appeared in *Walton v. Missouri*, 91 U. S. 281, 23 L. ed. 849, and was absent in *Hove Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754.

The petitioner's counsel referred to a decision said to have been rendered in the Hustings Court in Richmond; and also to a case in the Court of Common Pleas, in Delaware County, Pennsylvania, in which, they contended, the law, as they present it, was settled on this identical subject.

We have not been able to find the former decision; but we have examined the latter case with care. Larkin and others were arrested in the City of Chester for selling soapine without a license, and the court of common pleas held the ordinance void, and inapplicable on two grounds stated in the opinion:

1. Because it was doubtful whether the charter of Chester gave to the city the power to pass an ordinance to license peddling.

But the District of Columbia, as we have seen, undoubtedly possesses that power.

2. Because the sellers of the soapine were not peddlers within the meaning of the city ordinance.

But that ordinance did not specially describe the form of sale which should thereafter constitute "peddling." The Act in force in this District does explicitly contain that description.

That case further differs from the case before us, because no such facts as to the sale of the boxes to the merchant, and the repurchase of them by the agent, seem to have existed there; whereas those important circumstances appear in the agreement filed in the present case.

These differences are sufficient to discriminate that case from the present; but at the best it is only the decision of an inferior court, and we think it erroneous.

But whatever force it might be supposed to have is destroyed by a subsequent decision of the court of appeals of the State in March, 1890, in *Com. v. Gardner*, 183 Pa. 285, 7 L. R. 12 L. R. A.

A. 666, in which all the points raised before us are in turn considered.

The defendants were indicted for hawking and peddling goods within the County of Schuylkill, contrary to the provisions of the Act of April, 1846.

It appears from the special verdict found by the jury, and from the opinion of the court, that the defendants, who were in the county temporarily for the purpose of making such sales, sold from door to door within said county parcels or packages of soapine or washing powder, being a substitute for soap, etc. That they sold the goods as agents of a manufacturing company whose office, works, members and officers are in Providence, Rhode Island; that the goods were made there and were sold by defendants on account of the company; that the defendants had no interest in the goods, nor in their proceeds, but were paid a salary for their services by the company. The Statute forbids the sale of foreign or domestic goods, wares or merchandise within the county by any person as a hawker or peddler.

The county court entered a verdict of guilty upon the special verdict; and an appeal from this ruling was taken to the court of appeals, where the case was elaborately argued by counsel and discussed by the court.

The court decided that the defendants were "peddlers" within the meaning of the law; "that it was of no consequence if they did not own the articles sold, but acted as the agents of others;" that the prohibition in the law against all peddling in the county was a valid exercise of the police power of the State, and was not in violation of the constitutional right of the citizen secured by the Constitution of the State; that the sale from house to house by agents of goods manufactured in Rhode Island by a company whose members are nonresidents of Pennsylvania is not interstate commerce; and that the law forbidding all peddling within the county does not invade the exclusive right of Congress to regulate interstate commerce.

In speaking upon the last point the court says: "The citizen of another State may come into Pennsylvania when he will and where he will stay as long as he chooses, open as many places for the sale of his goods as he may see fit, and enjoy the same measure of freedom in regard to the conduct of his business as a native citizen. But when he comes within the State permanently or temporarily he is under the protection of its laws and the correlative duty of obedience rests on him. His rights are equal to, but not above, those of the citizen. He has no more right to sell intoxicating drink without a license than a citizen; no better right to sell cigarettes to children, or oleomargarine to customers, in violation of law, than a citizen. He has no better right to take a pack on his back, or a horse and cart, and engage in peddling, than a citizen. To hold the contrary would be subversive of law and order, and would render the possession of the police power useless to the State."

The facts of the case at bar are less favorable to the defendant than those in 183 Pa., inasmuch as the stratagem of the alleged sale by the agent of the one box of soapine to the merchant and its alleged repurchase did not appear

in that case. But if the present case were no worse than that, the decision cited would be a powerful authority in support of the view we have taken.

The resident merchants here are obliged to pay taxes upon their stock in trade and shops, besides paying a license tax. It is hardly fair that persons without any stake in the community, and who contribute nothing in any other form towards the expenses of the government here, should be permitted to carry on their traffic without payment of a license tax; which in the language of the court, in *Hove Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754, is "an exaction not unusual or unreasonable."

The judgment of the Police Court against the treasurer having been correct, *the application for a habeas corpus is overruled, and the petitioner remanded into custody.*

**Bradley, J., dissenting:**

By the record it appears that the relator has been fined the sum of \$55 by the Police Court of the District of Columbia, and that in default of payment he has been committed to the custody of the Intendant of the Washington Asylum, having been tried and convicted upon an information charging him with engaging in the business of a peddler, in selling from house to house an article called soapine, without first having obtained a license therefor. By the agreed statement of facts, it appears that the relator is a regular salaried agent of the Kendall Manufacturing Company, a corporation under the laws of the State of Rhode Island, and there engaged in the manufacture of soapine, a washing powder and substitute for soap; That the soapine sold was sent to the relator by his employer, direct, in a box, and was the property of the manufacturer, although nominally it formed part of a number of boxes sold to some resident dealer at wholesale rates, and without being delivered to such dealer it was repurchased by the manufacturer at retail price.

The effect of this arrangement was to give the dealer an additional discount on his purchase to the extent of the difference between the wholesale and retail price of the box retained, and the sale of the soapine in the retained boxes was intended to advertise the article and stimulate its sale.

This box was opened by the agent of the manufacturer, and its contents, in small packages, sold from door to door at retail price. The manufacturer thereby made no profit on the sales. The relator had no property interest either in the soapine or in the proceeds of the sales.

The relator is charged with the violation of an Act of the Legislative Assembly of the District of Columbia of August 28, 1871, amended June 20, 1872, entitled "An Act Imposing a License on Trades, Business and Professions Practiced and Carried on in the District of Columbia," the 36th section of which reads as follows: "Peddlers shall pay fifty dollars annually. Any person who may offer for sale from house to house, or from a wagon, dry goods, fancy goods, notions, toys and similar articles, delivered at the time of the sale shall be known as a peddler."

In behalf of the relator it is claimed:

1. That he is not a peddler, but a salaried  
12 L. R. A.

agent of a manufacturing company and therefore not included in the law.

2. That if the Act requires of a nonresident manufacturer a license fee as a condition to selling and delivering its manufactures by its agent, it is void, as in conflict with art. 1, § 8, cl. 3, of the Constitution of the United States.

First let us inquire whether the relator comes within the provisions of the law under which he was charged and sentenced.

It needs no examination of definitions by lexicographers to reach the conclusion that the relator was not a peddler in the ordinary signification of the word. By Endicott, J., in a Massachusetts case, a peddler is defined as "an itinerant trader who goes from place to place and from house to house carrying for sale and exposing the goods, wares and merchandise which he carries. He generally deals in small cheap articles such as he can conveniently carry in a cart or on his person."

In *Randolph v. Yellowstone Kit*, 88 Ala. 472, it is said: "The term 'peddler' has many definitions, more or less full. . . . Its popular definition is a small retail dealer, who, carrying his merchandise with him, travels from house to house or from place to place, exposing his goods for sale and selling them."

According to these definitions and to the popular and accepted meaning of the term he is a dealer or trader in small wares who has no permanent place of business, but who carries his wares with him from place to place or from house to house. He is one who buys to sell again, and whose gains are the profits realized on small sales. A manufacturer who sends his agents into other communities than that of his residence to vend his product either immediately, or by sample, is not a trader or peddler, nor is the agent employed by him in such business. *Com. v. Campbell*, 83 Pa. 880.

I think that the distinction is well marked and is reasonable, and that this relator cannot be held under the Act referred to, unless it be by the force and stress of the legislative definition which accompanies the provision. This definition is, "Any person who may offer for sale from house to house, or from a wagon, dry goods, fancy goods, notions, toys, and similar articles, delivered at the time of sale," shall be considered a peddler.

The language used is broad enough to cover the case of any person, not a trader or a dealer, who may offer for sale from house to house a single article. But its sense must be governed and restricted by the subject to which it relates and by the connection in which it is used. It relates to peddlers, those who are popularly known as such, and the definition so applied and limited is relieved of the indefiniteness which otherwise attaches to it. It was intended to apply to perambulating dealers who carry about with them a limited stock of small articles, "dry goods, notions, fancy goods, toys and similar articles," for sale.

If this section was intended to apply to others not peddlers in the well-understood popular signification of the word, why was not the limiting term omitted, and the broad descriptive definition left to stand alone as indicating the class intended to be taxed?

If the broad and comprehensive meaning claimed for it was intended by the Legislative

Assembly (which I doubt), then I hold that it was not in its power, by its ordinance, to include persons as peddlers who do not fall within the ordinary meaning of that term. *Mays v. Cincinnati*, 1 Ohio St. 288.

The broad meaning attributed to the provision in question would include a person who "as agent for nonresident manufacturers or wholesale dealers, offers for sale merchandise," unless he restricted his offers for sale to one house. But this class was distinctly taxed as commercial agents, under the Act of Aug. 23, 1871, and required to pay a license fee of \$250. By the amendment of this Act of June 20, 1872, commercial agents are required to pay \$200 annually, and they are defined as "every person whose business it is, as agent, to offer for sale goods, wares or merchandise, by sample, catalogue or otherwise." Acts 2d Sess. p. 60.

Taking the original section it is apparent that it would include the case of the relator, but might not include one who offered for sale by sample or catalogue. The amendment specifically included agents who are sellers by sample or by catalogue, and all others who otherwise offer for sale. Clearly the 3d section of the Act was intended to and does cover cases like that of the relator, as "commercial agents." The difference between the tax of \$50 required of a peddler, and \$200 required of a "commercial agent" indicates that the former applies to the small perambulating trader, while the latter applies to the agents of manufacturers and wholesale dealers.

The conclusion I have reached is that the relator is not a peddler within the purpose or intent of the Act of the Legislative Assembly of the District of Columbia, under which he was prosecuted, convicted and sentenced.

Upon the other point made by the relator, that the Act is void as an attempt to regulate "commerce among the States" a subject which under the Constitution is committed exclusively to the Congress of the United States, it is contended for the District of Columbia that the provision of the law in question, as construed and applied to the case of the relator, is not repugnant to the Constitution because the importer (the Kendall Mfg. Co.) had so acted upon the thing imported, that it had become incorporated and mixed up in the mass of property in the District, and that it had lost its distinctive character of an import, and become subject to the taxing power of the District of Columbia.

By the District of Columbia it is claimed that a number of boxes of soapine are sold and delivered to a consignee here, and that one of these original packages is purchased from the consignee after it has become part of the general property of the District, and is then broken and sold by the agent. But the agreed fact is that the box which is broken and sold by the agent from door to door never passes into the hands of the dealer, but is sent to the agent direct from the manufacturer. It is the property of the nonresident manufacturer when it enters the district, and it continues to be its property in the hands of its agent until it is sold and delivered to the retail purchasers.

By the majority of the court it is held that the original package or box broken and sold by the agent became a part of the general mass

of property, lost its distinctive character as an import and became subject to taxation the moment the original package in the hands of the agent was broken.

In this I am not able to concur, and I approach this constitutional feature of the subject with diffidence and hesitation.

The principle embodied in the proposition that the contents of the box of soapine became a part of the mass of the property in this District when the original package was broken in the hands of the agent, for sale, had its origin in the opinion by Marshall, *Ch. J.*, in the case of *Brown v. Maryland*, 25 U. S. 13 Wheat. 442, 6 L. ed. 686.

In that case, an Act of Maryland requiring importers of certain foreign commodities to take out a license for which they should pay \$50, before they should be authorized to sell, was declared to be repugnant to that provision of the Constitution which declares that "no State shall without the consent of Congress lay any imposts or duties on imports," etc., and also to the provision which declares that "Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

The importer had sold one package of foreign dry goods without having a license.

To the suggestion that the imported article must at some time be subject to the taxing power of the State, and that such power must attach when it came into the State, the court says, page 451: "We cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious that this construction would defeat the prohibition. The constitutional prohibition on the States to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import and has become subject to the taxing power of the State; but while remaining the property of the importer in his warehouse in the original form or package in which it was imported, a tax upon it "is too plainly a duty on imports to escape the prohibition of the Constitution."

It is important to remark that the court is here dealing with the subject of the exclusive power of Congress to impose duties upon imports, and not with the subject of the power to regulate commerce with foreign nations, or among the States.

There can be no doubt that the license tax imposed in the case at bar as a condition to his

exercising the right to sell the goods brought into the District of Columbia, by the nonresident manufacturer, is a tax upon the goods themselves in his hands. "All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself." *Brown v. Maryland, supra.*

A license tax imposed upon "drummers," or persons who offer for sale by sample, so far as concerns the sale of or offer to sell goods not yet brought into the State, is clearly a tax on the goods themselves, and a regulation of interstate commerce. *Robbins v. Shelby County Taxing Dist.*, 130 U. S. 489, 80 L. ed. 694; *Asher v. Texas*, 128 U. S. 129, 82 L. ed. 868; *Welton v. Missouri*, 91 U. S. 275, 28 L. ed. 847.

Is the tax imposed by this Act upon goods brought into the District of Columbia, for sale by a nonresident manufacturer, as a condition precedent to his right to sell, a regulation of interstate commerce?

In *Brown v. Maryland*, under the consideration of this provision of the Constitution the chief justice says:

"The conclusion that the right to sell is connected with the law permitting importation as an inseparable incident is inevitable. . . . Any penalty inflicted on the importer for selling the article in his character of importer must be in opposition to the Act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation and principal object of it is to prescribe the regular means for accomplishing that introduction and incorporation."

It is then clearly held that the importer has the right to sell the import in its original package, without the burden of any additional tax by the State, by way of license or otherwise, and that it does not lose its exemptive character so long as it remains the property of the importer, in his warehouse, in the original form or package in which it was imported.

When does the imported merchandise become a part of the general property of the State so as to become subject to its general taxing power?

In the case of the resident importer the line of distinction is drawn at the point of sale by the importer, or at the point when the imported package is broken in his hands, when it has lost its distinctive character as an import, and the imported goods, mingled with his other goods, become a part of the mass of the property of the State. But this rule was not stated as being one of universal application, and its application to the case of goods carried from one State into another has been denied. *Woodruff v. Parham*, 75 U. S. 8 Wall. 128, 19 L. ed. 882; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257.

In the former case an ordinance of the City of Mobile imposing a tax upon sales by auctioneers was sustained, when applied to sales by them of goods, the product of other States than Alabama, received by them as consignees and agents and sold in the original and unbroken packages.

In the latter case coal shipped from Pitts-

burgh to New Orleans, and resting there in the boats and original condition, packages in which it was shipped, held for sale for the agents, was held liable to the assessment of a tax imposed generally upon property within the State; that the coal was a commodity in the market of New Orleans, and that it had become a part of the general property of the State.

It will not do, then, to say in the case at bar that the soapine in the hands of the relator in the broken box, or package, any more than in the unbroken box, has become a part of the mass of the general property of the District.

In *Robbins v. Shelby County Taxing Dist.* it is held as within the power of the State among other things, "the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations pursued therein not directly connected with foreign or interstate commerce . . . the imposition of taxes upon all property within the State mingled with and forming part of the great mass of property therein. But in making such internal regulations a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce, nor can it impose such taxes upon property imported into the State from abroad, or from another State and not yet become a part of the common mass of property therein."

Is it reasonable to hold that a nonresident manufacturer coming into this District for the mere temporary purpose of exercising the privilege of sale of his goods under the freedom of interstate commerce, is only protected from local taxation so long as his goods remain in the unbroken package in which he has imported them? If his free right to sell is limited to a sale in unbroken packages, the limitation amounts to a denial of the privilege because all exhibition and inspection are prohibited, inasmuch as the opening or breaking of the package for any purpose subjects the seller to the requirement of the license tax.

The clause of the Constitution under consideration includes commerce with the Indian tribes as under the regulation of Congress. Imagine an Indian trader from one of the tribes coming into a State with a bale of skins and furs, and being informed that under a municipal ordinance similar to this he was free to sell the whole mass, unopened, with package unbroken, but if he opened or exposed them his goods became part of the mass of goods in the State and he was subject to taxation. It would not be tolerated—it would be too plain a violation of that clause of the Constitution. Is it not absurd to hold that an agent may sell without license by sample—but that he may not sell the sample?

It must be that in this case the nonresident manufacturer bringing his goods into the District for the temporary purpose of sale, and retaining them in his actual possession, custody and control, such goods do not become part of the mass of goods in the District of Columbia, until he parts with them by sale, or otherwise changes their status.

It is beyond dispute that it is the free right of the Kendall Manufacturing Company to import its goods into the District of Columbia,

because it is a right of interstate commerce. (*Stoutenburgh v. Hennick*, 129 U. S. 142, 82 L. ed. 688), and Congress has not exercised its constitutional right of trammeling it with any regulations.

In *Brown v. Maryland*, the court says: "Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms with the intent that its efficacy should be complete should cease at the point when its continuance is indispensable to its value. Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as the importation itself. It must be considered as a component part of the power to regulate commerce."

Any penalty inflicted on the importer for selling the thing in his character of importer must be in opposition to that freedom of interstate commerce which must exist until Congress under its constitutional power imposes some restrictions. The absence of such regulation means that interstate commerce is free.

In *Leisy v. Hardin*, 135 U. S. 124, 84 L. ed. 187, the court says, with reference to beer imported into the State of Iowa from the State of Illinois and held for sale by the agent of the manufacturers in Iowa, in the original packages in which it was imported, that notwithstanding a prohibitory statute, "they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time we hold that in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action in prohibition of importation and sale by the foreign or nonresident importer."

The Supreme Court of the United States has been careful, in construing the provisions of the Constitution restricting the powers of the States in their general right of taxation, to limit the decision to the actual case before it, anxious not to interfere with the jealously guarded rights of the States.

It has been held to be regulations of interstate commerce.

A statute laying a tax upon nonresident drummers offering for sale or selling goods, wares or merchandise by sample manufactured or belonging to citizens of other States. *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694.

Also a statute requiring a license of itinerant dealers in goods, wares and merchandise, not the growth or produce or manufacture of the State. *Walton v. Missouri*, 91 U. S. 275, 23 L. ed. 847.

Also an Act of the Legislative Assembly, District of Columbia, imposing a tax upon "commercial agents," defining them as "every person whose business it is, as agent, to offer for sale goods, wares or merchandise by sample, catalogue or otherwise," as applied to the case of an agent for a nonresident firm, selling by sample. *Stoutenburgh v. Hennick*, 129 U. S. 141, 82 L. ed. 687.

The question in this case is now for the first time presented here. It has not been before the Supreme Court of the United States in any case reported. It demands a new departure, the drawing of a new line of demarkation back of which the State cannot step for the purpose of taxation, and that line in my judgment in this case is the line of sale by the nonresident importer, temporarily in the District for that purpose, of the goods by him imported, whether in upbroken or broken packages.

The case of *Stoutenburgh v. Hennick* settles the question that the Act in question is not a regulation of Congress.

The relator should be discharged.

## WASHINGTON SUPREME COURT.

L. EISENBACH *et al.*, *Appts.*,

v.

E. H. HATFIELD.

(2 Wash. ....)

1. The soil under navigable waters up to high-water mark is, in the State of Washington, by express provisions of the Constitution, as

well as by the common-law rule, the property of the State.

2. Riparian rights in the several States are settled by the respective States for themselves.

3. A riparian proprietor on the shore of the sea, or its arms has no right as against the State or its grantees to extend wharves in front of his land below high-water mark.

4. Under Const., art. 15, providing for

NOTE.—Navigable waters are public highways.

The confusion of navigable with tide waters, found in the monuments of the common law, long prevailed in this country, to the exclusion of admiralty jurisdiction from our great rivers and inland seas; but the doctrine is now established, that the great lakes and other navigable waters of the country above as well as below the flow of the tide are navigable waters amenable to the admiralty jurisdiction. *Martin v. Waddell*, 41 U. S. 16 Pet. 397, 10 L. ed. 997; *Pollard v. Hagan*, 44 U. S. 8 How. 212, 11 L. ed. 565; *Goodtitle v. Kibbe*, 50 U. S. 9 How. 471, 13 L. ed. 230; *The Genesee Chief v. Fitzhugh*, 53 U. S. 12 How. 443, 13 L. ed. 1058. See note to *Haines v. Hall* (Or.) 3 L. R. A. 610.

13 L. R. A.

Navigable rivers are placed upon the same footing as the sea and are regarded as public highways. *People v. Canal Appraisers*, 33 N. Y. 461. See note to *Swanson v. Mississippi & R. River Boom Co.* (Minn.) 7 L. R. A. 673.

The "navigable waters of the United States" are such as are navigable in fact, and which, by themselves or their connection with other waters, form a continuous channel for commerce with foreign countries or among the States. *Miller v. New York*, 109 U. S. 385, 385, 27 L. ed. 971, 975; *United States v. The Montello*, 73 U. S. 11 Wall. 411, 20 L. ed. 191, 87 U. S. 20 Wall. 430, 22 L. ed. 591.

If a river be capable in its natural state of being used for purposes of commerce, no matter in what

See also 13 L. R. A. 590; 18 L. R. A. 668; 21 L. R. A. 62; 22 L. R. A. 736; 29 L. R. A. 539; 30 L. R. A. 497; 38 L. R. A. 606.



the appointment of a commission to establish harbor lines and the leasing of the right to build wharves, no right to build them beyond high-water mark can be claimed by a riparian proprietor, even if he would have such right at common law.

5. There can be no vested right to future accretions to land which can be protected by injunction.
6. Riparian proprietors on the shore of the navigable waters of the State have no special or peculiar rights in such waters as an incident to their estates.
7. The building by a State or its grantees of wharves upon the shores of navigable waters will not constitute either a taking or damaging of the private property of riparian proprietors for public use.
8. One having valuable improvements on tide lands in actual use for commerce, trade and business prior to the Act of March 28, 1890, has a right as against the riparian proprietor who has never erected any improvements on the shore to maintain them as they were on the passage of that Act, but not to enlarge them prior to purchase of the lands from the State.

(Stiles, J., dissents.)

(March 12, 1891.)

**A**PPEAL by defendants from a judgment of the Superior Court for Pierce County in favor of plaintiff in a suit brought to enjoin defendants from erecting and maintaining structures upon the shore of Puget Sound below high-water mark in front of plaintiff's property. *Reversed.*

mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway, although its navigation may be encompassed with difficulties by reason of natural barriers. *United States v. The Montello, supra.*

If a river is navigable only between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State. *Miller v. New York, 109 U. S. 385, 37 L. ed. 971; United States v. The Montello, supra.*

The statute admitting Oregon into the Union provided that "all the navigable waters of said State shall be common highways." *Hatch v. Wallamet Iron Bridge Co. 7 Sawy. 127.*

Riparian rights of owners of lands bounding on navigable streams. See note to *Parker v. West Coast Packing Co. (Or.) 5 L. R. A. 61.*

#### *State sovereignty over land covered by navigable waters.*

After the Revolution the States succeeded to all the rights of the king and Parliament as absolute owner of all navigable waters and the soil under them. *Martin v. Waddell, 41 U. S. 16 Pet. 387, 10 L. ed. 997; Pollard v. Hagan, 44 U. S. 8 How. 212, 11 L. ed. 555; Weber v. State Harbor Comrs. 85 U. S. 18 Wall. 57, 21 L. ed. 798; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Hoboken v. Pennsylvania R. Co. 124 U. S. 856, 31 L. ed. 543; Stevens v. Paterson & N. R. Co. 34 N. J. L. 533.*

As to sovereign proprietorship over shores and beds, see *Goodtitle v. Kibbe, 50 U. S. 9 How. 473, 13 L. ed. 223; Hallett v. Beebe, 54 U. S. 18 How. 26, 14 L. ed. 38; Smith v. Maryland, 59 U. S. 18 How. 74, 15 L. ed. 270; Gilman v. Philadelphia, 70 U. S. 3 Wall. 723, 18 L. ed. 99; Mumford v. Wardwell, 78 U. S. 6 Wall. 433, 18 L. ed. 761; St. Clair Co. v. Livingston, 80 U. S. 23 Wall. 63, 23 L. ed. 63; Newport & C. Bridge 13 L. R. A.*

The case sufficiently appears in the opinion. *Meers, Calkins & Shackelford, for appellants:*

The owner of upland abutting on an arm of the sea where the tide rises and falls has no riparian rights. Such land in England belongs to the king, in America to the State. There are no riparian rights in the ocean.

*Pollard v. Hagan, 44 U. S. 8 How. 212, 11 L. ed. 555; Martin v. Waddell, 41 U. S. 16 Pet. 410, 10 L. ed. 1012; Boston v. Leclerc, 58 U. S. 17 How. 426, 15 L. ed. 118; Hoboken v. Pennsylvania R. Co. 124 U. S. 856, 31 L. ed. 543; Stevens v. Paterson & N. R. Co. 34 N. J. L. 533; Martin v. O'Brien, 84 Miss. 31; State v. Jersey City, 25 N. J. L. 525; Galveston v. Menard, 28 Tex. 393; Parker v. Taylor, 7 Or. 485; DeForce v. Welch, 10 Or. 507; Olney v. Moore, 13 Or. 239; American D. & Imp. Co. v. Trustees for the Support of Pub. Schools, 39 N. J. Eq. 409; Taylor v. Underhill, 40 Cal. 471; Davidson v. Boston & M. R. 8 Cush. 105; Henry v. Newburyport, 5 L. R. A. 179, 149 Mass. 585; Gould v. Hudson River R. Co. 6 N. Y. 548; Lansing v. Smith, 8 Cow. 146, 4 Wend. 1; People v. Vanderbilt, 26 N. Y. 287; Toule v. Remsen, 70 N. Y. 303; Langdon v. New York, 93 N. Y. 155; New York v. Hart, 95 N. Y. 443, 452.*

On the question generally whether the upland owner has any peculiar interest in the shore, see—

*Com. v. Alger, 7 Cush. 58; Clancy v. Houdlette, 39 Me. 451; Wood v. Fowler, 26 Kan. 632; Tomlin v. Dubuque, B. & M. R. Co. 32 Iowa, 106; McManus v. Carmichael, 3 Iowa,*

*Co. v. United States, 105 U. S. 491, 26 L. ed. 1150; Esanaba & Lake M. Transp. Co. v. Chicago, 107 U. S. 689, 27 L. ed. 443; Huse v. Glover, 119 U. S. 543, 30 L. ed. 489; Seabury v. Field, McAll. 4; Shively v. Welch, 10 Sawy. 141.*

The power of Congress over the navigable waters of the States extends only to the regulation of commerce. *Pollard v. Hagan, supra; Woodruff v. North Bloomfield Gravel Min. Co. 18 Fed. Rep. 777; United States v. New Bedford Bridge, 1 Woodh. & M. 410.*

#### *Inland seas and lakes.*

An inland sea or lake belongs to the State in which it is territorially situated. *Wharton, Commentaries, § 192; Woolsey, International Law, § 57; Holtzendorff, Encyclop. 1222.*

The right and title to the shores of the Great Lakes is in the several States and not in the United States. *Waukegan Breakwater, 6 Ops. Atty-Gen. 172.*

#### *The great ponds.*

Great ponds are held for the common use of all, and littoral owners have no private property in the waters, or in the soil under them below the natural low-water mark. *Potter v. Howe, 2 New Eng. Rep. 167, 141 Mass. 357.*

Under the Colony Ordinance of 1647, which is still in force, with some changes, in Massachusetts, the State owns the great ponds in its borders as public property held in trust for public uses. The State has not only the *fus privateum*, the ownership of the soil, but also the *fus publicum*, and may appropriate the waters, or authorize a city or town to do so, without compensation to the littoral owners on the ponds or streams flowing from them. *Wattuppa Reservoir Co. v. Fall River, 1 L. R. A. 466, 147 Mass. 543.*

The public right includes the use of water for domestic and other purposes, but only within the

56; *American Dock & Imp. Co. v. Trustees for the Support of Pub. Schools, supra*; *State v. Pacific G. Co.* 22 S. C. 50; *Land & Water Co. v. Richardson*, 70 Cal. 205, 209.

Every State adopts its own rules and makes its own laws for the sale and disposition of tide and shore lands. This question is one for the State exclusively and one in which Congress and the United States courts can take no part.

*Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224.

**Messrs. Dolittle, Pritchard, Stevens & Grosscup**, for appellee:

The owner of land abutting upon the navigable waters of an arm of the sea, by virtue of such ownership and the appurtenances to his land, has certain natural rights called riparian or littoral rights, consisting of the free and undisturbed access from the front of his land to such navigable waters and incidentally the right to facilitate such access by the erection of wharves and piers, also the right to the natural increase upon the front of his land whether by accretion of soil thereto, or by dereliction of the water in front of his lands, for purposes of loading or unloading, embarking or disembarking, and landing and tying up boats and vessels, also the right of fishery, the right of ferriage, the right to have seaweed and other debris from the ocean deposited there and many other rights of a similar character.

See *Davenport & N. W. R. Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51; *Cooley*, Const. Lim. 5th ed. p. 675, note 1; *Backus v. Detroit*, 49 Mich. 110.

These riparian rights are based:

natural levels; although the dam had been maintained for more than twenty years. *Potter v. Howe, supra*.

Private rights in great ponds could be acquired by prescription during the interval between the passage of the Acts of 1836 and of 1867, which latter Act provided that the Statute of Limitations should not apply "to any property, right, title or interest of the Commonwealth below high-water mark or in the great ponds. *Atty-Gen. v. Revere Copper Co. (Mass.)* 9 L. R. A. 510.

The title to a great pond which had been granted to a town previously to the passage of Mass. Code, 1647, but which had not at that time passed to a private person, could not thereafter be transferred to any private person. *Ibid*.

#### *Territorial jurisdiction of the State.*

By the common law it is established that the right of property in all the soil which is covered by tide water, and is also part of the nation's territory, is *prima facie* in the crown. *Direct U. S. Cable Co. v. Anglo-American Telegr. Co.* L. R. 2 App. Cas. 394; *Reg. v. Keyn*, L. R. 2 Exch. Div. 63.

The seashore is thus during parts of each day within the limits of the adjacent county, and as far as ordinary high-water mark it is the property of the crown. *Com. v. Alger*, 7 Cush. 58; *Weston v. Sampson*, 8 Cush. 247; *Com. v. Roxbury*, 9 Gray, 451; *Providence S. R. Co. v. Providence S. Co.* 12 R. I. 348; *Pollard v. Hagan*, 44 U. S. 3 How. 212, 11 L. ed. 565; *Goodtitle v. Kibbe*, 50 U. S. 9 How. 471, 13 L. ed. 220; *State v. Sargent*, 45 Conn. 358; *Gough v. Bell*, 21 N. J. L. 156; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532; *Galveston v. Menard*, 23 Tex. 249; *Teschmacker v. Thompson*, 18 Cal. 11; *People v. Davidson*, 30 Cal. 379; 2 Dane, Abr. 694; 8 Kent, Com. 427, cited in *Gould, Waters*, § 4.

The territorial jurisdiction of the State now extends 12 L. R. A.

1. Upon the general principles of the common law of England.

See *Bucelouch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Lyons v. Fishmongers Co.* L. R. 1 App. Cas. 662; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 248.

2. Upon the American common law.

*Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984. See *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74; *Dutton v. Strong*, 66 U. S. 1 Black, 22, 17 L. ed. 29.

One of the most valuable rights belonging to the riparian owner is the right of future accretion.

*St. Clair County v. Livingston*, 90 U. S. 23 Wall. 46, 23 L. ed. 59; *Weber v. Board of State Harbor Commrs.* 85 U. S. 18 Wall. 57, 21 L. ed. 798; *Davenport & N. W. R. Co. v. Renwick, supra*; *Bowman v. Wathen*, 2 McLean, 876; *Tuck v. Olds*, 29 Fed. Rep. 738; *Illinois v. Illinois Cent. R. Co.* 33 Fed. Rep. 730; *Cass v. Loftis*, 5 L. R. A. 684, 39 Fed. Rep. 780.

A shore owner upon the tide waters, or upon a navigable stream, possesses rights which, of late, are conceded to be property.

*Wilson v. Welch*, 12 Or. 344, 353; *Parker v. West Coast Packing Co.* 5 L. R. A. 61, 17 Or. 510; *Shirley v. Bishop*, 67 Cal. 543; *Clark v. Peckham*, 10 R. I. 85, 14 Am. Rep. 654; *Dela-plains v. Chicago & N. W. R. Co.* 42 Wis. 214; *Boorman v. Sunnucks*, Id. 243; *Diedrich v. Northwestern U. R. Co.* Id. 248; *Carls v. Stillwater Street R. & T. Co.* 28 Minn. 873; *Brisbane v. St. Paul & S. C. R. Co.* 23 Minn.

tends seaward to the distance of three geographical miles, or one marine league from the shore. *Church v. Hubbard*, 6 U. S. 2 Cranoh, 187, 2 L. ed. 240; *The Ann*, 1 Gall. 63; *United States v. New Bedford Bridge*, 1 Woodb. & M. 448; 1 Kent, Com. 22. And see *Gould, Waters*, citing numerous international law authors.

There are cases where it is not unlikely that the distances on the sea spoken of were measured as land miles, as parts of land miles, instances of measurements upon or near the shore, or measurements in rods or feet, cases resting upon peculiar facts. Illustrations of these are found in the following citations: *Mahler v. Norwich & N. Y. Transp. Co.* 35 N. Y. 352, 360; *People v. Richmond County Supra*. 73 N. Y. 336; *United States v. Jackalow*, 66 U. S. 1 Black, 424, 17 L. ed. 225; *Dolner v. Monticello*, Holmes, 7, cited in *Rockland, Mt. D. & S. S. R. Co. v. Fessenden*, 3 New Eng. Rep. 843, 79 Me. 140.

The limit of one sea league from shore is provisionally adopted as that of the territorial sea of the United States. 1 Wharton, International Law, Dig. § 32. See 6 Webster's Works, 306; Wharton, Conf. L. § 354.

#### *Title to land below high-water line is in the State.*

A person acquiring land abutting on a navigable stream takes title only to the high-water line, and that line is limited by the outflow of the medium high tide between the spring and neap tides. All below that line belongs to the State. *New Jersey Zinc & Iron Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 393.

Title to land under water, and to the shore below ordinary high-water mark, in navigable rivers and arms of the sea, was, by common law, vested in the sovereign. *Barney v. Keokuk*, 94 U. S. 324 (24 L. ed. 224); *Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 220.

114; *Miller v. Mendenhall*, 8 L. R. A. 89, 43 Minn. 95; *Clement v. Burns*, 43 N. H. 609; *Meyers v. St. Louis*, 8 Mo. App. 266; *Myers v. St. Louis*, 52 Mo. 867; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21; *Pittsburg v. Scott*, 1 Pa. 814; *Rice v. Buddiman*, 10 Mich. 125; *Bay City Gas Light Co. v. Industrial Works*, 28 Mich. 182; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 404; *Watson v. Peters*, 26 Mich. 517; *Lorman v. Benson*, 8 Mich. 18; *Lincoln v. Davis*, 53 Mich. 375; *Mather v. Chapman*, 40 Conn. 882, 16 Am. Rep. 46; *State v. Sargent*, 45 Conn. 858; *Moulton v. Libbey*, 87 Me. 472; *Welles v. Basley*, 4 New Eng. Rep. 841, 55 Conn. 292; *Baltimore & O. R. Co. v. Chase*, 43 Md. 28, 25; *Garites v. Baltimore*, 53 Md. 422; *New York v. Hart*, 95 N. Y. 448; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644; *Stockham v. Browning*, 18 N. J. Eq. 390; *New Jersey Zinc & Iron Co. v. Morris Canal & Bkg. Co.* 1 L. R. A. 133, 44 N. J. Eq. 898; *Musser v. Hershey*, 42 Iowa, 856; 8 Washb. Real Prop. 5th ed. 445; Gould, Waters, §§ 123, 124, and notes, 148-154.

**Anders, Ch. J.**, delivered the opinion of the court:

In this case this court is called upon for the first time to determine the rights of littoral proprietors of lands abutting upon the shore of an arm of the sea in which the tide ebbs and flows.

And while it is scarcely necessary to look beyond our own Constitution and laws for authority to guide us to a conclusion, still, owing to the importance of the questions

both to individuals and the public, and the magnitude of the interests involved, we have examined the numerous authorities cited by the learned counsel for the respective parties in the elaborate briefs which they have filed, in order that we might familiarize ourselves with the decisions of other courts upon the subject and with the reasons upon which their decisions are based.

We shall not attempt, however, to review all of the decisions in detail for that would be impracticable, if it were desirable, but will only refer to a few of the cases especially cited by counsel.

In this State the common law is our rule of decision in the settlement of questions requiring judicial determination when not specially provided for by statute, and it seems to be generally conceded that, at common law, the title to the soil under water was vested in the crown. The ownership of the soil was regarded as a *jus privatum*, and could be conveyed to individuals, subject only to the public right of navigation and fishing, which public right was under the absolute control of Parliament. In this country we have the highest authority in support of the doctrine that the State has succeeded to all the rights of both king and Parliament, and hence is the absolute owner of all navigable waters and the soil under them within its territorial limits.

This question was thoroughly discussed by the Supreme Court of the United States in the case of *Martin v. Waddell*, 41 U. S. 16 Pet. 867, 10 L. ed. 997. That was an action of eject-

A deed, by an individual, of property including a stream in which the tide ebbs and flows, and the land under which therefore belongs to the State, will not convey the bed of the stream beyond high-water mark. *Roberts v. Baumgarten*, 110 N. Y. 380.

The owner of land abutting on a navigable stream takes title only to the high-water line, and that is limited by the outflow of the minimum high tide between the spring and neap tides. *New Jersey Z. & I. Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 398; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74.

By the laws of Pennsylvania the riparian owners along the large rivers of that State own only to the bank, and have no exclusive right to the soil or water of such rivers to the middle thread of the water. *Rundle v. Delaware & R. Co.* 55 U. S. 14 How. 80, 14 L. ed. 335.

High-water mark, or the dividing line between the proprietors of lands bordering on a navigable stream and the State is the point beyond which the presence and action of water are so common and usual and so long continued in all ordinary years as to mark upon the soil a character distinct from that of the banks in respect to vegetation, as well as in respect to the soil itself. *St. Louis, I. M. & S. R. Co. v. Ramsey*, 5 L. R. A. 559, 53 Ark. 314.

Hence the holder under a United States patent of land bordering on such river cannot maintain an action to recover damages for the removal of gravel from the river bed in front of his land below high-water mark. *Ibid.*

#### *Establishment of dock and harbor lines.*

A body of water need not be landlocked in order to be a "haven" or "harbor." *Huntington v. Lowndes*, 40 Fed. Rep. 625.

Huntington Bay, a body of water lying between Lloyd's Neck and Eaton's Neck, on the north side 12 L. R. A.

of Long Island, in the State of New York, is a "haven" or "harbor," within the meaning of the language in the Colonial Patents of 1666, 1688 and 1694. *Ibid.*

The establishment of a dock or harbor line in pursuance of legislative authority is to be construed as giving to the owners of the upland the privilege of filling in and building out to such line. *Miller v. Mendenhall*, 8 L. R. A. 89, 43 Minn. 95.

The Statute giving to the harbor commissioners the care and supervision of the tide-waters and the flats, confers no additional rights upon adjacent or contiguous proprietors. *Henry v. Newburyport*, 5 L. R. A. 179, 149 Mass. 532.

The power of the City of Astoria over the subject of the erection of a wharf within the city limits, in front of the shore of the Columbia River, is confined to the establishing of a wharf line. *McCann v. Oregon R. & Nav. Co.* 18 Or. 455.

The deposit of refuse matter in the channel of the Hudson River opposite Newburgh is within waters tributary to New York Harbor, within the meaning of the Act of Congress of June 30, 1838, prohibiting injurious deposits within that harbor or adjacent and tributary waters. *United States v. The Sadie*, 41 Fed. Rep. 396.

Harbor commissioners; supervision of tide-waters on flats. See note to *Henry v. Newburyport* (Mass.) 5 L. R. A. 179.

#### *Littoral proprietors; extent of right and title.*

In the absence of evidence to the contrary, it is presumed that the owner of land bordering on the seashore holds only to ordinary high-water mark, and that all the seashore fronting his land lying between high and low water mark is the property of the State. *Long Beach Land & Water Co. v. Richardson*, 70 Cal. 204.

In the Massachusetts Colonial Ordinance of 1647,

ment for land under the waters of Haritan Bay, in New Jersey, over which the tide ebbed and flowed. The land in controversy was included in a large tract which was granted by the King of Great Britain to the Duke of York, and subsequently became vested in the proprietors of East Jersey, who afterwards surrendered to the crown all their governmental powers, but retained all their rights of private property. One of the parties to the action as the grantees of the State of New Jersey, under a law of the State, claimed the exclusive right to take oysters in the place granted, and the other claimed the same right by virtue of his title from the proprietors. The right of the crown to make the grant to the Duke of York, which not only included the tide land, and also the waters, and soil under the waters, as well as the power of the State to convey the same, were questions thus brought directly before the court for determination. And it was held that the king as the representative of the nation had an unquestionable right to make the grant to the Duke of York with all the prerogatives and powers of government therein contained. In discussing the question as to whether, since Magna Charta, the king had power to grant land covered by navigable waters to any individual so as to give him an exclusive right of fishing within the limit of the grant, *Mr. Chief Justice Taney* said: "And we the more willingly forbear to express an opinion on this subject because it has ceased to be of much interest in the United States. For, when the Revolution took place, the people of each State became

themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to the grants of the British crown."

The natural and logical conclusion of the court was, that the grant by the State conferred upon its grantees the exclusive right to take oysters within the territory covered by the grant.

The question of the ownership of lands under tide-waters was again raised in the same court in the case of *Pollard v. Hagan*, 44 U. S. 8 How. 212, 11 L. ed. 565, which was ejectment for a lot of land in the City of Mobile, in Alabama, which lay below high-water mark, and which had been granted to plaintiff by Congress. After approving the decision in the case of *Martin v. Waddell*, *Mr. Justice McKinley*, in the course of his opinion, says:

"Then to Alabama belong the navigable waters and the soil under them in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge those rights."

The court further says that "by the preceding course of reasoning we have arrived at these general conclusions: first, the shores

which declares that in all places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety "to the low-water mark," the words "to the low-water mark" mean to the extreme low-water mark. *Sewall & D. Cordage Co. v. Boston Water-Power Co.* 6 New Eng. Rep. 323, 147 Mass. 61; *Sparhawk v. Bullard*, 1 Met. 96; *Atty-Gen. v. Boston Wharf Co.* 12 Gray, 553; *Wonsou v. Wonsou*, 14 Allen, 71; *Atty-Gen. v. Woods*, 103 Mass. 436. See note to *Miller v. Mendenhall* (Minn.) 8 L. R. A. 90.

The common-law doctrine prevailing in England has been adopted in most, if not all, of the New England States, and was in the early cases in New York in force in that State (see *Ex parte Jennings*, 6 Cow. 518); but it was modified and finally overruled in subsequent cases, and the better doctrine of the civil law adopted. See *People v. Canal Appraisers*, 33 N. Y. 461; *McManus v. Carmichael*, 3 Iowa, 1.

The title of the littoral owners bordering on the seashore, and appurtenant rights in the shore and mud flats between high and low water mark are separable, and either may be conveyed separately. See note to *Miller v. Mendenhall* (Minn.) 8 L. R. A. 92.

#### *Tide lands; ownership of.*

An owner of land situated in the vicinity of tide-water has not the right to have the water flow over the premises of others owning flats or the shore between high and low-water marks to his own land. *Henry v. Newburyport*, 5 L. R. A. 179, 149 Mass. 582.

Tide lands applies to those lands adjoining main lands, and periodically covered and uncovered by the rising and falling tides. *Hobson v. Monteith*, 15 Or. 251.

To be tidal water it is not necessary that water should be salt, but the spot must be one where the tide, in the ordinary course of things, flows and reflows. *Reece v. Miller*, L. R. 8 Q. B. Div. 680.

12 L. R. A.

#### *Qualified property in water-front.*

At common law a littoral proprietor and a riparian owner have a qualified property in the water frontage belonging by nature to their land, which includes the right of access over an extension of their water fronts to navigable water, and the right to construct wharves, piers, or landings and fish houses, although the effect of doing so will be to shut off access by the adjoining owners to wharves on that side. *Bond v. Wool*, 107 N. C. 139.

He is entitled to fill in and make improvements in shallow waters in front of his land to the line of navigability; and his rights therein can be interfered with only by the State for public purposes. *Miller v. Mendenhall*, 8 L. R. A. 89, and note, 43 Minn. 95.

This right is subject only to the limitation that he shall not interfere with the public right of navigation. *Dutton v. Strong*, 66 U. S. 1 Black, 23, 17 L. ed. 29; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 964; *Fulmer v. Williams*, 1 L. R. A. 603, 122 Pa. 191.

No one but the riparian proprietor has the right to improve and occupy such premises for private purposes, and it does not concern others how or to what particular purpose the reclaimed premises may be devoted so long as there is no violation of the maxim *sic utere tuo ut alienum non laedas*. *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 725, 43 Minn. 104.

The right of the riparian owner on navigable streams to erect wharves and piers is appurtenant to his ownership, subject, however, to governmental control. See note to *Parker v. West Coast Packing Co.* (Or.) 5 L. R. A. 61.

The paramount common right of navigation is not confined to the channel of a waterway but extends to high-water mark in tide-waters and tidal

of navigable waters and the soils under them were not granted by the Constitution of the United States but were reserved to the States respectively; second, the new States have the same rights, sovereignty and jurisdiction over this subject as the original States; third, the right of the United States to public lands and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the lands in controversy in this case."

Again in the case of *Weber v. Board of Harbor Comrs.*, 85 U. S. 18 Wall. 57, 31 L. ed. 798, it was held that to the State of California upon her admission into the Union passed the absolute property in and dominion over all soils under tide-water within her limits, with the consequent right to dispose of the title to any part thereof in such manner as the State might deem proper, subject to the paramount right of navigation over the waters so far as such navigation might be required by the necessities of commerce with foreign nations and among the several States, the regulation of which was vested in the general government. (Opinion of Mr. Justice Field, at page 65, 801.)

The court went still further in the case of *McCready v. Virginia*, 94 U. S. 891, 24 L. ed. 848, and there held that not only the soil under tide-waters, in the State, but the waters themselves and the fish in the waters, so far as they are capable of ownership, belonged to the State, and that the Legislature had the constitutional right to pass a law

prohibiting any person not a citizen of the State from fishing in such waters. And in *Wilson v. Black Bird Creek Marsh Co.*, 27 U. S. 2 Pet. 245, 7 L. ed. 413, the court sustained an Act of the Legislature of Delaware authorizing the damming up of a navigable stream for the benefit of adjoining lands.

The case of *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 31 L. ed. 548, was an action of ejectment for land occupied by the railroad company along the margin of the Hudson River. Plaintiff claimed by dedication of the street to the water by the original proprietor of the land, as evidenced by the "Loss" map. Defendant claimed by virtue of a grant from the State. Mr. Justice Matthews, speaking for the court, said: "The nature of the title in the State to lands under tide-water was thoroughly considered by the Court of Errors and Appeals of New Jersey in the case of *Stevens v. Paterson & N. R. Co.*, 84 N. J. L. 582; it was there declared, p. 549, 'that all navigable waters within the territorial limits of the State, and the soil under such waters, belong in actual propriety to the public; that the riparian owner by the common law has no peculiar rights in this public domain as incidents of his estate, and that the privileges he possesses by the local custom or by force of the Wharf Act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the Legislature. The result is, that there is no legal obstacle to a grant by the Legislature to the defendants of that part of the property of the public which

streams. See note to *Wright v. Mulvaney* (Wis.) 9 L. R. A. 807.

#### *Title to islands in river; law of accretion.*

The title to land acquired by accretion is a title acquired under the operation of the law of the State, which each State determines for itself. *Barney v. Keokuk*, 94 U. S. 824, 24 L. ed. 224; *St. Louis v. Rutz*, 128 U. S. 220, 34 L. ed. 951.

The owner in fee of the bed of a river, or other submerged land, is the owner of any bar island or dry land which subsequently may be formed thereon. *Mulry v. Norton*, 1 Cent. Rep. 748, 100 N. Y. 424; *St. Louis v. Rutz*, *supra*.

The Arsenal Island was "a mere moving mass of alluvial deposits." To such a movable island, traveling for more than a mile and from one State to another, the law of title by accretion can have no application, for its progress is not imperceptible in a legal sense. *St. Louis v. Rutz*, *supra*.

The right of accretion to an island in a river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river, as such riparian proprietors. *St. Louis v. Rutz*, 128 U. S. 126, 34 L. ed. 941.

The owner of an island between two channels of a river, which, by a change in the course of the channels, has gradually pushed up stream as the result of natural accretions, is entitled to the accretions, under Cal. Civ. Code, § 1014, which is merely declaratory of the law as it has always been. *Fillmore v. Jennings*, 78 Cal. 684.

The Enabling Act of April 18, 1818 (3 Stat. 490, § 2), under which Illinois was organized as a State and admitted into the Union, made "the middle of the Mississippi River" the western boundary of the State. The Enabling Act of March 3, 1820 (3 Stat. 19 L. R. A.

545, § 2), under which Missouri was organized as a State and admitted into the Union, made the "middle of the main channel of the Mississippi River" the eastern boundary of Missouri, so far as its boundary line was coterminous with the western boundary of Illinois. It has been held by the Supreme Court of Illinois (*Buttenth v. St. Louis Bridge Co.*, 14 West. Rep. 651, 128 Ill. 686) that these two Enabling Acts are to be construed as *in pari materia*, and that the common boundary line between Missouri and Illinois is the "middle of the main channel of the Mississippi River." The "middle of the main channel of the Mississippi" has been constantly treated as the eastern boundary of the State of Missouri. *Jones v. Soulard*, 65 U. S. 84 How. 41, 16 L. ed. 604; *The Schools v. Riskey*, 77 U. S. 10 Wall. 91, 19 L. ed. 860; *St. Louis v. Rutz*, 128 U. S. 220, 34 L. ed. 960.

It follows that an island in the Mississippi River, in its course between Illinois and Missouri, must lie wholly in one of those States or the other, because the main channel of the river must run on one side or the other of such island. *St. Louis v. Rutz*, *supra*.

The right of accretion to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river, as such riparian proprietors. *Mulry v. Norton*, 1 Cent. Rep. 748, 100 N. Y. 424, 430, 437; *St. Louis v. Rutz*, *supra*.

If an island in a non-navigable stream results from accretion, it belongs to the owner of the bank on the same side of the *flum aqua*. 2 Washb. Real Prop. 423, 428; 2 Sharswood, Bl. Com. 261, note; 3 Kent, Com. 428; *Kinggrave, Law Trials*, 5; Hale, De Jure Maris, 14; *King v. Yarborough*, 8 Barn. & C. 91, 107; *Ex parte Jennings*, 6 Cow. 587, note; *Ingraham v. Wilkinson*, 4 Pick. 268; *Deerfield v. Arms*, 17 Pick. 41; *Woodbury v. Short*, 17 Vt. 297.

lies in front of the lands of the plaintiff, and which is below high-water mark."

"It was therefore held in that case that it was competent for the legislative power of the State to grant to a stranger lands constituting the shore of a navigable river under tide-water, below the high-water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of a riparian owner from his land to the water, and without making compensation to him for such loss." And again: "Our conclusion therefore is that the grants from the State of New Jersey, under which the defendants claim, respectively, are a complete bar to the recovery sought against them in these suits." And finally, "Under those grants they have and hold the rightful and exclusive possession of the premises in controversy against the adverse claims of the plaintiff to any easement or right of way upon and over them, by virtue of the original dedication of the streets to high-water mark on the Loss map."

The foregoing decisions of the highest judicial tribunal of the United States, without other or further authority, would seem to settle, beyond controversy, the question of title to the tide lands of this State, and to leave no doubt whatever that they belong to the State in actual propriety and that the State has full power to dispose of the same, subject to no restrictions, save those imposed

upon the Legislature by the Constitution of the State and the Constitution of the United States. And if this be true, it necessarily follows that no individual can have any legal right whatever to claim any easement in, or to impose any servitude upon, the tide-waters within the limits of the State, without the consent of the Legislature.

But in order that there might be no doubt upon this vexed question, the Constitution of the State has spoken upon the subject. Section 1 of article 17 of that instrument declares that "the State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide in the waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; provided that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State." And, so jealous were the people of the State in guarding their rights in these lands, that they inserted a proviso in the Constitution to the effect that no law of Washington Territory granting shore or tide lands to any person, company or any municipal or private corporation, should be deemed valid. Const. art. 17, § 2.

Appellee contends, however, that whatever may be the title of the State to the soil under tide-water, he, by virtue of his contiguity to

#### *Title by discovery, in United States government.*

Islands discovered by a citizen of the United States become the property of the United States government. United States Rev. Stat. chap. 72; *Duncan v. Navassa Phosphate Co.* 137 U. S. 647, 34 L. ed. 827.

The Guano Islands Act of Congress of 1856 makes the island of Navassa part of the United States. *Jones v. United States*, 137 U. S. 202, 34 L. ed. 601.

The whole right conferred by the Guano Islands Act Aug. 18, 1856, upon the discoverer of an island and his assigns is a license to occupy the island for the purpose of removing the guano. This right cannot last after the guano is removed. *Duncan v. Navassa Phosphate Co.* *supra*.

#### *Riparian rights.*

Riparian rights are settled by the States themselves. *St. Louis v. Myers*, 113 U. S. 536, 28 L. ed. 1181; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Wilson v. Blackbird Creek Marsh Co.* 37 U. S. 2 Pet. 245, 7 L. ed. 412; *Com. v. Alger*, 7 Cush. 63; *Dana v. Jackson Street Wharf Co.* 81 Cal. 118; *Martin v. O'Brien*, 34 Miss. 21; *Case v. Loftus*, 5 L. R. A. 684, 39 Fed. Rep. 730.

Among rights of a riparian owner are access to the navigable part of the river from the front of his land, and the right to make a landing, wharf or pier for his own use or the use of the public. *Dutton v. Strong*, 66 U. S. 1 Black, 23, 17 L. ed. 29; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 273, 19 L. ed. 74; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 504, 19 L. ed. 984, 986; *St. Louis v. Ruiz*, 138 U. S. 226, 34 L. ed. 949.

A current is not essential to the existence of riparian rights, as water may be navigable with or without a current. *Turner v. Holland*, 8 West. Rep. 801, 65 Mich. 453.

#### *Rights of owners in various States.*

##### *Arkansas.*

Owners of land bordering on a river are entitled to compensation for damages suffered by reason of 12 L. R. A.

their riparian rights having become less valuable on account of railroad tracks and other improvements, but can claim nothing on account of the running of a transfer boat, where they have no ferry license. *Organ v. Memphis & L. R. Co.* 51 Ark. 235.

##### *California.*

The Sacramento River being navigable in fact, the title of the riparian owner extends no further than the edge of the stream. *Lux v. Haggis*, 69 Cal. 255.

##### *Colorado.*

Though the charter of a corporation may be ineffectual to convey an exclusive right, or any other right, to the waters of a river in Colorado, it is entitled to the protection of its rights in the water to the extent of its actual appropriation. *Platte Valley Co. v. Northern Colorado Irrigation Co.* 12 Colo. 525.

##### *Delaware.*

A riparian proprietor or owner of land fronting upon a navigable river holds to the low-water mark. *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435.

##### *District of Columbia.*

The United States became the riparian proprietor, and succeeded to all the riparian rights by becoming the owner in fee simple absolute of Water Street, in Washington, a strip of land that adjoined the river, and owned the right of wharfage appurtenant to it, although the land was granted for a street. *Potomac S. B. Co. v. Upper Potomac S. B. Co.* 109 U. S. 672, 37 L. ed. 1070.

##### *Illinois.*

A riparian owner on a navigable stream cannot maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury in-

the water, has certain rights in the shore beyond those of the general public, and which are peculiar to himself, among which are a right to wharf out opposite to his upland, a right of ferriage, a right of unobstructed access to the navigable water in front of him, and a further right to accretions that may hereafter be found, and that all of these rights are property and are "vested rights." And in support of his contention the learned counsel for appellee have cited many authorities, among which are *Dutton v. Strong*, 66 U. S. 1 Black, 23, 17 L. ed. 29; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984.

But before proceeding further it may be proper here to observe that riparian rights in the several States are settled by the respective States for themselves. See *St. Louis v. Myers*, 118 U. S. 566, 28 L. ed. 1181; *Barnes v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Wilson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245, 7 L. ed. 412.

In *Dutton v. Strong*, *supra*, cited by appellee as an authority in favor of his right to wharf out against his premises, the facts before the court were as follows: The defendant in the court below had constructed a landing, or bridge pier, in front of his premises extending to the navigable waters of the lake; plaintiff's vessel was moored to this pier in a storm, and, by force of the gale, was about to pull down and destroy defendant's structure, when he, after requesting the master of the vessel to detach the same,

but who refused to do so, cut the hawser, whereby the ship was set adrift and sank. Plaintiff sued for the resulting damage. The court held that the defendant had a right to erect the pier where it was, and to protect the same by cutting the vessel's fastenings, even although it was thereby exposed to destruction. Speaking of the origin of riparian rights in this country, *Mr. Justice Clifford* said: "Our ancestors when they immigrated here undoubtedly brought the common law with them, as a part of their inheritance; but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil, between high and low water, to the accomplishment of these objects. Different States adopted different regulations upon the subject; and in some the right of the riparian proprietor rests upon immemorial usage. No reason is perceived why the same general principle should not be applicable to the lakes, although these waters are not affected by the ebb and flow of the tide."

We have no doubt of the correctness of that decision, and this court would undoubtedly follow it in a similar case.

The case of *St. Paul & P. R. Co. v. Schurmeier*, *supra*, involved the title to land on the Mississippi River at St. Paul. Schurmeier's premises were bounded by high-water mark of the river, but the land in front had been filled in and built upon down to extreme low-water mark; and it was held that he had a right as riparian proprietor to the reclaimed land as against the railroad company. And at page 289, *Mr. Justice Clifford* said: "Al-

licted, or carelessness, negligence or want of skill in causing the obstruction. *Northern Transp. Co. of O. v. Chicago*, 99 U. S. 635, 25 L. ed. 835.

#### Iowa.

In Iowa it is unlawful for any person or corporation to construct or operate any railroad or other obstruction between the shore and the river, without compensation to the shore-owners. *Davenport & N. R. Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51.

#### Massachusetts.

The owner of lands not accessible by navigation from the sea has no cause of complaint because of being deprived, by the erection of wharves or by the filling up of flats, of the ebb and flow of the tide to his premises, or the right thereby to drain over the lands of others. *Henry v. Newburyport*, 5 L. R. A. 179, 149 Mass. 582.

#### Michigan.

Where plaintiff leased a water lot to defendant only to furnish a water front upon which defendant could store its boats and launch and land the same unobstructed, his subsequent obstruction of defendant's access is an eviction and defeats his right to claim rent during the continuance of the obstruction. *Pridgeon v. Excelsior Boat Club*, 9 West Rep. 211, 66 Mich. 326.

#### Missouri.

The Act of Congress providing for the admission of Missouri into the Union left the rights of riparian owners on the Mississippi River to be settled according to the principles of state law. *St. Louis v. Myers*, 118 U. S. 566, 28 L. ed. 1181.

#### New Jersey.

The acquisition, by a railroad or canal company, 12 L. R. A.

of an easement, for a right of way, over the land of a riparian owner, along or on the shore of his land, does not, according to general principles of law, deprive such owner of his right or equity to preserve or improve the connection of his land with the adjacent tidewater. *New Jersey Zinc & Iron Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 398.

The title to the land taken remains in such cases in the owner, subject only to such servitude as the corporation has power to impose; and their power in this respect is limited, as a general rule, to such use of the land as may be reasonably necessary for a right of way. *Taylor v. New York & Long Branch R. Co.* 38 N. J. L. 28; 1 Redf. Railroads, 270.

Entry upon land of another and appropriating it to its own use neither constitutes a trespass nor gives the owner a right to maintain an action of ejectment against them. *Kough v. Darcey*, 11 N. J. L. 281; *Den v. Morris Canal & Bkg. Co.* 24 N. J. L. 587; *Lehigh Valley R. Co. v. McFarland*, 81 N. J. Eq. 708, 48 N. J. L. 605.

#### Pennsylvania.

In Pennsylvania the test by which the character of a stream as public or private is determined is its navigability in fact. *Fulmer v. Williams*, 1 L. R. A. 603, 122 Pa. 191.

The common-law doctrine was never recognized in this State. *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112.

As between themselves, riparian owners on a navigable stream are owners of the soil, and are bound to observe the obligations that grow out of their ownership and their proximity, so as not to injure just rights. *Fulmer v. Williams*, *supra*.

Riparian rights of owners on natural streams. See note to *Whitney v. Wheeler Cotton Mills (Mass.)* 7 L. R. A. 613.

though such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide."

But it will be remembered that the same learned judge said in *Dutton v. Strong* that different States adopted different regulations upon the subject. And no doubt the decision of the case was in no way in conflict with the "regulations" of Minnesota.

The question before the court in *Yates v. Milwaukee* was as to the validity of an ordinance of the City of Milwaukee declaring a wharf belonging to Yates a nuisance. And it was remarked by Mr. Justice Miller, in speaking generally of riparian rights on navigable streams, that whether the title of such owner extended beyond the dry land or not, he has the right of access to the navigable part of the river, and to make a landing, wharf or pier for his own use or that of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever they may be, and that it is a valuable right and property, and a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation.

But if the court in these cases really intended to say that the same rule applied to the shore of the sea, or the arms of the sea, and that a riparian proprietor has a right, as against the State, to erect wharves extending below high-water mark, we cannot see how these can be reconciled with other decisions of the court, especially with that of *Hoboken v. Pennsylvania R. Co.*, *supra*. But it would seem, however, that the court in the later case of *Weber v. Board of Harbor Comrs.*, *supra*, did make a distinction between tidal and non-tidal waters. For, in that case, Mr. Justice Field, after approving the doctrine laid down in *Yates v. Milwaukee*, says: "Nor is it necessary to controvert the proposition that in several of the States, by general legislation or immemorial usage, the proprietor whose land is bounded by the shore of the sea, or of an arm of the sea, possesses a similar right to erect a wharf or pier in front of his land, extending into the waters to the point where they are navigable. In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those States where the common law obtains. By that law the title to the shore of the sea and of the arms of the sea and under tide-waters is, in England, in the King, in this country, in the State. Any erection thereon without license is therefore deemed an encroachment upon the property of the sovereign, or, as it is termed, in the language of the law, a purpresture which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

We think the above is a correct statement of the law applicable to riparian rights on

tide-waters, and that it is fully supported by the authorities. Gould, *Waters*, § 187, and cases cited; *Com. v. Alger*, 7 Cush. 53; *Dana v. Jackson Street Wharf Co.* 31 Cal. 118; *Martin v. O'Brien*, 34 Mass. 21.

And in this connection it must not be forgotten that, in the cases of *Dutton v. Strong*, *St. Paul & P. R. Co. v. Schurmeier and Yates v. Milwaukee*, as well as that of *Case v. Loftus*, 39 Fed. Rep. 730, 5 L. R. A. 684, also cited by counsel, the respective riparian proprietors had already erected their improvements, presumably with the license of the State, and therefore had vested rights of property which it was proper to recognize and protect.

This seems to have been the view of Mr. Gould, for, in a note to section 149 of his work on *Waters*, in which he quotes from the opinion of the court in the case of *Yates v. Milwaukee*, he uses this language: "In this case the wharf which it was attempted to condemn as a nuisance was actually built."

In *Ravenwood v. Flemings*, 22 W. Va. 52, 46 Am. Rep. 485, which is a well-considered case, it was held, under a law of that State, that a riparian proprietor on a navigable river had no right to build a wharf, ferry or bulk-head, below high-water mark, without the consent of the town council, and that he might be prevented from so doing by injunction.

And in *Com. v. Alger*, *supra*, the court, in a most learned and elaborate opinion by Chief Justice Shaw, sustained an indictment against the defendant for extending a wharf beyond the harbor line in the City of Boston, on his own land, and further, that the Statute establishing harbor lines, and taking away the right of proprietors of flats in the harbor beyond the lines, to build wharves thereon, even when they would be no injury to navigation, and providing for no compensation to such proprietor, was not unconstitutional as taking private property for public uses without compensation.

We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights, as against the State, or its grantees, to extend wharves in front of his land below high-water mark. But if this were not so, we would still be constrained to hold that appellee has no such rights, for the Constitution of the State, which is the supreme law of the land, expressly declares that the Legislature shall provide for the appointment of a commission, whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors of the State, whenever such navigable waters lie within or in front of the incorporated limits of any city, or within one mile thereof, upon either side; and further, that the Legislature shall provide general laws for the leasing of the right to build wharves, docks and other structures, upon certain designated areas, or the Legislature may provide by general laws for the building and maintaining, upon such area, wharves, docks and other structures. Const. art. 15.

Nor can the right to wharf out be claimed under the Act of the Territorial Legislature authorizing bank owners to build wharves



in front of their premises. That Act was but a license at most, and, until availed of, was revocable; and the Constitution and subsequent laws have abrogated the law.

But appellee claims that he has a vested right to future accretions to his land, and cites, as authority to sustain his position, the case of *St. Clair v. Livingston*, 90 U. S. 23 Wall. 46, 23 L. ed. 59. And the court in that case does say that the riparian right of future accretions is a vested right. But we are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence. It seems to us that the more reasonable doctrine is announced in the case of *Taylor v. Underhill*, 40 Cal. 471, in which case the court says: "The plaintiff as a riparian owner has also a right to accretions to his land, and it is said the claim of defendant will be a cloud upon his title to such accretions, but as yet there is no such property and there may never be. He cannot ask the court to interfere in advance to prevent a cloud being cast upon his title to that which may never have an existence."

The case of *Davenport & N. W. R. Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51, cited by appellee, was an action for damages by a riparian proprietor on account of the building of a railroad along the Mississippi River in front of his premises. The court held that the plaintiff could recover, but placed its decision upon a Statute of Iowa (1874) providing for compensation to riparian owners in such cases. Previous to this Statute, it was held in the case of *McManus v. Carmichael*, 8 Iowa, 1, after an exhaustive review of the authorities, that the title of riparian owner extended only to high-water mark. And in the case of *Tomlin v. Dubuque, B. & M. R. Co.*, 82 Iowa, 109, the court held that "the doctrine deducible from adjudged cases is, that by the rules of the common law, the owner of land along the shore of a navigable river is entitled to no right, either in the shore or waters, as an incident of his ownership, except the contingent ones of alluvion and dereliction. Hence he is not entitled to damages for an improvement made along the banks of such river, by authority of the State, the effect of which is to deprive him of free access to the stream."

The same question was before the Court of Appeals of New York in the case of *Gould v. Hudson River R. Co.*, 6 N. Y. 522, and was decided the same way. In that case the court said: "The banks of the Hudson River between high and low water mark, belong to the people, and the riparian proprietor has no better right to the use of it than any other person. If he build on it or erect a wharf there, it would be a purpresture which the Legislature might direct to be removed or to be seized for the use of the public. Or the Legislature might authorize an erection in front thereof as in case of Smith's wharf on the Thames."

And in *Stevens v. Paterson & N. R. Co.*, 84 N. J. L. 522, it was held that, although an owner of land adjacent to navigable water is more conveniently situated for the enjoyment of the public easements than others, he has, 12 L. R. A.

by virtue of common law, no more or greater rights than the rest of the community. In *Langdon v. New York*, 98 N. Y. 155, it was said that the Legislature of the State, where not restrained by constitutional inhibitions, could authorize a boom to be placed across the Hudson River for private use, and that the right of the State to grant the navigable waters except as restrained by constitutional checks, is as absolute as its rights to grant the dry land which it owns, and that the State holds the public domain as absolute owner and not as a trustee, except as it is organized and possesses all its powers and property for the public benefit.

Many decisions of the various state courts have been cited by appellee as sustaining a contrary doctrine to that of the above cases, but we find, upon examination, that they are mostly (especially those referring to riparian rights in tide-waters) based either upon statutes or local customs, and are therefore not precedents binding upon us.

Our attention is also called to the English cases of *Buckleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, and *Lyon v. Fishmongers Co.*, 17 (Moak) Eng. Rep. 51, L. R. 1 App. Cas. 682, only the latter of which, however, we have had an opportunity to examine. And in that case the principal question involved was the construction of an Act of Parliament which distinctly recognized riparian rights in the owner, and which provided (§ 179) that "none of the powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter or abridge any right, claim, privilege or franchise, exemption or immunity, to which any owner or occupier of any lands or hereditaments on the banks of the river, including the banks thereof, or of any aits or islands in the river, and by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this Act had never been made."

The Statute is a very broad and comprehensive one. And as it was not questioned but that Lyons' wharf was erected and used where it was in accordance with the law, the owner was therefore entitled to the "privilege" of continuing to use it, as against the Fishmongers' Company, as if the Act had never been passed.

Indeed, it was conceded in argument that he had a right of access from the river to the front of his wharf, but it was contended that he had no such right as to the side next Winckworth's Hole, which was merely an inlet from the river. The court held otherwise; and its conclusion was evidently in accordance with the provisions of the Act in question, although at variance with the earlier common-law doctrine as laid down by Lord Mansfield in *King v. Smith*, 2 Dougl. 441, in which that eminent jurist held that the king might authorize the erection of a structure in front of defendant's premises, between high and low water mark, in the River Thames, even though the defendant was thereby cut off from the use of his wharf.

The result of our investigation of the authorities leads us to the conclusion that

riparian proprietors on the shore of the navigable waters of the State have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the State to deal with its own property as it may deem best for the public good.

If the State cannot exercise its constitutional right to erect wharves and other structures upon its public waters in aid of navigation without the consent of adjoining owners, it is obviously deficient in the powers of self-development which every government is supposed to possess—a proposition to which we cannot assent. See *Galveston v. Menard*, 23 Tex. 849.

Nor do we think this view in any way conflicts with the Constitution of the State, but, on the contrary, we believe it is in strict harmony with it, when all its parts are construed together. We cannot think that the building by the State or its grantees of wharves upon shores of navigable waters would constitute either a taking or damaging of private property for public use in contemplation of the Constitution.

The next question to be considered is, By what right, if any, do appellants occupy the shore in front of appellee's premises? And in considering this question, it must be remembered that the demurrer in this case admits that they have thereon valuable improvements in actual use for commerce, trade and business, and that said improvements were on said lands on March 26, 1890, the date of the passage of the Tide Land Act; that said lands are within one mile of the corporate limits of the City of Tacoma; that the harbor lines have not been fixed opposite to said lands, and that the same have not been disposed of by the State.

Appellee has never erected any improvements on the shore, but claims that the appellants are trespassers and that, as against them, he is entitled to relief by injunction. On the other hand, appellants claim to be rightfully in possession of the disputed lands by authority of the Act of the Legislature above mentioned.

Section 11 of this Act provides that "the owner or owners of any lands abutting, or fronting upon, or bounded by, the shore of the Pacific Ocean, or of any bay, harbor, sound, inlet, lake or watercourse shall have the right for sixty (60) days following the filing of the final appraisal of the tide lands to purchase all or any part of the tide lands in front of the lands so owned: provided, that if valuable improvements in actual use for commerce, trade or business have been made upon said tide lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid: . . . provided, that nothing in this Act shall be so construed as to apply to any improvements made after the passage of this Act."

We think, by a fair construction of this statute, that appellants are rightfully in possession of the disputed premises, and have a right to maintain their improvements as they were on March 26, 1890, but that they have

no right to enlarge their erections, prior to such time as they may be authorized to purchase the lands from the State.

For the foregoing reasons, *the judgment of the court below is reversed and the cause remanded for further proceedings in accordance with this opinion.* So ordered.

We concur: **Hoyt, Scott and Dunbar, JJ.**

**Stiles, J., dissenting:**

The plaintiff in the superior court, the appellee here, alleged ownership to lots 15, 16 and 17 in blocks 1 and 2 in Wallace's Addition to the City of Tacoma; that his lots had a water frontage on Puget Sound, a navigable arm of the sea, for a distance of more than 150 feet; that defendants had, about May 1, 1890, taken exclusive possession of the shore in front of his lots, including all the area between high and low water marks, and had placed certain obstructions in the way of his access to the water, and were threatening to increase the obstructions, and refused him any access to the water from his land, or to permit him to enjoy any of his riparian rights. The prayer of the complaint was for a mandatory injunction to secure the removal of the obstructions.

The answer admitted plaintiff's ownership to high-water mark, but denied his right of access and all other riparian rights; admitted taking possession of the shore; claimed improvements in actual use for commerce, trade and business on March 26, 1890, and prior thereto, and the right to purchase the land improved under the Act of that date; and alleged the distance between high and low water marks to be not exceeding 250 feet, and from high water to water of the depth of five fathoms to be 400 feet.

The court below sustained a demurrer to the answer and the opinion of this court has reversed the ruling.

I think the demurrer should have been sustained, first, for the reason that the allegations of the answer intended to show improvements March 26, 1890, was not the statement of any fact, but a conclusion of law; and, secondly, on the main question, because the law of the case is different from that announced by the court in its decision.

This is the first instance in the recorded history of English or American law where private persons, for private ends, have been sustained by a court in taking and maintaining permanent possession of the shore of an arm of the sea, or of any navigable water, to the exclusion of the owner of the bank from passing over it to the water; and if the Act of March 26, 1890, has the effect ascribed to it, it is the first Act of an English or American Legislature, not excepting those of New York and New Jersey, which has ever done so much.

The public right in navigable waters and to the soils underlying them has been freely regulated and disposed of by both Parliament and the Legislatures, but both have held sacred the rights admitted to exist in connection with the lands bordering the waters, whether with or without constitutional rules against taking private property

without compensation. These rights have been regulated in divers ways proper to their locality, according to the complicated necessities of crowded harbors or the unfrequented shores of remote waters; but while it is true that a few courts have theoretically denied, many have actually upheld, them, and no other Legislature has ever ignored them.

Even the Act of the Legislature of New York, in 1840, which gave rise to the case of *Gould v. Hudson River R. Co.*, 86 N. Y. 548, made the most ample provision for draw-bridges so as to continue navigation in bays and streams cut off by the railroad, and for the extension of wharves and docks across the tracks to the river beyond; all of which was in obedience to the settled policy of the State inaugurated in 1786, which prohibited the sale of any shore lands to other than riparian owners. *Rumsey v. New York & N.E.R. Co.* 114 N. Y. 423.

Of the other old States, every one, from the Massachusetts Colony in 1641, down to New Jersey in 1848 and 1869, has similar provisions to those of New York, and a similar policy.

Of the younger States, while some have no provisions by statute on the subject, every one which has a statute yields to the shore owner the right to wharf, and in the great majority of the others, the courts have held such a right to exist whenever the question has been presented. I know this argument proves nothing in the face of the claim that it is for every State to settle for itself, through its Legislature, what its policy in this regard will be. I adduce it merely by way of offering a reason why this court should be slow to conclude that the effect of the Act of 1890 was, and was intended to be, what it has now been decided to be.

We are not a new people. As an organized community we date from 1853. True the sovereignty was withheld until 1889; but upon the faith of a policy adopted and placed among the statutes of the Territory in 1854, lands were acquired upon the shores of our navigable waters, and improvements made at great cost by private persons; improvements which had a large share in making it possible for Washington to become a State, but which the principle of the court's decision would render it possible for the very next Legislature to sweep out of existence or confiscate without compensation.

This was a territorial statute, it is true; but the Territory was competent to frame, and did frame, policies in a hundred other particulars, between which and this I can see no distinction. If Massachusetts, in 1841, when a mere colony of Great Britain, could absolutely grant away the soil beneath the waters so as to bind her when she became a State, as well as the States of Maine and New Hampshire; and if the provincial governor of New York could, in 1689, grant to the City of New York the fee of the shore between high and low water marks, whereon are now based some of the most valuable titles in that city and in the world, it would seem to be no great violation of common sense to say that the Territory of Washington

could lawfully legislate to the extent of the Act of 1854.

And who has ever questioned the title to shore lands under the Massachusetts ordinance, or under the Dongan Charter of 1689?

But it is said that the Constitution, or the Act of 1890, or both together, have repealed the Act of 1854. Let us see.

In the schedule of the Constitution, art. 27 § 2, in obedience to the last clause of section 24 of the Enabling Act, it was provided that all laws in force in the Territory, not repugnant to the Constitution, should remain in force until they expired by limitation or were repealed by the Legislature; and then there was a proviso: "That this section shall not be so construed as to validate any Act of the Legislature of Washington Territory granting shore or tide lands to any person, company or any municipal or private corporation." What effect does that proviso have on any such Act? It prevents the Constitution from "validating" it. If the Act was a valid law, it continued so; if it was invalid it continued the same. Everybody knows that the proviso was aimed at a single case where the Legislature of the Territory did once attempt to grant shore lands to a railroad company; and it was merely to prevent that Act from gathering force from the Constitution so as to render that valid which it was suspected had become or had always been invalid, that the proviso was enacted. The grant was believed to have been a fraud, and dead in law; and the proviso was to prevent its being galvanized into life.

But the Act of 1854 (Code, § 8271) was not a grant of lands, in any sense. This court has said it was "but a license at most," and while I do not agree that the right to wharf out was dependent upon the Act, the court's statement is good law to the effect that it was not a grant of tide or shore lands, and therefore was not covered by the proviso in question. But mark the difference when the Constitution touches shore lands covered by patents of the United States, taken and paid for in good faith by settlers. Article 17 treats of tide lands, and in its second section the State expressly disclaims all title to such patented lands unless the United States shall set aside the patents as fraudulent. Now, under the case of *Pollard v. Hagan*, these patents, so far as the tide lands were concerned, were absolutely void, and the lands would have belonged to the State, but for the constitutional waiver made by the people of the State, in their high sense of fairness and justice.

The only other provision on the subject in the Constitution is in section 1 of art. 17, where the State's ownership of the beds and shores of all the navigable waters in the State to ordinary high-water mark is asserted. But it did not require any such assertion to vest those lands in the State; for by an unbroken line of decision from far back of *Pollard v. Hagan* the courts have held that this ownership is in the State, thrust upon it as sovereign, in trust for its own people and those of the nation for purposes of commerce and navigation as natural highways. It is

idle to say that this assertion in the Constitution conferred or strengthened the actual title of the State, and this could not, therefore, have been its purpose. But there was a valid purpose to subserve by the assertion, and that was to put it beyond question that in this State the sovereignty assumed was to high-water mark, and not merely to low-water mark. The United States, in all its grants has conceded that the fast land stops at high-water mark, but in some of the States, as Massachusetts, Rhode Island, Illinois and Minnesota, the title of the shore owner has been conceded to extend to low water or a certain distance below high-water mark. This concession was by legislation in some States, and by the decisions of courts in others. *Meyers v. St. Louis*, 8 Mo. App. 266.

I hold that it was to place Washington in the rank of the greater number of States which stop the title of the shore owner at high water that the constitutional assertion of ownership was made, and for no other purpose, since no other purpose could be subserved by it.

But mark, again, the care with which this assertion of ownership was coupled with the proviso: "That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State."

Under the view the court takes of these constitutional provisions, what vested right could there be to which the proviso would apply? It could not have reference to any wharf property erected under the Act of 1854, since the court says that Act was a mere license; and a mere license is revocable at the pleasure of the licensor and creates no vested right. *Kivett v. McKeithan*, 90 N. C. 106; *Johnson v. Skillman*, 29 Minn. 95; *St. Louis Nat. Stock Yards Co. v. Wiggins Ferry Co.* 113 Ill. 384; *Cobb v. Fisher*, 121 Mass. 169.

So the court holds that the right to future accretions is not a vested right, citing *Taylor v. Underhill*, 40 Cal. 471, although that was merely the refusal of the court to declare a void certificate of purchase from the State a cloud upon plaintiff's right. This leaves nothing whatever for the constitutional provision to act upon, and the language, under the court's interpretation, is mere sound without any substance whatever.

The article (15) on harbors and tide-waters is nothing more than a limitation upon the Legislature, prohibiting it forever from disposing of the sea or river beds beyond certain lines in front of incorporated towns. Such lines exist in all important harbors and are drawn to preserve the public right of navigation. Usually their location is changed from time to time as circumstances require; and it was a change of this kind, fully authorized by the State, that produced the case of *Yates v. Milwaukee*.

The court seems to construe section 2 of this article as though there were never to be any wharves here except "upon certain designated areas," and that construction is quite harmonious with the views taken of the constitutional scheme as a whole; but, if anything else were necessary to convince one that

the whole construction is wrong, this would supply it. Certainly no equally absurd scheme could be contrived unless someone were to propose that until the State build its wharves all ships must be anchored at the harbor line,—cargo and passengers to get ashore as best they can.

Turning now to the Act of March 26, 1890, the first thing that attracts attention, as having a bearing on the matter under discussion is that for some reason the law gives the pre-emptive right to buy tide lands, with certain exceptions, not to the public at large, but to the upland owner, and therein, I maintain, is foreshadowed the general policy of the State on this subject, which is to enlarge the right conceded to be in upland owners by the Act of 1854, and is exactly in harmony with the legislation of every other State in the Union which has lands of this character and laws upon the subject. I say this is the policy, because it is not going outside of proper bounds to further say that of all the shores of navigable waters within the State of Washington not one ten-thousandth part will be free from this pre-emptive right of shore owners, or their grantees under section 12 of the Act.

This section 12 has some striking language in it, which, to my mind, further shows the policy. Under it, when an abutting owner has attempted to convey tide lands in front of his uplands, or littoral rights therein, his grantee may purchase the tide lands to the extent of the tract or rights (littoral rights) so conveyed. Now what are the "littoral rights" which the upland owner could so convey? Are they what the Constitution speaks of as "vested" rights? The mere license under the Act of 1854 was not one of them, because a license is personal to the licensee and cannot be conveyed. 18 Am. & Eng. Encyclop. Law, 545.

What "littoral" right could an upland owner attempt to convey, but his right to wharf out, by way of severance? I confess inability to imagine any other; and if there is no other, and this one has no existence, then the Statute has nothing to act upon.

But suppose it were the wharf license that was meant; section 12 says nothing about an executed license as the one to be confirmed; and if this be the littoral right intended then the Legislature did not look upon the Act of 1854 as repealed by the Constitution. Furthermore, it is hard to see what good the State's deed to the shore owner's grantee will do for him, whether the littoral right be natural or statutory, if the harbor-line area is to be a wall between him and deep water. The State would be driving a hard bargain, indeed, with any such plan of operation, and is not to be suspected of such a scheme.

But the most important thing about this section 12 is the legislative admission contained in it, that the "land" and the "littoral right" are two so distinct and severable things that they may absolutely belong to different persons by deeds from the State. This is exactly what the doctrine of riparian access and wharfage is, and the justice of the provision made is apparent.

Lastly, touching the proviso of the 11th

section: "That if valuable improvements, in actual use for commerce, trade or business have been made upon said tide lands by any person, association or corporation the owner or owners of such improvements shall have the exclusive right to purchase the land so improved, provided that nothing in this Act shall be so construed (as) to apply to any improvements made after the passage of this Act." Here, again, the care of the Legislature to preserve the right of the upland owner to acquire these lands is manifested most broadly, for subsequent to the passage of the Act no enlargement of the improvements can be made, and the court in its decision so holds. And it is also to be noted that whereas the upland owner may acquire all of the tide lands in front of his upland the improver has the pre-emptive right to nothing but the "land so improved;" so that in this case the appellants' purchase would be limited to the exterior line of their actual works on the 26th day of March, 1890, and the appellee could acquire all in front of them to the harbor line.

Now it was settled in *Weber v. Board of Harbor Comrs.* that a purchaser of tide lands from the State was entitled to none of the rights of a riparian owner. 85 U. S. 18 Wall. 57, 21 L. ed. 798.

Upon what consideration, then, was this pre-emptive right conferred upon "improvers?" The Act itself furnishes the answer. By section 12, where the upland owner has, by his deed, for a consideration, conveyed his rights away, his grantees will be protected; yet there may be another class, who have merit equally as strong as the grantees under a deed. Where the owner of the fee of land has stood by for years, while an adverse claimant under color of title has made valuable improvements, the improvements offset the damages for withholding *pro tanto* (Code, § 541); and if the inaction of the owner continues beyond the term of our Statute of Limitations, the very title is presumed to have passed to the adverse party. An easement, however, of the nature of which the upland owners' rights both by nature and by statute largely partake, is much more easily lost. It is lost if the holder of the right does, or permits to be done, any Act inconsistent with the future enjoyment of the right. 6 Am. & Eng. Encyclop. Law, 147.

Therefore if an upland owner has, in any case, remained passive; while another has in good faith placed erections in the waters in front of him, which have not been abandoned, but are in customary use, the equitable policy of section 12 requires that an estoppel be sustained against the denial of the upland owner that he has conveyed to his permissive improver. The courts, which have often restrained intrusions of this kind, when objected to promptly, would have supported such an estoppel; why, then, should not the Legislature recognize it?

But I maintain that the Statute did not and could not deprive the upland owner of his full right to move promptly in the courts for the removal of any obstruction to his access to the water, where it was placed there against his will, and under threats of force 13 L. R. A.

and violence as the fact is admitted to be in this case; and that whenever such a state of facts exists any title derived from the State must be held in trust for the upland owner.

Such cases are precisely within the principles of *Atherton v. Fowler*, 96 U. S. 518, 24 L. ed. 732, and numerous other cases where force, fraud and the misconduct of officers have transferred lands patented by the United States to their rightful owners.

Emphasis is laid upon the construction by the last paragraph of the section, where it is provided that nothing in the Act shall apply to improvements made after the date of its passage; showing the legislative intention to discourage all scrambling possessions or claims not founded upon the upland owner's deed.

Conceding, however, that the Act was intended to apply to such a claim as the one at bar, it cannot be regarded in any other light than as showing the intention to make improvements alone the basis for the State's parting with its legal title, leaving the holders of adverse equities to resort to the courts for their enforcement. *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167.

And here the importance attached to a pleading of the facts in the answer appears. None of the material averments of the complaint were denied; for the allegations therein of the plaintiff's various rights were not material. If by nature the plaintiff had the rights claimed, it was not necessary to plead them; and the Statute gave him the exclusive right to purchase. The answer was a confession and avoidance in the nature of a plea in bar. But the rules of equity pleading require that a plea in bar shall state the facts upon which the avoidance is claimed, so that the plaintiff may demur to the sufficiency of the facts as constituting a defense. *Goodrich v. Pendleton*, 8 Johns. Ch. 385, 1 L. ed. 657; *McCloskey v. Barr*, 38 Fed. Rep. 165; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 175, 20 L. ed. 559; *Farley v. Kittson*, 120 U. S. 808, 30 L. ed. 684.

This answer alleged that valuable improvements in actual use for commerce, trade and business had been made upon said lands long prior to the 26th day of March, 1890, and that said improvements were on March 26, 1890, in actual use for commerce, trade and business, and that the defendants are the owners of and in possession of such improvements. These allegations are all but legal conclusions. *Portman v. Mills*, 35 Cal. 118; *McCloskey v. Barr*, *supra*.

The decision says the demurrer admits the truth of these allegations. But a demurrer admits the truth of such facts only as are well pleaded, and not of mere conclusions of law.

Of what could these improvements consist that would bring the defendants within the statutes? It is clear that there were no docks, piers, wharves or other conveniences of shipping, because it is declared, in the sixth paragraph, to be the intention of the defendants to erect and maintain such structures in the future; this court says they may not enlarge their present improvements; and their right to wharf out is precluded by the de-

cision in *Wabcr v. Board of Harbor Comrs.*, and by the fact that either the upland owner or someone else may buy the area in front of them to the harbor line.

I conclude, therefore, that there is nothing in the Constitution or the Statute which is hostile to the doctrine of riparian access and the right to wharf; that if it is denied tentatively by section 1, art. 17, the proviso leaves it to the courts to say whether, under the law, such rights exist; and that upon the pleadings the judgment should have been sustained.

The court has found that upon authority a riparian proprietor on the shore of the sea, or its arms, has no rights as against the State or its grantees to continued access to the water to extend wharves in front of his land below high-water mark. In the language of Mr. Lewis, in his work on *Eminent Domain*, p. 88, it has done so "by a narrow and technical course of reasoning, based upon the fact that the title to the soil is in the State or public," and has not, as I conceive, accepted the great weight of authority both in England and America. To my mind in reaching its conclusion it has completely ignored the prime common source of the State's title and of the riparian claim to access, which is that the navigable waters are natural public highways. Yet, as compared with this matter of substance all questions of reclamation, of accretion and selection, of fishery and seaweed, pale and fade into insignificance. It is as highways that the sovereignties of the world, and particularly our own, have any jurisdiction over the navigable waters differing in any respect from their jurisdiction over the fast land, and their different jurisdiction is of precisely the same character as the jurisdiction over highways upon the land.

Under the Constitution of the United States Congress has the power to regulate commerce between the States and with foreign waters; but while under this power it has never yet undertaken to dictate concerning the manner of construction of any land highway not undertaken by itself, it has gone upon the water highways, both tide and fresh, and assumed the broadest control, deepening channels, changing harbors, building dikes and regulating the building of bridges, in all of which it has been sustained by the Supreme Court of the United States, solely because the waters are natural highways. But it is at this point that the opponents of the riparian right of access make their strong stand, and where the forces of the parties for and against meet in final conflict; and that the court did not see fit to allude to this phase of the question is greatly to be regretted. For the real question involved here is not whether the owner of upland bordering upon the sea has any adverse claim to the soil under the water, as against the State; but whether, being upon his own fast land, he can step therefrom upon the public highway, there as a member of the public to enjoy the public right of passage.

In the case at bar the appellants, possessing themselves of the exact line which borders the land and the highway, say to the landowner: "You can reach the water by yonder street; or, if you will wait until we have built a

wharf here you can pass over it at the same rate of toll as any other person. In the meantime you cannot pass at all." The appellants, however, in order to sustain their own position, are forced to maintain the very doctrine they fight against, that of the right of access. They oppose the upland owner's access, but having planted themselves in the highway, they propose to build wharves and maintain access themselves. By their improvements they propose to turn the shallows into land, and then will claim that access to the water is necessary to its enjoyment. But here is land formed by nature, that since time was had no other outlet than over the sea, put there by nature as a highway. The land passed from the sovereign owner by right of discovery, the United States, by solemn patent, to the appellee, who is now told that the highway he relied upon is forever closed without his consent and without any compensation for his loss. Has he been damaged? Actually, oh, yes! will be admitted by his bitterest opponent; but not in law, because the title to the land beneath this water is in the State. But wherein does the nature of the State's title to soil under navigable waters differ from that of its title to soil of a land highway? No writer or court that I have been able to consult points out the distinction, if there be one, except the subjection of the State's title in the submerged soil to the constitutional powers of Congress. If the purpose to be subserved by the State's holding the two titles is identical then, viz., the perpetuation of highways, it seems extremely difficult to argue on any secure or even plausible ground that the owner of land abutting on the sea has not the same right of access to, and continuance of, his highway, as his neighbor who abuts upon a land highway.

Certainly it is not necessary to argue what the rights of an abutter on a road or street are. The State, or its hand-maidens, the county, township, or municipal corporation, regulate and improve the way, but they cannot destroy it or injure the abutter's direct access to it from every part of his frontage, without compensation.

A late writer on this subject says: "Once a highway always a highway," is an old maxim of the common law to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position, who have lawfully and in good faith invested or obtained property interests in the just expectation of the continued existence of the highway, the maxim still holds good. Not even the Legislature can take away such rights without compensation." *Elliott, Roads and Streets*, p. 658.

To illustrate this by more explicit authority: It has long been settled that running a street railroad is a proper public use of a street, when it is built so as not to interfere unnecessarily with the public right to travel over it; and that the mere erection of such a structure on the surface of the street does not entitle an abutting owner to compensation, even when the fee of the street is in him. But in some large cities it became necessary to have elevated railroads to carry

on the traffic. These were authorized by the Legislature of New York with no provision for compensating abutters; and in a very recent case, where an elevated railroad had been built in front of his premises on Pearl Street an 'abutting owner' sued the railroad company for damages. *Abendroth v. New York Elev. R. Co.* (N. Y.) 25 N. E. Rep. 496.

The Court of Appeals in its decision said: "The term 'abutting owner' will be used in this judgment to denote a person having land bounded on the side by a public street, and having no title or estate in its bed or soil and no interests or private rights in the street except such as are incident to lots so situated. . . . There is no finding that the plaintiff, or any one of his predecessors ever had any title to or estate in the land whereon this street is maintained, or any interest except that of an abutting owner." The court then recalls numerous cases where abutting owners, both in city and country, in England and America, had been allowed special damages for obstructions in highways not opposite their land and not authorized by legislative enactment, as well as several late cases in that State where the same principle had been upheld where the obstruction was by legislative authority. Speaking of these last cases it says: "The judgments for damages which have been recovered and sustained against the elevated railroads do not, and cannot, rest on the ground that the roads are public nuisances, for they were constructed pursuant to statute; and besides, as before stated, a public nuisance does not create a private cause of action unless a private right exists and is specially injured by it. The only remaining ground upon which they can and do stand is that, by the common law, the plaintiffs had private rights in the streets before the roads were built or authorized to be built. . . . The Constitution of this State provides: 'Nor shall private property be taken for public use without just compensation.' It is settled by *Story's Case*, 90 N. Y. 123, and *Lahr's Case*, 104 N. Y. 268, 6 Cent. Rep. 371, that such rights as this plaintiff has in Pearl Street are private property within the meaning of the constitutional provision quoted. . . . It follows that the authority conferred by the Legislature to construct the road is not a defense to the action."

As will be seen, from the decision, so far as the public generally was concerned, no matter how great was the nuisance in the street, it could remain, because the Legislature authorized it.

And while I am so near the subject, I will here refer to the case of *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 666, 81 L. ed. 543, relied upon by the court to sustain its decision. For the student of that case, it seems to me, must see that the only matter there in issue, and decided, was whether the State of New Jersey, as the superior of the City of Hoboken, could wholly destroy the public right of passage over filled-up lands at the end of a street, beyond the end of the street as originally dedicated. No private citizen was complaining, and the court says, on page 12 L. R. A.

698: "The right insisted upon in these actions by the City of Hoboken is the public right, and not the right of individual citizens claiming by virtue of conveyances of lots abutting on streets made by Stevens or his successors to the title. The public right represented by the plaintiff is subordinate to the State, and subject to its control. The State may release the obligation to the public, may discharge the land of the burden of the easement, and extinguish the public right to its enjoyment. Whatever it may do in that behalf conclusively binds the local authorities, when, as in the present cases, the rights of action asserted are based exclusively on the public right." And it might have added that the Legislature of New Jersey could have altogether destroyed the corporation of Hoboken; but it could not touch the right of a single lotowner, corporation or no corporation, to pass from his lot to the street, and thence abroad.

The difficulty which the court finds in harmonizing *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984, and the other leading cases in the United States Supreme Court, with *Hoboken v. Pennsylvania R. Co.* vanishes entirely when the right of the State to incumber a public highway, or to destroy it altogether, so far as the public right is concerned, is studied in connection with a case like that of *Abendroth* and the other New York Elevated Railroad cases, and the same principles are applied to both as should be done.

And now, the right to wharf is derived by strict analogy from the abutter's right in connection with a land highway. For no one questions the right of an abutter, where the improved roadway covers but a narrow strip in the middle of the way, to build for himself a convenient means to reach the traveled track, over the intervening land; and so on the waterway, the navigable part of the water is the actual way, to which the wharf is the reasonable means of access. And as the right of access to the road pertains to every portion of the abutter's front, so the right to wharf belongs to all of the riparian owners' fronts. I know it is said, in response to this, that the abutter cannot charge a toll to any member of the public who goes upon his side-way. Granted. But there is no question here of charging wharfage, which must be always reasonable, and is always under the public control. *Parkersburgh & O. R. Transp. Co. v. Parkersburgh*, 107 U. S. 699, 37 L. ed. 587.

It was strongly intimated in *Yates v. Milwaukee* that whenever the water-way was made navigable up to the line of the upland owner's land, he could then no longer maintain his right to project his wharf. But except in very contracted waters, the cheaper and more practical way is to build out the wharves, instead of deepening the water.

The deprivation of these private rights by the State for its own public purposes is the taking of property, whether on land or water, and must be compensated.

Why, at this day, are these rights denied? I think this is the reason. Sometimes it happens that it is not necessary, for purposes of

navigation, that the water-way should be as wide as nature has made it.

Moreover, the waters have washed down the banks and made shoals and flats, which can be filled up and made fast land, valuable for building and even farming purposes. The self interest of upland owners has led them, in some instances, backed by their lawful riparian rights, to claim substantially the whole beneficial use of the entire area from the high-water mark to the point of navigability, by which means, and the non-assertion of the State's rights, they have filled up the flats, excluded the water and made land of the whole. In some States, as Rhode Island and Minnesota, this has been conceded to them as a right, and the public has received nothing for its complaisance. This is not justice. The protest against such a monopoly has, as is often the case in such matters, overflowed its proper bounds and gone to the extent of denying all riparian rights. But there is a middle course which is the right one, in my judgment, and which the courts ought to pursue as leading to the law of these cases. I regret that the decision here adopted follows one of the extremes and not the middle course.

I now come to consider the cases cited by the court as requiring its conclusion.

Theoretically that is not land which is beneath navigable water; from the high-water mark all beyond is water. Grants of land stop at the margin, no matter how shallow or extensive may be the shoals beyond. Yet, although we do not endure the State as an ordinary landlord, we say that the title to the sea and river bottoms is in it. The State holds upland upon the same terms and with the same rights as a private citizen. We enforce this rule even upon the federal government, in all but the matter of taxation and the right of eminent domain.

There was a time when it was thought that the land beneath navigable waters belonged to the United States; but the Supreme Court in *Pollard v. Hagan* awarded it to the several States. Yet, in that great case, 44 U. S. 8 How. 229, 11 L. ed. 578, the court said that Alabama held these submerged lands as a part of her sovereignty and jurisdiction, not governed by the common law of England as it prevailed in the Colonies before the Revolution, but as modified by our own institutions, and that "although the territorial limits of Alabama have extended her sovereign power into the sea, it is there, as on the shore, but municipal power subject to the Constitution of the United States, and the laws which shall be made in pursuance thereof." And it is worthy of note that the eminent counsel who successfully presented that case for the defendant said: "A right to the shore between high and low water mark is a sovereign right, not a proprietary one. Rivers do not pass by grant, but are an attribute of sovereignty. The right passes in a peculiar manner; it is held in trust for every individual proprietor in a State or the United States, and requires a trustee of great dignity. Rivers must be kept open; they are not land which may be sold. *Martin v. Waddell*."

I think there is a popular idea that *Pollard* 12 L. R. A.

*v. Hagan* in some way involved the question of riparian rights. On the contrary, it was a contest between a patentee of tide flats from the United States, who was not an upland owner, and a squatter on the tide flats who had no license whatever from the State of Alabama.

The same repute is true of *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997. But the case was this: The titles to nearly or quite all the land in New Jersey came from the grantees of the Duke of York, to whom Charles Second, in 1664, in consideration of the annual payment of forty beaver skins, gave a charter bestowing upon his royal brother the sovereignty and proprietorship of all the lands, bays, waters, rivers, soils, fisheries, etc., etc., within a vast area. The duke immediately parceled out his domain, under grants equally generous in their terms with that of the king to himself, and under one of these the proprietors of East Jersey became vested with all his rights in the lands and waters about Raritan Bay. In 1702 the proprietors surrendered to Queen Anne the sovereignty only; and by the Revolution New Jersey became an independent State. The royal grants, however, were respected, and New Jersey had no public lands. The proprietors continued to make grants of lands to colonists and in a few instances attempted to convey exclusive rights of fishing to individuals in certain defined areas of Raritan Bay. In 1821, one Arnold, the possessor of such a fishery, sued one Mundy for trespass in entering the limits of his fishery and taking away oysters. The case was appealed on a judgment for defendant, and is reported in Halsted, 1. The ground of the decision was that although the king of England could by his royal charter grant to a subject an indisputable title to any or all of the fast land, he could not and did not grant one inch of the soil beneath the waters to the Duke of York, because it belonged to the sovereignty which was held in trust for the common public, and was returned to Queen Anne, to be devolved in turn upon the State of New Jersey. After stating some of the dispositions which the State might make of these soils, the court said: "The sovereign power itself therefore, cannot, consistently with the principles of the laws of nature and the Constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right (of fishery). It would be a grievance which never could be long borne by a free people."

In 1824 a statute of New Jersey gave to riparian owners the right to drive stakes in the waters of the bay, in front of their lands, to which to fasten nets, they not interfering with the navigation or any fishery. *Waddell* drove stakes accordingly, within the lines of a several fishery theretofore granted by the proprietors, and *Martin*, the grantee of the fishery, brought ejectment. The cause resulted as did *Arnold v. Mundy*, 6 N. J. L. 1, and reached the Supreme Court of the United States in 1842, where it was affirmed. The question here was, as in all cases of ejectment, upon the strength of plaintiffs'



title, and had no bearing whatever upon any riparian rights of the defendant; nor did the fact that the defendant had a license from the State cut any figure in the decision, and the result would have been the same without it. The court said: "From the opinion expressed in *Blundell v. Catterall*, 5 Barn. & Ad. 287, and in *Somerst v. Fogwell*, 5 Barn. & C. 888, the question whether since Magna Charta the king could grant to a subject a portion of the soil covered by the navigable waters of the kingdom so as to give him an immediate and exclusive right of fishery, either of shell fish or floating fish, within the limits of his grant must be regarded as settled in England against the right of the king."

The case of *Wilson v. Blackbird Creek Marsh Co.*, 37 U. S. 2 Pet. 245, 7 L. ed. 412, decided in 1829, merely held that in the absence of congressional legislation, the State of Delaware could authorize the damming of an inconsiderable sluggish creek for the purpose of facilitating the owners of its marshy shores in reclaiming them; so that the health of the community could be bettered; and that a citizen of another State could not complain of the obstruction.

*McCready v. Virginia*, 94 U. S. 891, 24 L. ed. 248 (1876), decided that a State held the tide-waters and the fish in them for its own people, and not for the people of another State; and that a statute prohibiting the citizens of any other State from taking the fish was, "in effect, nothing more than the regulation of the use, by the people, of their common property," and therefore no denial of the constitutional right that the citizens of each State have to all the immunities and privileges of citizens of the several States.

*Barney v. Keokuk*, 94 U. S. 824, 24 L. ed. 224, confirmed the claim of the State of Iowa to the title of the Mississippi to high-water mark; but as the main point in the case held that one who has dedicated a street parallel to navigable water cuts himself off from riparian ownership, and yields to the public, in this instance the City of Keokuk, the right to wharf out as an incident of the public use of the street. Barney's contention was that as owner of the land to the middle of the river, his dedication only extended to the water's edge, and that the filling beyond that line was a trespass on his land.

It will be seen from the opinion of the court that its decision is based mainly upon these United States Supreme Court cases. It is worthy of remark that they have not been so interpreted in any but a very small minority of the States: and the Supreme Court itself has never in a single instance based its ruling, in a case where the riparian right of wharfage was in issue, upon any state statute or ascertained custom or usage. In its most clearly cut decision, *Yates v. Milwaukee*, no such interpretation was allowed to interfere with its declaration of a riparian right of wharfage in *Yates*, although he was contending not only against the City of Milwaukee but against the State of Wisconsin, which had chartered the city to regulate the wharves on her water front and herself to build and maintain such aids to navigation at the ends of the streets.

12 L. R. A.

In *Weber v. Board of Harbor Comrs.*, 85 U. S. 18 Wall. 57, 21 L. ed. 798, notwithstanding the language quoted by the court in its opinion, Judge Field distinctly and broadly announced the adherence of the Supreme Court to the doctrine of *Yates v. Milwaukee*, and showed that Weber was not a riparian owner. It is worth remembering at this point that San Francisco was the successor of a Mexican pueblo, and that the municipal corporation was the owner of all the land to high-water mark, so that when the State of California fixed the harbor line and surrendered the tide lands within it to the city, it was making the surrender to a riparian owner. *Hart v. Burnett*, 15 Cal. 530.

Inasmuch as the cases above noted are chiefly relied upon to overcome the force of *Dutton v. Strong*, *Yates v. Milwaukee* and *St. Paul & P. R. Co. v. Schurmeier*, and as none of them involved the matter here in issue, I will briefly allude to these three cases, which it is agreed do touch the point. It is urged that there was a difference between the fresh-water rules and the salt-water rules; or that the upland owner had already built his wharf, presumably under state license; or that there was some unmentioned statute on which the court was relying, *et cetera*. But if any such elements did enter into the consideration of those cases, the published decisions, from syllabus to signatures, including briefs of counsel, fail to note the fact. Their declarations are broad and general, and if we may rely on anything in judicial decisions, we ought to be able to do so here. Each of the cases was quoted in the succeeding ones, and all have been cited often and again by the supreme court, and by almost every federal and state court. *Yates v. Milwaukee* is the leader, and that was a case in which the state's authority was indirectly, but very materially, in question. So in *St. Paul & P. R. Co. v. Schurmeier*, the defendant had the State's title to the land over which the plaintiff claimed to exercise his right of access.

Since those decisions, there is, I believe, not a single case in the federal or state reports where the principles therein laid down are doubted or departed from. On the contrary, they have been often cited, always to the effect contended for here, and to the frequent overruling of contrary holdings. It is the same with the law-writers who have embraced this subject in their works, with a single exception. I mention this, not as arguing that numbers make the law, but to show that the profession has not understood those decisions to have been pronounced with any of the qualifications and reservations suggested; and I conclude with the proposition, taken from these cases and never denied by the Supreme Court of the United States, that a riparian owner on the sea-shore has a natural right of access and a right to construct a landing, wharf or pier, for his own use or for the use of the public, which is a vested right, incident or appurtenant to his land, under the common law of real property as it exists in the United States, without any reference to statutory license or customary usage. In support of this position I cite, Angell, Tide Waters, 24, 224

et seq.; Cooley, Const. Lim, 5th ed. p. 675, note 1; Angell, Watercourses, 7th ed. 782; 8 Washb. Real Prop. 5th ed. 445; Gould, Waters, §§ 148-154; Lewis, Em. Dom. §§ 77-83; Dillon, Mun. Corp. 4th ed. § 106; Washb. Easem. and Serv. 4th ed. 324; Hough, Rivers, §§ 280, 281; 6 Am. & Eng. Encyclop. Law, 558; 28 Myers, Fed. Dec. title *Riparian and Littoral Proprietors*; 8 Kent, Com. 13th ed. p. 418, note.

Mr. Wood, in his *Law of Nuisances*, is, I believe, the only modern text-book writer who maintains the opposite ground. But this author does not attempt to misconstrue *Yates v. Milwaukee*, or find excuses for its ruling. On the contrary he attacks it boldly, characterizing the language of it as "mere dictum," and declares the principle established by it "as wholly unsustained by any authority." We are not accustomed to thus lightly treat decisions of that great court; but the attack thus made is admirable for its audacity. *Lyon v. Fishmongers Co.* is also explained away by this court as never before. Mr. Wood found no explanation. He quotes at length from the opinions of *Lords Cairnes*, *Chelmsford* and *Shelburne*, and then says: "Thus it will be seen that there is considerable conflict upon the question discussed in the note, but while we believe that the doctrines advanced in this case are utterly fallacious and unsustained in principle, as they are upon authority, it will not be profitable to pursue the matter further; but as it is the business of an author to give the law as he finds it, I have felt constrained to give the leading portions of the opinions of the *Lords Justices* in the case, that the question may be fairly presented."

I take it that the author "gives the law as he finds it," when he quotes the opinion of the two highest courts of the civilized world, although he personally does not agree with the correctness of their decision.

The court assumes that inasmuch as many of the States have long had statutes regulating the riparian owner's exercise of his right of wharfage, and in many instances enlarging it, therefore his right rests entirely upon the statute of his State. I do not see why it should be so regarded, since we constantly find what has always been the law enacted into statutory form; and we might as consistently say that the State's title to the tide and shore lands is dependent solely upon article 17 of the Constitution. It is sufficient to say that the courts of the States alluded to have not taken any such position, and I shall now cite some cases showing this to be the fact.

One of the oldest of these statutes is that of Maryland, in 1745; but in *Baltimore & O. R. Co. v. Chase*, 48 Md. 28, the court said: "These riparian rights (of accretion and wharfage), founded on the common law, are property and are valuable, and while they must be enjoyed in due subjection to the rights of the public, they cannot be arbitrarily or capriciously destroyed or impaired. They are rights of which, once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use, upon due

compensation,"—citing *Yates v. Milwaukee*. In New York, although for many years the courts have been handicapped by *Gould v. Hudson River R. Co.*, 6 N. Y. 548, as a settled rule of property, in *New York v. Hart*, 95 N. Y. 448, the court said: "But it shocks every notion of justice and right to say that the riparian owner upon a navigable water has no equities by reason of that ownership. It is a doctrine which is repudiated by the entire legislation of our State. Granting, as has been held, that the riparian owner has no legal or equitable right enforceable as such against the public right, it is nevertheless true that out of his situation upon the banks, and the convenience and benefit of the water front, he suffers peculiar damage and individual injury when cut off by public use. . . . And whenever and wherever the State has granted to the City of New York exterior lands under water, it has accompanied the grant with pre-emptive rights to the adjacent owners. It is idle to say that all this has been done of pure grace, and without any equity in the abutters. There was reason for doing it, and justice in the act." If stronger language were needed to show that the New York Court of Appeals would now overturn *Gould v. Hudson River R. Co.* if it could, it is to be found in *Rumsey v. New York & N. E. R. Co.* 114 N. Y. 428, 125 N. Y. 681.

Rhode Island has always maintained the doctrine contended for, without reference to any statute [*Providence S. E. Co. v. Providence S. Co.* 13 R. I. 348; *Clark v. Peckham*, 10 R. I. 85]; Connecticut, in like manner. *Simons v. French*, 25 Conn. 345; *State v. Sargent*, 45 Conn. 858.

This case contains an eminently fair discussion of the powers of the State.

In New Jersey the courts maintained the rule, until *Stevens v. Paterson & N. R. Co.*, 84 N. J. L. 532 [see *Keyport & M. P. S. B. Co. v. Farmers Transp. Co.* 18 N. J. Eq. 516; *Gough v. Bell*, 23 N. J. L. 411; *Bell v. Gough*, 28 N. J. L. 624], when in a long discussion not in any wise necessary to the decision of the case the court announced that riparian owners had no rights which could be injured by the State, but, at the same time, sustained a judgment for injuries of precisely the character discussed, in all essential parts. The decision on the main point for which the case is celebrated was based on the English case of *Buccleuch v. Metropolitan Board of Works*, L. R. 5 Exch. 281, which was reversed afterwards in the House of Lords [L. R. 5 H. L. 418], and still further overthrown by *Lyon v. Fishmongers Co.*, 17 (Moak.) Eng. Rep. 51, on the very point relied on. The Legislature of New Jersey immediately amended the wrong done by this decision, by its Act of 1869.

*Vincum Fishing Co. v. Carter*, 61 Pa. 31, says: "The State can grant authority to make such erections (of structures below high water) either to the riparian owner, or to others, so long as the riparian owner is not thereby deprived of access to and the use of the river as a public highway, which is implied, if not expressed, in the grant to him of land bounded on the stream."

In North Carolina, *Bond v. Wool*, 107 N. C. 189, is the latest of several cases on this subject, and there the court said: "In the absence of any special legislation on the subject, a littoral proprietor and a riparian owner, as is universally conceded, have a qualified property in the water frontage, belonging by nature to their land; the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their water fronts to navigable water, and the right to construct wharves, piers or landings subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers or navigable water."

It will be said that the phrase "in the absence of any special legislation on the subject" means unless there be special legislation otherwise;" but it is not so. The sense is "without any legislation to that effect," and the decision shows it.

*Bond v. Wool* is supported by decisions in other States, old and new, in numerous cases of which I mention one or more in each, viz.: in Michigan,—*Rice v. Ruddiman*, 10 Mich. 125; *Lincoln v. Davis*, 58 Mich. 375; in Indiana,—*Bainbridge v. Sherlock*, 29 Ind. 364; in Wisconsin,—*Deleplains v. Chicago & N. W. R. Co.* 42 Wis. 214; in Minnesota,—*Brisbane v. St. Paul & S. O. R. Co.* 23 Minn. 114; in Missouri,—*Meyers v. St. Louis*, 8 Mo. App. 266, affirmed, 82 Mo. 367; in Illinois,—*Chicago & St. P. R. Co. v. Stein*, 75 Ill. 41; in Kentucky,—*Thurman v. Morrison*, 14 B. Mon. 367; in Ohio,—*Hickok v. Hine*, 23 Ohio St. 523; in Arkansas,—*Organ v. Memphis & L. R. Co.* 51 Ark. 235, and cases cited; in California,—*Shirley v. Bishop*, 67 Cal. 543; in Oregon,—*Wilson v. Welch*, 12 Or. 353; *Parker v. West Coast Packing Co.* 17 Or. 510, 5 L. R. A. 61.

Of these States, at least Missouri, Kentucky, Arkansas, North Carolina, California and Oregon stop the upland title at high-water mark.

Cases to the same undoubted effect in the United States courts are: *Bowman v. Wathen*, 2 McLean, 376; *Northwestern Union Packet Co. v. Ailes*, 2 Dill. 479, affirmed, 88 U. S. 21 Wall. 389, 23 L. ed. 619; *Illinois v. Illinois Cent. R. Co.* 33 Fed. Rep. 730; *Hollingsworth v. Parish of Tensas*, 17 Fed. Rep. 118; *Ruts v. St. Louis*, 3 McCrary, 261; *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 699, 27 L. ed. 587; *Potomac S. B. Co. v. Upper Potomac S. B. Co.* 109 U. S. 673, 27 L. ed. 1070.

In *Van Dolsen v. New York*, 17 Fed. Rep. 317, decided in 1883, the facts were precisely those of the case at bar, and after considering all of the cases, both English, state and federal, the court holds that the *New York Elevated Railroad Cases* are decisive of the law; that State, since there is no difference between the principles applying to the land-way and the water-way; and further, that in view of *Yates v. Milwaukee*, *Lyon v. Fishmongers Co.* and other like cases, *Gould v. Hudson River R. Co.*, *Stevens v. Paterson & N. R. Co.*, *Lansing v. Smith*, 4 Wend. 9, and *Furman v. New York*, 10 N. Y. 565, are no longer to be regarded as controlling. 12 L. R. A.

There the lessee of the riparian owner sought an injunction to prevent the City of New York, which was the owner of the land between high and low water, from filling up the flat and obstructing his access to the way, and was held to be entitled to the relief asked.

This court, I think, misreads the case of *Lyon v. Fishmongers Co.*, where it gives importance to the term "privilege" as though the right sustained in *Lyon* were a concession of statute or usage merely. On the contrary, each of the lords who delivered an opinion was pronouncedly clear that the right was by nature. Said Lord Shelburne: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure natura*, because his land has, by nature, the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. . . . Even if it could be shown that the riparian rights of the proprietor of land on the bank of a tidal navigable river are not similar to those of a proprietor above the flow of the tide, I should be of the opinion that he had a right to the river frontage belonging by nature to his land, although the only practical advantage of it might consist in the access thereby afforded him to the water, the right of navigation common to him with the rest of the public. Such a right of access is his only, and is his by virtue and in respect of his riparian property; it is wholly distinct from the public right of navigation."

No other state court has interpreted this case, and the opinions of the judges to mean anything but what they say; and a very high English authority, the *Encyclopedia Britannica*, cites the case in the concluding words of its article on Riparian Laws in this way: "It should be noticed that rights of the public may be subject to private rights. Where the river is navigable, although the right of navigation is common to the subject of the realm, it may be connected with a right to exclusive access to riparian land, the invasion of which may form the ground for legal proceedings by the riparian proprietor."

Says Judge Dillon in his *Municipal Corporations*, § 106: "By the common law the riparian owner has the right to establish a wharf on his own soil, this being a lawful use of the land. The right is judicially recognized in this country, and riparian owners on ocean, lake or navigable rivers have, in virtue of their proprietorship and without special legislative authority, the right to erect wharves, quays, piers and landing places on the shore if these conform to the regulations of the State for the protection of the public, and do not become a nuisance by obstructing the paramount right of navigation. This right has been exercised by the owners of the adjacent land from the first settlement of the country."

The idea of "purpresture" furnishes forth a great difficulty in the mind of the court. There is a short and comprehensive history of that pretentious institution in *People v.*

*Davidson*, 80 Cal. 879, from which it appears to be not much more than an ancient prerogative ghost, whose original substance has been completely emasculated by the later law. Suffice it to say, that whether the doctrine of purpresture as applied to wharves extended by riparian owners has any force in this country or not, it never, in its palmy days, had the effect of permitting the king to shut off the riparian owner of land from access to the sea by an obstruction of any kind placed in the highway, which is the real ultimate point in issue in this case.

In conclusion I recur to the Act of 1854, to remark that if that Act is to be taken as now repealed, and if riparian owners have not the natural right of access and wharfage, then there is not, in the State of Washington, any authority under which the slightest convenience can be erected or maintained in aid of navigation, excepting in front of incorporated towns; and all the accumulations of labor and wealth already expended by private enterprise in building up a commerce second to none in present importance and future promise, are laid at the mercy of a public policy which has not seen its equal since men began to "go down in ships." For what? To maintain an idea of "legal title" and royal

sovereignty, which has been repudiated for generations, and which now at this day says to the common people of Washington: "The shores of your great inland sea, and of your hundred rivers, are walled in by the State until such time as after survey, appraisement, contests, slow legislative proceedings, and what not, the speculator on your necessities shall have loaded himself with tide-land patents, and fattened with your fees for crossing his "land." The simple logger may not roll the hard-won product of his toil down the slope of his land and into the water because some shrewd watcher of the land office has bought the shore while his back was turned. This is making the waters a public highway with a vengeance. But the illustration is just, because it refers to the very use made every day of our shores in hundreds of places without wharves, docks or piers, and where there is no question of purpresture, but only the right of access is availed of. It involves the principle of the case in homely, practical form.

Conceiving that no such conclusions were necessarily involved in the Constitution or the Statute, I dissent from the idea that any such policy was intended to be adopted, even though it were lawful to do so.

## INDIANA SUPREME COURT.

Egbert JAMIESON, *Appt.*,  
v.  
INDIANA NATURAL GAS & OIL CO.  
*et al.*

(....Ind.....)

1. Courts take judicial notice of the fact that natural gas is a dangerous agency.
2. The regulation of the pressure of natural gas transported in pipes is within the police power of the Legislature to be exercised according to its discretion in the absence of facts showing oppression or usurpation under a pretext of exercising police power, at least so far as constitutional provisions protecting vested or contract rights are concerned.
3. A contract is invalidated by the subsequent enactment of police regulations which render its performance illegal as to one of the parties.
4. Judicial notice will be taken of the relative distances from a certain place to another part of the same State and to neighboring States.
5. State regulation of the pressure of natural gas transported in pipes within the State which operates upon all alike is not neces-

sarily an unlawful regulation of interstate commerce.

(*Olds, J., dissents.*)

(June 20, 1891.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Porter County in favor of defendants in an action brought to enjoin the performance of a contract. *Reversed.*

The facts are stated in the opinion.

*Mr. Walter D. Holt* for appellant.

*Messrs. Bell, Morris, Morris & Barrett* and *Elam & Winter* for appellees.

*Elliott, J.*, delivered the opinion of the court:

The complaint of the appellant states these material facts: The Indiana Natural Gas & Oil Company is a corporation organized under the laws of Indiana, for the purpose of drilling wells, procuring natural gas and supplying it to consumers. The appellant is a stockholder in that corporation. The Columbus Construction Company is also a corporation and is the owner of natural-gas wells in many counties of this State. In June, 1890, the Gas Com-

### NOTE.—Natural gas an article of commerce.

Natural gas is as much an article of commerce as any other product of the earth. *State v. Indiana & O. O. G. & Min. Co.* 6 L. R. A. 579, 120 Ind. 575.

As to the power of Congress to regulate commerce with foreign nations and between the several States, see note to *State v. Indiana & O. O. G. & Min. Co.* (Ind.) 6 L. R. A. 579.

A statute of Indiana providing that it shall be unlawful for any person, natural or artificial, to

conduct natural gas out of the State, violates the provision of the Federal Constitution against the regulation by States of interstate commerce. *State v. Indiana & O. O. G. & Min. Co. supra.*

Transportation of natural gas. See note to *Saltsburg Gas Co. v. Saltsburg (Pa.)* 10 L. R. A. 193. Judicial notice. See note to *Olive v. Alabama (Ala.)* 4 L. R. A. 38.

Courts will take judicial notice that electricity used as a propelling power is dangerous. *Taggart v. Newport Street R. Co.* 7 L. R. A. 206, 16 R. I. 682.

pany entered into a contract with the Construction Company, wherein it was provided that the latter company should acquire the right of way through Indiana and through Illinois to the City of Chicago; that it should construct for the Gas Company on the right of way secured a line of pipe for the transportation of natural gas, and should furnish all necessary machinery and appliances required to obtain and convey natural gas to consumers. In consideration of the purchase of the right of way and the furnishing and construction of pipe lines, machinery and appliances, the Gas Company agreed to issue and deliver to the Construction Company capital stock to the value of \$1,500,000; and also to issue to the Construction Company \$4,000,000 of its corporate bonds, and to secure their payment by a mortgage upon its property and franchises. The Construction Company, proceeding under the contract, acquired a right of way as agreed, and did purchase and lay down a line of pipe for a distance of twenty miles, and distributed pipe along the right of way for a distance of forty miles. That Company has purchased, and has in readiness, machinery and appliances to be connected with the line of pipes; and it is able, ready and willing to perform its part of the contract. Natural gas can only be transported to Chicago by pumping and under pressure. It will be impossible to transport it to that point at a pressure which does not exceed 825 pounds to the square inch. The Gas Company will have no other assets or property than "its plant and system, and no means whatever of paying either the principal or interest of the corporate bonds," which are to be issued to the Construction Company; but its only means of paying such bonds or of redeeming its capital stock will be such as are derived from "the plant and system and the revenues, tolls, income and profits to be earned thereby in the transportation and sale of natural gas in the City of Chicago; and the sole value of its stock will depend upon the right and ability of said Company to engage in and carry on, by means of its natural-gas plant and system, the business of transporting natural gas to Chicago and there selling the same." The plant and system cannot be put to any other commercially profitable use than that of transporting natural gas to Chicago, and can only be used to advantage and profit by the use as aforesaid of the pumping machines and other artificial devices. The complaint sets forth at full length the Act of March 4, 1891; and, in addition to the averments of the facts already outlined, contains these allegations: "The Indiana Natural Gas & Oil Company, by reason of the Statute aforesaid, is prohibited from transporting said gas through said pipe line at more than the natural flow and pressure, or at a pressure in excess of 800 pounds to the square inch; or from using any artificial device to increase or maintain the natural flow of the gas. The natural gas property and plant constructed to be furnished and delivered to the defendant as aforesaid will be of no value for the purpose of such plant and of little or no value for any purpose to said defendant; and the stock and bonds of the defendant will be wasted and said Company deprived of all the means

of effecting the objects and purposes of its incorporation and be rendered entirely insolvent."

Plaintiff further avers and charges that the statute aforesaid has made it unlawful for said defendant, or any person in said State of Indiana, to transport natural gas through said pipe line at a pressure exceeding 800 pounds per square inch, or the natural flow and pressure of such gas, or to use in such transportation any artificial device for the purpose, or which shall have the effect of increasing or maintaining the natural flow and pressure of such gas.

Wherefore plaintiff avers that it has become and is illegal for either of said defendant Companies to further proceed with the execution of said contract, and that the defendant, the Indiana Natural Gas & Oil Company especially ought not to be permitted to further proceed in the execution of said contract, the performance of which will result as aforesaid, in a waste and destruction of almost its entire corporate assets and make it entirely impracticable for it to carry out the objects and purposes of its incorporation, and will also involve it in liability for the payment of heavy penalties for the violation of said Statute.

Plaintiff avers that immediately upon the taking effect of said Statute, he demanded of the board of directors of said the Indiana Natural Gas & Oil Company that they and the said Company should at once desist from any further proceedings toward executing and carrying out said contract; and that they should abandon the said enterprise of transporting natural gas by the use of artificial pressure, or pressure in excess of 800 pounds to the square inch, or other than the natural flow and pressure of said natural gas; and that they should at once rescind and abandon the said contract; but that said board of directors refused to do so, and declared that, notwithstanding said Statute and regardless of the right of this plaintiff, they would proceed to perform fully said contract as to all the obligations of the said the Indiana Natural Gas & Oil Company thereunder; and would not abandon the said enterprise of transporting natural gas by artificial pressure in excess of the natural flow and pressure and in excess of 800 pounds to the square inch; and that upon performance of said Columbus Construction Company of its part of said contract, the said the Indiana Natural Gas & Oil Company would issue and deliver to said Columbus Construction Company its stock and bonds in all respects according to the terms of said contract.

Plaintiff further avers that in execution of said contract companies have already and since the taking effect of said Statute, connected their said pipe line with certain gas wells in the County of Howard, in the State of Indiana, being wells which, under said contract, are to be acquired and used by the said the Indiana Natural Gas & Oil Company, and by means of a certain artificial device for pumping, known as a pump, being a part of the machinery to be acquired and used by said the Indiana Natural Gas & Oil Company, did unlawfully transport the natural gas from said wells, through the said line of pipe in said county, at an artificial pressure in excess of 800 pounds to the square inch, and in excess of

the natural pressure and flow of said gas, to wit, at a pressure of 490 pounds to the square inch; whereas, the natural pressure of such gas was but to wit, 325 pounds to the square inch, and ever since have continued to and still are so engaged in violating the provisions of said Statute; whereby the said the Indiana Natural Gas & Oil Company has already incurred liability for the penalty prescribed by said Statute and will be subjected to further liability for such penalties unless the said defendant companies be enjoined as hereinafter prayed; which will result in further waste of the corporate assets and irreparable loss to this plaintiff.

And plaintiff further avers that said defendant, the Indiana Natural Gas & Oil Company, unless enjoined from so doing, will issue to said Columbus Construction Company its bonds and stock as provided by said contract.

The trial court carried back the demurrer addressed to an answer filed by the appellees to the complaint, and gave judgment because of the insufficiency of that pleading. The ruling of the trial court in carrying back and sustaining the demurrer to the appellant's complaint is properly challenged by a specification in the assignment of errors.

We decide the case upon the ruling adjudging the complaint bad; and we neither give nor intimate an opinion upon any other ruling, nor upon any other questions than such as that ruling legitimately presents. We do not feel at liberty to consider any other questions than those designated, and upon none others do we give judgment, nor, indeed, can we decide any other questions without a departure from settled principles of procedure.

To determine what questions are legitimately presented to us it is necessary to give a construction to the complaint which the trial court condemned; but it is only necessary to state in a very general way what we adjudge to be the nature of the complaint. We adjudge that the complaint is to be construed as charging that the contract of the corporation of which the appellant is a member with the Construction Company is incapable of performance because it requires a violation of the Act of March 4, 1891, in this: that it provides for and requires that natural gas be transported in pipes at a greater pressure than the natural pressure, or at an artificial pressure exceeding 800 pounds to the square inch. We may further affirm it to be our judgment upon this phase of the case that there is here no question as to the right of a stockholder to maintain such a suit as this, for no such question is presented by the briefs or arguments; and we say, still further, that the essential and controlling question presented by the ruling upon the complaint is whether a contract which can not possibly be performed without a direct violation of a statute is invalidated by the enactment. The complaint avers, and the demurrer admits, that the performance of the contract is impossible without violating the statutory provision that no greater pressure than 800 pounds to the square inch shall be put upon pipes used for the transportation of natural gas. We are careful to state the questions upon which we give judgment, and to declare the construction which we give to the complaint upon which

those questions arise, so that there may be no misconception of our decision.

It is obvious from what we have said that the central question here presented and here to be decided is this: Is the provision of the Act of March 4, 1891, prohibiting the use of more than the natural pressure or an artificial pressure exceeding 800 pounds to the square inch, invalid because it violates the Constitution of the United States or of the State of Indiana? The validity of that provision, and of that provision alone, demands our judgment. If the Legislature of Indiana has no power to require that the pressure put upon natural gas poured into pipes shall not exceed three hundred pounds where artificial pressure is employed, the contract between the two corporations is legal and the complaint is bad; if it has such power, the complaint is good.

The question, as the record presents it, is one of power. With questions of policy or expediency the courts have no concern. *Licenses Tax Cases*, 72 U. S. 5 Wall. 463, 18 L. ed. 497; *Heiderich v. State*, 101 Ind. 564.

If a subject is within the legislative power, the question whether that power is wisely or unwisely exercised is not a judicial one. If the power exists, then the Legislature must determine the mode of its exercise, unless the mode is prescribed by the organic law. If, to descend from a wide generalization to a narrow one, a subject is within the police power of the State, the question as to what regulations are proper and needful is one for legislative consideration and decision. It is a cardinal principle of law that legislative discretion cannot be controlled by judicial decisions, and is not subject to judicial surveillance. *Legal Tender Cases*, 79 U. S. 12 Wall. 457-561, 20 L. ed. 287-315; *State v. Haworth*, 123 Ind. 463-467, 7 L. R. A. 240.

It must be true, therefore, that if the Legislature of Indiana has power to regulate the pressure that shall be put upon natural gas taken from wells in this State and conducted into pipes laid in the soil of the State, it has, presumptively at least, power to determine what limit the public safety requires to be placed upon the pressure employed. The question as it comes to us is not a broad one, involving the authority of the Legislature arbitrarily to enact a law destructive of property by commercial rights under the guise of exercising police power; for here there is regulation and not destruction. If artificial pressure is resorted to it must, as the Statute declares, not exceed 800 pounds to the square inch, and there is nothing in the complaint justifying the inference that this is an unreasonable regulation, or one made to accomplish an unlawful object. There are no facts presented warranting the inference that such a pressure is not reasonable, or is not demanded for the public safety.

As the regulation prescribed by the Statute is not one which appears on its face to be destructive of commercial interests or property rights; and, as there is nothing in the complaint indicating a purpose to oppress or destroy, we cannot, nor can any court, presume that there was any other purpose than the just one of regulating the use of essentially dangerous property for the good of the community.

As there is power to regulate the use of property, the measure of regulation must, to a very great extent, be within the discretion of the Legislature. If it is not true that the Legislature may not put some limit upon the pressure employed, and those who transport natural gas may, at their pleasure, employ an unlimited degree of pressure, no matter to what extent persons and property are endangered. If it is not true that the Legislature may, in the exercise of its discretion, and within the scope of its power, determine what the pressure shall be, then no organ of government can determine it. If it be conceded that there is no legislative power to determine the question, and that it may be determined as particular controversies arise, then, the whole matter would depend upon the decision of individual judges or particular juries, and we should have acts criminal in some localities and innocent in others. But principle and authority forbid that the legislative judgment should be disregarded. As the question is presented in this case it is power or no power. As the record stands, there is no middle course, for we may not assume, in the absence of facts, that there was oppression or usurpation. It must be true that the provision of the Act of 1891 regulating the pressure is within the power of the Legislature, or it must be true that the Legislature is absolutely destitute of power over the subject.

The pleading upon which we give judgment in this instance does not require us to decide how far the Legislature may go in regulating the use of property not intrinsically dangerous. A distinctive and conspicuous feature of this case is that the property upon which the Statute operates is dangerous, and is of an extraordinary species and nature. That natural gas is a dangerous agency is a matter of common knowledge; and hence courts take judicial notice of that fact. We know, as the Legislature knew, and as everyone knows, that natural gas is in a high degree inflammable and explosive. Surely no court would require evidence to inform it that artificial gas will ignite and explode, or that gunpowder and dynamite are intrinsically dangerous; and yet with quite as much propriety might it be claimed that without evidence a court cannot know the qualities of any of the things named, as to claim that a court cannot take judicial notice of the qualities of natural gas. But we need not at this place discuss this phase of the subject at length, for the adjudged cases very clearly show that the courts will take judicial notice of the qualities of such things as artificial gas, kerosene, gunpowder, dynamite or the like. *Langigan v. New York Gas Light Co.* 71 N. Y. 29; *Wood v. Northwestern Ina. Co.* 48 N. Y. 421; *Com. v. Peckham*, 2 Gray, 514; *Schlicht v. State*, 56 Ind. 178; *Free v. State*, 28 Fla. 267; *State v. Hayes*, 78 Mo. 806; *Lohman v. State*, 81 Ind. 15.

We may, however, add that courts take judicial notice that natural gas is so far a necessity that the right of eminent domain may be invoked by a corporation to obtain a right of way for its pipes. *State v. Indiana & O. O. G. & Min. Co.* 180 Ind. 575, 6 L. R. A. 579; *Ottawa Gas & Min. Co. v. Elwood*, 114 Ind. 832, 14 West. Rep. 92, and cases cited.

It would be unreasonable to hold that the

courts know judicially that natural gas is a public necessity so far as to warrant the exercise of the right of eminent domain, and yet hold that they do not know that it is inflammable and explosive. Knowing the one thing, they must know the other. We hold without hesitation that natural gas is so dangerous that its use may be made the subject of a police regulation. Decision after decision recognizes the principle we have stated, and upholds laws regulating the use of property. *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 258; *Dent v. West Virginia*, 129 U. S. 114, 33 L. ed. 628; *Slaughter House Cases*, 83 U. S. 18 Wall. 86, 21 L. ed. 894; *Re Sam Kee*, 81 Fed. Rep. 680; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Electric Light Co. v. San Francisco*, 9 R. & Corp. Cas. 494; *State v. Wordin*, 56 Conn. 216, 6 New Eng. Rep. 752; *Eastman v. State*, 109 Ind. 278, 7 West. Rep. 418, and authorities cited.

We conclude our discussion of this point by quoting from a recent opinion of the Supreme Court of the United States: "Some occupations," said that great court, "by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them, require regulation as to the locality in which they shall be conducted. Some by the dangerous character of the articles used, manufactured or sold require, also, special qualifications in the parties permitted to use, manufacture or sell them. All this is but matter of common knowledge." *Crowley v. Christensen*, 187 U. S. 86, 34 L. ed. 620.

So far as the facts placed before us by the confessed allegations of the complaint will enable us to judge, there is nothing unreasonable in so regulating the pressure as to keep it down to 800 pounds to the square inch. If the facts were such as to enable us to declare as matter of law that such a regulation was oppressive, unreasonable or subversive of commercial rights, we should perhaps have a different question to determine. But in the pleading upon which we pronounce judgment, there are no facts warranting any inference leading to the overthrow of the statutory provision here involved upon any such ground. When a case arises wherein it legitimately appears that under the pretext of enacting a police regulation the Legislature usurps power, invades property or commercial rights, then the courts will have to deal with questions different from those presented in this case.

The public safety and welfare is the highest consideration in all legislation, and to this consideration private rights must yield. No man has a right to so use a dangerous species of property as to put the safety of others in peril. Liberty does not imply the right of one man to so use property as to endanger the property of others, nor does ownership imply any such right. This is rudimental. It must therefore be true that the owner of property of such a dangerous nature as to require regulation to prevent injury to others can have no right paramount to the police power. It is not too much to say that, as against the police power, there is no such thing as a vested right. If the position of appellee's counsel is tenable, then after a corporation has invested money in natural gas pipes, machinery and appliances, there can

be no subsequent legislation, although the use of the pipes bought might put in peril towns, houses and even human life along the entire line. The law is subject to no such reproach, as a rule, like that for which appellees contend would bring upon it. No investment, however great, can so vest a right as to preclude the just exercise of a great governmental power, such as that under which regulations for the protection of the health and safety of persons are enacted. This principle is supported by many decisions. In *Boston Beer Co. v. Massachusetts*, 97 U. S. 82, 24 L. ed. 991, it was said: "If the public safety or public morals require the discontinuance of any manufacture or traffic, the hands of the Legislature cannot be stayed from providing for its discontinuance by any inconvenience which individuals or corporations may suffer."

An emphatic and an unanswerable demonstration of the principle was given in *Mugler v. Kansas*, 128 U. S. 638, 81 L. ed. 205, given, too, in cases where many thousands of dollars of property was rendered worthless. The principle has found expression in lottery cases, in cases respecting noxious trades and in cases respecting the use of dangerous articles. *State v. Woodward*, 89 Ind. 110; *Stone v. Mississippi*, 101 U. S. 814, 35 L. ed. 1079; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734; *New Orleans Gas Light Co. v. Louisiana, L. & H. P. & Mfg. Co.* 115 U. S. 650-672, 29 L. ed. 516-524; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *State v. Addington*, 77 Mo. 110; *Stickrod v. Com.* 86 Ky. 285; *Welsh v. State*, 128 Ind. 71, 9 L. R. A. 664; *Day v. Woodworth*, 54 U. S. 13 How. 368, 14 L. ed. 181.

A familiar application of the principle is that made in the great number of cases which hold that railway companies may be compelled to fence their tracks. The decisions everywhere prove that the police power may sleep, but it does not die. The question when the dormant power shall be aroused is, as we have suggested, one for legislative decision. "Under our system," said the court in *Mugler v. Kansas*, "that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine primarily what measures are needful or appropriate for the protection of public morals, the public health or the public safety."

It is a mistake to suppose that regulating the use of property under the police power is a taking without process of law. This seems so clear that it is hardly necessary to cite authorities; but, nevertheless, we cannot forbear quoting from the opinion in *Mugler v. Kansas*, *supra*: "A prohibition simply upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals or safety of the community cannot in any just sense be deemed a taking or appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it."

In the case at our bar, there is no taking of property; there is simply a regulation of its use, leaving the ownership untouched. No owner has a right to use property in such a mode as to

endanger the public safety, and hence, no rights of ownership are impaired in a statute which protects the public safety by a reasonable regulation of the use of dangerous property.

We are satisfied that no provision of our State Constitution is violated by the Act of 1891, and that it is not antagonistic to the Fourteenth Amendment of the Federal Constitution, nor to any provision of that instrument protecting vested or contract rights.

The general question which remains is that presented by the contention that the Act of 1891 violates the provisions of the Federal Constitution vesting in Congress power over commerce between the States.

We preface our discussion of the principal question stated by saying that we are here concerned only with the general question of the power to regulate the pressure upon natural gas in pipes, for, according to the averments of the complaint, whether natural or artificial pressure be employed, the contract between the two corporations named cannot be made effective without violating the Act of 1891 by using more pressure than 800 pounds to the square inch. If there is power to regulate the pressure, then the corporation of which the appellant is a member ought not to be allowed to execute the contract described, since, under the confessed allegations of the complaint, it is impossible for one of the corporations to act without violating the Statute. Courts are always reluctant to strike down a statute or to decide constitutional questions; and they only decide them when imperatively necessary. Even then they decide only such as are absolutely essential to a disposition of the case, and are fully and clearly in the record. *Cooley, Const. Lim. chap. 7.*

Whether the Act of 1891 usurps powers vested in Congress is to be determined from the language employed by its framers. If the language expressly or by necessary and unavoidable implication assumes to regulate interstate commerce, the Act is a nullity. There is, however, no express regulation of interstate commerce, nor do we think that the necessary effect of the Statute, when construed according to settled rules of law, is to limit or restrain commerce. If it were necessary to sustain the Statute, and necessary to a decision of this case, as made by the record, to construe the Statute as simply limiting artificial pressure to 800 pounds, it would be our duty to so construe it, since that would be a sounder conclusion, in view of the provisions of the Statute, than the conclusion that the Legislature intended to enact a statute which must be deemed a nullity. The rule is that, "before proceeding to annul by judicial sentence what has been enacted by the law-making power, it should clearly appear that the Act cannot be supported by any reasonable intentment or allowable presumption." *People v. Orange County Supra*. 17 N. Y. 285-241.

We have no right to presume that the Legislature usurped power or disregarded the organic law. No precedent will justify such a presumption, nor any reason sustain it. A party who asserts that the Legislature has usurped power or has violated the Constitution must affirmatively and clearly establish his position.



Nor have the courts the right to so construe a statute as to render it void where a construction that is reasonably admissible will uphold it. *Cooley*, Const. Lim. 6th ed. 218.

This is elementary law. We are therefore not dealing with a case where there is nothing more than a question as to the meaning and effect of a statute. We are to resolve doubts in favor of the validity of the Statute without, as an able court has said, "stopping to inquire what construction might be warranted by the natural import of the language used." *Dow v. Sayward*, 14 N. H. 16-18.

It is our plain duty to uphold the Statute if it can be done by just intendment and reasonable presumption, and the questions in the record do not require us to do more than decide upon the general question of the power to regulate the conveyance of natural gas in pipes.

Nothing in the words of the Statute expresses or indicates a purpose to usurp a federal power. If there be any such usurpation, it is because of the effect of the Statute and not because of any direct attempts to regulate interstate commerce; but we have no right to ascribe any such effect to the Statute if any other fair and reasonable effects can be given it. We are not to destroy a statute when it can be fairly avoided.

A further prefatory suggestion seems appropriate, and that is this: The Statute makes no discrimination; it operates upon all alike. It affects the citizens of Indiana as it does others and not differently. We know, as a matter of common knowledge, as all courts must know, that there are parts of our State farther distant from the gas fields than are parts of the States by which ours is bounded. It cannot, therefore, be implied that the Statute was directed against the citizens of other States.

In considering the principal question, two things are important, (1) locality, and (2) the character of natural gas. Of these in their order.

The pipes for the transportation of the gas must be laid in our soil; they must cross our farms, pass through our towns, and cross our highways. There are many persons, many houses and much property along the line within the borders of our State. There is danger to our inhabitants, and to their property from the use of defective or insecure pipes, as well as from an improper use of them. If a volatile, inflammable and explosive substance, such as natural gas, cannot be conveyed in pipes under an unsafe pressure without danger to those whom it is the duty of the Commonwealth to protect, then regulation is not unreasonable or illegal in itself. The danger is to our citizens in their own homes, and on our own thoroughfares. It cannot, we suppose, be successfully asserted that a gas company could use pipes of paper, or of spider webs at their pleasure, and yet, if there is no power in the State to regulate the character of the pipes or the like, this conclusion must result; they indeed may do what they please. The danger to be avoided is within the State. The protection of the law ought, upon every principle of justice, to be commensurate with the danger. The legislation is local, is for local protection, and presumptively at law for no other purpose. Gas

companies acquire the right to lay pipes by virtue of the power of eminent domain resident in the State, and, surely, if they take the benefit of our laws and use our lands and minerals, they must yield obedience to such laws as are framed for the local protection. If they seize private property and occupy highways under local laws, they must conform to those laws in using privileges vouchsafed to them. The right to lay pipes, to sink wells, and to do similar things is local in every particular. It is from first to last local; it is so in the acquisition of the original right, and in the exercise of the right acquired. It is certainly as essentially and characteristically local as the right to erect telegraph poles, conduct laundries or operate elevators, and over these things the State may legislate, although the legislation may indirectly or incidentally affect commerce. It seems true beyond fair controversy that the State by virtue of its inherent power may provide that pipes shall be laid in trenches, or shall be of sufficient strength to be safe; otherwise they might be laid on the ground, subject to the action of the elements, or be of inadequate strength and thus be fruitful of danger to persons and property. It also seems entirely clear that the State may declare that gas shall not be confined in insufficient tanks or reservoirs, as is done respecting petroleum in States where it is obtained. If it be true that such regulations may be made, it must also be true that pressure may be regulated and that the State must, to a great extent, be the judge of the nature and character of the regulations required.

The local character of such a substance as natural gas is, we repeat, marked and peculiar. It is a natural product and its source is in the soil or rocks of the earth. It is as strikingly local as coal, or petroleum, and yet no one has ever questioned the power of a State to enact laws governing mining. If it be not true that the mining and conveyance of natural gas may be regulated for the protection of persons and property, it must be true that many mining laws are void. Coal oil is subject to inspection and regulation, and so must be natural gas; for it is more dangerous than coal oil. It is so essentially local that only local regulations can be effective or appropriate. It is found in very few localities, and the character of locality is impressed upon it more clearly and strongly than upon almost any other natural product in the world.

We have considered (very briefly, however, because time presses) the question of the power to regulate the use of natural gas because of the local character of the product upon principle, and we now briefly consider the question upon authority. The decisions clearly recognize a distinction between local and general matters. Necessarily, this must be so, or else there would be no power in the State to declare where telegraph poles shall be placed, or at what speed railroad trains should be run through populous towns, or where noxious trades shall be conducted. To deny the power to regulate the use of a product so clearly and exclusively local as natural gas would be to annihilate the police powers of the State. The principle which we here enforce is thus stated by the Supreme Court of the United States in *Western Union Teleg. Co. v. Pendleton*, 123 U.

§. 347, 80 L. ed. 1187: "Undoubtedly under the reserved powers of the State, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the State for the good order, peace and protection of the community. The subjects upon which the State may act are almost infinite, yet in its regulations with respect to all of them, there is this necessary limitation, that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation it may undoubtedly make all necessary provisions with respect to buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require."

If regulations may be made concerning buildings and wires used by telegraph companies, it is impossible to conceive why they may not be made concerning pumps, pipes or the like of natural gas companies. There is infinitely more reason why the power should exist in the one case than in the other, since natural gas is a local product, intrinsically dangerous, and can only be conveyed from place to place in a peculiar mode.

There is another phase of the subject upon which the element of locality exerts an important influence. The local and peculiar character of natural gas makes it almost impossible that it should be the subject of a general national regulation.

The principle here involved is affirmed in the strongest case that the appellees have adduced in support of their position. In that case, *Leisy v. Hardin*, 185 U. S. 109, 84 L. ed. 183, Fuller, Ch. J., speaking for the majority of the court, said: "Where the subject matter requires a uniform system, as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroach upon by the States, but where, in relation to the subject matter, different rules may be suitable for different localities, the States may exercise powers, which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until, or unless circumscribed by the action of Congress in effectuation of the general power." *Cooley v. Wardens of Port of Philadelphia*, 53 U. S. 12 How. 299, 18 L. ed. 996. But the principle had long before been stated in stronger and clearer terms, and it has been often asserted and enforced. *Munn v. Illinois*, 94 U. S. 135, 24 L. ed. 87; *Sherlock v. Ailing*, 98 U. S. 99, 28 L. ed. 819; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Quachita v. Aiken*, 121 U. S. 447, 80 L. ed. 977; *Morgan's L. & T. R. & S. Co. v. Louisiana*, 118 U. S. 464, 80 L. ed. 241.

Upon this point we affirm that natural gas is characteristically and peculiarly a local product, that its production is confined to a limited territory, that because of its local characteristics and peculiarities, it is a proper subject for state legislation, and cannot, so far as regards local protection, be made the subject of general legislation by Congress, or, at all events, that it does "not require a uniform system as between the States," for its regulation.

We come now to a consideration of the ques-

tion of the inherent dangerous qualities of natural gas as affecting the power of the State to regulate its use. We have already declared that it is a dangerous substance, requiring regulation, and we shall only add to what we have said a quotation from the opinion in the case of *State v. Hayes*, 78 Mo. 807: "It was not necessary," said the court, "to aver that coal oil is inflammable or to prove it. Courts and juries will take cognizance of such matters as are of common knowledge and pertain to the experience and affairs of almost every man's daily life. Courts do not require proof that fire will burn or powder explode, or gas illuminate, or that many other processes in nature and art produce certain known effects. 1 Greenl. Ev. § 56; *Brown v. Piper*, 91 U. S. 87, 23 L. ed. 200; *Uddersook's Case*, 76 Pa. 340; *Garth v. Caldwell*, 72 Mo. 632; *Nagel v. Missouri Pac. R. Co.* 75 Mo. 665, 666."

As natural gas is dangerous, it is a proper subject for police regulation, and the affirmation of this proposition is a sufficient refutation of appellee's argument that it may be assumed that the Statute, under guise of the police power, attempts to regulate interstate commerce, and thus usurp a federal power. What the rule would be if natural gas were an article not dangerous, such as corn, wheat or the like, we need not inquire, since the record does not present any such question.

The rule that courts take notice of geographical, historical or natural facts extends far and is an unbending one. In the case of *Jones v. United States*, 187 U. S. 202, 84 L. ed. 691, the supreme court fully reviewed the authorities and declared that averments in a pleading would be disregarded in every instance where the court judicially knew that they were not true. We cannot quote at length from the opinion, but must content ourselves with saying that it asserts in the strongest possible terms that what is judicially known to be false no pleading can effectively aver to be true. The practical application of this old and familiar doctrine to this case requires us to assert that the courts judicially know that natural gas is a local product that cannot be handled, stored or transported as an ordinary commercial commodity without imperiling life and property.

If natural gas cannot be safely transported to a State distant from its source it is because of its natural qualities, and not because of legislation. The restriction upon transportation, if there be any, is in the inherent nature of the thing itself; none is put upon it by the Statute, since the Statute does no more than regulate its conveyance from the wells to points of distribution in such a mode as to protect lives and property. This it does and nothing more. If the distribution within the State cannot be made at a safe pressure, it is because of the character of the local natural product, not because of any standard of pressure fixed by legislation. Fixing the standard of pressure is not a regulation of interstate commerce; possibly, it might be different if the product were not a local one and intrinsically dangerous; but natural gas is local and is dangerous in its transportation and use. It is the inherent element of danger that makes it necessary to handle, store and transport natural gas in peculiar modes and under reasonable restrictions.

It is true that natural gas may be an article of commerce, but it is not an ordinary article of commerce. It is not a commercial commodity while in the earth; it is only so when it ceases to become real estate and becomes personal property. It cannot in any event become an ordinary article of merchandise in which no dangerous elements combine. In a limited and qualified sense, it is a commercial commodity, but the limitation is not put upon it by any statute; that is done by nature. It is, no doubt, so far a commercial commodity that this State cannot prohibit its transportation to another State by direct legislation. *State v. Indiana & O. O. G. & M. Co.* 120 Ind. 575, 6 L. R. A. 579.

If it can be taken from the well and transported to another State under a safe pressure, the State cannot prohibit its transportation; nor can the State establish one standard of pressure for its own citizens and another standard for the citizens of other States. But nothing of the kind is attempted, directly or indirectly, for, as we have shown, there is one standard and no prohibition. The standard is for all. If it is such as will allow the transportation of natural gas to other States, there is no restriction or burden upon interstate commerce. If there is a prohibition in any sense or to any extent it is in the nature of the commodity itself; but there is no prohibition.

We have shown, as we believe, that natural gas, because of its local nature and intrinsic qualities, cannot be made the subject of general commerce between the States; and have thus established the conclusion that it cannot, so far as local safety is concerned, be made the subject of uniform federal legislation, but is a legitimate subject for reasonable police regulation. But if it be conceded that it is the subject of general commerce between the States, it may, nevertheless, be the subject of legislation by the State in so far as the regulation is local. In every case in which there is an authoritative decision upon the question, it is affirmed that the States may make police regulations, although articles of commerce may be affected by such regulations. Interstate commerce, it is true, can neither be burdened nor restricted. *State v. Indiana & O. O. G. & Min. Co. supra.*

But the establishment of a reasonable police regulation for local safety is neither a burden nor a restriction, within the meaning of the law, since, if there be lawful exercise of a governmental power, there can be no wrong. Our own cases recognize the power to enact reasonable police regulations concerning articles of commerce. *Ibid.*

But our decisions are of comparatively little importance upon this question, since the question is one to be determined by the decisions of the Supreme Court of the United States. The most familiar instances of the exercise of police power over commercial commodities are those wherein intoxicating liquors were the subject of legislation, and it has been uniformly held that such commodities are subject to State authority. *Orowley v. Christensen* and *Mugler v. Kansas. supra.* and authorities cited.

In asserting this we are not unmindful of the decision in *Letsy v. Hardin*, 185 U. S. 100, 34 L. ed. 128, but that decision is easily discrimi-

nated from the class of cases to which we have referred, as well as from the case before us. In *Letsy v. Hardin* the state legislation was condemned because it operated directly upon an ordinary and world-wide article of commerce. We do not assume that a State can legislate for the regulation of interstate commerce,—that power is undoubtedly federal,—nor do we assume that under the guise of exercising the police power there may be a regulation of commerce between the States; but we do assume that it is settled by the decisions that state legislation is not invalid simply because it operates upon, or affects, commercial commodities or instrumentalities. So long as there is nothing more than an exercise of the police power, and no regulation of commerce, there is nothing more than the exercise of a state power. In *Prigg v. Pennsylvania*, 41 U. S. 16 Pet. 539, 10 L. ed. 1060, *Judge* Story, speaking for the court, said: "The police power belonging to the States in virtue of their general sovereignty, extends over all subjects within the territorial limits of the State, and has never been conceded to the United States."

This general doctrine is affirmed in many cases, and it is conceded in the majority opinion in *Letsy v. Hardin*. We know that the decision in that case affirms that where the whole subject is federal, the States can exercise no power, but that doctrine we neither dispute nor deny; although we do affirm that it is not applicable to such a case as this. In affirming that state police regulations may rightfully operate upon articles of commerce, we do not affirm that commerce may be regulated. If police regulations cannot operate upon articles of commerce, then there are few kinds of personal property upon which they can operate. To deny that state legislation can operate upon commodities that are commercial is to practically annihilate it, for it is difficult, if not impossible, to conceive any species of personal property that is not commercial. But it is by no means only property such as intoxicating liquors upon which the police power of a State may be exercised. In the case of *United States v. De Witt*, 76 U. S. 9 Wall. 41, 19 L. ed. 593, a penalty was imposed by the United States statute upon any person who should offer for sale oil manufactured from petroleum, unless it was of a designated specific gravity, and it was held such a power belonged to the police power of the State. A similar question came before the court in *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, and the state statute was upheld. The opinion in that case so fully and ably discusses the question that we cannot forbear quoting from it at some length. The learned judge by whom the court spoke said:

"In the American constitutional system," says Mr. Cooley, "the power to establish the ordinary regulations of police has been left with the individual States, and cannot be assumed by the national government." Cooley, Const. Lim. 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate by any general rule the exact limitations which the States must observe in its exercise, the existence of such a power in the States has been uniformly recognized in this court. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Licenses Cases*, 46 U. S. 5 How.

504, 12 L. ed. 256; *Gilman v. Philadelphia*, 70 U. S. 8 Wall. 713, 18 L. ed. 96; *Henderson v. New York*, 92 U. S. 259, 28 L. ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 537; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989.

"It is embraced in what Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, calls that 'immense mass of legislation' which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control. 'If the power only extends to a just legislation of rights, with a view to the due protection and enjoyment of all, and does not deprive anyone of that which is justly and properly his own, it is obvious that its possession by the State, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction or afford a basis for an appeal to the protection of the national authorities.' Cooley, Const. Lim. 574.

"By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government. The Kentucky statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens. It expresses in the most solemn form the deliberate judgment of the State that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. Whether the policy thus pursued by the State is wise or unwise, it is not the province of a national authority to determine. That belongs to each State, under its own sense of duty, and in view of the provisions of its own Constitution. Its action in those respects is beyond the corrective power of this court. That the Statute of 1874 is a police regulation within the meaning of the authorities is clear from our decision in *United States v. De Witt*, 78 U. S. 9 Wall. 41, 19 L. ed. 593. By the Internal Revenue Act of March 2, 1867, a penalty was imposed upon any person who should knowingly sell or keep for sale, or offer for sale, such mixture, or who should sell or offer for sale oil made from petroleum for illuminating purposes inflammable at less temperature or fire test than 110 degrees Fahrenheit. We held that to be simply a police regulation, relating exclusively to the internal trade of the States; that, although emanating from Congress, it could have by its own force no constitutional operation within state limits, and was without effect, except where the legislative authority of Congress excluded, territorially, all state legislation, as, for example, in the District of Columbia."

Other decisions assert like principles. *Webber v. Virginia*, 103 U. S. 348, 26 L. ed. 566; *Turner v. Maryland*, 107 U. S. 88, 27 L. ed. 370; *Cooley v. Wardens of Port of Philadelphia*, 53 U. S. 12 How. 299, 13 L. ed. 996; *Crandall v. Nevada*, 78 U. S. 6 Wall. 35 18 L. ed. 745; 12 L. R. A.

*Knob v. Lee*, 79 U. S. 12 Wall. 571, 20 L. ed. 318; *Butchers Ben. Assn. of New Orleans v. Crescent City, L. S. L. & S. H. Co.* 77 U. S. 10 Wall. 273, 19 L. ed. 915; *Coleman v. Tennessee*, 97 U. S. 531, 24 L. ed. 1127; *Presser v. Illinois*, 116 U. S. 268, 29 L. ed. 620; *Tennessee v. Davis*, 100 U. S. 801, 25 L. ed. 663.

The principle we have stated is involved in the cases where regulations were made respecting the instrumentalities of commerce. It is involved in the very numerous cases already mentioned, requiring railroads to fence their tracks. It is involved in cases requiring trains to stop at the crossing of other railroads, and in many other cases of like character. It is strongly and broadly asserted in the cases which hold valid state statutes requiring trainmen or engineers to be examined as to their qualifications, as well as in cases concerning pilots. *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 33 L. ed. 852; *Sherlock v. Alling*, 93 U. S. 99, 28 L. ed. 819; *Cooley v. Wardens of Port of Philadelphia*, 53 U. S. 12 How. 299, 13 L. ed. 996; *Ex parte McNeil*, 80 U. S. 18 Wall. 236, 20 L. ed. 624; *The Panama*, Deady, 37; *Ex parte Siebold*, 100 U. S. 385, 25 L. ed. 722; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *State v. Penny*, 19 S. C. 218.

In the first of the cases cited, it was said: "The width of the gauge, the character of the grades, the mode of crossing the streams by culverts and bridges, the kinds of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns and cities, are all matters naturally and peculiarly within the provisions of the law, from the authority of which the modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property otherwise endangered by their use are strictly within the limits of the local law. They are not, *per se*, regulations of commerce," etc.

The provision of our Statute of 1891, limiting the pressure upon natural gas confined in pipes, is certainly as essentially a police regulation as any of the acts enumerated by the Supreme Court of the United States in the case from which we have quoted. It is equally as clear that it is not *per se* a regulation of interstate commerce. Pipes are local vehicles of conveying the dangerous product, and pressure is the power locally employed.

The decisions relied upon by the appellees do not oppose the conclusion that the use of such an article as natural gas may be regulated. In our own case of *State v. Indiana, & O. O. G. & Min. Co.*, *supra*, the statute was in terms a regulation of commerce between the States, and moreover was an absolute inhibition upon the exportation of natural gas, so that the decision there made is not in point. Of *Leisy v. Hardin*, we need only say, in addition to what has been already said, that the state law there overthrown by a majority of the court was a direct prohibition of the sale of a general article of commerce in its original form, not a regulation of its use. It is obvious that regulating the use of a dangerous article is a very differ-

ent thing from prohibiting its sale, and still wider is the difference where, as here, the article is inherently dangerous, and not of an ordinary commercial character. The cases of *Welton v. Missouri*, 91 U. S. 375, 23 L. ed. 347; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691,—involved the power of a State to levy a tax upon interstate commerce, and are not of controlling force upon such a question as that before us, because they are not relevant to the point in dispute. The case of *Bowman v. Chicago & N. W. R. Co.*, 135 U. S. 465, 31 L. ed. 700, involved the validity of a state statute absolutely prohibiting the importation of a commercial commodity, and it is without influence here, for here we have no such question. *Mobile County v. Kimball*, 103 U. S. 691, 26 L. ed. 288, decides that a municipal corporation may be authorized to issue bonds to improve a harbor, but decides nothing that lends support to the appellee's assault upon the Act of 1891. It does, however, contain statements that give strong support to the proposition that local matters may be regulated by state laws, although they are connected with interstate commerce.

The cases of *Ohy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550, and *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543, relate entirely to the power of a State to regulate immigration and pour little or no light upon the question with which we are here concerned. In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, it was held that a State could not prohibit the importation of cattle, but here we have no such question, for here there is no prohibition; there is merely the regulation of the mode of conveying from the wells a local product, of an intrinsically dangerous nature. The case of *Kimmish v. Ball*, 129 U. S. 217, 32 L. ed. 695, modifies the decision in *Hannibal & St. J. R. Co. v. Husen*, or, at least, explains it. But in *Hannibal & St. J. R. Co. v. Husen* it was said: "Many acts of a State may, indeed, affect commerce without amounting to a regulation of it in the constitutional sense of the term."

This doctrine is directly applicable here, for here the Statute regulates the use of a dangerous substance, and thus incidentally affects commerce; but it is not a regulation of commerce "in the constitutional sense of the term." A regulation of the mode of using property is not necessarily prohibition or restriction, and the Statute before us is no more than such a regulation. The opinions in the cases of *Minnesota v. Barber*, 186 U. S. 813, 34 L. ed. 455, and *Brimmer v. Reban*, 188 U. S. 78, 34 L. ed. 863, were written by the same great judge, Mr. Justice Harlan, who wrote the opinions in *Patterson v. Kentucky* and in *Smith v. Alabama*, and there is in them not the slightest intimation of a departure from the doctrines of former cases; on the contrary, those doctrines are adhered to, and the Meat Inspection Laws were condemned because they discriminated against the citizens of other States. In the latter case it is said: "The case in principle is not distinguishable from *Minnesota v. Barber*, where an inspection statute of Minnesota, relating to fresh beef, mutton, lamb and pork was held to be a regulation of interstate

commerce and void, because by its necessary operation it excluded from the markets of that State, practically, all such meats—in whatever form, and although entirely sound and fit for human food—from animals slaughtered in other States."

The difference between the meat inspection cases and the present is essential and clear. Here, there is no discrimination; here, there is nothing more than the regulation of a natural, local and intrinsically dangerous product, while in the inspection cases there was discrimination, indeed, absolute prohibition, and the article was not dangerous, nor of a local or unusual character.

In *Minnesota v. Barber* the court shows very clearly the difference between that case and the case of *Patterson v. Kentucky* (which is cited with approval), and in doing this proves that the principle asserted in *Patterson v. Kentucky* rules here, and that the doctrine of *Minnesota v. Barber* is not relevant to such a question as the one presented by the ruling upon the complaint before us.

The trial court erred in sustaining the demurrer to the complaint, for in thus ruling it adjudged that the provision of the Act of 1891, regulating the pressure that may be placed upon natural gas confined in pipes, was void. That was the question before it upon the complaint, and it is the question before us. The effect of this ruling was to adjudge that the appellant's complaint did not state a cause of action, for the reason that the statutory provision referred to was, upon the case stated by the pleading, unconstitutional. Beyond that case the trial court could not justly go, nor can we.

For the error in sustaining the demurrer to the complaint the judgment is reversed.

#### McBride, J.:

The Legislature may undoubtedly provide for the regulation of the mode of procuring, using and transporting natural gas. In so far as the Act of March 4, 1891, attempts to do this, it is a legitimate exercise of the police power of the State, and not an interference with the power of Congress to regulate interstate commerce. Section 1 of the Act, however, contains a provision which, literally construed, forbids the transportation of natural gas through pipes, otherwise than by the natural pressure of the gas flowing from the wells, and section 2 contains a provision which, similarly construed, declares it to be unlawful to use any device or artificial process or appliance to maintain the natural flow of natural gas. These provisions are not in the nature of regulations, but are prohibitory in their character. There are, however, independent provisions, which may be eliminated from the Statute without materially impairing its sufficiency, if its purpose is simply to regulate the production, transportation and use of natural gas. As I understand the principal opinion, it holds that notwithstanding these provisions of the Statute, artificial pressure may be applied, provided it does not exceed 800 pounds to the square inch. Whether this conclusion is reached by construction or by eliminating the objectionable features of the Statute is not material. I concur in the conclusion reached.

**Olds, J., dissenting:**

I cannot concur in the main opinion in this case. There are many propositions stated in the main opinion, and ably discussed and supported by copious quotations and citations of authorities; with some of which I agree, but do not regard them as decisive of the questions involved in this case. As it seems to me, the question as to the validity of the complaint depends upon the validity and construction of the Act of the Legislature of Indiana passed by the General Assembly March 4, 1891, which is as follows:

"An Act to Regulate the Mode of Procuring, Transporting and Using Natural Gas, and Declaring an Emergency."

"Section 1. Be it enacted by the General Assembly of the State of Indiana, that any person or persons, firm, company or corporation engaged in drilling for, piping, transporting, using or selling natural gas, may transport or conduct the same through sound wrought or cast iron casings and pipes, tested to at least four hundred pounds to the square inch, provided such gas shall not be transported through pipes at a pressure exceeding three hundred pounds per square inch, nor otherwise than by the natural pressure of the gas flowing from the wells.

"Sec. 2. It is hereby declared to be unlawful for any person or persons, firm, company or corporation to use any device for pumping, or any other artificial process or appliance for the purpose, or that shall have the effect of increasing the natural flow of natural gas from any well, or of increasing or maintaining the flow of natural gas through the pipes used for conveying and transporting the same.

"Sec. 3. Any person or persons, firm, company or corporation violating any of the provisions of this Act shall be fined in any sum not less than one thousand dollars nor more than ten thousand dollars, and may be enjoined from conveying and transporting natural gas through pipes otherwise than as in this Act provided: provided, that nothing in this section shall operate to prevent the use of nitro-glycerine or other explosives for shooting any well or wells from which the gas is procured.

"Sec. 4. It is hereby declared that an emergency exists for the immediate taking effect of this Act, and the same shall take effect from and after its passage."

In my opinion, the decision is erroneous. The law does not seem to me to have been framed with an intention, or with an effort on the part of the General Assembly, to exercise the legitimate police power vested in the State. It does not attempt to regulate the transportation of natural gas; but its sole purpose is to prohibit the transportation, sale and use of gas beyond the distance which the natural pressure from the well will transport it. Strictly construed, according to the letter, it does not permit its transportation through pipes at the natural well pressure, if such pressure exceeds 800 pounds to the square inch, nor does it permit any artificial method or device to increase the natural well pressure to that standard, if the well pressure should be below the amount of pressure designated. The statute upon its face admits that the transportation of gas at a pressure of 800 pounds to the square inch through sound wrought or cast-iron casings and pipes

tested to at least 400 pounds to the square inch is safe; yet it prohibits the increase of the pressure of a well of less pressure than that degree, and prohibits any transportation by artificial methods, even to this extent, though admitting it is safe to do so.

In the case of *State v. Indiana & O. O. G. & Min. Co.*, 120 Ind. 575, 6 L. R. A. 579, this court said: "In order to give any force to this contention, it is necessary to determine at the outset whether natural gas can be considered an article of commerce. With this preliminary question we have but little difficulty. Natural gas is as much an article of commerce as iron ore, coal, petroleum or any other of the like products of the earth. It is a commodity which may be transported, and it is an article which may be bought and sold in the market of the country." In support of this proposition, the following authorities were cited: *Citizens Gas & M. Co. v. Elwood*, 114 Ind. 332, 14 West. Rep. 92; *Carother's App.* 118 Pa. 468, 11 Cent. Rep. 48; *Columbia Conduit Co. v. Com.* 90 Pa. 307; *West Virginia Transp. Co. v. Volcanic O. & C. Co.* 5 W. Va. 382; *The Daniel Ball*, 77 U. S. 10 Wall. 557, 19 L. ed. 999; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346.

This court further said: "The gas in the earth may not be a commercial commodity; but, when brought to the surface and placed in pipes for transportation, it must assume that character as completely as coal on the cars or petroleum in the tanks."

The doctrine contained in the quotations which I have made from *State v. Indiana & O. O. G. & Min. Co.*, *supra*, is well supported by authority, and with it I most fully concur. That gas and petroleum are to some extent inflammable, explosive and dangerous I am free to admit; and that courts take judicial knowledge of the fact. But coal is in common use for fuel, petroleum in common use for lighting purposes, and to some extent for fuel; natural gas in the communities where it is mined and has been carried through pipes, is in common use as fuel and for heating purposes, and to some extent for lighting purposes; and but few or any more accidents or deaths occur from its use than do from the use of coal or petroleum. We read of accidents and deaths occurring in various ways from the use of coal and petroleum, as well as natural gas. As well might the Legislature of the various States within the borders of which there are oil fields pass a law prohibiting the pumping of the oil from wells and the transportation of the same to any greater distance than its natural flow from the wells will carry it, while admitting that it can be safely transported in casks and tanks, as to say that the Legislatures, while admitting that natural gas may be transported with safety in pipes at a pressure to the extent of three fourths of the tested pressure of the pipes, prohibit its transportation by artificial methods or devices in the same safe manner by a pressure not exceeding three fourths the tested pressure of the pipes through which it is transported; either of which propositions seem to me to be a prohibition, an interference with commerce, against the rights of citizens in the free disposition of their property and unfounded in law.

It is not necessary, in this case, to deny that the Legislature has a right to exercise police

power over the transportation of natural gas. Admitting that it has, and can, exercise it to a reasonable extent, so as to prevent its transportation in a careless, reckless and unsafe manner, unnecessarily endangering its citizens, I do affirm that the Legislature can only exercise this power to a reasonable extent, so as to secure its transportation in a safe manner, as not to unnecessarily endanger the citizens of the State; and that it cannot, under the color of exercising a police power, absolutely prohibit its transportation and sale in a safe manner to suitable markets; and the latter is what is attempted to be done by this statute. The statute, conceding that natural gas can be transported in the manner stated, prohibits its transportation beyond the distance it will naturally flow from the wells, which as admitted in argument is not to exceed sixty or seventy miles at farthest. As said in the case of *State v. Indiana & O. O. G. & Min. Co.*, *supra*, natural gas is an article of commerce, and the owner of it may sell it for use within the distance which it may be transported by the natural flow of the well, or beyond such distance; and it may be transported in a proper and safe manner beyond that distance by artificial methods, and this cannot be prohibited by legislative enactment.

In the case of *Re Jacobs*, 98 N. Y. 99-110, after citing and quoting from numerous authorities in speaking of the police power of the State, the court says: "These citations are sufficient to show that the police power is not without limitation, and that in its exercise the Legislature must respect the great fundamental rights guaranteed by the Constitution. If this were otherwise, the power of the Legislature would be practically without limitation. In the assumed exercise of the police power in the interest of the health, the welfare or the safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away."

Generally, it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends; under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded and the determination of the Legislature is not final or conclusive. If it passes an Act ostensibly for the public health and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to, and is convenient and appropriate to promote the public health. It matters not that the Legislature may, in the title of the Act or in its body, declare that it is intended for the improvement of public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

In the case of *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, the eminent jurist, Justice Harlan, speaking for the highest court of the world, said: "If, therefore, a statute purport-

ing to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution." See *Minnesota v. Barber*, 136 U. S. 320, 34 L. ed. 458.

It will not be controverted that the owner of land is not the owner of gas mined upon his own land; that it is his property. The right of private property includes the right to dispose of all one's legal acquisitions without illegal restraint or diminution. These principles are almost as old as the law itself. The Constitution of the United States provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law."

The Constitution of Indiana, in the Bill of Rights, declares that "all men are endowed with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." It is also declared that "no man's property shall be taken by law without just compensation."

See the following authorities as bearing upon the questions involved in the case: *Hennecy v. St. Paul*, 37 Fed. Rep. 585; *Cole v. Keyler*, 84 Iowa, 59; *Harvey v. Devoody*, 18 Ark. 252-261; *State v. Mott*, 61 Md. 297; *Manhattan Mfg. & F. Co. v. Van Keuren*, 23 N. J. Eq. 251; *Glenn v. Baltimore*, 5 Gill & J. 424; *Bills v. Belknap*, 36 Iowa, 583; *Everett v. Council Bluffs*, 46 Iowa, 66; *Quinton v. Burton*, 61 Iowa, 471; *Everett v. Marquette*, 53 Mich. 450; *Ames v. Port Huron Log. D. & B. Co.* 11 Mich. 139; *Sedgwick, Stat. and Const. L. p. 534*; *New Albany & S. R. Co. v. Peterson*, 14 Ind. 112; *Acton v. Blundell*, 12 Mees. & W. 324; *Greencastle v. Hazlett*, 23 Ind. 186; *Haldeman v. Bruckhart*, 45 Pa. 514; *Wheatley v. Baugh*, 25 Pa. 528; *Taylor v. Fickas*, 64 Ind. 172; *Angell, Water-courses*, §§ 94-135; *State v. Woodruff S. & P. Coach Co.* 114 Ind. 155, 18 West. Rep. 311; *Hannibal & St. J. R. Co. v. Huse*, 95 U. S. 465, 24 L. ed. 527; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 228; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Loisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455; *Brimmer v. Redman*, 138 U. S. 78, 34 L. ed. 862.

It is clearly apparent that the Statute in question had for its purpose the prohibition of the transportation of natural gas, and confining its use and sale to a limited territory, curtailing its use, diminishing its value, abridging the rights of the owners and other persons who might wish to buy and transport it to markets beyond the distance which the natural well pressure will carry it, absolutely forbidding its use and sale beyond a small territory, wherein it can be distributed by the natural well pressure; and if subject to be safely transported into other States, it necessarily interferes with interstate commerce.

I have hurriedly and briefly stated some of the objections to the constitutionality of the law. No good can be accomplished by extending this opinion and discussing each question involved separately and supporting the positions by authority. I believe the law to be

unconstitutional and void for several reasons; and the law being void, the complaint was bad and the demurrer was properly sustained.

To uphold the law at all, it is necessary to strike out all the Legislature has said in such emphatic terms that no artificial methods can be used in transporting natural gas, or even in keeping up its pressure; and interpolate in lieu thereof an allegation that artificial methods may be used to the extent of 800 pounds to the square inch in pipes tested to the strength of 400 pounds to the square inch. In view of the absolute and positive prohibition against the use of any artificial methods expressed in the Statute, it seems to me no such intention can be attributed to the Legislature, or such a construction given to the law.

Michael A. DOWNING *et al.*, *Appts.*,

# INDIANA STATE BOARD OF AGRICULTURE.

(....Ind....)

**A state board of agriculture** created a body corporate with perpetual succession including as *ex officio* members the president of each county agricultural society, and which is in a sense an educational institution required to hold an annual meeting and receive reports from county societies and make an annual report to the Legislature, its funds having been received for the most part from other sources than the State, is a private and not a public corporation, although no shares of stock are issued.

(June 19, 1891.)

**A** PPEAL by defendants from a judgment of the Circuit Court for Marion County in favor of plaintiff in an action brought to quiet title to certain real estate, and to have an Act of the Legislature abolishing plaintiff and transferring its assets to a State Agricultural Board thereby created declared to be null and void. *Affirmed.*

The facts are stated in the opinion.

*Mr. A. C. Harris* for appellants.

*Messrs. McDonald, Butler & Snow* for appellee.

*Olds, J.*, delivered the opinion of the court:

This action was brought by the appellee, the Indiana State Board of Agriculture, a corporation created under an Act entitled: "An Act for the Encouragement of Agriculture, Approved February 14, 1851," against the appellants claiming to act as individuals and as a state agricultural and industrial board, created by an Act of the Legislature of 1891, entitled: "An Act Abolishing the State Board of Agriculture and Transferring all its Assets, Liabilities and Credits to a State Agricultural Board; Providing for the Creation of the State Agricultural and Industrial Board," etc., which became a law by lapse of time without the governor's signature, March 4, 1891, to quiet the title to certain real estate described in the complaint and known as the state fair grounds, to declare null and void appellant's claims of ownership and en-

joining them from setting up any interest in or ownership of said real estate; and to have said Act of the Legislature of 1891 declared unconstitutional and void; also asking the same relief as to the personal property, and asking that appellee be declared the owner of appropriations made by an Act of the Legislature approved February 28, 1889, appropriating for the use of the appellee \$10,000 annually for five years; two of which annual appropriations have been paid to the appellee. On the trial of the cause in the court below, final judgment and decree was entered in favor of the appellee quieting title of the appellee in the real estate; that the Act of the Legislature of 1891 was unconstitutional and void; that appellee is the owner of the personal property and that the appellee is the owner of the unpaid appropriation and entitled to receive the payment of the same; and perpetually enjoining the appellants, either as individuals or as a state board under the Act of 1881, from claiming or asserting any title or ownership of the real estate, personal property or said appropriation, or demanding or receiving possession of either or any part of the same.

We deem it unnecessary to set out or make any further statement of the pleadings or issues in the case, or the manner in which the question for decision is presented, as it is conceded that the sole question presented for the decision of this court is whether or not the appellee, the Indiana State Board of Agriculture, is a private corporation. If it is a private corporation, then the Legislature exceeded its powers by the passage of the Act of 1891, and such Act is unconstitutional and void and the judgment must be affirmed. But if such Board is a public corporation, a state institution, belonging to the State and subject to legislative control, then said Act of the Legislature is valid and the judgment must be reversed. The question must be determined by the construction to be placed on the Act of the Legislature approved February 14, 1851, by which the Indiana State Board of Agriculture was incorporated. So much of the Act as is material for the decision of this case reads as follows:

"An Act for the Encouragement of Agriculture, approved February 14, 1851."

"Sec. 4. That Joseph A. Wright of Marion County, Alexander C. Stevenson of Putnam County, Jeremiah McBride of Martin, Roland Willard of Kosciusko, Jacob R. Harris of Switzerland, Henry L. Ellsworth of Tippecanoe, John Ratliff of Morgan, Joseph Orr of LaPorte, David P. Holloway of Wayne, John P. Kelley of Warrick, William McLean of Lawrence, Samuel Emerson of Knox, John McMahon of Washington, Thomas W. Sweney of Allen, George Brown of Shelby and George Hussey of Vigo, be and they are hereby created a body corporate, with perpetual succession in the manner hereafter described, under the name and style of the Indiana State Board of Agriculture.

"Sec. 5. It shall be the duty of said Board, or any five of them, to meet in the City of Indianapolis at such time as the governor shall appoint, and to organize by appointing a president, secretary and treasurer, and such other officers as they may deem necessary; also, de-



termine by lot the time each member shall serve, so that the term of service of one half of the members shall expire annually, on the day of the annual meeting in January; and the president shall have power to call meetings of the Board whenever he may deem it expedient.

"Sec. 6. There shall be held in the City of Indianapolis on the first Thursday after the first Monday in January, an annual meeting of the Indiana State Board of Agriculture, to gether with the president of each county agricultural society, or other delegate therefrom duly authorized; who shall, for the time being, be *ex officio* members of the State Board of Agriculture for the purpose of deliberation and consultation as to the wants, prospects and conditions of the agricultural interests throughout the State; and at such annual meeting the several reports from the county societies shall be delivered to the president of the Indiana State Board of Agriculture; and the said president and delegates shall, at this meeting, elect suitable persons to fill all vacancies in the Indiana State Board of Agriculture.

"Sec. 7. And it shall be the duty of said Board to make an annual report to the General Assembly of the State, embracing the proceedings of the Board for the first year, and an abstract of the proceedings of the several county agricultural societies, as well as a general view of the condition of agriculture throughout the State, accompanied by such recommendations as they may deem interesting and useful.

"Sec. 8. That the sum of \$1,000 be, and the same is hereby, appropriated from the treasury for the use of the Board, and an account of the expenditures of the Board shall be included in the annual report of the Board of the General Assembly.

"Sec. 9. That the Indiana State Board of Agriculture shall have the power to hold state fairs at such times and places as they may deem proper and expedient and have the entire control of the same, fixing the amounts of the various premiums offered, embracing every article of science and art, or such portions of them as they may deem expedient and proper, calculated to advance the interest of the people of the State. They may employ assistants, receive contributions, donations, etc., and unite with a county or district society for the purpose of defraying the expenses of said state fairs."

The foregoing Act was passed under the Constitution of 1816, which contained the following provision:

"Sec. 1. Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government, . . . the General Assembly shall, from time to time, pass such laws as shall be calculated to encourage intellectual, scientific and agricultural improvements, by allowing rewards and immunities for the promotion and improvement of arts, sciences, commerce, manufactures and natural history; and to countenance and encourage the principles of humanity, honesty, industry and morality." Art. 9, § 1.

The Constitution of 1816 contained no provision against creating private corporations by special Acts. In *Angell & Ames on Corporations*, at section 18, it is said: "The public benefit is deemed a sufficient consideration of a grant of corporate privileges; and hence,

when a grant of such privileges is made (being in the nature of an executed contract) it cannot, in case of a private corporation, which involves private rights, be revoked. The object in creating a corporation is, in fact, to gain the union, contribution and assistance of several persons for the successful promotion of some design of general utility; though the corporation may at the same time be established for the advantage of those who are members of it. The principle is and has been so laid down by Domat that the design of a corporation is to provide for some good that is useful to the public. With respect to Acts of Incorporation, says one of the judges of the Court of Appeals of Virginia, "they ought never to be passed but in consideration of services to be rendered to the public."

In Section 14 the following statement is made: "The Bank of the United States, for example, if the stock belonged exclusively to the government, would be a public corporation; but inasmuch as there are others and private owners of the stock, it is a private corporation."

In section 31 it is said: "Private corporations are indisputably the creations of public policy; and, in the popular meaning of the term, may be called public; but yet, if the whole interest does not belong to the government (as if the corporation is created for the administration of civil or municipal power) the corporation is private."

In section 82 it is said: "Nor does it make any difference that the State has an interest as one of the corporators; for it does not by such participation identify itself with the corporation. Says Marshall, *Ch. J.*, in *U. S. v. Planters Bank*, 22 U. S. 9 Wheat. 907, 6 L. ed. 244, 'the Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it.'" In section 34 it is said: "A hospital founded by private benefaction, it has been held, is not thereby constituted a public corporation, controllable by the government; nor does it make any difference that the funds have been generally derived from the bounty of the government itself." See §§ 89, 40.

In 1 Dillon on Municipal Corporations, 4th ed. § 22, it is said: "Public and municipal corporations distinguished. Corporations intended to assist in the conduct of local civil government are sometimes styled political, sometimes public, sometimes civil and sometimes municipal; and certain kinds of them, with very restricted powers, quasi corporations. All these by way of distinction from private corporations."

Sec. 52: "A fundamental division of corporations heretofore adverted to is into public and private. The importance of this distinction cannot be too much emphasized; since upon it are based the legal principles which so broadly distinguish the two classes of corporations. With private corporations the present work has no other concern than to point out by way of illustration wherein they differ from those which are public. Both classes are alike created by Legislature, and in the same way, by special charter or under general Corporation Acts."

In section 58 it is said: "Private corporations are created for private as distinguished from purely public purposes; and they are not, in contemplation of law, public, because it may have been supposed by the Legislature that

their establishment would promote, either directly or consequentially, the public interest. They cannot be compelled to accept a charter or incorporating statute; but when assented to the legislative grant is irrevocable, and it cannot, without the consent of the corporation, be impaired or destroyed by any subsequent Act of legislation, unless the right to do so was reserved at the time." Waterman, on the Law of Corporations, asserts the same doctrine. §§ 14, 16, 17.

In the case of *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629, it is held that public corporations are such only as are founded by the government for public purposes where the whole interests belong to the government. In this case it is held that no authority exists in a government to regulate, control or change a corporation created by it; except when the corporation is, in the strict sense, a public one, and its franchises the exclusive property of the government itself. In such a case, the officers of the corporation would be public officers. The corporation in this case was created by a charter in which the trustees were mentioned by the name of the "Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees who are to govern the college to fill up all vacancies which may be created in their own body, and it was held to be a private corporation.

In the case of *Vincennes University v. Indiana*, 55 U. S. 14 How. 268, 14 L. ed. 416, it was held that the Acts of 1806 and 1807, establishing Vincennes University and incorporating the same by the name of the Board of Trustees of the Vincennes University, made it a private corporation over which the State could not exercise control. See *Union Pac. R. Co. v. United States and Cent. Pac. R. Co. v. Gallatin*, 99 U. S. 700, 718, 25 L. ed. 496, 504.

The State University was established by an Act which made provision for a board of trustees and enacted that they and their successors shall be a body politic, with the style of the Trustees of the Indiana University, in that name to sue and be sued, etc. In the case of *State v. Carr*, 111 Ind. 335, 9 West. Rep. 818, the court quoted from the case of *Regents of the University of Maryland v. Williams*, 9 Gill & J. 365-368, with approval the following language: "A corporation may be private, and yet the act or charter contain provision of a purely public character, introduced solely for the public good. . . . A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government, subject to the control of the Legislature and its members, officers of the government, for the administration and discharge of public duties; as in the cases of cities, towns," etc. The court further says that "the university was established under the direct authority of the State, through a special Act of the Legislature; or that the charter contains provisions of a purely public character; nor yet that the institution was merely established, and is and should be perpetually maintained, at the public expense, for the public good, does not make it a public corporation, or

constitute its endowment fund a public fund." It is further said: "The legal status of the State University, being that of a technically private or at most a quasi public corporation, the university fund of which it is the sole beneficiary is therefore not a public fund within the meaning of the law."

These legal rules laid down by the authorities from which we have quoted and stated the law as declared, are supported and adhered to by innumerable decisions of courts of the highest standing, from which we might quote and extend this opinion to an unreasonable and unwarranted length; but we deem it unnecessary to do so. Under the rules stated, it is clear that the Indiana State Board of Agriculture is a private corporation; and it matters not to what extent the State has voluntarily aided it by contributions and appropriations. The corporation now owns a large amount of property. The main funds it has handled and used have been received from private citizens, railroad companies, the City of Indianapolis and funds received from state fairs held by the Board. The members of the Board have not been chosen by the State; they are not state officers. It has not been a state institution. It is true, there are no shares of stock issued and held by the trustees or private individuals; neither are shares of stock issued by colleges and universities or charitable institutions which are private corporations, and it is not necessary to make it a private corporation that shares of stock be issued. The act creating it made it a body corporate, with perpetual succession in the manner prescribed. It is, in a sense, an educational institution. It seeks to bring together people engaged in agricultural pursuits, as well as those engaged in manufacturing farm machinery and other articles adapted to use in the cultivation of the soil and harvesting of crops and other articles used by the public, as well as those engaged in raising stock, and to exhibit to those in attendance the crops resulting from the various methods of farming and the various machinery manufactured for the use of those engaged in agricultural pursuits, as well as the various brands of stock; and give to the people of the State, and particularly those engaged in agricultural pursuits, an opportunity of discussing various methods of farming and farm implements used and the different brands of stock raised, and to educate the people in this way in the pursuits of agriculture, and to educate and improve the condition of the agriculturist, that they may have a knowledge of the best methods of farming, best machinery to use and the best brands of stock. An agricultural society is defined in the Century Dictionary as "a society for promoting agricultural interests, such as the improvement of land, of implements, of the brands of cattle, etc." A new English dictionary defines an agriculturist as "a student of the science of agriculture."

The trustees so elected have no financial interest in the property of the corporation; that is to say, they are not the owners of the property of the corporation in such a sense as that they can sell it and appropriate the proceeds to their own use, any more than could the trustees of the State University sell and convert the proceeds of the property to their own

use. They are simply trustees to manage and control it. The institution, the corporation, exists for the benefit of the people of the State, and the law would not allow its purpose to fail by a failure of those charged with the duty of electing the successors; but neither the State by its General Assembly nor the trustees of the corporation have any right to appropriate the property of the corporation to the use of the State or the individual members of the Board. The General Assembly of the State has recognized this Indiana State Board of Agriculture as a private corporation. By an Act of the Legislature in 1877, the State loaned to the corporation \$35,000, and took a mortgage upon its property. Again, in 1881, by an Act of the Legislature, such lien for \$25,000 was postponed and made a subsequent lien to a lien of a third party on the lands of said corporation. See, in addition to the authorities above cited, 1 Morawetz, Priv. Corp. 2d ed. §§ 1, 3, 4; *New Glou-*

*cester School Fund Trustees v. Bradbury*, 11 Me. 124; *Allen v. McKean*, 1 Sumn. 297; *State v. Vincennes University*, 5 Ind. 78; *Baltimore & P. R. Co. v. Fifth Bap. Church*, 108 U. S. 880, 27 L. ed. 744; *Yarmouth v. North Yarmouth*, 84 Me. 417; *People v. Morris*, 18 Wend. 881; *State Board of Agriculture v. Citizens St. R. Co.* 47 Ind. 407.

The Act of 1891 attempts to take from the appellee all the property acquired by it. It both impairs the contract or charter of 1851, by which it made the appellee a private corporation, and it seeks to take its property from it without due process of law.

Having reached the conclusion that the appellee is a private corporation, it leads to an affirmation of the judgment.

*Judgment affirmed, with costs.*

McBride, J., took no part in the decision of this case.

## NEW YORK COURT OF APPEALS.

George MCARTHUR, Committee, etc., of  
Ebenezer Larmouth, *Resp.*,

v.

Henry GORDON *et al.*, *Appts*

(.....N. Y.....)

1. A declaration of trust made in consideration of a conveyance of land, although at a later date, is valid and irrevocable, and cannot be limited or affected by subsequent acts or contracts of the trustee with a stranger to the parties named in the instrument.
2. The support of an incompetent person who has always lived on a certain farm to which a vendee of the farm binds himself by a declaration of trust to apply the net rents of the farm or the interest on the purchase price if it should be sold, and which is made a first lien on the farm in case of a sale thereof, is not

limited to support on the farm where there is nothing in the declaration to show that intent.

3. It is the duty of a trustee to exercise a supervision over the care and comfort of an incompetent person for whose support in consideration of the conveyance of a farm he has made a declaration of trust to appropriate the net rents of the farm or the interest on its price if sold; and he should apply the proceeds so far as necessary to that purpose wherever within reasonable limits such person may be cared for and supported.
4. The liability of a trustee who in consideration of a deed has charged property with a trust for the support of an incompetent person cannot be avoided by transferring the property charged with such support, but he is liable for such part of the expense thereof if not furnished by his grantee as cannot be recovered from the land itself or from the second grantee.

(Earl, J., *dissent*.)

### NOTE.—Creation or declaration of trust.

Any agreement or contract in writing, whereby a person agrees that a particular parcel of land shall be dealt with in a particular manner for the benefit of another, raises a trust in favor of such other person. *Conway v. Kinsworthy*, 21 Ark. 9; *Price v. Reeves*, 38 Cal. 457; *Rabun v. Rabun*, 15 La. Ann. 471; *Baylies v. Payson*, 5 Allen, 498; *Pingree v. Coffin*, 12 Gray, 288; *Giddings v. Palmer*, 107 Mass. 270; *Homer v. Homer*, 107 Mass. 82; *Price v. Minot*, 107 Mass. 61; *Paul v. Fulton*, 25 Miss. 156; *Waddingham v. Loker*, 44 Mo. 132; *Currie v. White*, 45 N. Y. 822; *Reed v. Lukens*, 44 Pa. 200; *Cressman's App.* 42 Pa. 147; *Rees v. Livingston*, 41 Pa. 113; *Pownall v. Taylor*, 10 Leigh, 138; *Seymour v. Freer*, 75 U. S. 8 Wall. 202, 19 L. ed. 806; *Legard v. Hodges*, 1 Ves. Jr. 478.

The trust may be manifested or proved by any writing in which the fiduciary relation between the parties and its terms can be clearly read. *Bragg v. Paulk*, 42 Me. 502; *Portland Second Unitarian Soc. v. Woodbury*, 14 Me. 281; *Macoubbin v. Cromwell*, 7 Gill & J. 157; *Orleans v. Chatham*, 3 Pick. 29; *Gomez v. Tradesman's Bank*, 4 Sandf. 106; *Raybold v. Raybold*, 20 Pa. 306; *Steere v. Steere*, 5 Johns. Ch. 1, 1 L. ed. 967; *Cuyler v. Bradt*, 3 Cal. Cas. 326; *Graham v. Lambert*, 5 Humph. 596; *Barron v. Barron*, 13 L. R. A.

24 Vt. 375; *Fisher v. Fields*, 10 Johns. 426; *Buck v. Swazey*, 35 Me. 41; *Chamberlain v. Thompson*, 10 Conn. 243.

The Statute of Frauds is satisfied if it is manifested by any subsequent acknowledgment, as by an express declaration (*Willard v. Willard*, 56 Pa. 119; *Ambrose v. Ambrose*, 1 P. Wms. 321; *Nutton v. Crow*, 10 Mod. 283); or memorandum to that effect (*Fisher v. Fields*, *supra*; *Urann v. Coates*, 109 Mass. 581; *Bellamy v. Burrow*, Cas. t. Talb. 97); or by a letter under his hand. *Kingsbury v. Burnside*, 58 Ill. 310; *Steere v. Steere*, *supra*; *Johnson v. Deloney*, 35 Tex. 42; *Buckner v. Kingsbury*, 58 Ill. 310; *Montague v. Hayes*, 10 Gray, 609; *Phelps v. Seely*, 23 Gratt. 573; *Forster v. Hale*, 3 Ves. Jr. 696; *Bentley v. Mackay*, 15 Beav. 12; *Childers v. Childers*, 1 DeG. & J. 422; *Gardner v. Rowe*, 3 Sim. & Stu. 346; *Crooke v. Brooking*, 3 Vern. 106.

If there is any competent evidence that the holder of the legal title is only a trustee, it will open the door for the admission of parol evidence to explain the position of the parties. *Prevost v. Gratz*, 1 Pet. C. C. 396; *Corse v. Leggett*, 25 Barb. 899; *Hollingshead v. Allen*, 17 Pa. 276; *Hutchins v. Lee*, 1 Atk. 447; *Cripps v. Jee*, 4 Bro. Ch. 473; *Morton v. Tewart*, 2 Younge & C. 67, cited in 1 Perry, Tr. § 82. See *note* to *Dreisbach v. Serfass* (Pa.) 3 L. R. A. 593.

(June 2, 1891.)

**A**PPEAL by defendants from a judgment of the General Term of the Supreme Court, Third Department, modifying and affirming a judgment of the Washington County Special Term in favor of plaintiff in an action brought to enforce compliance with the terms of a declaration of trust alleged to have been made by defendant Gordon for the support of Larmouth. *Modified and affirmed.*

The facts are fully stated in the opinion.

*Messrs. Westfall & Whitcomb*, for appellants:

It is not pretended that the agreement claimed to have been made between Miss McDoual and Gordon, as the consideration of the deed from her to him, was in writing. And such agreement, if clearly and conclusively proved to have been made by parol, would be void and not enforceable by action at law or in equity.

*Wheeler v. Reynolds*, 66 N. Y. 227; *Cook v. Barr*, 44 N. Y. 156; *Hutchins v. Hutchins*, 98 N. Y. 57; *Ros v. Barker*, 82 N. Y. 432; *Levy v. Brush*, 45 N. Y. 589; *Sturtevant v. Sturtevant*, 20 N. Y. 89; *Wilson v. Deen*, 74 N. Y. 581; *Bighmie v. Taylor*, 98 N. Y. 288.

The paper executed by Gordon and recorded April, 1876, neither creates, declares, establishes nor proves the trust relied upon by the plaintiff to maintain this action.

*Cook v. Barr*, *supra*; *Hubbard v. Sharp*, Nov. 1887; 1 Hilliard, Real Prop. 4th ed. 425; 1 Greenl. Cruise, Real Prop. 356; 1 Greenl. Ev. § 268.

If the instrument in question is sufficient in form and substance to constitute a declaration of trust, it never became operative, because it never had an inception, and especially because the beneficiary, at all times until at or just before the commencement of this action, repudiated it and sought to cancel and destroy it.

*Young v. Young*, 80 N. Y. 422; *Re Crawford*, 113 N. Y. 560; *Jackson v. Phipps*, 12 Johns. 418; *Jackson v. Bodle*, 20 Johns. 184; *Elzey v. Metcalf*, 1 Denio, 328; *Gifford v. Corrigan*, 7 Cent. Rep. 277, 105 N. Y. 227; *Pool v. Pool*, 1 Hill, 590; *Jenk. v. Robertson*, 58 N. Y. 621; *Risley v. Smith*, 64 N. Y. 576; *Wheat v. Rice*, 97 N. Y. 296; *Fonda v. Sage*, 48 N. Y. 183; *Homer v. Guardian Mut. L. Ins. Co.* 67 N. Y. 478; *Winch v. Mutual Benefit Ice Co.* 86 N. Y. 618; *Cornell v. Cornell*, 96 N. Y. 108; *Averill v. Patterson*, 10 N. Y. 500.

Until refusal to support at the place designated, there is no right of action.

*Bennett v. Akin*, 88 Hun, 251; *Pool v. Pool*, 1 Hill, 580.

The transactions between Gordon and Davis furnish no cause of action against Davis in favor of Larmouth.

The recording by Gordon of the paper claimed by plaintiff to be a "declaration of trust" did not operate as notice to Davis, a subsequent purchaser, and there is no proof that he had actual notice thereof.

\*A decision was reached in this case and an opinion handed down reversing the judgment of the lower court, on January 27, 1891. A rehearing was subsequently granted, after which the opinion given herewith was handed down, which supersedes the former one and renders the printing of it unnecessary. [Rep.]

12 L. R. A.

*Boyd v. Schlesinger*, 59 N. Y. 309; *Dillaye v. Whitehall Com. Bank*, 51 N. Y. 853; *Gillig v. Maass*, 28 N. Y. 192; *Judson v. Dana*, 79 N. Y. 874; *Bank for Savings v. Frank*, 13 Jones & S. 404.

Larmouth was a stranger so far as the agreements between Gordon and Davis were concerned. And "a mere stranger cannot intervene and claim by action the benefit of a contract between other parties."

*Vrooman v. Turner*, 69 N. Y. 284; *Wheat v. Rice*, *supra*; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121; *Craig v. Wells*, 11 N. Y. 821; *Towle v. Remsen*, 70 N. Y. 812; *Post v. Bernheimer*, 81 Hun, 252; *Duryee v. New York*, 96 N. Y. 496.

#### On re-argument.

The instrument executed by the defendant Gordon, considered as a declaration of trust, does not entitle Larmouth to "support" elsewhere than on the premises referred to in the instrument, so long as it is not refused him there.

*Parker v. Parker*, 126 Mass. 438; *Oram v. Oram*, 68 N. H. 81; *Pool v. Pool*, 1 Hill, 590; *McKillop v. McKillop*, 8 Barb. 566; *Currier v. Currier*, 2 N. H. 75; *Pratt v. Pratt*, 42 Mich. 174; *Zimmer v. Seille*, 19 N. Y. Week. Dig. 245; *Boons v. Tipton*, 15 Ind. 270; *Green v. Green*, 32 Ind. 276.

The bond being purely voluntary, the obligor should be treated more as a surety than as a principal debtor; and therefore the obligations which he assumed should be strictly construed, and should not be extended by construction.

*Birckhead v. Brown*, 5 Hill, 640; *McCluskey v. Cromwell*, 11 N. Y. 593; *People v. Pennock*, 60 N. Y. 426; *People v. Chalmers*, 60 N. Y. 168; *Bissell v. Saxton*, 66 N. Y. 60; *Ward v. Stahl*, 81 N. Y. 406; *Thomson v. MacGregor*, 81 N. Y. 596; *National Mechanics Bkg. Assn. v. Conkling*, 90 N. Y. 116.

There could be no default except upon proper demand, by the proper person, in proper manner and in proper time.

28 Cent. L. J. 816-824, and cases cited; *McKillop v. McKillop*, *supra*.

Plaintiff's and Larmouth's non-acceptance and repudiation constitute a waiver and a perfect defense.

*Pool v. Pool*, *McKillop v. McKillop* and *Boons v. Tipton*, *supra*; *Jenks v. Robertson*, 58 N. Y. 621; *Risley v. Smith*, 64 N. Y. 576; *Cornell v. Cornell*, 96 N. Y. 108; *Wheat v. Rice*, 97 N. Y. 296, and cases cited on page 802; *Homer v. Guardian Mut. L. Ins. Co.* 67 N. Y. 481; *Winch v. Mutual Ben. Ice Co.* 86 N. Y. 619.

*Mr. Matthew Hale*, with *Mr. Job G. Sherman*, for respondent:

The court was right in holding that the instrument executed and placed upon record by the defendant Gordon was a valid and binding declaration of trust, relating back to the date of the deed from Ellis McDoual to him.

1 Perry, Tr. § 82; *Fisher v. Fields*, 10 Johns. 495; *Urann v. Coates*, 109 Mass. 581; *Montague v. Hayes*, 10 Gray, 609; *Wright v. Douglass*, 7 N. Y. 564; *Adams v. Adams*, 83 U. S. 21 Wall. 185, 22 L. ed. 504; *Van Cott v. Prentice*, 6 Cent. Rep. 364, 104 N. Y. 45; *Hatch v. Stewart*, 42 Hun, 164; *Westlake v. Wheat*, 43 Hun, 77.

The recording of the declaration of trust was constructive notice thereof to all subsequent purchasers or incumbrancers. It is a "conveyance" within the meaning of the Statute.

1 Rev. Stat. 762, § 88, 769, §§ 16, 17; *Bacon v. Van Schoonhoven*, 19 Hun, 188, affirmed, 87 N. Y. 446; *Grandin v. Hernandez*, 29 Hun, 399.

The facts found by the trial court, and approved by the general term, show that an equitable lien exists in favor of Ebenezer Larmouth.

1 Jones, Liens, §§ 28, 80; 2 Story, Eq. Jur. § 1281; *Hauselt v. Harrison*, 105 U. S. 401, 26 L. ed. 1075; *Gregory v. Morris*, 96 U. S. 619, 24 L. ed. 740; *Mornington v. Keane*, 2 DeG. & J. 292; *Pinch v. Anthony*, 8 Allen, 586; *Seymour v. Canandaigua & N. F. R. Co.* 25 Barb. 284; *Price v. Palmer*, 23 Hun, 504; *Fowler v. Mutual L. Ins. Co.* 28 Hun, 195; *Chase v. Peck*, 21 N. Y. 581; *Payne v. Wilson*, 74 N. Y. 848; *Perry v. Board of Missions of Albany P. E. Church*, 3 Cent. Rep. 62, 102 N. Y. 99; *Smith v. Smith*, 51 Hun, 164.

#### On re-argument.

The obligation of defendants under the instrument executed by the defendant Gordon April 19, 1876, was not limited to the support of Larmouth upon the farm in question.

28 Cent. L. J. 816.

The office of trustee cannot be delegated. If a trustee confides his duties or the trust fund to the care of a stranger, he will be personally responsible.

1 Perry, Tr. § 402; *Adams v. Olifton*, 1 Russ. 297; *Hardwick v. Mynd*, 1 Anstr. 109.

A transfer of a trust fund by a trustee to another is of itself a breach of trust, and renders the assigning trustee responsible for the acts of his assignee.

*Hulme v. Hulme*, 2 Myl. & K. 682; *Flanders v. Lamphear*, 9 N. H. 201.

The refusal of defendant Gordon to do anything for Larmouth, accompanied by his statement "that he had got all through with it," excused plaintiff from making any further demand.

*Robinson v. Frank*, 9 Cent. Rep. 846, 107 N. Y. 655; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 698.

The trust being perfectly created, nothing is required of the court but to give effect to the trust as an executed trust; and it will be carried into effect, although without consideration, to the same extent and in the same manner as if there had been a valuable consideration for the creation of the trust.

1 Perry, Tr. § 96; 1 Lewin, Tr. 67; *Stone v. Hackett*, 12 Gray, 237.

Where a sum of money, or the entire income of any property, is appropriated for the maintenance and support of another, the beneficiary is entitled to the benefit of the sum of money or income so appropriated, without reference to the purpose for which it is so appropriated.

*Webb v. Kelly*, 9 Sim. 472; *Leves v. Leves*, 16 Sim. 266; *Noel v. Jones*, Id. 309; *Young-husband v. Gisborne*, 1 Coll. 400; *Bayne v. Crouther*, 20 Beav. 400; *Atwood v. Alford*, L. R. 2 Eq. 479; *Re Sanderson's Trust*, 3 Kay & J. 497.

12 L. R. A.

*Ruger, Ch. J.*, delivered the opinion of the court:

This action is brought on behalf of Ebenezer Larmouth, a lunatic, against the defendant Gordon and his grantee, upon a declaration of trust executed by Gordon for the benefit of said Larmouth, to enforce the trust, and recover the rents and profits of the trust property claimed to have been misappropriated by the defendants. The complaint proceeded upon the theory that the defendants had neglected to execute the duties of the trust, and had appropriated to their own use the income of the trust property, instead of applying it to the maintenance and support of its beneficiary, as provided by the trust. This case has been the occasion of some difference of opinion in the court as to the proper construction to be given to the declaration of trust, and now comes before us upon a re-argument. This disagreement has arisen as much, I think, from the divergent views taken of the facts by the various members of the court as from any difference between us as to the rules of law applicable to them. A more elaborate statement of the leading facts, as they appear from the findings of the trial court, as well as from the undisputed evidence, will tend more, I think, to dissipate misconception and harmonize our views than any other mode of treating the case. Stated in their chronological order, they are as follows:

In the year 1876 one Ellis McDoual, an unmarried woman of the age of ninety years, owned and resided upon a farm of about 45 acres in the Town of Jackson, Washington County, having no other property of any material value. Her only son, then of the age of about sixty-six years, a harmless lunatic, resided with her, and had so lived with her on the farm for many years. The farm was worth about \$8,000, and its annual rental value, exclusive of taxes, was about \$175. In the year 1873 Miss McDoual executed a will by which she devised all her property, both real and personal, in trust to her executors to receive the rents and profits thereof, and apply them to the use of her son, Ebenezer Larmouth, during his natural life, with remainder to her pastor and friend, the Rev. Henry Gordon. On October 16, 1874, Miss McDoual executed and delivered to Gordon a warranty deed of such premises for the consideration, expressed in the deed, "of one dollar and other valuable consideration to her duly paid," which deed was duly recorded October 22, 1874, in the clerk's office of Washington County. Miss McDoual died March 8, 1876, having lived upon and retained possession of the farm until that time, and leaving her son in possession thereof. On April 19, 1876, Gordon executed an instrument in writing, which he caused to be recorded in the clerk's office of Washington County, reading as follows: "Know all men by these presents, that because of certain real estate duly conveyed to me by Ellis McDoual, late of the Town of Jackson, Washington County, New York, I, Henry Gordon, of Coila, Washington County, New York, do, of my own free will and accord, hereby consider myself, heirs, executors or administrators, holden and firmly bound to appropriate or cause to be appropriated, for the comfortable support of Ebene-

zer Larmouth during his life, all the rents, after deducting necessary expenses, of said real estate, or, if said real estate should be sold, the proper maintenance in board and clothing should be first lien upon said real estate during the life of said Ebenezer Larmouth. The subscriber to this bond distinctly asserts that its obligations on him are limited to the rents of said real estate, or to the interest on the purchase money, should said real estate be sold. Signed with my hand and seal this 19th day of April, 1876. Henry Gordon. [L. s.] Miss McDoual never owned or conveyed to Henry Gordon any other real estate than this farm. Gordon preached Miss McDoual's funeral sermon, immediately after her death, and, referring to her son, stated "that ample means have been provided for his support and welfare," and concluded by saying "The friends may rest assured that her wishes will be faithfully carried out." The first year after Miss Doual's death the executor of her will took possession of the farm, and rented it to one Green for \$150 a year. During this time Larmouth occupied the house on the farm alone, and was boarded by Green, who was allowed 20c. a week therefor, to be applied upon the rent of the land. No special complaint is made by the plaintiff but that the income of the farm was for this year substantially applied to the support of Larmouth. In January, 1877, Henry Gordon executed and delivered to one Robert Davis a warranty deed of the farm for the consideration of \$400, which was secured by a mortgage upon the farm; and upon the condition also that Davis "would provide and furnish Ebenezer Larmouth," during his natural life, "suitable clothing, food, lodging and necessary medical attendance and medicine," which Davis thereby covenanted to provide. It was further provided by this deed that "the support and maintenance of the said Larmouth, as aforesaid, shall constitute and remain an indefeasible lien upon the premises hereby conveyed, during the natural life of said Larmouth." Immediately after this conveyance the defendant Davis leased about an acre and a quarter of the land, with the buildings on the premises, to one Plunkitt, in consideration that Plunkitt should board Larmouth, and do his washing and mending, "if the said Larmouth would consent to stay on the farm with Plunkitt, and, in case he did not, that Plunkitt should pay \$40 a year for the privileges enjoyed by him." Davis occupied and cultivated the remainder of the premises, and received payment of the rent agreed to be paid by Plunkitt, Larmouth having refused to live in Plunkitt's family. Plunkitt was assisted in taking possession of the house by Davis, his servants, and the executor of Miss McDoual's will, and met with some opposition from Larmouth, who forbade them from coming upon the premises, and claimed to own the farm and the property in the house, and asserted that they were attempting to rob him of his patrimony. Larmouth's bed and furniture were then forcibly taken from the room which he was accustomed to occupy, and packed away in another part of the house, and he refused to remain and live with Plunkitt. It appears that Larmouth was a Presbyterian, of Scottish descent, and Plunkitt an Irish Catholic, with a family con-

sisting of a wife and three children; and Larmouth being asked to stay with Plunkitt, said he didn't want to live with an Irishman. He had been subjected to a personal assault at the hands of a servant of Davis on the premises previously. Larmouth then left the house with McArthur, and has ever since continued to make it his home at McArthur's, and has lived with and been practically supported by him. He has during all this time, up to the trial, been irrational, poor, needy and dependent, and frequently sick and practically unable to support or take care of himself. He has never received any attention or support from either Gordon or Davis, and all applications to them for aid have been uniformly neglected or evaded. Applications have been frequently made to them for assistance, and the payment of bills for medical attendance and other necessities, but they were met by Gordon, after he sold to Davis, with the declaration "that he had got through with it," and by Davis with a refusal to pay for anything he did not himself order. Plunkitt remained in possession of the property rented by him for two years, after which Davis moved into the house and occupied it, with the farm, and has continued to do so, and to receive the rents and profits thereof, to the time of the trial. Davis has never paid anything for the property, except the sum of \$34 annually to Gordon as interest upon the bond and mortgage, which sum Gordon has appropriated to his own use.

There are certain propositions involved in this controversy concerning which there is no difference of opinion in the court, and among them are the following: *first*, that the declaration of April 19, 1876, constituted a valid and enforceable trust, and imposed upon its creator the obligations and duties of a trustee, to be discharged in accordance with the meaning and effect of the language used therein by him; *second*, that, in giving a construction to such instrument, regard may be had to the situation of the parties, and the surrounding circumstances, as well as the language of the instrument, for the purpose of arriving at the intent of the author in making it, where that intent is not clearly expressed; *third*, that this trust was irrevocable, and cannot be limited or affected by any subsequent acts or contracts of the trustee with a stranger to the parties named in the instrument; *fourth*, that, so far as any interest in the real estate is concerned, the rights and liabilities of Gordon and Davis, after the purchase by Davis, were co-extensive, Davis having purchased, not only with constructive as well as actual notice of the liabilities imposed upon the land by the terms of the trust, but also under a positive condition that he should hold the title subject to the obligation of discharging the duties imposed by its provisions upon the trustee; *fifth*, that Gordon did not, by contracting with a third party to discharge his obligations to Larmouth, relieve himself from the duty of seeing that such obligations were performed; *sixth*, that it is quite immaterial, so far as the liabilities of Gordon and Davis to the beneficiary of the trust are concerned, what the nature of the subsequent contract between Gordon and Davis was, and

whether the same should be reformed or not.

Assuming the correctness of these propositions, there are left for consideration the following questions: *first*, whether the provisions in the declaration of trust, relating to Larmouth's support and maintenance, are limited to support to be furnished on the premises therein referred to, or constitute a general obligation to appropriate the rents and profits of the trust property to his support wherever it might be needed: *second*, whether an active duty on the part of Gordon was incurred, by the obligations of the trust, to exercise care and supervision over the person and wants of the beneficiary, and to provide for them to the extent of such rents and profits wherever such care and supervision might be necessary and reasonable: *third*, what is the measure of the liability incurred by Gordon, and how far has he made himself responsible by his neglect to appropriate the income of the trust property to the support of Larmouth.

It seems to be well established by the authorities that, under a general obligation to maintain and support another, where no place is specified, the beneficiary may, as a general rule, live wherever he chooses, provided his choice does not involve needless expenses. *Wilder v. Whittemore*, 15 Mass. 262; *Stillwell v. Pease*, 4 N. J. Eq. 74; *Proctor v. Proctor*, 141 Mass. 165, 2 New Eng. Rep. 838; *Conkey v. Everett*, 11 Gray, 95; *Pettie v. Case*, 2 Allen, 546; *Rowell v. Jewett*, 69 Me. 298. This rule is, undoubtedly, subject to exceptions in cases where there is great inadequacy of consideration, or family arrangements are made involving the support of some of its members by others who have been accustomed to live together, or the circumstances of the case, and the language of the instrument indicate an intention that support shall be furnished in a particular manner, at a particular place, or by particular persons. In such cases the courts have sometimes construed similar contracts as meaning that support could be required only at the place or by the persons indicated, even though that was not made an express requirement of the agreement. Such were the cases of *McKillop v. McKillop*, 8 Barb. 552; *Pool v. Pool*, 1 Hill, 560, and others of like character. We have, however, been unable to find, among the numerous cases referred to, any which are at all applicable to the circumstances of this particular case. Whether we regard the language of the instrument, or the circumstances surrounding the parties, we find nothing which constitutes this case an exception to the general rule. The trust deed unconditionally devotes the net rents of the trust property to the support of the beneficiary, so far as they are necessary for that purpose, without reference to his place of abode, and implies that the trustee shall collect and appropriate them, from time to time, as they are needed by the beneficiary. There is nothing in the circumstances of the parties indicating an intention to limit the requirements of the beneficiary to a living upon the trust property. The creator of the trust evidently had no intention of making Larmouth a member of his family. He was, apparently, an aged clergyman, living at a

distance from his benefactress, and was unadapted, by occupation, character and pursuits from receiving an uninviting and irrational person into his family, or of exercising personal supervision over the life, manners and occupation of such a person. He was in no wise related to his benefactress or her son, and had no apparent intention of changing his mode of life, or engaging in the unaccustomed business of farming at a distance from the field of his accustomed labors. He certainly manifested no intention of permitting any member of Larmouth's family to live on the premises, and he had not then determined to farm out his support to strangers who were offensive or otherwise to his religious and social feelings. No one was then living on the farm, and none, therefore, who could receive and take care of Larmouth at that place, and it is obvious that the trustee had not then any person or family in view who could have had any interest in supporting him on the farm. The beneficiary, while not violent or dangerous, was unmanageable and insensible to the dictates of reason or propriety, and could be managed or controlled only by persuasion or force. It was at all times conjectural whether he would be satisfied with any provision, whether reasonable or not, which should be made for him, and in case he was not, it was obvious that other means would have to be adopted by the author of the trust in order to make its object and purpose effective. When the trust was declared, it is apparent that Gordon had no settled plan as to the disposition he intended to make of the property, or the mode in which the duties of the trust were to be discharged. By the deed of trust he devoted all the rents of the farm, unconditionally, to the support of Larmouth, so far as they should be necessary, and, in case he sold the farm, he provided that the interest on the purchase price should be the limit of his liability under the trust deed. These amounts were capable of definite ascertainment, and were not subject to the uncertainty which would attend an obligation to support and maintain alone. It must then have appeared to Gordon a matter of comparative indifference whether these rents or interest should be expended upon the farm, or were paid to those who would apply them to the support of Larmouth. Indeed, the language of the trust furnishes irrefutable evidence that Gordon contemplated the sale of the property, and the application of the interest money derived from the purchase price to the support of Larmouth, wherever he might be; and it furnishes no answer to this view that the obligations of the trust were made a lien upon the farm. It was not till a year later that Gordon concluded to realize his interest in the farm, and he then considered it worth about one seventh of the value of the property, leaving at least six sevenths to accomplish the purposes of the trust. The theory that, under the terms of the trust deed, Larmouth would be obligated to take his support upon the trust property, seems to have been an afterthought, as it was neither expressed in the trust deed, claimed on the trial, presented by finding or exception, nor raised in the points of defendant's counsel in this court,

until the re-argument of the case. The main drift of the defendant's contention, heretofore, has been that, under the terms of the deed from Gordon to Davis, if reformed as Davis desired it should be, he could not be held liable to furnish support, except upon the property purchased. We are therefore of the opinion that the trust deed constituted the rents and profits of the farm, or the interest upon its purchase price, a trust fund for the support of Larmouth; and that it was the duty of the trustee thereunder to exercise a supervision over his care and comfort, and apply such proceeds to his use, so far as they were necessary, wherever he might, within reasonable limits, be cared for and supported. These duties were assumed for an ample consideration by Davis upon his purchase, and, as between Gordon and Davis, he became primarily liable to discharge them. It is obvious, from the undisputed evidence in the case, that both Davis and Gordon have been grossly derelict and blamable in the performance of their duties. The series of proceedings by which substituted performances of the duties of the trust were attempted to be made, which culminated in the obligation of Plunkitt to devote \$40 a year to that purpose, illustrate the indifferent and improvident manner in which this trust has been neglected by the trustee. No consideration whatever seems to have been given to the wishes of Larmouth, or regard manifested for his welfare, health or comfort, but an unconscientious struggle was entered upon by the substituted agencies to find the minimum sum to which the obligations of the trust might be reduced. Gordon thought the rents and profits of about six sevenths of the farm were sufficient for the purpose, but Davis was of the opinion that less than a quarter of the amount was necessary, and Plunkitt undertook to make a profit even at that price. Larmouth was thus turned over to strangers, whose only interest in him was to see how cheaply he could be made to live, or if his living could not be made so disagreeable that he would abandon all claims to support from the defendant. We are of the opinion that even if the obligations of the trust had required Larmouth to take his support upon the farm, no adequate or sufficient provision was then made for him; and much more was this the case if he had the right to live elsewhere, as no provision whatever was made for such a contingency.

Having reached the conclusion that the duties of the trust have been wholly neglected by those charged with their performance, it follows that they are liable in this action for such damages as have been incurred by Larmouth on account of their default, to the extent of the rents and profits of the land, or the sum which, with reasonable care and prudence in

its management, it would have yielded from the time the trustee took possession, in March, 1887. Such damages could not, however, have been extended beyond the sum which was required for the reasonable and comfortable support of the beneficiary; but, to this extent, they were applicable, even if it required the whole of such rents and profits. The evidence on the subject of the amount required for the support of Larmouth is somewhat indefinite, and the trial court made no finding on the subject. There is evidence furnished by the testimony of the principal parties to the action which shows a practical agreement as to the sum which ought to be paid for the purposes of the trust. Davis expressly swears that he was willing and offered to pay the sum of \$100 annually to the relatives of Larmouth and the plaintiff, although denying that such offer had been made, leaves his evidence open to the inference that if he had understood the offer to have been made he would certainly have accepted it. William Larmouth, a relative and representative of Larmouth, testifies that he had a conversation with Davis in which he asked him to pay a hundred dollars a year for Larmouth's support, but Davis refused to do so. We think there was a substantial agreement between the interested parties that \$100 a year was deemed a satisfactory sum to pay towards Larmouth's maintenance. In view of the desire of the parties, manifested on the argument, that a final judgment should be made in the case, we have concluded to give effect to the apparent concurrence of the parties on the trial as to the amount which should be paid for the annual support of Larmouth. It is certainly desirable that a controversy which has extended over a long period of time should be ended, and some relief should be afforded to the helpless and indigent beneficiary before his death, which, in the ordinary course of nature, must soon occur, if this can be consistently done. We are therefore of the opinion that the judgment should be modified so as to provide for the payment of \$100 a year, with interest on such annual payments, with costs of the action to plaintiff in all the courts, the payments to commence with March 6, 1878; that these sums, having, by the trust, been made a lien upon the land, should be primarily charged upon it, and, in case there should be a deficiency on the sale thereof to meet the charges, such deficiency should be adjudged to be paid by the defendant Robert Davis, and in case of his inability to pay it, then upon the defendant Gordon.

*The judgment is therefore affirmed as modified, with costs in all the courts.*

All concur, except Earl, J., dissenting, and Gray, J., not voting.



## UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

George C. MILLS *et al.*v.  
UNITED STATES.

(....Fed. Rep.....)

1. **Damage to rice fields by the construction of a dam** in harbor improvements, thus raising the low-water level in a navigable river and destroying the drainage of the fields and increasing their liability to overflow in time of freshets, does not constitute a taking of the property within the meaning of the constitutional provision for compensation. The rights of riparian owners are subordinate to the power of the government to control and improve navigation.

2. **A claim against the United States for consequential damages** to rice fields by the construction of a dam in making harbor improvements is one sounding in tort, and is not within the jurisdiction of the circuit court.

(July 17, 1891.)

**A**CTION to recover compensation for injuries to plaintiffs' land by reason of the construction of a dam by defendant in a navigable river in making harbor improvements. On demurrer to the complaint. *Case dismissed.*

The facts are stated in the opinion.

Tried before Pardee and Spear, JJ.

Mr. Marion Erwin, U. S. Atty., for defendant, in support of the demurrer:

**NOTE.—Rights of navigation and commerce paramount.**

The rights of navigation and commerce are always paramount to those of public fisheries. *Stockton v. Baltimore & N. Y. R. Co.* 1 Intera. Com. Rep. 411. See note to *Wright v. Mulvaney* (Wis.) 9 L. R. A. 807.

The power of Congress to regulate commerce comprehends the control, for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from any other State than those in which they lie (*Gilman v. Philadelphia*, 70 U. S. 8 Wall. 718, 18 L. ed. 96), or which may be in any manner connected with commerce with foreign nations, or among the several States, or with the Indian tribes. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23. See *Cardwell v. American River Bridge Co.* 118 U. S. 308, 28 L. ed. 960; *Morgan Steamship Co. v. Louisiana Board of Health*, 118 U. S. 465, 30 L. ed. 242.

But navigation upon a sound, as Currituck Sound, entirely within a State, is inland navigation, and where it is not connected with other waters leading to the sea it is not navigable under the laws of the United States. *Woodhouse v. Cain*, 55 N. C. 113.

The laws of a State granting to certain persons the exclusive right of navigation, by means of fire and steam, on all the waters of the State, are repugnant to the commercial clause of the United States Constitution. *Gibbons v. Ogden*, *supra*.

The public have a right of way for the purposes of navigation, which includes all that is reasonably necessary for that purpose. *Pursell v. Stover*, 110 Pa. 43.

This right exists between high and low water mark on a navigable stream, and includes the rights to tie a float of logs to a tree standing between 19 L. R. A.

This action sounds in tort.

In general only the injuries to the land through which the works are constructed are included in the assessment of damages.

*Gould, Waters*, § 252.

An action to redress these alleged injuries, if the suit were between individuals, would necessarily be in form *ex delicto*.

8 Bl. Com. pp. 218, 220-222; 1 Addison, Torts, § 4; 4 Am. & Eng. Encyclop. Law, p. 978, citing *Wilson v. Myers*, 4 Hawks, 78; 1 Chitty, Pl. pp. 127, 140, 142; *Leathers v. Blessing*, 105 U. S. 626, 36 L. ed. 1192.

The tort cannot be waived and the defendant sued upon the implied agreement to pay the value of the property converted to his own use.

*May v. Le Claire*, 78 U. S. 11 Wall. 235, 20 L. ed. 53. See also *Jones v. Hoar*, 5 Pick. 285.

The acts complained of here are not a "taking" of private property for public use within the meaning of the constitutional provision guaranteeing compensation in such case.

*Northern Transp. Co. of Ohio v. Chicago*, 90 U. S. 640, 25 L. ed. 837; 4 Watt, Act. and Def. 727, citing *Renwick v. Morris*, 7 Hill, 575; *Saltonstall v. Banker*, 8 Gray, 195; *Com. v. Erie & N. E. R. Co.* 27 Pa. 339; *Rea v. Pease*, 4 Barn. & Ad. 80; *People v. Law*, 85 Barb. 494; *People v. New York Gas Co.* 64 Barb. 55; *Denver & S. R. Co. v. Denver City R. Co.* 2 Colo. 678; *Atty. Gen. v. New York & L. B. R. Co.* 24 N. J. Eq. 49; *Danville, H. & W. R. Co. v. Com.* 78 Pa.

these points and to drive along the water's edge below low-water mark. *Ibid*.

So Congress may authorize the construction of a bridge across navigable waters for the purpose of interstate commerce, even against the protest of a State. *Pennsylvania R. Co. v. Baltimore & N. Y. R. Co.* 37 Fed. Rep. 129.

**State sovereignty over inland navigable rivers.**

State sovereignty over navigable rivers exclusively within their borders has never been surrendered to the general government. See note to *Swanson v. Mississippi & Rum River Boom Co.* (Minn.) 7 L. R. A. 674.

When the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soil under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government. *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997; *Austin v. Rutland R. Co.* 17 Fed. Rep. 470; *United States v. New Bedford Bridge*, 1 Woodb. & M. 410.

**State sovereignty over domestic commerce.**

Purely internal commerce and navigation of a State are exclusively under state regulations. *Moore v. American Transp. Co.* 65 U. S. 24 How. 1, 16 L. ed. 674.

Commerce upon lakes lying within the State, such as the Cayuga or Seneca, is not within the regulation of Congress. *Ibid.*; *Walker v. Western Transp. Co.* 70 U. S. 8 Wall. 155, 16 L. ed. 174; *The War Eagle*, 6 Biss. 365; *The Mamie*, 5 Fed. Rep. 321.

The Alabama Act of 1897, to provide for the improvement of the river, bay and harbor of Mobile, is not invalid, as conflicting with the commercial

29; Gould, Waters, §§ 248, 248a, 249; Ang. Tide Waters, p. 92 *et seq.*; *Fitchburg R. Co. v. Boston & M. R.* 8 Cush. 88; Cooley, Const. Lim. p. 542; *Davidson v. Boston & M. R.* 8 Cush. 105; *Conway v. Taylor*, 66 U. S. 1 Black. 608, 17 L. ed. 191; *Mills v. St. Clair County*, 49 U. S. 8 How. 569, 13 L. ed. 1901; Gould, Waters, citing *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 506; *Newport & O. Bridge Co. v. United States*, 105 U. S. 470, 26 L. ed. 1148.

Navigation on navigable waters is a great public right, and all grants of property in the soil bordering thereon, so far as they carry with them riparian rights, are given with the implied condition that the latter shall be subordinated at any time to the necessities of navigation at the will of the government.

Gould, Waters, § 149, citing *Lyon v. Fishmongers Co.* L. R. 1 App. Cas. 662; *Ewing v. Colquhoun*, L. R. 2 App. Cas. 889.

Even as to the overflow of their land during freshets, to which they say we have caused them to be more subject, plaintiffs do not stand in the position of the owners of land above mean high-water level. Their lands are all reclamations from the bed of the river.

When the sea or a bay is named as a boundary line, ordinary high-water mark is always intended where the common law prevails.

*United States v. Pacheco*, 69 U. S. 2 Wall. 587, 17 L. ed. 865; *Martin v. Waddell*, 41 U. S. 16 Pet. 411, 10 L. ed. 1018; *Barney v. Keokuk*, 94 U. S. 824, 24 L. ed. 224; *Com. v. Roxbury*, 9 Gray, 491.

The *jus publicum*, the right of the govern-

ment over sea-shores and tide-waters, extends to high-water mark.

*Com. v. Roxbury*, *supra*.

*Messrs. Lawton & Cunningham*, for plaintiff, *contra*:

Property signifies the right or interest which one has in land or chattels.

*Morrison v. Semple*, 6 Binn. 94; *Jackson v. Housel*, 17 Johns. 281.

The word "property" includes "rights in tide-waters and running streams."

Lewis, Em. Dom. § 54; *Old Colony R. Corp. v. Plymouth*, 14 Gray, 155.

Every proprietor past whose land a stream of water flows has a right that it shall continue to flow to and from his premises in the quantity, quality and manner in which it is accustomed to flow by nature.

Ang. Watercourses, §§ 90-96; Gould, Waters, § 204; Lewis, Em. Dom. § 61.

It is a violation of his rights to increase the quantity of waters flowing past his lands by artificial means not connected with the reasonable use of the lands above.

Wood, Nuisances, 1st ed. § 865.

A right to have the water of a stream flow off from one's premises is property.

Lewis, Em. Dom. § 67, citing *Trenton Water Power Co. v. Raff*, 36 N. J. L. 835.

Plaintiffs' property has been taken.

*Baltimore v. Appold*, 43 Md. 442; *Gardner v. Newburgh*, 7 Am. Dec. 532, 2 Johns. Ch. 164, 1 L. ed. 88; *Druley v. Adam*, 102 Ill. 177; *Pumpelly v. Green Bay & M. C. Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557; *Cooper v. Williams*, 4 Ohio, 253, 23 Am. Dec.

power of Congress, nor because the expenses of the work are imposed on a single county. *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 233; *Washer v. Bullitt County*, 110 U. S. 564, 28 L. ed. 261; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 708, 36 L. ed. 571.

Reasonable compensation for the use of artificial facilities for the improvement of navigation is not an impost upon such navigation or an interference with its freedom, within the meaning of the Ordinance of 1787. *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487. See *Cannon v. New Orleans*, 87 U. S. 20 Wall. 577, 23 L. ed. 417; *Cincinnati, P. B. & P. Packet Co. v. Catlettburg*, 105 U. S. 559, 26 L. ed. 1169.

The authority of Illinois over the rivers of the State is not affected by the Ordinance of 1787, providing that navigable waters leading into the Mississippi and St. Lawrence should become highways and forever free. *Huse v. Glover*, *supra*.

#### Admission of new States.

The first clause of section 3 of art. 4 of the Federal Constitution, in relation to the admission of new States into the Union, refers to States to be formed out of territory to be acquired as well as that already ceded. *Dred Scott v. Sandford*, 60 U. S. 19 How. 612, 15 L. ed. 786.

Congress is vested with the sole power of admitting new States into the Union. *Brittle v. People*, 2 Neb. 198.

On the admission of a new State it at once becomes entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. *Pollard v. Hagan*, 44 U. S. 8 How. 212, 11 L. ed. 565; *Permoli v. First Municipality of New Orleans*, 44 U. S. 8 How. 559, 11 L. ed. 739; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442; *Cardwell v. American River Bridge Co.* 118 U. S. 205, 28 L. ed. 959; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487; *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280, 30 L. ed. 368.

When a new State was admitted into the Union from the Northwest Territory the Ordinance of 1787 ceased to have any operative force in limiting its powers of legislation as compared with those possessed by the original States. On the admission of such new State it at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to them. *Willamette Iron Bridge Co. v. Hatch*, 135 U. S. 9, 31 L. ed. 683, citing *Pollard v. Hagan*, 44 U. S. 8 How. 230, 11 L. ed. 578; *Permoli v. First Municipality of New Orleans*, *Escanaba & L. M. Transp. Co. v. Chicago*, *Cardwell v. American River Bridge Co.* and *Huse v. Glover*, *supra*.

The clause in the Admission Act of a new State prohibiting physical obstructions and impediments in navigable waters without the consent of Congress prohibits only the imposition of duties for the use of the navigation, and any discrimination denying to citizens of other States the equal right to such use in no way affects the right of the States to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits. *Pound v. Turok*, 95 U. S. 459, 24 L. ed. 525; *Cardwell v. American River Bridge Co.*, *Hamilton v. Vicksburg, S. & P. R. Co.* and *Huse v. Glover*, *supra*; *Sands v. Manistee River Imp. Co.* 129 U. S. 283, 31 L. ed. 149.

*Co-ordinate powers of general and state governments.*  
Every nation acquiring territory by treaty or otherwise must hold subject to the Constitution and laws of its own government, and not according to the government ceding it. *Pollard v. Hagan*, 44 U. S. 8 How. 212, 11 L. ed. 565.  
The powers of the general government and of the State, although both exist and are exercised

749; *Estabrook v. Peterborough & S. R. Co.* 13 Cush. 324; *Delaware & R. Canal Co. v. Lee*, 22 N. J. L. 243; *Evansville & O. R. Co. v. Dick*, 9 Ind. 433; *Arnold v. Hudson River R. Co.* 55 N. Y. 661; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 7 Am. & Eng. R. R. Cas. 596; *Red River Bridge Co. v. Clarksville*, 1 Sneed, 176, 60 Am. Dec. 143; *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 449; *Avery v. Fox*, 1 Abb. U. S. 246; *United States v. Great Falls Mfg. Co.* 113 U. S. 645, 28 L. ed. 846; *Great Falls Mfg. Co. v. Atty-Gen.* 124 U. S. 581, 31 L. ed. 537. See also *Crocker v. New York*, 15 Fed. Rep. 405.

When the United States, by such formal proceedings as are necessary to bind it, takes for public use, as for an arsenal, custom-house or other purposes, land to which it asserts no claim or title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value.

*Langford v. United States*, 101 U. S. 841, 25 L. ed. 1010; *United States v. Great Falls Mfg. Co.* 113 U. S. 645, 28 L. ed. 846; *Great Falls Mfg. Co. v. Atty-Gen.* *supra*; *Johnson v. United States*, 4 Ct. Cl. 243.

*Speer, J.*, delivered the opinion of the court:

The plaintiffs filed their petition under the provisions of the Act of Congress of March 3, 1887 (24 Stat. at L. p. 505), to recover from the United States compensation for injury to the value of their lands caused by the erection of works by the government for the improvement of the navigation of the Savannah River.

within the same territorial limits, are yet separate and distinct sovereignties. *Ableman v. Booth*, 62 U. S. 21 How. 506, 16 L. ed. 169, cited in *Riggs v. Johnson County Suprs.* 73 U. S. 6 Wall. 194, 18 L. ed. 776; *United States v. Tarble*, 80 U. S. 13 Wall. 403, 20 L. ed. 598; *Claffin v. Houseman*, 98 U. S. 137, 23 L. ed. 332; *Covell v. Heyman*, 111 U. S. 132, 23 L. ed. 393.

The power of Congress over the territory of the United States extends to all rightful subjects and methods of legislation not denied to it by the Constitution, and consistent with the spirit and genius of the same and the purpose for which such territory may have been acquired. *Nelson v. United States*, 30 Fed. Rep. 112.

The power of a State over bridges across its navigable streams is plenary, until Congress acts on the subject. *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442; *Gilman v. Philadelphia*, 70 U. S. 8 Wall. 718, 18 L. ed. 96, cited in *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 705, 27 L. ed. 589; *Miller v. New York City*, 109 U. S. 398, 27 L. ed. 976; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 553, 30 L. ed. 233; *Hamilton v. Vicksburg*, 8 & P. R. Co. 119 U. S. 234, 30 L. ed. 365; *Holyoke Water Power Co. v. Connecticut River Co.* 22 Blatchf. 144.

A State may authorize the erection of a dam across a navigable stream. Until action has been taken by Congress, such Act is not repugnant to the power to regulate commerce. *Pound v. Turok*, 95 U. S. 459, 24 L. ed. 525, citing *Wilson v. Blackbird Creek Marsh Co.* 37 U. S. 3 Pet. 245, 7 L. ed. 412; *Crandall v. Nevada*, 73 U. S. 6 Wall. 35, 18 L. ed. 745; *Willamette Iron Bridge Co. v. Hatch*, 126 U. S. 1, 31 L. ed. 633; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959.

When a city is made a port of entry, Congress does not thereby assume to detract from the sovereign rights before exercised by each State over its own public rivers, including the power to make 12 L. R. A.

The petition avers that the plaintiffs owned rice plantations on Hutchinson's Island in the Savannah River and on the mainland opposite. These lands have been prepared at large expense for the purpose of rice cultivation, and have their chief value because of that fact. It is essential to the cultivation of rice on such plantations that there shall be a system of canals both for flooding and draining the rice fields. The lands in question were drained into the front river, that is the river proper, prior to the acts on the part of the government complained of. The bottoms of the plaintiffs' ditches and the sills of the trunks and flood-gates were above low-water mark, and their system of drainage was complete, and it is complained that the erection by the government of what is called the cross-tides dam, running from the upper end of Hutchinson's Island to the lower end of Argyle Island, cuts off all the flow of water from the stream connecting front and back rivers, has raised both the high and low water levels in front river, and has not only destroyed the facilities for draining these lands into front river, but has rendered it necessary to raise the levees around the rice fields to prevent flooding the fields at high water. This it is alleged has unfitted the lands for the purpose of rice culture, and makes it necessary that new drainage into back river must be provided where the water levels are suitable. The expense of doing this will amount to \$10,000, and plaintiffs insist that they are thus damaged to that extent. This cross-tides dam was erected by the United States as a part of a system of harbor improvements with the full

bridges over them. (Decision of circuit court affirmed on equal division.) *Milnor v. New Jersey R. & Transp. Co.* (U. S.) 16 L. ed. 799.

A power of government which actually exists is not lost by nonuser. *Chicago, B. & Q. R. Co. v. Cutts* ("C. B. & Q. R. Co. v. Iowa"), 94 U. S. 155, 24 L. ed. 94.

#### Right of eminent domain.

"All the property in a State is derived from or protected by its government, and hence it is held subject to its wants in taxation, and to certain important public uses both in war and in peace." *Vattel*, Law of Nations, § 244; 2 Kent, Com. 270; 1 Bl. Com. 139.

Some ground this public right on sovereignty (2 Kent, Com. 339; Grotius, bk. 1, chap. 1, § 6), some on necessity, and for useful purposes (Grotius, bk. 3, chap. 14, § 7; Puffendorf, Law of Nations, bk. 3, chap. 5, § 7; Bynkershoek, Law of War, bk. 2, chap. 15. And see note to *Gardner v. Newburgh*, 2 Johns. Ch. 163, 1 L. ed. 333; *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 539, 13 L. ed. 543; some on implied contract. *Bogert v. United States*, 2 Ct. Cl. 164.

To render the exercise of the legislative power to take or injure private property valid, a fair compensation must in all cases be previously made. See note to *Barre R. Co. v. Montpelier & White River R. Co.* (Vt.) 4 L. R. A. 735.

Private property, however, is not "damaged for public purposes" by a public improvement within a constitutional provision requiring compensation for such damages where no invasion is made of any right or use of such property; in such case it is *damnum absque injuria*. See note to *Peel v. Atlanta* (Ga.) 3 L. R. A. 737.

Power of general government in exercise of the right.

The right of eminent domain over the shores

knowledge of the fact that the drainage of plaintiffs' land would be thus impaired and destroyed. The case of the plaintiffs depends upon the following propositions:

1. The action of the government officials in erecting the cross-tides dam amounts to a taking of their property for public use without just compensation.

2. The right of drainage into the river is appurtenant to the land, and has been taken in the same manner.

3. The government by taking this property entered into an implied contract for the compensation of complainants.

4. Their right to this compensation is a claim arising under the Constitution of the United States; and—

5. Also under an Act of Congress, to wit, the Act authorizing harbor improvements.

The defendant demurred to the petition upon the grounds (1) that the plaintiffs have not set forth a cause of action against the government; (2) in so far as it is set forth it is an action *ex delicto*, and of actions sounding in tort against the government the court has no jurisdiction.

There are other grounds, but the decision must depend, in our opinion, upon the grounds stated.

The material clause of the Act of Congress under which it is sought to maintain this suit confers jurisdiction on the court of claims to try:

1. All claims against the United States founded upon the Constitution of the United States or any law of Congress except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United

States were suable; provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war and commonly known as war-claims, or to hear and determine other claims which have heretofore been rejected or reported adversely by any court, department or commission authorized to hear and determine the same.

2. That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of claims does not exceed \$1,000, and the circuit court of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds \$1,000, and does not exceed \$10,000. All causes brought and tried under the provision of this Act shall be tried by the court without a jury. 43 Stat. at L. p. 505.

It appears from these provisions of the Statutes that the government has, with somewhat unusual magnanimity, opened the portals of its courts to a very large class of litigants having claims against it. It is equally observable that certain marked and distinct limitations upon this enlargement of the jurisdiction of the courts were defined. It will be obvious also that it was not the purpose of this legislation to create new causes of action, but merely to provide a convenient form for the adjudication of certain specified controversies.

The first and the more important inquiry presented by the demurrer is this: The jurisdiction being granted, do the facts set out in their entirety constitute a cause of action between plaintiffs and the government?

The entire declaration, with the bill of particulars, must be considered in order to determine this question,—otherwise a very partial and indeed imperfect view of the claim might

and the soil under navigable waters for all municipal purposes belongs exclusively to the States within their respective territorial jurisdiction, and they only have the constitutional power to exercise it; but this power can never be so used as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States has been invested by Congress, as over the navigable waters. Pollard v. Hagan, 44 U. S. 3 How. 215, 11 L. ed. 555; Good Title v. Kibbe, 50 U. S. 9 How. 473, 13 L. ed. 233; Doe v. Beebe, 54 U. S. 13 How. 26, 14 L. ed. 36; Smith v. Maryland, 59 U. S. 18 How. 74, 15 L. ed. 271; Gilman v. Philadelphia, 70 U. S. 3 Wall. 720, 13 L. ed. 99; Mumford v. Wardwell, 73 U. S. 6 Wall. 436, 13 L. ed. 761; Weber v. State Harbor Comrs. 85 U. S. 18 Wall. 68, 21 L. ed. 802; St. Clair County v. Livingston, 90 U. S. 23 Wall. 63, 23 L. ed. 63; Barney v. Keokuk, 94 U. S. 837, 24 L. ed. 228; McCready v. Virginia, 94 U. S. 394, 24 L. ed. 243; Newport & C. Bridge Co. v. United States, 105 U. S. 491, 26 L. ed. 1156; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 699, 27 L. ed. 448; Huse v. Glover, 119 U. S. 546, 30 L. ed. 489; Woodruff v. North Bloomfield Gravel Min. Co. 13 Fed. Rep. 786; Seabury v. Field, McAll. 4; Mining Debris Case, 9 Sawy. 499; Shively v. Welch, 10 Sawy. 141.

#### *State sovereignty; police powers.*

There must be a direct statute of the United States in order to bring within the scope of its 12 L. R. A.

laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the State, such obstructions being offenses against the States. For illustrations, see Wilson v. Blackbird Creek Marsh Co. 37 U. S. 2 Pet. 245, 7 L. ed. 412; Pollard v. Hagan, 44 U. S. 3 How. 229, 11 L. ed. 573; Milnor v. New Jersey R. & Transp. Co. (U. S.) 16 L. ed. 799; Gilman v. Philadelphia, 70 U. S. 3 Wall. 724, 13 L. ed. 99; Pound v. Turok, 95 U. S. 459, 24 L. ed. 523; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 443; Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959; Hamilton v. Vicksburg, S. & P. R. Co. 119 U. S. 290, 30 L. ed. 393; Huse v. Glover, 119 U. S. 543, 30 L. ed. 487; Sands v. Manistee River Imp. Co. 123 U. S. 238, 31 L. ed. 149; Parkersburg & O. Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584.

Congress is not deemed to have assumed police power over a navigable river in consequence of expenditures in improving its navigation. Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 7 Sawy. 127, 9 Sawy. 643.

A state statute authorizing a dam which stops the navigation of a navigable creek up which the tide flows for some distance, for the purpose of excluding the water from a marsh, to enhance the value of property adjoining, and to improve the health of the inhabitants, is not unconstitutional in the absence of any Act of Congress upon the subject. Wilson v. Black Bird Creek Marsh Co. 37 U. S. 2 Pet. 245, 7 L. ed. 412.

be formed. The question is of importance in contemplation of the extensive and generous appropriations annually made by the national Legislature for the improvement of navigation, and thus for the general advancement and development of the interests of the entire country, and when we consider also the great volume of litigation which may depend upon the decision of cognate questions. It is insisted by the plaintiffs that the action of the government constitutes a taking of their property without just compensation, in violation of the 5th Amendment of the Constitution, which provides: "Nor shall private property be taken for public use without just compensation."

What is a taking of private property for public use, in the meaning of this provision of the Constitution?

In the case of *Northern Transp. Co. v. Chicago*, 99 U. S. 640, 25 L. ed. 837, decision by Mr. Justice Strong, for the court, a statement of the law fundamental to this inquiry will be found. In that case the action was to recover damages for injuries alleged to have been sustained by the plaintiffs in consequence of the action of the city authorities, in constructing a tunnel or passageway under La Salle Street, and under Chicago River where it crosses that street. The plaintiffs were the lessees of a lot, bounded on the east by the street and on the south by the river, and the injury of which they complained was that by the operations of the city they were deprived of access to their premises, both on the side of the river and of the street, during the prosecution of the work. It is true, in that case it was not claimed that the obstruction was a permanent one, and it appeared, as in the case now before the court, that there were no averments that the works were unnecessary. They were indeed indispensable for the construction of the tunnel. Also, as in this case, it was argued that the erection of the coffer dam was not only a public nuisance, but caused special damage to

the plaintiff for which the right of action was maintainable. The argument was met by the following observations by the court: "That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes. A Legislature may, and often does, authorize and even direct acts to be done which are harmful to individuals, and which without its authority would be nuisances; but in such a case, if the Statute be such as the Legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power, a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer; but then the right is a creature of the Statute. It has no existence without it." It was there insisted that, though the city had the legal right to construct the tunnel, and to do what was necessary for its construction, subject to the condition that in doing the work there should be no unnecessary interference with private property, yet it was liable to make compensation for the consequential damage to persons specially injured. To this proposition the court withheld its assent.

The learned justice adds "that acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority." "The extreme qualification of the doctrine," continues Justice Strong, "is to be found, perhaps, in *Pumpelly v. Green Bay & M. C. Co.*, 80 U. S. 13 Wall. 166, 20 L. ed. 557, and in *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a taking. In

#### *Title to soil under navigable waters.*

The State holds the title to the soil in navigable waters to low-water mark in trust for the people, and chiefly for the protection of the right of navigation. See note to *Miller v. Mendenhall* (Minn.) 8 L. R. A. 89; *St. Louis, I. M. & S. R. Co. v. Ramsey*, 8 L. R. A. 559, 58 Ark. 814.

Under the Riparian Laws of New Jersey, the lands below high-water mark constituting the shores and submerged lands of the navigable waters of the State were the property of the State as sovereign. *Hoboken v. Pennsylvania R. Co.* 124 U. S. 656, 81 L. ed. 543.

So the title to lands covered by rivers which are navigable in fact is in the State, whether the tide ebbs and flows in them or not. *St. Louis, I. M. & S. R. Co. v. Ramsey*, *supra*; *Fulmer v. Williams*, 1 L. R. A. 603, 122 Pa. 191.

The beds of navigable rivers between the lines of ordinary low water on their opposite sides belong to the State, to be held and controlled by and for the public. *Fulmer v. Williams*, *supra*; *Pursell v. Stover*, 110 Pa. 43; *Hobson v. Monteth*, 15 Or. 251.

The public easement of access to navigable waters is distinct in its essential qualities from the title of the State in lands under tide-waters. The former inheres in the State in its sovereign capacity, the latter is strictly proprietary; and a grant or the proprietary title will not release or extinguish the 13 L. R. A.

sovereign right not necessarily included within the scope of the grant. *State v. Haight*, 36 N. J. L. 471.

All navigable waters within the territorial limits of the State and the soil under them belong in actual propriety to the public; the riparian owner by the common law has no peculiar rights therein as incidents of the estate and the privileges he possesses by the local custom, or by force of the Wharf Act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the Legislature. *Stevens v. Paterson*, & N. B. Co. 34 N. J. L. 532.

In *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 384, the court held that the owner of land bounded by a navigable river has certain riparian rights, such as free access, the right to make a landing, wharf or pier for his own use or for the use of the public. *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 456.

At the time of the platting of Astoria, in 1847, the title of the land lying between high and low water mark upon the Columbia River was in the State; it could not be conveyed by a riparian owner. *Hobson v. Monteth*, 15 Or. 251.

Riparian rights of owners bounding on navigable streams, rule in various States. See note to *Parker v. West Coast Packing Co.* (Or.) 5 L. R. A. 61; *Fulmer v. Williams* (Pa.) 1 L. R. A. 603; *Hanford v. St. Paul & D. R. Co.* (Minn.) 7 L. R. A. 722.

these cases there was a physical invasion of the real estate of the private owners and a practical ouster of his possession."

In the case of *Pumpelly v. Green Bay & M. O. Co.*, *supra*, to which the reference above quoted is made, the plaintiffs' demand for damages was based upon the following averments:

The defendants had erected a dam across Fox River, the northern outlet of Lake Winnebago, by which the waters of the lake were raised so high as to forcibly and with violence overflow the plaintiff's land, from the time of the completion of the dam in 1861 to the commencement of this suit, the water coming in with such violence as to tear up his trees and grass by the roots and wash them, with his hay by tons, away, to choke up his drains and fill up his ditches, to saturate some of his lands with water, and to dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring them.

It is to be observed, also, that the waters of Lake Winnebago were raised so high as to forcibly and with violence overflow all the lands of the plaintiff from the time of the completion of the dam in 1861 until the commencement of the suit in 1867. It was insisted by the defendants that they had erected a dam in accordance with the Act of Congress, and that the lands in question had not been taken or appropriated. Upon this contention, *Mr. Justice Miller*, in rendering the decision on appeal, announced: "We are of the opinion that the Statutes did not authorize the erection of a dam which would raise the water of the lake above the ordinary level," thus indicating, as will presently appear, a controlling distinction from the facts before the court here.

With reference to the contention of the defendants that there was no taking of the plaintiff's land within the meaning of the constitutional provision, and that the damage was a consequential result of such use of a navigable stream as the government had a right to make for the improvement of its navigation, *Justice Miller* further observes: "It would be a very curious and unsatisfactory result if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principle of common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrain from the absolute conversion of real property to the uses of the public, it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private rights under the pretext of public good, which had no warrant in the laws or practices of our ancestors."

To this cogent statement, however, the

learned justice adds: "We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked, that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers and other highways for the public good there is no redress; and we do not deny that the principle is a sound one in its proper application to many injuries to property so originating. And when in the exercise of our duties here we shall be called upon to construe other State Constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of the opinion that the decisions referred to have gone to the utmost limit of sound judicial construction in favor of this principle, and in some cases beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand and other materials, or by having any artificial structure placed on it so as to effectually destroy it or impair its usefulness, it is a taking within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principles. Beyond this we do not go, and this case calls us to go no further." It seems evident, therefore, that an "actual" invasion of property is essential for the full application of the doctrine thus announced.

The case just quoted declared, as we have seen, in *Northern Transp. Co. v. Chicago*, *supra*, to be a somewhat extreme statement against the public of what constitutes a taking of property for the public use is really distinguishable from that before the court. In the one case the construction of the dam so as to raise the waters of the lake was not authorized. In the other the cross-tides dam, as it stands, about which the complaint is made, is part of an authorized system of river and harbor improvements, and this has been expressly so decided by the supreme court itself in the case of *South Carolina v. Georgia*, 98 U. S. 4, 23 L. ed. 782, a case having in question the legality of this identical structure. The obstruction then, unlike that in the case of *Pumpelly* against the *Green Bay & M. O. Company*, is fully authorized. It will be further observed that in the first case there was a continuous and virtually permanent submersion of the land by the waters of the lake, and its practical destruction for all the valuable purposes for which it might otherwise have been utilized.

In the case at bar, it is simply complained that the drainage of the rice land is impaired by raising the low-water level of the Savannah River two or three feet, thus making the bottoms of the plaintiffs' ditches and canals and sills and flood-gates from one to two feet below the low-water level, and by increasing the liability of said rice lands to overflow, the frequently occurring freshets in the Savannah River rendering it necessary for the plaintiffs to raise banks surrounding the rice fields.

Aside from the doubt which exists as to the right, as against the public, of the plaintiff to divert the waters of this navigable stream to the injury of navigation or to use them for any other purpose save that of navigation, which will be presently considered, it is evident that

the injury complained of is by no means so direct and absolute as in the case of *Pumpelly v. Green Bay M. O. Co.*, *supra*. It is moreover true that whatever may be the franchise of the plaintiff in the lands, submerged by the flow of the tide, this franchise was subordinate to the power of Congress to provide for the necessities of navigation by means of which the interstate and foreign commerce of the country is carried on. Wood, Nuisances, § 615. The paramount authority of Congress to control the entire subject of the improvement of navigation upon waters of the United States is affirmed by the Supreme Court of the United States, not only in the case of *South Carolina v. Georgia*, *supra*, but also in the case of the *Newport & O. Bridge Co. v. United States*, 105 U. S. 470, 26 L. ed. 1148, and a multitude of other cases.

"There can be no doubt of the general doctrine on this subject. It is within the power of the Legislature to change or obstruct the course of public waters as the public convenience may require it. Those upon whom authority is conferred for this purpose are not liable for the consequential injuries resulting from their acts, but could not trespass upon or cut a channel through private lands without making compensation for the land so taken." Gould, Waters, §§ 248, 248a, 249; Ang. Tide-Waters, p. 93 *et seq.*

It is long settled that the right of the riparian proprietor is to be considered as a valuable property right, although in the language of *Mr. Justice Miller*, in *Yates v. Milwaukee*, 77 U. S. 10 Wall. 504, 19 L. ed. 986: "It must be enjoyed in due subjection to the rights of the public." Rights of this character are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use, or for the use of the public, subject to such general use or regulation as the Legislature may see proper to impose for the protection of the rights of the public, whatever those rights may be.

In the case of *Miller v. Mendenhall*, 43 Minn. 95, 8 L. R. A. 89, it is held that the riparian proprietor is entitled to fill in and make improvements in shallow water in front of his land to the line of navigability, and this right though subject to state regulations can only be interfered with by the State for public purposes. See also *Ladies Seamen's Friend Soc. v. Halstead*, 88 Conn. 144; *Boston v. LeOravo*, 58 U. S. 17 How. 426, 15 L. ed. 118; *Gregory v. Forbes*, 96 N. C. 77; *People v. Baltimore & O. R. Co.*, 117 N. Y. 150; *Steers v. Brooklyn*, 101 N. Y. 51, 1 Cent. Rep. 798; *St. Paul & Pac. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 273, 19 L. ed. 74; *Parker v. West Coast Packing Co.* 5 L. R. A. 61, 17 Or. 510; *Truck v. Olds*, 29 Fed. Rep. 788.

There cannot be any doubt, however, that all of these rights are subject to the paramount right of the public to use the river for navigation; nevertheless, if the structures described in many of the cases above cited are absolutely destroyed or injured for the benefit of the public, the riparian proprietor is entitled to compensation. It being true, however, in this case that whatever rights the plaintiffs may possess are subordinate to the paramount public right to improve the navigation of the river, and that the structure of the defendant is not on the

land of the plaintiffs, it follows that the plaintiffs' demand must depend upon the alteration in the flow between high and low water mark, of the navigable stream itself. A franchise so depending has been held to be not private property, but an incorporeal hereditament. *Parker v. West Coast Packing Co. supra*.

But whether the franchise or usufruct of the plaintiffs in the flow of the stream between high and low water mark, for injury to which the suit is brought be strictly an incorporeal hereditament or otherwise, it would appear difficult upon reason or authority to justify the action they have brought. It would seem to be otherwise if the stream were not navigable, but upon navigable waters any franchise depending upon the use of the stream itself seems to be common to all and to relate to the purposes of navigation and to facilities therefor.

The recent case of *Fulmer v. Williams*, 129 Pa. 191, 1 L. R. A. 608, is an instructive decision upon this topic. In that case the plaintiff owned a factory on the west bank of the Lehigh River, and had constructed a dam to an island about eighty feet from that bank, the effect of which was to raise the water about one foot above its ordinary level, thus supplying the water-power for his mill. The defendant, Fulmer, owned land adjoining, and next above, the land of the plaintiff. The evidence showed that he deliberately and maliciously filled up the channel below low-water mark for the express purpose of depreciating the value of the plaintiff's property and of destroying his water-power. The Lehigh River is a navigable stream and the plaintiff had no grant from the State to use the water for any purpose. The defendant denied that the plaintiff had title to the water-power, as riparian owner or otherwise. The court below instructed the jury, however, that between low and high water marks the plaintiff was the owner of the soil, and, subordinate to the right to navigate the stream by the public, he had a right to use the water and could recover for the destruction of his water-power so far as it occurred with relation to the water flowing above the low-water mark.

Upon this subject, the supreme court, Williams, J., delivering the opinion, held that "the grant of land bounded upon a stream not navigable extends, *usque ad flum medium aqua*; but a grant of land bounded upon a navigable river extends to ordinary low-water mark only. Between this line and high-water mark the land of the grantee is by the nature and necessities of the situation subject to a servitude in favor of the public. . . . The grantee takes subject to the rights of the public in and upon the highway, and, as between him and the public, he may use his lands below the line of high water for such purposes only as do not interfere with the free flow and navigation of the water that flows over it."

"What rights," the learned justice continues, "has a riparian owner in the water of a navigable river flowing between high and low water marks? The water of a stream is not the subject of ownership in the ordinary sense of that word. . . . The right to the use of the water follows the ownership of the bed in which it flows. The Commonwealth is therefore the owner of the rivers and holds them

for the use of its citizens. They are public property, natural highways, open to all who may have occasion to use them. When the volume of the stream swells in time of high water, its surface remains the surface of the highway, and the riparian owner must do nothing that shall interfere with the use of the highway or any part of it by the public up to the line of high water. . . . The owner of the shore, having no ownership in the water, has, as between himself and the Commonwealth, no greater rights in it than any other citizen. He has no right to erect a dam to turn the water to his mill without a grant from the Commonwealth of the right so to do; and if he erects such a dam without a grant, he is a trespasser and acquires no title to the water-power resulting therefrom. He stands in the same position as an intruder upon a public road, without right and liable to removal at any moment. He has an indisputable right as a citizen to the use of the river as a public highway, but as a riparian owner he has no right to obstruct its flow, or to divert its waters, except for domestic purposes, and within certain limits for purposes of irrigation. If he does erect a dam and turn the water to his mill, he ordinarily infringes the public right only. . . . Applying these principles to the case now before us, it is clear that the plaintiff was allowed to recover for what did not belong to him. He had no title to the water whether above or below low-water mark, and he could have no legal right to the power resulting from the erection of his dam. Its destruction was therefore *damnum absque injuria*."

This case seems altogether applicable to the use of the waters of the Savannah River by the plaintiff for the purpose of flooding his rice fields. The Savannah has been repeatedly held to be a navigable river. See the recent case of *Lawton v. Comer*, 7 L. R. A. 55, 40 Fed. Rep. 480, affirmed by the Supreme Court of the United States, decision rendered May 25, 1891.

If the malicious and deliberate diversion of the water by the defendant in the case of *Fulmer v. Williams*, *supra*, so as to destroy the water-power of the plaintiff's mill, is *damnum absque injuria*, much more is this true of the diversion of the waters of the Savannah from the rice canals and ditches of the plaintiff by the officers of the government for the improvement of the navigation of the stream, and for the most important uses of the public.

In the case of *Henry v. Newburyport*, 149 Mass. 582, 5 L. R. A. 179, it was held that the owner of lands not accessible to navigation from the sea has no cause of complaint because of being deprived by the erection of walls, or by the filling up of flats, of the ebb and flow of the tide to his premises, or the right thereof to drain from the lands of others; and further, that such an owner can only maintain an action for damages by reason of nuisance when some right of his own has been invaded.

In the case of *Fitchburg R. Co. v. Boston & M. R.*, 8 Cush. 88, it was held, Chief Justice Shaw rendering the opinion, that if the piers of a bridge which is authorized by the Legislature change tidal currents, a littoral proprietor is not entitled to recover the expense of a structure necessary to protect his land. It is 12 L. R. A.

incident to the power of the Legislature to regulate a navigable stream so as best to promote the public convenience.

These cases are valuable because in Massachusetts, as in Georgia, the low-water line is the boundary of littoral proprietors on tide-waters.

In the case of *Davidson v. Boston & M. R.*, 8 Cush. 105, certain riparian proprietors were using for their mills and for navigation in connection therewith, certain flats from which the tide wholly ebbs, lying between up-land territory and navigable water. The plaintiff had erected a mill, the motive power of which was the ebb and flow of the tide. The defendant, a railroad company, which the Legislature had required by the provisions of its charter to pay for private property taken by it, built a solid embankment across the flats, thereby entirely shutting off the flow of the tide and thus destroying the value of the plaintiff's mill. It was held by the court upon suit brought to recover the value of the water right taken, that the plaintiff had no right as against the public to have those flats kept open.

The plaintiffs here rely upon the Act of the General Assembly of Georgia of 1790, Code 2882. It is as follows: "All persons owning or who may hereafter own lands on any watercourses in this State, are authorized and empowered to ditch and embank their lands so as to protect the same from freshets and overflows in said watercourses; provided, always, that the said ditching and embanking does not divert said watercourse from its ordinary channel; but nothing shall be so construed as to prevent the owners of land from diverting unnavigable watercourses through their own lands."

Aside from the fact that this would seem to deny to the plaintiffs the right to divert the water of a navigable stream through their lands, the Act was passed after the adoption of the Constitution of the United States by the State of Georgia, and is of course subordinate to that provision relating to the control of commerce, and as a consequence of the navigable waters by Congress. And there are many authorities to the effect that this control is paramount, even where the State has undertaken to make enactments upon the subject of navigation itself.

Gould, Waters, §§ 27, 149, citing *Lyon v. Fishmongers Co.* L. R. 1 App. Cas. 662; *Evring v. Colquhoun*, L. R. 3 App. Cas. 839; *South Carolina v. Georgia*, 38 U. S. 4, 23 L. ed. 782; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959; *Newport & C. Bridge Co. v. United States*, 105 U. S. 670, 26 L. ed. 1143; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 288; *Com. v. Roxbury*, 9 Gray, 491.

Very great importance is attached by the plaintiffs to the decision of the Supreme Court of the United States in the case of *United States v. Great Falls Mfg. Co.*, 112 U. S. 647, 28 L. ed. 847. There, however, was an actual appropriation of the plaintiff's lands, and the water-power they were bought to control. There was an actual conversion of private property to public use. Besides, the appropriation was not for the purpose of the improvement of a navigable stream, and the



property of the plaintiffs in that case, unlike that involved in the question before this court, was in no way subservient to the government for the public use for which it was taken. It was a distinct exercise of the right of eminent domain, and not, as in the case here, the proper exercise of the legitimate and ordinary functions of the government from which a consequential damage to the plaintiffs may have resulted. Moreover, Congress had distinctly recognized the right of the Great Falls Manufacturing Company to compensation, and had submitted the liability of the United States, for the conversion of the property, to arbitration, the results of which merely were affirmed by the Supreme Court of the United States.

Upon a careful consideration of all that has been advanced by the plaintiffs in support of their claim, we are of the opinion that all the right they have in the ebb and flow of the tide of the Savannah River is subordinate to the control of the government over that navigable stream for its free navigation by the public.

We are further of the opinion that the free navigation of that stream comprehends necessarily all of those improvements which the government is at liberty to make, to facilitate and enlarge the interstate and foreign commerce carried upon its waters, and, the sovereign authority of the nation having determined that the waters of the river shall be confined for the purpose of scouring and deepening the channel, the plaintiffs have no legal claim against the government for the diversion of those waters from their rice fields, or for an increase in the flow of the tide which will fill the canals and ditches they have constructed on the level between low and high water mark, a level which is subservient to the government for the purposes of navigation.

It must be observed, with relation to the claim of damage caused by the overflow of the plaintiffs' lands during the freshets, that they do not stand in the attitude of landowners above mean or high-water level. Their lands are reclamations, as appears from the declaration, which would be covered not only by ordinary high water, but by the ordinary flow of the tide. The government, as we have seen, has found it necessary to change this flow for the purposes of navigation, and the reclamations of the plaintiffs are subservient to that necessity. *Com. v. Roxbury*, 9 Gray, 491-495; *United States v. Pacheco*, 69 U. S. 2 Wall. 587, 17 L. ed. 865; *Martin v. Waddell*, 41 U. S. 16 Pet. 411, 10 L. ed. 1018; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; Gould, Waters, § 27.

If it had been possible, however, to have reached a different conclusion as to the rights of the plaintiffs, we are clearly of the opinion that the court has no jurisdiction to hear and determine the plaintiffs' demand, because it makes a case sounding in tort, and therefore is specially excepted from the operation of the Statute extending the jurisdiction of the court of claims to the circuit and district courts of the United States. If it were an action pending between individuals, it would be necessarily *ex delicto*. It is a nuisance to stop or divert waters that used to run to another's meadow or mill. 3 Bl. Com. 218. Running out a dam into the waterway of a navigable river, giving new direction to the current, causing

his neighbor's land to be washed away, is a tort. 1 Addison, Torts, § 4. The overflow of lands by a mill-pond is a tort. 4 Am. & Eng. Encyclop. Law, p. 978, citing *Wilson v. Myers*, 4 Hawks, 78. See also 1 Chitty, Pl. pp. 140-142.

Tort includes wrong suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. *Leathers v. Blessing*, 105 U. S. 626-630, 26 L. ed. 1192, 1194.

Plaintiffs insist that the dam erected to improve the navigation of the river has raised the level of mean low tide, and the latter result has destroyed their usufruct in the waters of the river for the purposes of rice culture on their lands on Hutchinson's Island and on the main land. They are not suing for the conversion of the land, nor is it alleged that the government has converted to its own use the water-rights connected with the lands, but they are suing for consequential injuries to their water-rights, resulting indirectly from the act of the government, which act was performed for a lawful purpose and not performed on the land with which the usufruct was connected.

It is true that if the property be tortiously taken or converted, the tortfeasor may be sued in trespass or trover, or the injured party may waive the tort and sue in assumpsit. In the latter case the same result follows as if there had been an implied contract, as insisted by the plaintiffs here. *May v. LeClair*, 78 U. S. 11 Wall. 285, 20 L. ed. 58.

This, however, is applicable where there has been an actual conversion of the property, and not an indirect injury to it resulting from acts which the alleged tort-feasor had the legal right to perform. Any demand of the plaintiff therefore must be based upon the tortious conduct of the defendant's agents; but to constitute a tort, two things must occur, actual or legal damage to the plaintiff, and a wrongful act committed by the defendant.

The court being of the opinion that neither of these essentials exist in the case at bar, we feel constrained on both the questions herein considered to sustain the demurrer to the plaintiffs' declaration and order *the case dismissed*.

#### AMERICAN FREEHOLD LAND & MORTGAGE CO. of London, Limited,

Turner O. THOMAS, Admr., etc., of J. Pinckney Thomas, Deceased.

(....Fed. Rep.....)

#### 1. A circuit court of the United States has no jurisdiction, in an action at law upon

NOTE.—*Suits by assignees of choses in action.*

The court has no jurisdiction over cases where an assignee is plaintiff unless the court would have had jurisdiction had the action been brought by the assignor. *Newgas v. New Orleans*, 33 Fed. Rep. 198.

But where the transfer of choses in action may be made by delivery, and the obligation is made to bearer and by a corporation, the court has jurisdiction, although had the suit been brought by a

a note, to enforce a specific lien upon property conveyed to secure it, according to a remedy and practice given by state law, without foreclosure proceedings; at least it has none in favor of an assignee of the note without indorsement or guaranty, who has taken no conveyance of the property from the maker of the note.

2. A motion to vacate what purports to be a judgment, but which is a nullity because of lack of jurisdiction, may be granted even after the term in which the entry was made.

3. A stipulation in a note that the entire amount shall be due after thirty days' default in payment of interest creates a condition precedent to an action brought before the date named for the maturity of the principal, and prevents a trial without a jury, as provided by Ga. Const., § 4, ¶ 7, Code 5145, in case of "unconditional contracts," where an issuable defense is not filed under oath or information.

(July 16, 1891.)

**MOTION** by defendant to vacate a judgment which had been entered against him in an action brought to enforce payment of a promissory note, and also to vacate the execution issued thereon and the sale made thereunder. *Granted.*

The facts are stated in the opinion.

former holder the court would have had no jurisdiction. *Ibid.*

This rule is applied to an action by an assignee on a county warrant payable to bearer. *Rollins v. Chaffee County*, 84 Fed. Rep. 91.

An assignee of county warrants payable to a third person or his order, and not indorsed by him in blank or to the order of the assignee, cannot sue thereon in the circuit court unless such third person could have done so. *King Iron Bridge & Mfg. Co. v. Otoe County*, 120 U. S. 235, 30 L. ed. 623.

The Judiciary Act of March 3, 1897, was intended to prohibit suits in the federal court by assignees of choses in action unless the original assignor was entitled to maintain the suit, in all cases except suits on foreign bills of exchange, and except suits on promissory notes made payable to bearer and executed by a corporation. *Wilson v. Knox County*, 43 Fed. Rep. 451; *Hudson v. Bishop*, 86 Fed. Rep. 680.

Where the record does not show of what State the assignor is a corporation the prohibition of the statute applies. *Brook v. Northwestern Fuel Co.*, 120 U. S. 341, 33 L. ed. 906.

The assignee of a contract cannot sue for its enforcement in the circuit court if the assignor could not have done so. *Shoecraft v. Bloxham*, 124 U. S. 730, 31 L. ed. 574.

So of the assignee of a written contract of lease. *Republic Iron Min. Co. v. Jones*, 3 L. R. A. 743, 37 Fed. Rep. 721.

So of the assignee of a contract of reinsurance. *Laird v. Indemnity Mut. M. Assur. Co.* 44 Fed. Rep. 712.

So of the assignee of a guardian's bond. *Hudson v. Bishop*, *supra*.

So the restriction applies to the assignee of a mortgage given as security for a promissory note. *Sheldon v. Sill*, 49 U. S. 8 How. 441, 12 L. ed. 1147. But see Act of March 3, 1875, chap. 137.

Although the maker and payee of a negotiable note secured by a mortgage are citizens of the same State, an indorsee of the note living in another State may, since the Act of 1875, foreclose the mortgage in the United States circuit court. *Tredway v. Sanger*, 107 U. S. 823, 37 L. ed. 553; *Mersman v. Werges*, 112 U. S. 120, 33 L. ed. 641.

12 L. R. A.

*Mr. Frank H. Miller*, for defendant, in support of the motion:

A motion to set aside a judgment may be made after the term within the period of the Statute of Limitations.

*Artope v. Barker*, 74 Ga. 462.

Article 6, § 4, par. 7, of the Constitution of 1877, Code 1883, § 5145, is: The court shall render judgment without the verdict of a jury in all civil cases founded on unconditional contracts in writing where an issuable defense is not filed on oath or affirmation. Under this as the notes sued on were conditional, the judgment is void and should be opened as prayed for.

Judgments by default are opened in circuit courts of the United States like in state courts.

*Brown v. Philadelphia, W. & B. R. Co.* 9 Fed. Rep. 183; *Foster*, Fed. Proc. §§ 360-379; *Morrison v. Bernards Twp.* 85 Fed. Rep. 400; *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *Phillips v. Negley*, 117 U. S. 665, 29 L. ed. 1013.

An unconditional contract on which the court may render a judgment is one that does not contain a condition, and where suit was brought on three promissory notes, one of which appeared not to be due, the allegation that they were due was by virtue of cov-

So it applies to the assignee of a claim for damages for refusal to pay for goods purchased under an oral contract. *Simons v. Ypsilanti Paper Co.* 23 Fed. Rep. 123.

Under U. S. Rev. Stat., § 622, a suit to enforce performance of a contract is one to recover the contents of a chose in action. *Shoecraft v. Bloxham*, 124 U. S. 730, 31 L. ed. 574.

The circuit court of the United States has no jurisdiction of a suit founded on contract in favor of an assignee, where it does not appear that the plaintiff's assignor could have brought suit on the contract if no assignment had been made. *Brook v. Northwestern Fuel Co.* 120 U. S. 341, 33 L. ed. 906; *Shoecraft v. Bloxham*, *supra*.

An action to recover the amount of a mortgage bond is not within the jurisdiction of the circuit court when brought by an assignee thereof, in a case in which the assignor could not have sued. *Blacklock v. Small*, 127 U. S. 93, 33 L. ed. 70.

#### *Assignee of judgment.*

Where the assignor of a judgment could not have sued in the original proceedings in this court, his assignee cannot do so under the Act of 1833. *Mississippi Mills v. Cohn*, 39 Fed. Rep. 835.

Under the Act of 1875, before its amendment in 1887, the assignee of a judgment founded on a contract could not sue on the judgment in a federal circuit court, on the ground of diverse citizenship of the parties, unless it appeared affirmatively in the record that both the plaintiff and his assignor were not citizens of the same State with the defendant. *Metcalf v. Watertown*, 128 U. S. 526, 33 L. ed. 543.

#### *To what restriction does not extend.*

The United States circuit court has jurisdiction of an action for damages for wrongfully entering on lands and carrying away the timber thereon, brought by an assignee of the claim against a citizen of another State, although the assignor could not himself have sued in that court. *Ambler v. Eppinger*, 137 U. S. 480, 34 L. ed. 765.

The exception in the statute did not extend to a suit on a chose in action to recover a specific chattel, or for damages for its wrongful caption or

enants in a bond for titles set out and annexed, and it was not an unconditional contract.

*Dye v. Garrett*, 78 Ga. 471; *Banner v. Sayne*, 78 Ga. 467. See *Mosey v. Walker*, 84 Ga. 274; *Craig v. Herring*, 80 Ga. 709.

The judgment being void, no sale thereunder will pass any title.

*Hobby v. Bunch*, 83 Ga. 1.

The Legislature cannot give jurisdiction to courts other than is named in the Constitution.

*Western U. Teleg. Co. v. Taylor*, 8 L. R. A. 189, 84 Ga. 408.

The deed was from an improper party, the debt having been transferred.

*Neal v. Murphey*, 60 Ga. 888; *McGregor v. Matthis*, 32 Ga. 417; *Palmer v. Simpson*, 69 Ga. 793; *Hunt v. Harbor*, 80 Ga. 746; *Oarhart v. Reviere*, 78 Ga. 178; *Ware v. Jackson*, 19 Ga. 457; *Ralston v. Field*, 32 Ga. 457; *Scroggins v. Hoadley*, 56 Ga. 165; *Port Valley Planter's Bank v. Prater*, 64 Ga. 609.

The court upon whose judgment an execution issues has full power to set aside a sale thereunder when the ends of justice require it, and to order a resale.

*Johnson v. Dooly*, 72 Ga. 297; *Parker v. Glenn*, 72 Ga. 644; *Wallace v. Atlanta Med. College Trustees*, 52 Ga. 164.

*Mr. William E. Simmons*, for complainant, *contra*:

After a circuit court has adjourned without day, it cannot set aside one of its own judgments upon motion, even for the want of a jurisdiction over the cause; the judgment is binding until reversed on error.

*Bank of United States v. Moss*, 47 U. S. 6 How. 81, 12 L. ed. 581; *Sibbald v. United States*, 87 U. S. 13 Pet. 492, 9 L. ed. 1169; *Cameron v. M'Roberts*, 16 U. S. 8 Wheat. 591, 4 L. ed. 467; *Know County v. Harshman*, 138 U. S. 152, 33 L. ed. 586; *Foster*, Fed. Proc. § 879.

The property of the defendant has been sold under the execution issued upon the judgment sought to be set aside by the defendant in this proceeding, and sales made under process issued on irregular or erroneous judgments are not affected by the subsequent reversal of such judgment.

*Bank of United States v. Washington Bank*, 81 U. S. 6 Pet. 8, 8 L. ed. 299; *Rorer*, Jud. Sales, §§ 547, 565.

A judgment cannot be set aside on account of grounds which could have been taken before it was rendered, and which the defendant negligently omitted to take.

*Barksdale v. Greene*, 29 Ga. 418.

Unless it appears on the face of the judgment that it is void, or that the pleadings are so defective that no legal judgment could have been

detention. *Ibid.*; *Deshler v. Dodge*, 57 U. S. 623, 14 L. ed. 1084.

It does not apply to mere naked rights founded on some wrongful act or neglect of duty to which the law attaches damages. *Bushnell v. Kennedy*, 76 U. S. 397, 19 L. ed. 736.

The sale of an equitable interest in land is not a mere assignment of a right of action relating thereto; and in a suit in a national court it is not material what is the citizenship of his vendor, under whom he claims. *Gest v. Packwood*, 39 Fed. Rep. 535.

An order drawn on a city and accepted is not an assignment of the contractor's claim, within the meaning of the Act of August 13, 1888, providing that an assignee cannot bring suit in the circuit court unless the assignor might have done so had no assignment been made. *Ripley v. Superior*, 41 Fed. Rep. 112.

The restriction does not extend to suits removed to such court from a state court. *Delaware County v. Diebold Safe & Lock Co.* 123 U. S. 473, 33 L. ed. 674.

#### Holders of negotiable instruments.

In the Act of 1887 the clause "or of any subsequent holder of such instrument be payable to bearer, and be not made by any corporation," the word "of," preceding the words "such instrument," should be held to be "if." *Newgas v. New Orleans*, 33 Fed. Rep. 193. The Act of August 13, 1888, corrects the error mentioned.

The test of the negotiability of a note, in order to determine the right of an assignee to sue thereon in the circuit court of the United States, under the Act of Congress of 1875, is its negotiability according to the principles of the law-merchant, and is not affected by state statutes. *Windsor Sav. Bank v. McMahon*, 3 L. R. A. 192, 33 Fed. Rep. 233.

The provision relating to suits by an assignee under the Act of 1888 does not forbid the federal court to take jurisdiction of a suit by the holder of an order, a resident of a foreign State, against the drawee, a resident of the State of the drawer, the citizenship in such case being diverse. *Superior v. Ripley*, 123 U. S. 93, 34 L. ed. 914.

But one who buys a promissory note payable to 12 L. R. A.

order, and afterwards fills the blank with his own name as payee, is an assignee within the Act of 1875, as amended, and is not entitled to sue, the original holder and the maker both being citizens of the State in which suit is brought. *Steel v. Rathbun*, 42 Fed. Rep. 360.

Where the maker and payee of a note are both citizens of the same State, it may be proved in a suit by the indorsee that the indorsee was in fact the real payee, and that there never had been any assignment of the note. *Goldsmith v. Holmes*, 1 L. R. A. 316, 33 Fed. Rep. 434.

Drain orders drawn by a county drain commissioner upon a county treasurer, and which are required to be paid by a tax assessed and collected from the owners of property benefited thereby, are so far negotiable that suit brought upon them by the holder is not outside of the jurisdiction of a federal court. *Aylesworth v. Gratiot County*, 40 Fed. Rep. 350.

#### Motive for assignment will not affect right to sue.

The motive with which a person purchases property or a claim has nothing to do with his right to maintain an action thereon in the national courts. *Neal v. Foster*, 13 Savy. 236; *Vermont v. Chicago & N. W. R. Co.* 69 Iowa, 297.

When the owners of a mortgage sold it to a citizen of another State for the express purpose of giving jurisdiction if the purchaser took it in good faith without knowledge of such purpose, the mortgage passed the legal title. *Smith v. Kernochen*, 48 U. S. 7 How. 193, 12 L. ed. 693; *Banigan v. Worcester*, 30 Fed. Rep. 632.

The transfer of interest by one party to a suit in a federal court, to a citizen of the same State with the other party, will not oust jurisdiction of the court. *Jarboe v. Templer*, 33 Fed. Rep. 213.

Even where a statute of a State provided that in the case of fraudulent assignment a court of competent jurisdiction is authorized to declare the assignment void, although the assignee is not shown to have notice of the fraud, the equity courts of the United States having jurisdiction can enforce rights under such statute. *Bernheim v. Birnbaum*, 30 Fed. Rep. 335.

rendered, a judgment cannot be set aside on motion.

*Dugan v. McGlann*, 60 Ga. 353.

The contract was an unconditional one, with conditional incidents.

*Oraig v. Herring*, 80 Ga. 709.

It is within the power of the court to render judgments without the intervention of a jury, in all cases where the court can, from examining the paper sued on, and without the aid of any *alibunde* proof, see that plaintiff is entitled to recover.

*Sanner v. Sayne*, 78 Ga. 487; *Dye v. Garrett*, 78 Ga. 471.

All the pleas could have been filed by the defendant before the judgment, and cannot be allowed, even under the practice in the courts of this State, after judgment.

*Barksdals v. Greene*, *supra*.

**Speer, J.**, delivered the following opinion:

The American Freehold Land & Mortgage Company of London, Limited, brought suit in this court against J. Pinckney Thomas, a citizen of this district, for the sum of \$5,816.66 on a certain promissory note which reads as follows:

"\$5,000.00.

"Waynesboro, Ga., January 18, 1888.

"On the first day of December, 1887, I promise to pay J. K. O. Sherwood, or order, at the office of the Corbin Banking Company, New York City, \$5,000.00 with interest from this date at the rate of eight per cent per annum, payable annually as per five notes herewith attached. Value received.

"Should any of said interest not be paid when due, it shall bear interest at the rate of eight per cent per annum from maturity as stipulated in said interest-notes, and upon failure to pay any of said interest within thirty days after due, said principal sum may, at the option of the holder of this note, be declared due, without notice, and may thereupon be collected at once, time being of the essence of this contract; and in case this note is collected by suit I agree to pay all costs of collection including ten per cent of the principal and interest as attorneys' fees.

(Signed) J. Pinckney Thomas. 3977.  
No. 32220.

Indorsed,

Without recourse.

J. K. O. Sherwood.

Copies of the interest notes are attached. On the 9th day of April, 1888, the following judgment by default was taken:

"There being no defense filed on oath in this case, judgment is rendered by the court for the plaintiff vs. the defendant for \$5,000.00 as principal, \$990.47 as interest to this date, \$599.04 attorneys' fees and \$11.85 for cost of suit to be taxed by the clerk, this 9th day of April, 1888."

(Signed) Emory Speer, Judge.

After said judgment was rendered by the court, without having submitted the case, or any evidence therein, to a jury, Mr. Fred Lockhart, the plaintiffs' attorney, entered a  
12 L. R. A.

judgment, signing the same as attorney, for the principal, interest and attorneys' fees, to be levied upon the land, tenements and hereditaments of the defendant, and especially upon 1150 acres, more or less, in Burke County, Georgia. Then followed a description, the boundaries being given, of the land.

Execution was issued in accordance with the judgment last above mentioned. The marshal was commanded to levy generally upon the lands, etc., of the defendant, and especially upon the 1150 acres described in the judgment, entered by the plaintiffs' attorney. On the fourth day of December, 1888, this property was sold by the marshal in the usual manner of marshal's sales, and was bought in by William G. Wheeler for the sum of \$481.36, and the marshal's deed made in pursuance of said sale. On the 6th of August, 1890, Turner C. Thomas, the administrator of J. Pinckney Thomas, made a motion in writing giving notice thereof to the plaintiffs in the original suit to vacate the award and judgment, the execution issued thereon and the sale made in pursuance thereof, and also asked for leave to file the pleas described in the motion. The grounds of the motion which it is important to consider for the purposes of this decision are as follows:

1. That the defendant, J. Pinckney Thomas, died prior to the final adjournment of the term of court at which the judgment by the court was entered, and that no representative was appointed for the estate until the 5th day of April, 1890.

2. That the award granted April 9, 1888, was granted without jurisdiction because suit was brought upon a conditional contract, and the verdict of a jury was required before judgment could be lawfully entered.

3. Because the judgment entered on the award does not conform to the pleadings in the case, nor to the award of the court.

4. Motion is made to set aside the execution because it did not conform to the award of the court, and was issued to enforce a special lien only.

5. To vacate the sale because Wheeler, the purchaser, was an officer of the plaintiff, who acted for and in its behalf, and that the sale under the circumstances, as disclosed by the record and the deed pursuant to the sale, made by the marshal to said Wheeler, amounted to "chilling" the bid of the plaintiff *in fi fa*.

Plaintiff made application to be permitted to file pleas to the jurisdiction of the court, and to the effect that the note so sued on was actually given for a loan of \$4,000 though nominally for \$5,000, \$1,000 being retained by the payee at the time of giving the note and making the loan, and was therefore usurious.

There were other grounds upon which it was sought to vacate the judgment, execution, levy and sale, which appear in the record. The American Freehold Mortgage Company of London, Limited, transferee of the contract, and the plaintiff in the original suit, object to the motion above set forth upon the following material grounds, and others which appear in the record:

1. Because after a circuit court has adjourned without day it cannot set aside any of its own judgments on motion, such judgments being binding until reversed for error.

2. The grounds of the motion ought to have been urged before judgment, and the movant being in laches cannot be heard now.

3. Because it appears from the pleadings that the court had jurisdiction and it is too late now to deny it.

4. Because sale under an execution cannot be set aside after the consummation and distribution of the proceeds thereof.

5. Because the pleas ought to have been filed before the rendition of the judgment.

The Constitution of the State of Georgia, § 4, par. 7, Code 5145, provides: "A court shall render judgment without the verdict of a jury in all civil cases founded on unconditional contracts in writing where an issuable defense is not filed under oath or affirmation." The plaintiffs' attorney taking the judgment in this case followed the practice of the state courts and took his judgment in conformity with the rule of the superior courts of the State, number 89, a rule adopted in consonance with the clause of said Constitution quoted above.

Two important questions depending upon this action have been evoked by the motion.

Does the jurisdiction in this court, to give the judgment affirmatively, appear in the record?

Is the judgment void in view of the law of the State, because it was rendered, not upon an unconditional, but upon a conditional, contract in writing, as insisted by the movant.

The cause was pending at law, and it is insisted by the movant that the judgment granted was tantamount to the foreclosure and enforcement of an equitable lien in the nature of a mortgage, to do which is not within the jurisdiction of a law court of the United States, but is the exercise of a power belonging to a court of equity. The lien in question is created by sections 1969 and 1970 of the Code of Georgia, which provide as follows: "Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said vendor any money, or to secure any other debt, and shall take a bond for titles back to said vendor upon the payment of such debt or debts, or shall in like manner convey any personal property by bill of sale and take an obligation binding the person to whom said property was conveyed to reconvey said property upon the payment of said debt or debts, such conveyance of real or personal property shall pass title of said property to the vendee: provided that the consent of the wife has been first obtained, till the debt or debts which said conveyance was made to secure shall be fully paid and shall be held by the courts of this State to be an absolute conveyance with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and not a mortgage.

Section 1970: "When any judgment shall

be rendered in any of the courts of this State upon a note or other evidence of debt, which such conveyance of realty was made and intended to secure, it shall and may be lawful for the vendee to make and file, and have recorded in the clerk's office of the superior court of the county wherein the land lies, a good and sufficient deed of conveyance to the defendant for said land; and if the said obligor be dead, then his executor or administrator may, in like manner, make and file such deed without obtaining an order of the court for that purpose, whereupon the same may be levied on and sold under said judgment as in other cases: Provided that the said judgment shall take lien upon the land prior to any other judgment or incumbrance against the defendant."

It will be observed that the machinery provided by these statutes belongs to the state courts, where there are no distinctions between the practice and procedure at law and in equity. And it is urged by the movant that the proceeding on the part of the plaintiff in the suit at common law, to have defined and enforced the lien provided by the sections of the Code above quoted, presents a matter not within the jurisdiction of the circuit court, sitting as a court of law. That proposition was held to be true by this court in the case of *New England Mortg. Secur. Co. v. Gay*, 38 Fed. Rep. 686, and after a more careful consideration of the authorities in the recent case, decided at this term of *Alexander v. Mortgage Co. of Scotland, Limited*, not reported. The judgments of a court of law usually take rank and effect in accordance with the date when they were rendered or granted. The judgments provided for by the special statutes above quoted take effect from the date of the contract between the parties. The contract, moreover, is in itself the creation of an equitable lien, where certain rights are reserved to the debtor, and certain privileges given to the creditor.

In the case of *Penn v. Holmes*, 63 U. S. 21 How. 484-487, 16 L. ed. 199, 200, will be found a condensed statement of the leading cases in the earlier volumes of the United States Supreme Court Reports upon this doctrine. They all sustain the following announcement made in that case for the court, by Mr. Justice Daniel: "By the Constitution of the United States, and by the Acts of Congress organizing the federal courts, and defining and investing the jurisdiction of these tribunals, the distinction between common-law and equity jurisdiction has been explicitly declared and carefully defined and established. Thus, in section 2, article 3, of the Constitution, it is declared that 'the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, etc.'"

"In the Act of Congress 'to establish the judicial courts of the United States,' this distribution of law and equity powers is frequently referred to; and by the 16th section of that Act, as if to place the distinction between these powers beyond misapprehension, it is provided 'that suits in equity shall not be maintained in either of the courts of

the United States in any case where plain, adequate and complete remedy may be had at law,' at the same time affirming and separating the two classes or sources of judicial authority. In every instance in which this court has expounded the phrases, 'proceedings at the common law,' and 'proceedings in equity,' with reference to the exercise of judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter as meaning the administration with reference to equitable, as contradistinguished from legal rights of the equity law as defined and enforced by the Court of Chancery in England." See also *Basey v. Gallagher*, 87 U. S. 20 Wall. 680, 22 L. ed. 453; *Bacon v. Howard*, 61 U. S. 20 How. 22, 15 L. ed. 811; *Bennett v. Butterworth*, 53 U. S. 11 How. 675, 13 L. ed. 862.

In the case last cited, as in the case now under consideration, there was nothing in the proceeding which resembled a bill or answer in equity, according to the rules prescribed by this court, nor any evidence stated upon which a decree in equity could be revised in an appellate court.

In the case now under consideration there was no averment or prayer which authorized the court to give anything save an ordinary judgment at common law, and, as held in the case of *Bennett v. Butterworth*, *supra*, the error is patent upon the record and is open to correction without motion in arrest of judgment, or exception taken at the trial.

To the argument that this court may adopt the remedy granted by the statute of the State of Georgia, and enforce it, as do the courts of that State at common law, a sufficient reply is found in the language used by Mr. Justice Miller in the case of *Van Norden v. Morton*, 99 U. S. 380, 25 L. ed. 454: "We think the rule is settled in this court that whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on state statutes, or Acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the federal courts, must be determined by the essential character of the case, and unless it comes within some of the recognized heads of equitable jurisdiction, it must be held to belong to the other,"—citing the cases of *Thompson v. Central Ohio R. Co.*, 78 U. S. 6 Wall. 184, 18 L. ed. 765; *Robinson v. Campbell*, 16 U. S. 8 Wheat. 212, 4 L. ed. 372; *Basey v. Gallagher*, 87 U. S. 20 Wall. 680, 22 L. ed. 453; *Bennett v. Butterworth*, *supra*, and *Jones v. McMasters*, 61 U. S. 20 How. 8, 15 L. ed. 805.

It is suggested that by the law of Georgia the equity of redemption of a mortgage may be sold under a judgment had upon the note which the mortgage is given to secure, without proceeding to foreclose the mortgage, and that this would as effectually conclude the movant here as if the mortgage itself had been properly foreclosed. It does not appear that this can be justified in a court of the 12 L. R. A.

United States in view of the important principle discussed and settled by the authorities last above quoted.

The case of *Willard v. Wood*, 185 U. S. 309-314, 24 L. ed. 210-214, is instructive in this connection. That was an action brought in the Supreme Court of the District of Columbia by a mortgagee against the representatives of one who had bought the mortgaged lands "subject to the mortgage" and who had assumed to pay, satisfy and discharge the mortgage debt. Judgment was rendered for the defendant upon an agreed statement of facts, and error was assigned upon that judgment. The Supreme Court of the United States, Mr. Justice Gray rendering the opinion, after reciting the fact that the contract in question was made in New York, where the mortgagee is entitled to maintain a suit either in equity or at law, against the grantee of the mortgagor to enforce the payment of the mortgage debt, held that the form of the plaintiff's remedy "whether it must be in covenant or in assumpsit, at law or in equity, is governed by the *lex fori*, the law of the District of Columbia, where the action was brought. *Dixon v. Ramsay*, 7 U. S. 3 Cranch, 819, 324, 2 L. ed. 453, 454; *United States Bank v. Donnelly*, 88 U. S. 8 Pet. 561, 8 L. ed. 974; *Wilcox v. Hunt*, 88 U. S. 13 Pet. 378, 10 L. ed. 209; *Leroy v. Beard*, 49 U. S. 8 How. 451, 12 L. ed. 1151; *Pritchard v. Norton*, 106 U. S. 124, 130, 138, 27 L. ed. 104, 106, 107." "In the Supreme Court of the District of Columbia," continues the learned justice, "as in the circuit courts of the United States, the jurisdiction in equity is distinct from the jurisdiction at law, and equitable relief cannot be granted in an action at law,"—citing *Fenn v. Holme*, 62 U. S. 21 How. 481, 16 L. ed. 198. "A statement of facts agreed by the parties, or, technically speaking, a case stated, in an action at law, doubtless waives all questions of pleading, or of form of action, which might have been cured by amendment; but it cannot enable a court of law to assume the jurisdiction of a court of equity,"—citing *Seudderv v. Worster*, 11 Cush. 573; *McRae v. Locke*, 114 Mass. 96; *West Roxbury v. Minot*, 114 Mass. 546.

The case at bar, while not identical with, is strongly analogous to, *Willard v. Wood*, *supra*. The suit was brought by a transferee of the note, and of the security for it, a deed or mortgage which the proceedings was intended to enforce. There was no privity whatever between the original maker of the note and the transferee. The transferee was not under legal obligation to reconvey the land to the maker of the note upon payment of the debt. In fact, the transferee had no title or deed to the land made by the maker of the note, to secure the debt, and J. K. O. Sherwood's only conveyance of the note to the plaintiff in the action was an ordinary transfer without recourse on him. When J. K. O. Sherwood, without indorsement or guarantee from himself, transferred the note given by J. Pinckney Thomas, it is presumed that it was transferred for value, and that his rights as against the maker were satisfied, and it being presumable, in the absence of indorsement or guarantee, that his

interest in the note was paid off and discharged, Thomas would seem entitled to a reconveyance of the land from him, and the transferee of the note—who is the plaintiff here—to the lien of an ordinary judgment merely. *Neal v. Murphey*, 60 Ga. 388; *Tompkins v. Williams*, 19 Ga. 569; *McGregor v. Matthis*, 33 Ga. 417.

In the case of *Palmer v. Simpson*, 69 Ga. 793, a proceeding to enforce a specific lien, on certain specified property, in an action at law, was held to be equitable in its character, and that the mode of procedure should be as in equity. In the same case, p. 798, the supreme court of the State uses this language: "It must be borne in mind that Simpson is not the vendor, and could not pursue the statutory remedy under Code, 3654, because he could not make the deed. True, if the vendor to him made the deed, or would make it, he might pursue that remedy. *Scruggins v. Hoadley*, 56 Ga. 165. But is he bound to go to him? Can he not go at once into equity? He did so and thus subjected all the land."

In the case of *Hunt v. Harbor*, 80 Ga. 748, the supreme court of the State held that when the vendor of land transferred the purchase-money notes without indorsement or guarantee of payment thereof, the money due from the purchaser of the land to the vendor was paid, and the purchaser of the notes is put in the attitude of an ordinary creditor and has no specific lien upon the land, such as is created by the state statute upon the subject.

The conclusion which the court reaches, after considering these authorities, is, that the plaintiff having accepted the notes sued on without the conveyance from the maker of the land given to secure the amount due thereon, and without indorsement or guaranty, is merely an ordinary creditor of the maker of the note, and is not entitled, in a court of law, to enforce the special lien under which the land was sold. *Scruggins v. Hoadley*, 56 Ga. 165. See also *Planters Bank of Fort Valley v. Frazer*, 64 Ga. 609.

It is true that Sherwood, the payee of the note, made a deed to the American Freehold Land Mortgage Company, and gave warranty of title to the land conveyed to secure the debt, against all persons claiming under himself, but against no one else, a quitclaim deed. This deed contained also this additional clause: "This conveyance is made subject to the rights of J. Pinckney Thomas, of the County of Burke, State of Georgia, to have said property reconveyed to him, his heirs, etc., upon the terms and conditions set out in my bond to him," etc. It is also true that the Mortgage Company attempted to file a deed of reconveyance of the land in question in the clerk's office of the Superior Court of Burke County. This, however, is assailed by the movant as invalid, and the question still remains, Can the court at common law without equitable powers adjust the equities which may arise? Certainly the Mortgage Company is not legally bound to comply with the obligation of Sherwood's bond for title to reconvey on payment; but it is equitable.

12 L. R. A.

To enforce, then, a contract of this character, and at the same time so to mold a verdict or a decree as to protect the rights of the contracting parties, is clearly within the domain of equity, and not within the totally separate and distinct jurisdiction of a United States court of law.

So far, therefore, as the judgment creates a specific lien upon the property described in it other than the ordinary judgment at law, it is a judgment upon a matter of which the court had no jurisdiction.

The defendants insist, however, that the term having ended we have no control over this judgment.

The numerous authorities cited by the attorney for the defendant, to wit: *United States Bank v. Moss*, 47 U. S. 6 How. 31, 12 L. ed. 381; *Sibbald v. United States*, 37 U. S. 12 Pet. 492, 9 L. ed. 1169; *Cameron v. McRoberts*, 16 U. S. 8 Wheat. 591, 4 L. ed. 467; *United States Bank v. Bank of Washington*, 31 U. S. 6 Pet. 8, 8 L. ed. 299,—wherein it is held that after a circuit court has adjourned without day, it cannot set aside one of its own judgments upon motion, even for want of jurisdiction over the cause,—were all decided upon cases where the court itself did not exceed its jurisdiction. It is true, however, that even where the court has jurisdiction of the parties and subject matter, if it makes a judgment or decree which is not within the power granted to it by the law of its organization, its decree or judgment is void.

In the case of *United States v. Walker*, 109 U. S. 258, 37 L. ed. 927, decision by Mr. Justice Woods for the court, will be found a condensed statement of the authorities upon this proposition. The decree under review in that case was made by the Supreme Court of the District of Columbia, and the Statute in question gave the court power on removal of an executor or administrator to order the assets of the decedent which might remain unadministered to be delivered to the administrator *de bonis non*. The court, however, had made an order directing the delivery of the proceeds arising from administered assets of the estate to the administrator *de bonis non*. This order was attacked as void because not within the power granted the court by the Statute under which it was acting. "It appears from the pleadings in the case," said the learned justice, "that the money ordered to be paid was the proceeds of a debt due the decedent which his administratrix had collected. It was not, therefore, as we have seen, assets or estate of the decedent. It was the property of the removed administrator. The court was therefore without power to direct the payment of the money to the administrator *de bonis non*. Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void. The limitation was well expressed by Mr. Justice Swayne, in *Nash v. Williams*, 37 U. S. 20 Wall. 226, 22 L. ed. 254, when he said: 'The jurisdiction having attacked in this case everything done within the power of that jurisdiction, when collaterally ques-

tioned, is held conclusive of the rights of the parties, unless impeached for fraud.' The case of *Bigelow v. Forrest*, 76 U. S. 9 Wall. 339, 19 L. ed. 696, is in point. It was an action of ejectment. Bigelow, who was defendant in the court below, relied for title on a sale made under a decree of the United States district court rendered in a proceeding for the confiscation of the premises sued for under the Act of July 17, 1862. Referring to this decree Mr. Justice Strong, speaking for the court, said: 'Doubtless a decree of a court having jurisdiction to make the decree cannot be collaterally impeached, but under the Act of Congress the district court had no power to order a sale which should confer on the purchaser rights outlasting the life of French Forrest. And the judgment of the court was that so much of the decree of the district court as was in excess of its power was void.'

"In *Ex parte Lange*, 85 U. S. 18 Wall. 163, 31 L. ed. 873, Mr. Justice Miller, delivering the opinion of the court, after stating that the circuit court had exceeded its authority in pronouncing sentence upon Lange, and that its judgment was therefore void, said: 'It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case.'

"In the case of *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914, Mr. Justice Field, after a review of the cases bearing upon this subject, announces their result as follows: 'The doctrine invoked by counsel, that when a court has once acquired jurisdiction it has a right to decide every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but is subject to many qualifications in its application. It is only correct when the court proceeds, after acquiring jurisdiction of the cause according to established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it.'

On page 282, L. ed. 917, the learned justice adds: "Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications.

12 L. R. A.

The judgments mentioned given in the case supposed would not be merely erroneous; they would be absolutely void; because the court rendering them would transcend the limits of its authority in those cases."

The learned justice continues: "A departure from established modes of procedure will often render the judgment void; thus the sentence of a person charged with felony, upon conviction by the court without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations without written pleadings would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the courts are not authorized to exert their power in that way."

If the judgments of a court in the cases above cited are void when attacked collaterally, *a fortiori* will they be void, as affecting the parties to the cause in which they were rendered, and upon a motion to vacate them, it follows, we think conclusively, that the court having been advised that what purports to be its judgments is a nullity, will remove the ineffectual entry from the record of its proceedings.

As we have seen, the judgment of the court at law, attempting to define and enforce the statutory lien of the creditor in Georgia to the realty conveyed to secure his debt, is deemed to be a proceeding in equity, and not appropriate to the modes of procedure at law. The case of *Mellen v. Molina Malleable Iron Works*, 181 U. S. 367, 38 L. ed. 183, would seem at first glance opposed to this view. It was there held, Mr. Justice Harlan delivering the opinion of the court, that "an adjudication that a particular case is of equitable jurisdiction is not void, even if erroneous, and cannot be disturbed by a collateral attack." There, however, was an adjudication that the court had equitable powers. If it had them not, it yet had the right to decide that question. That decision was valid and operative until set aside for error. There was, in other words, a regular adjudication of the court that it had jurisdiction. That is very different from a case like that before the court here, where no such question was presented or decided, and where the court, on motion of the plaintiffs' attorney, proceeded to exercise powers which were expressly withheld from it in the laws by which it was organized.

We may next inquire whether the judgment rendered by the court in this case is void by the law of Georgia. This provides, Code, 3594: "The judgment of a court having no jurisdiction of the person and subject matter, or void for any other cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it." And further, Code, 8828: "A judgment that is void may be attacked in any court and by any body. In all other cases judgments cannot be impeached collaterally but must be set aside by the court rendering them." See also 65 Ga. 601, decision by Judge Warner, where it is held: "When a court transcends the limits prescribed for it by law, and assumes to act



where it has no jurisdiction, its adjudications will be utterly void either as estoppel or otherwise." Herman, Estoppel, 45

It is true that in this case the court gave the judgment without the intervention of a jury. Because of the 7th Amendment of the Constitution of the United States, and the Acts of Congress embraced in §§ 648 and 649 of the Revised Statutes, this would be manifestly a nullity, unless the Constitution and laws of Georgia will authorize it. In this connection it will be instructive to consider *Barney v. Schneider*, 76 U. S. 9 Wall. 251, 252, 19 L. ed. 649, 650; *Flanders v. Tweed*, 76 U. S. 9 Wall. 425, 19 L. ed. 678; *Baylis v. Travelers Ins. Co. of Hartford*, 113 U. S. 820, 28 L. ed. 990; *Kearney v. Case*, 79 U. S. 12 Wall. 281, 20 L. ed. 896.

It will be observed that the defendant in the original suit did not waive his right to have the facts tried by a jury. In the case of *Barney v. Schneider*, *supra*, Mr. Justice Miller observed: "It is insisted with much ingenuity that in this case there was no disputed fact for the jury to pass upon, and that, the only issue in the case being one of law, it was proper for the court to dispose of it. If this were so, the instruction of the court might be sustained, provided the undisputed facts necessary to sustain the verdict had been submitted to the jury.

In *Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169, Mr. Justice Harlan, in rendering the decision of the court, observed: "It was the province of the jury to pass upon the issues of fact, and the right of the defendant to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for the plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury." The right of trial by jury in the courts of the United States is guarded with great jealousy by these courts, and while it is true that the 7th Amendment of the Constitution preservative of this right does not relate to state action, or state courts, it is at least patent that if the award in this case made by the court without the intervention of a jury is not sustained by the law of the State, it is not sustainable at all.

The Constitution of the State of Georgia, § 4, par. 7, Code, 5145, as we have seen, provides as follows: "The court shall render judgment without the verdict of a jury in all civil cases founded on unconditional contracts in writing where an issuable defense is not filed under oath or affirmation." It is interesting to consider whether this section is under any circumstances operative in the courts of law of the United States. Assum-

ing, however, for the purposes of this case, that it does authorize a United States judge to render judgment under circumstances where the judge of a state court might do so, certainly it would not do so otherwise.

Is the contract upon which the suit is brought and judgment obtained in this case an "unconditional contract?" It contains among others this stipulation: "Should any of said interest not be paid when due, it shall bear interest at the rate of eight per cent per annum from maturity, as stipulated in said interest notes, and upon failure to pay any of said interest within thirty days after due, said principal sum may, at the option of the holder of this note, be declared due without notice, and may, thereupon, be collected at once." Now, it is quite evident that while the coupon interest notes in the possession of the plaintiff were prima facie evidence that the interest had not been paid, yet, before the plaintiff was entitled to have the entire sum of the debt declared to be due, he must show by proof that the borrower failed to pay the interest installment within "thirty days" after it was due. This is a condition precedent to the right of the plaintiff to declare the entire sum due at once, an option of which he availed himself in bringing the suit. It was moreover necessary to the jurisdiction of the court to establish by proof the fact that the interest was not paid within thirty days after it was due. It will be perceived from an examination of the record that the principal sum was not due until the first day of December, 1887, and judgment for the whole amount was taken the 18th of July, 1887, and at the time the suit was brought the only indebtedness past due amounted to \$316.66, a sum less than the minimum jurisdictional amount of the court. The proof to establish the fact that the interest had not been paid within thirty days, a fact upon which such an important condition depended, should, by the laws of Georgia, properly have been submitted to a jury, even though, in the language of the Constitution of the State, there was no issuable defense filed under oath or affirmation. The Supreme Court of Georgia, in *Dye v. Garrett*, 78 Ga. 471, had this question before it upon these facts: Suit was brought on three promissory notes in January, 1886. The notes were of equal date, one due the first of January, 1886, the second due the first of January, 1887, and the third due the first of January, 1888. It was alleged that the notes were all due at the time the suit was brought, by virtue of covenants in a certain bond for titles which was annexed to the declaration, and which provided that if the first note was not paid at maturity, then the other two notes should become due. Upon the trial of the case, the court, without a jury, rendered judgment without the consent of the defendant, and as the record shows against his consent, upon all the notes. The defendant thereupon moved to arrest judgment upon the ground that the court had no power under the facts alleged in the declaration, and generally upon the facts and pleading to render judgment without the intervention of a jury. The supreme court held this to be a condi-

tional contract in writing. *Justice* Blanford, for the court, said: Notes falling due on the first of January, 1887, and the first of January, 1888, are to become due in the event and upon the condition that the first note is not paid, and there is a fact to be tried which does not appear upon the face of the papers; this fact, whether or not the first note has been paid, the judge could not try. Considering the facts and papers together, it was a condition that the last two notes should fall due upon the first note's not being paid. The fact whether that first note was paid or not was entirely outside of the writing. So we think this is not an unconditional contract in writing, and the judge could not render judgment upon these notes without a verdict of a jury unless by consent of the defendant, and no such consent appears in this record. The learned justice adds: "An unconditional contract is a contract that has no condition in it. It is manifest from the Constitution of the State that it is such a contract as the court, by looking at the paper itself, may determine that judgment should be rendered for the plaintiff in the case. This contract is not such a contract as that; the court would necessarily have to look outside of the paper to determine whether that first note was paid or not; and that question he could not determine under this writing, taking the bond and notes together. So we think the court erred in not arresting this judgment."

In the light afforded by this authority, we are of the opinion that the stipulation in the note now before the court, that the entire amount shall be due whenever it appears that the interest for one year has not been paid in thirty days after due, is equally a condition, and the proof with reference to it should have been submitted to a jury, and the court had no power under the Georgia law to render judgment without the intervention of a jury. See also *Sanner v. Sayne*, 78 Ga. 487; *Moseley v. Walker*, 84 Ga. 274.

Subsequently to the argument of this motion the attention of the court was called to the fact that the original declaration did not aver that Sherwood, the payee of the note, was a citizen of New York, the language used being merely "of New York;" nor that the transferee was a foreign corporation; and the case of *Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654, was cited to show that under such defective averments, it was error to have rendered the judgment whether or not the question of jurisdiction was raised. The court was also advised that opposing counsel had been referred to this citation, but the case is decided upon the grounds comprehended in the argument had at the hearing.

*The judgment of the court is, that an order be taken, vacating the award made by the court, and the judgment signed by the attorney and the execution issued thereon, and that the defendant have leave to file all proper pleas by the first day of the next term.*

## WISCONSIN SUPREME COURT.

Katherine SALENTINE, *Resp't.*,  
v.  
MUTUAL BENEFIT LIFE INSURANCE  
CO., *Appt.*

(.....Wis.....)

An option of the insurer to refund premiums paid with interest or pay the amount

of the policy on the life of one who died by his own hand while insane, according to the equities of the case, is not waived by failure to make it within the sixty days allowed after proofs of loss for payment if it is made within a reasonable time.

(May 5, 1891.)

APPEAL by defendant from a judgment of the Superior Court for Milwaukee County

*NOTE.—Option; contract; election in case of alternative promises*

When a party is allowed to pay or make satisfaction in two ways he may elect the way in which he shall pay. *Elkins v. Parkhurst*, 17 Vt. 106; *Layton v. Pearce*, 1 Dougl. 15; *Brookman's Trusts*, L. R. 5 Ch. 182; *Tielens v. Hooper*, 5 Exch. 683; *Reed v. Kilburn Co. Op. Soc.* L. R. 10 Q. B. 264.

So where goods are sold on credit of six or nine months, the duration of the credit is at the election of the purchaser. *Price v. Nixon*, 5 Taunt. 388; *Helps v. Winterbottom*, 2 Barn. & Ad. 436. See *Archibald v. Argall*, 53 Ill. 807; *Middlesex v. Thomas*, 20 N. J. Eq. 89; *Burkhalter v. Pennsylvania Second Nat. Bank*, 42 N. Y. 538, cited in 2 Wharton, Cont. § 620.

As a general rule, "in case an election be given of two several things, always he that is the first agent, and who ought to do the first act, shall have the election. Co. Litt. 145 a; *South Eastern R. Co. v. The Queen*, 17 Q. B. 485.

When from the whole agreement it appears that the promisee is to have his choice between the alternatives, then the election is with him. *Fordley's Case*, 1 Leon. 68; *Chippendale v. Thurston*, 4 Car. 12 L. R. A.

& P. 96; *Roberts v. Beatty*, 2 Penn. & W. 63; *Leake*, Cont. 2d ed. 677; *Mallam v. Arden*, 10 Bing. 200.

As a general rule, in case of election between alternative acts, when from the circumstances of the case injustice will be done unless notice of the election be previously given, such notice should be given. *Plowman v. Riddle*, 7 Ala. 776; *Aldrich v. Albee*, 1 Me. 120; *Watson v. Walker*, 23 N. H. 471; *Clough v. Hoffman*, 5 Wend. 500; *Topping v. Root*, 5 Cow. 404; *Vyse v. Wakefield*, 6 Mees. & W. 448; *Rippingall v. Lloyd*, 5 Barn. & Ad. 748; *Leake*, Cont. 2d ed. 678.

An election is limited by its own terms as to time (*Plowman v. Riddle*, *supra*; *Shearer v. Jewett*, 14 Pick. 282; *Heywood v. Heywood*, 43 Me. 229; *Choice v. Moseley*, 1 Bafl. L. 128; *Church v. Peterow*, 2 Penn. & W. 801), and place. *Stewart v. Donnelly*, 4 Yerg. 177; *Cox v. United States*, 31 U. S. 6 Pet. 172, 8 L. ed. 390; *Duncan v. United States*, 33 U. S. 7 Pet. 435, 8 L. ed. 730.

Where one of the periods has elapsed the other thereupon becomes obligatory. *Choice v. Moseley*, *supra*. See *Roberts v. Beatty*, 2 Penn. & W. 63; *Nesbitt v. Pearson*, 33 Ala. 608; *Townsend v. Wells*, 8 Day, 327; *McNitt v. Clark*, 7 Johns. 465; *Stevens v. Webb*, 7 Car. & P. 60.

in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Reversed.*

The facts are stated in the opinion.

*Messrs. Winkler, Flanders, Smith, Bottom & Vilas* for appellant.

*Messrs. E. P. Smith and Rogers & Mann*, for respondent:

I. Payment of some kind was to be made on or before the expiration of sixty days from the 28th day of January, 1884, and if the defendant desired to refund the premiums and avoid the payment of the amount insured, it should have given notice of such decision on or before the expiration of that day, as the determination to exercise its option was within the knowledge of the Company and not that of the plaintiff. Where one party has knowledge of a material fact not known to the other party, he is bound to give notice.

*Tasker v. Bartlett*, 5 Cush. 364; *Quarles v. George*, 23 Pick. 400; 1 Parsons, Cont. 6th ed. 589, note D; Benjamin, Sales, § 577, p. 562; 2 Wharton, Cont. 619; *Vyse v. Wakefield*, 6 Mees. & W. 442; *Smith v. Sandborn*, 11 Johns. 59; *Choice v. Moseley*, 1 Bail. L. 186; *Supple v. Iowa State Ins. Co.* 59 Iowa, 29.

Where the promise has been in the alternative either to pay the specified sum, or, in lieu thereof, to deliver certain chattels at a particular time, the promisor may pay the money or deliver the chattels at his option, provided he make election of the payment or delivery before the day for performance has passed. *Stewart v. Donnelly*, 4 Yerg. 177; *Gilman v. Moore*, 14 Vt. 457; *Plowman v. Riddle*, 7 Ala. 778.

But if the day is permitted to pass without any election by the promisor, the right of election has gone, and the promisee has the absolute right to the money, and may maintain an action for its recovery.

*Troubridge v. Holcomb*, 4 Ohio St. 33; *Heywood v. Heywood*, 42 Me. 229; *Miller v. McClain*, 10 Yerg. 245.

II. If, however, there was no such express limitation of sixty days, still it was the duty of the Company, within a reasonable time after receiving the proofs on the 28th of January, 1884, to have elected if they would simply return the premiums, and so electing, to have notified the plaintiff of such election, and offered to return the premiums within such reasonable time.

1 Addison, Cont. § 320, p. 466; *Davis v. Burrell*, 10 C. B. 821; 1 Addison, Cont. Appleton's ed. p. 468; *Nunes v. Daniel*, 86 U. S. 19 Wall. 580, 22 L. ed. 161; *Shearer v. Jewett*, 14 Pick. 232; Chitty, Cont. 7th Am. ed. 750; *Fitzpatrick v. Woodruff*, 96 N. Y. 565; 2 Wharton, Cont. 644-677; *Fordley's Case*, 1 Leon. 68; *Chippendale v. Thurston*, 4 Car. & P. 97; *Roberts v. Beatty*, 2 Penn. & W. 63; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328, and cases collated.

If the party entitled to choice neglects to elect by fulfilling, the right of choice passes thereupon to the other party, who may sue for the breach of the alternative he prefers.

Bishop, Cont. § 1435; *Rippingall v. Lloyd*, 5 Barn. & Ad. 742; *Watson v. Walker*, 23 N. H. 471-492; *Clough v. Hoffman*, 5 Wend. 500; *Topping v. Root*, 5 Cow. 404.

12 L. R. A.

When the facts are clear the question of reasonable time is always exclusively for the court.

*Toland v. Sprague*, 37 U. S. 12 Pet. 302, 9 L. ed. 1094; *Wood v. Milwaukee & St. P. R. Co.* 27 Wis. 541; *Boothby v. Scales*, Id. 626; *Carter v. Carter*, 14 Pick. 424; 2 Chitty, Cont. 7th Am. ed. 750, and 10th ed. 1061, note.

The same results follow the neglect to give notice within a reasonable time as the neglect to give notice when a day certain is fixed for the election.

*Irish v. Dean*, 39 Wis. 562; *Voechting v. Grau*, 55 Wis. 817.

III. The original proofs promptly furnished, none other being required, are evidence prima facie that the claim exists in favor of the insured, and that claim, until due election, must be good for the whole amount insured.

*Manhattan L. Ins. Co. v. Francisco*, 84 U. S. 17 Wall. 672, 21 L. ed. 699.

*Orton, J.*, delivered the opinion of the court:

This action is to recover the insurance on two life insurance policies given by the appellant Company to Katherine Salentine, the respondent, and wife of Peter Salentine, on his life, —the first one dated the 19th day of September, 1881, and numbered 105,844; and the other one dated the 20th day of September, 1883, and numbered 115,218; the first of \$2,000, and the other of \$3,000. The first of the above policies had the following conditions: "That in case he should die by his own hand, etc., this policy shall be void, null, and of no effect, except that in case he shall die by his own hand while insane the amount to be paid by the company on this policy shall be the amount of the premiums actually paid thereon, with interest."

Peter Salentine, whose life was insured, died by his own hand on the 6th day of January, 1884, and notice thereof was given to the Company on the 28th day of the same month. About this policy there is no contest, and the plaintiff was entitled to and obtained judgment for the premiums paid thereon and interest. The second policy had the following conditions: "If he [the insured] shall die by his own hand, this policy shall be void. If, however, it shall be shown that the insured at the time of taking his life was insane, the Company will pay the sum insured, or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case. This option is distinctly reserved by the Company, and is made a part of this contract." The Company stipulated in the policy to pay or cause to be paid the sum insured at their office at the City of Newark, to the said assured sixty days after due notice and satisfactory proof of the death of the assured. The court found that the first notice given to the plaintiff of the election of the Company to pay only by refunding the premiums was on the 5th day of May, 1884. The sixty days after notice and proofs of death expired on the 28th day of March, 1884. The only proof of the death of Peter Salentine by his own hand, while insane, was a certified copy of the coroner's inquest, without any of the evidence taken therein. There was no evidence that the plaintiff ever made an election to take the in-

insurance instead of the premiums and interest thereon, until after the notice of the Company that it elected to pay only by refunding the premiums which had been received by her. The court held that the plaintiff was entitled to recover the insurance, on the ground that the Company failed to give the plaintiff notice of its election to pay only the premiums within the sixty days after receiving the notice and proofs of death. On this appeal this is the only question, the learned counsel of the appellant contending that the Company made its election in proper time to limit the plaintiff to a recovery only of the premiums and interest thereon. The language of this condition is peculiar. The election to "pay the sum insured or refund the premiums" is to be made by the Company "according to its judgment of the equities of the case." The learned judge of the superior court seems to have limited the equities of the case to the amount of premiums paid. But there may be equities in such a case, arising from the circumstances of the death of the person whose life is insured—such as his situation in life, and the causes of his unfortunate mental condition—which might naturally appeal to sympathy and humane feelings, and arising also from the circumstances in which the wife and family had been left by this terrible calamity. To give to the beneficiary of this insurance what in pure justice and fairness she ought to have under the circumstances is a correct definition of equity. It depends upon the consideration of all the circumstances of the case. I speak of this because it is claimed that all the Company needed to be informed of to form a judgment of the equities of the case was the death of the insured by his own hand while insane, and the amount of the premiums paid, and that, therefore, but a short time was necessary for the Company to make and give notice of such election. The learned superior court held that the time in which notice of the election should be given was the sixty days after the notice and proofs of death. The sixty days mentioned in the policy has not the remotest reference to the time in which such an election should be made. If such notice ought to be governed by any rule, it should be reasonable under the circumstances. "In the absence of any statutory or contract provision, the time in which the right of election must be exercised is not limited, except there must not be such unreasonable delay as to injure rights acquired by others." *McCracken v. Finley*, Sneed, 195; *Cooper v. Cooper*, 77 Va. 198; *Tybits v. Tybits*, 19 Ves. Jr. 656.

The election provided for in this policy is different from any that is considered in the cases cited in the brief of the learned counsel of the respondent, or any that is usually found in reported cases, in one respect, and that is that the person to be notified of the election cannot be injured by delay if notice of the election is given at any time before suit, nor, indeed, if given after that, in time for judgment, except, perhaps, in disappointing an expectation. The plaintiff could acquire no rights which might be injured by the delay. In most of the cases the parties are reversed, and the obligee and not the obligor, and the promisee and not the promisor, is to make the election which affects the rights of the other party. It would seem

that the other party ought to be in such condition that his rights would be injured by the delay to complain of it. The plaintiff, by the policy itself, was entitled to nothing, as the policy was void. By the condition, however, she is entitled to the insurance or the premiums and interest thereon, one or the other, at the option or choice of the company. She cannot know which she is to receive until such election by the Company is made, and that is all the possible consequence of the delay. So essential is it that the other party must have rights to be affected by the election that it has been often held "that an election may be revoked where the rights of others are not affected by it." *Evans App.* 51 Conn. 435; *Dabney v. Bailey*, 42 Ga. 521; *Sill v. Sill*, 31 Kan. 248; *Adsit v. Adsit*, 2 Johns. Ch. 448, 1 L. ed. 446; *Elbert v. O'Neil*, 102 Pa. 302; *Dillon v. Parker*, 1 Swann. 559.

But notwithstanding this election differs from those most common, by the absence of any rights to be injured by the delay to make it, yet it is in the form of one kind of election mentioned in the books; and we cannot say that it ought not to be made, and notice thereof given within a reasonable time. "Election presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has the right to control one or both, that one should be a substitute for the other." 1 Swanst. 394, and note; 3 Wood. Lect. 491. This is more like a case of plurality of gifts than of rights, so far as any consequences of delay are concerned. "An election by the obligor or promisor is not common, and it is usually and oftenest used as a legal term, as the choice of one of two things, to each one of which the party choosing has equal right, but both of which he cannot have." 2 Bouvier, Law Dict. 520, *Election* in note. In such a case the rights of the other party would be likely to suffer by delay. The party to receive would usually suffer only the displeasure of long waiting, or of disappointment up to the time it becomes necessary to demand that the election be made, or to bring suit to enforce it. In the view taken above of the full import of what is meant by the "equities of the case," the Company had the right to postpone its election until it could obtain information of all the facts and circumstances above mentioned necessary to a sound judgment of the election it ought to make. "An election will not be compelled, until the party has had time and opportunity to become fully informed of the facts affecting its choice." *Macknet v. Macknet*, 29 N. J. Eq. 54; *Kreiser's App.* 69 Pa. 194; *Hall v. Hall*, 2 McCord, Eq. 269; *United States v. Duncan*, 4 McLean, 99; 6 Am. & Eng. Encyclop. Law, 254; *Dabney v. Bailey*, *supra*; *Reaves v. Garrett*, 34 Ala. 558.

Can the court say that a few days over three months was an unreasonable time for the Company to become fully informed of all the facts bearing on the question of what would be most equitable for the Company to do in making the election? It seems to me not. The plaintiff had not suffered anything in her rights, and had not been peculiarly injured in the least, and had not changed her condition in any respect by reason of the delay. It may be that the following principle would obtain and be ap-

plicable to such an election: "On the failure of a person who has the right to make an election in proper time the right of election passes over to the opposite party." Co. Litt. 145a; Bacon, Abr. and Vin. Abr. title *Election*; *Overbach v. Heermance*, Hopk. Ch. 337, 2 L. ed. 442. The plaintiff did not take advantage of this principle, and elect to have the insurance, before she received notice of the election made by the Company; nor did she predicate this action for the insurance on the ground of the unreasonable delay of the Company to make the election. She has never complained of the delay, either by notice or pleading, or

until on the trial of the action. The judgment for the plaintiff for the full insurance on the sole ground of this short delay, which had not injured the plaintiff in the least, was quite too strict a construction of this kind of an election. There does not appear to have been any ground for holding that the delay was unreasonable.

*The judgment of the Superior Court is reversed, and the cause is remanded with direction to render judgment for the plaintiff for only the amount of the premiums paid upon both policies and interest thereon.*

*Cole, Ch. J., took no part.*

## VERMONT SUPREME COURT.

J. W. HOBART  
v.  
Sumner YOUNG.

(...Vt....)

1. Cross-examination of a witness about coming on a pass need not be permitted in the absence of an offer to connect the party who produces him with the pass if he had one.
2. Testimony of witnesses as to their offers for horses need not be admitted to show the soundness of the horses, where they have already testified fully that the horses were sound.
3. A verbal warranty of horses on a day when the price was fixed, but prior

to the actual purchase, when a written bill of sale was made, may be binding on the seller.

4. An express warranty of soundness is made by a bill of sale of horses, which describes them as "sound and kind," especially where the buyer had not the peculiar means which the seller possessed of knowing the facts.

(March 8, 1891.)

**EXCEPTIONS** by defendant to rulings of the County Court for Franklin County, made during the trial of an action brought to recover damages for deceit and false warranty in the sale of a horse, which resulted in a verdict in favor of plaintiff. *Overruled.* Plaintiff's evidence tended to show that de-

### NOTE.—Object of cross-examination.

The object of cross-examination is to break the force or destroy the effect of the testimony given by the witness upon his direct examination, or to lay the foundation for testimony of other witnesses which shall have that effect. When a witness has been examined in chief, the other party has the right to cross-examine for the purpose of ascertaining and exhibiting the situation of the witness with respect to the parties and to the subject of the litigation his interest, his motive, his inclinations, his prejudices, his means of obtaining a correct and certain knowledge of the facts to which he has borne testimony, the manner in which he has used those means, his powers of discernment, memory and description. *Butler v. Flanders*, 12 Jones & S. 581.

### Range of cross-examination.

¶ The legitimate cross-examination of a witness, as to the issue involved in the action, is limited to those matters as to which the witness was interrogated upon his direct examination. In strict practice a party cannot introduce his case to the jury by cross-examining the witness of his adversary. A party has no legal right to cross-examine a witness except as to facts and circumstances connected with the matters stated on the direct examination. *Bell v. Prewitt*, 63 Ill. 382. See *Harrison v. Rowan*, 8 Wash. C. C. 580; *Kilmaker v. Buckley*, 16 Serg. & R. 77; *Castor v. Bavington*, 3 Watts & S. 505; *Floyd v. Bovard*, 6 Watts & S. 75; *Buckley v. Buckley*, 12 Nev. 428; *Cramer v. Culhane*, 2 McArthur. 197.

### Restrictions upon the right.

A party has no right to cross-examine any witness except as to facts and circumstances connected 12 L. R. A.

with the matters stated in his direct examination. If he wishes to examine him on other matters, he must do so by making the witness his own, and calling him as such, in the subsequent progress of the cause. A party cannot, by his own omissions to take an objection to the admission of improper evidence, brought on cross-examination, found a right to introduce testimony in chief to rebut it or explain it. *Philadelphia & T. R. Co. v. Stimpson*, 39 U. S. 14 Pet. 443, 10 L. ed. 535.

### Cross-examination discretionary with the judge.

The cross-examination of a witness is of necessity largely under the control and within the discretion of the primary court; and appellate courts are reluctant to review and reverse their action, in limiting or enlarging its area, when the purpose is to show the bias, or motive, or to impeach the witness. Much must depend on the conduct and attitude of the witness during the examination; and much may depend on the course of the cross-examining counsel. *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8.

### The scope of cross-examination on the case.

Whether the right of cross-examination covers the whole case, or is restricted to matters touched upon in the direct examination, is a point upon which the authorities are in hopeless conflict. The weight of American authority is in favor of restricting the right, making it simply co-extensive with the examination in chief. *Philadelphia & T. R. Co. v. Stimpson*, 39 U. S. 14 Pet. 443, 10 L. ed. 535; *Houghton v. Jones*, 68 U. S. 1 Wall. 702, 17 L. ed. 508; *Donnelly v. State*, 26 N. J. L. 463; *Johnson v. Wiley*, 74 Ind. 233; *Buckley v. Buckley*, 14 Nev. 322; *Fulton v. Central Bank of Pittsburgh*, 92 Pa. 112; *Bell v. Chambers*, 38 Ala. 600; *Chicago & R. I. R. Co.*

fendant owned a pair of black horses; that about June 1, plaintiff examined and rode after the horses and thought one of them favored one of his fore feet a little; that thereupon defendant said the horse was all right and he would warrant him; that plaintiff did not buy the horses that day but agreed upon a price at which he could have them; that on June 5, he sent for them, when defendant gave him the following bill of sale:

Alburgh, June 5, 1888.

J. W. Hobart.

Bot of Sumner Young, Esq., one pair of black (Pilot) geldings sound and kind, \$487.50. To be delivered on the cars at the depot with good halters, duties paid and certificates of the same attached hereto.

Rec'd payment,  
S. Young.

That soon after plaintiff received the horses, one of them showed lameness, which proved to be caused by ringbone; that plaintiff notified defendant to take the horses back or get a mate to the off one, which defendant declined to do claiming that he was under no obligations to do so.

Defendant denied making any warranty.

One Sowers was an important witness for plaintiff at the trial. On cross-examination he testified that he came to court from Boston at plaintiff's request, but did not suppose he would pay his expenses. He was then asked: "Did you come on a pass? This question was objected to and excluded and defendant excepted.

Further facts appear in the opinion.

*Messrs. Wilson & Hall*, for defendant:

The bill of sale does not constitute a warranty. The language "sound and kind" is simply descriptive as "black" "Pilot" and "gelding" in said bill of sale.

*Barrett v. Hall*, 1 Aik. 269; *Wason v. Rowe*, 16 Vt. 525; *Richardson v. Grandy*, 49 Vt. 22.

A simple affirmation made in the sale of property as to soundness or the like is not a warranty unless it was so intended and understood by both parties.

*Bond v. Clark*, 85 Vt. 577; *Foster v. Caldwell*, 18 Vt. 177; *Fennock v. Stygles*, 54 Vt. 226.

Where representations are made several days before the sale they cannot in law form the basis of recovery on the ground of warranty or deceit unless it appears that the buyer was induced to take the property relying upon such representations and the seller so understood it; and whereas, in the case at bar, the contract of sale is in writing, what was said and done days previous to the date of the bill of sale cannot be considered in determining how the expression in said bill of sale, "sound and kind," was understood, and it was the duty of the court to have so instructed the jury.

*Reed v. Wood*, 9 Vt. 285; *Bond v. Clark*, *supra*.

*Mr. Albert P. Cross* for plaintiff.

*Rowell, J.*, delivered the opinion of the court:

As to the exclusion of the question put to Sowers on cross-examination about his coming

*v. Coal & L. Co.* 36 Ill. 60; *Thornton v. Hook*, 36 Cal. 223; *Wilhelmi v. Leonard*, 12 Iowa, 330; *Sumner v. Blair*, 9 Kan. 521; *Congar v. Galena & C. U. R. Co.* 17 Wis. 477. See also, to substantially the same effect, *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Toole v. Nichol*, 43 Ala. 408; *Drohn v. Brewer*, 77 Ill. 230; *Brown v. State*, 23 Ga. 199.

Many American courts, however, maintain the English rule, that direct examination, even for formal proof, opens up the whole case to cross-examination. *Moody v. Rowell*, 17 Pick. 490; *Fulton Bank v. Stafford*, 2 Wend. 433; *Linsley v. Lovely*, 26 Vt. 123; *Fralick v. Presley*, 29 Ala. 437; *Com. v. Morgan*, 107 Mass. 199; *Maak v. State*, 33 Miss. 406; *State v. Sayers*, 53 Mo. 585; *Haynes v. Ledyard*, 33 Mich. 313.

Questions on the case must be relevant to the issue. But the same stringency is, as a rule, not required as in a direct examination. *Mayhew v. Thayer*, 8 Gray, 172.

It has been held that a party who has opened his case to the jury will not be entitled to establish such case by cross-examination, but must recall the witness. *Harrison v. Rowan*, 3 Wash. C. C. 580; *Ellmaker v. Buckley*, 16 Serg. & R. 72. But see *Burke v. Miller*, 7 Cush. 547; *Com. v. Hudson*, 11 Gray, 64. See Best, Ev. § 644, in connection with a valuable formal note by Mr. Chamberlain in the edition of 1889.

#### Oral warranty.

If the article is sold by a formal written contract or a regular bill of sale, and that is silent on the subject of warranty, no oral warranty made at the same time, or previously even, can be shown, since the writing is supposed to embody the whole contract. For the same reason no additional oral warranty can be grafted on or added to, one that is written. *Lamb v. Crafts*, 12 Met. 353; 13 L. R. A.

*Pender v. Fobes*, 1 Dev. & B. L. 250; *Reed v. Wood*, 9 Vt. 285; *Wood v. Ashe*, 1 Strobh. L. 407; *Boardman v. Spooner*, 13 Allen, 353; *Dean v. Mason*, 4 Conn. 432; *Frost v. Blanchard*, 97 Mass. 155; *Mumford v. McPherson*, 1 Johns. 414; *Merriam v. Field*, 24 Wis. 640; *Van Ostrand v. Reed*, 1 Wend. 424; *Randall v. Rhodes*, 1 Curt. C. C. 90; *Galpin v. Atwater*, 29 Conn. 93; *Whitmore v. South Boston Iron Co.* 2 Allen, 58; *Shepherd v. Gilroy*, 45 Iowa, 198; *Jones v. Alley*, 17 Minn. 232; *Thompson v. Libby*, 34 Minn. 374, *note*; *Benjamin, Sales, Bennett's notes*, p. 609.

#### Interpretation of warranties.

It is frequently said that the interpretation or construction of a written warranty is for the court and of an oral one for the jury; but it is conceived that this means only that it is for the jury to find what words were in fact used by the parties, and under what circumstances and intent, and that being established, the construction, or "effect of it," is as much for the court in an oral warranty as in a written one, the only difference being that in the one there is no uncertainty about the language used, while in the other there may be. *Short v. Woodward*, 13 Gray, 83.

#### Of written and oral warranties.

While the warranty is collateral to the sale, it must still be regarded as an essential ingredient to the contract; and where the writing is the written repository of the mutual intent, the warranty is supposed to be incorporated with it. *Whitmore v. South Boston Iron Co.* 2 Allen, 58; *Thompson v. Libby*, 34 Minn. 374; *Wood v. Ashe*, 1 Strobh. L. 407; *Dean v. Mason*, 4 Conn. 432; *Mullain v. Thomas*, 43 Conn. 232; *Lamb v. Crafts*, 12 Met. 353; *Frost v. Blanchard*, 97 Mass. 155; *Randall v. Rhodes*, 1 Curt. C. C. 90; *Boardman v. Spooner*, 13 Allen, 353; *Merriam v. Field*, 24 Wis. 640; *Reed v. Wood*, 9 Vt. 285;

on a pass, it is enough to say that no offer was made to connect the plaintiff with furnishing him a pass, if he came on one. Without this the plaintiff could not be affected by the fact that the witness came on a pass. The reasons urged to show error in not allowing defendant's witnesses Clark, Darby and Fairfield to testify their offers for the horses come pretty much to the same point,—relevancy to show soundness. All these witnesses had carefully examined the horses as to soundness, and Clark testified that they were sound, and defendant's counsel say that the others did, and we think that is fairly inferable from the exceptions. The defendant, therefore, had the full benefit of their testimony on that subject; and the attempt to prove their offers was but seeking to have them give supposed emphasis to their testimony by stating, in effect, that they felt certain enough that the horses were sound to make the offers for them without requiring a warranty. It was, at best, an indirect way of trying to get at what had already been gotten at directly: and certainly the offers, standing alone, would not have tended to show soundness, for the witnesses might have considered the horses unsound and yet have thought them worth what they offered for them, and so have been willing to buy them without a warranty. It is claimed that in charging on the aspect of warranty the court assumed that the horse was unsound at the time of sale, and did not give the jury to understand that it must find unsoundness then in order to warrant recovery on that ground. It is true that the court said nothing in that part of its charge about finding

unsoundness; but in charging on the aspect of deceit the court expressly told the jury that the burden of proving deceit was on the plaintiff, and that before they could find for him on that ground they must be convinced by a fair balance of evidence that the horse was unsound at the time; and in this connection the court charged that the same rule of evidence applied to the other branch of the case. We think it clear that the jury was not left to suppose that there could be a recovery on the warranty without finding a breach. It is conceded that the court correctly charged the law of warranty, but claimed that it did not apply it to either branch of the case, for that it did not tell the jury that in order to make the defendant's representations binding upon him he must have made them with the view of having the plaintiff receive them as true, and that the plaintiff must have made the purchase relying upon them. As to the aspect of warranty, certainly this claim has no foundation, for in connection with the proposition of law conceded to contain all the elements of a warranty the court expressly told the jury that they must make that rule their guide in applying the evidence, and determine whether what they found was said and done amounted to what the law calls a warranty. And again, in restating the questions at the close of the charge, the jury were told, among other things, that they were called upon to determine whether there was a warranty under the law laid down to them, defining what a warranty is in law. All this was quite sufficient. As to the aspect of deceit, the jury were told that they must deter-

Van Ostrand v. Reed, 1 Wend. 424; Galpin v. Atwater, 29 Conn. 96; Pender v. Forbes, 1 Dev. & B. L. 350.

#### *Exceptions under the general rule.*

The above paragraph states the prevailing rule, but it is the exception under it that applies with peculiar force to the case at bar. If the writing is merely an informal memorandum, and is not regarded by either party as evidencing the ultimate intent, then the sale rests in parol, and its terms, condition and character may be proved by either oral or written evidence. It follows, as a corollary, that in such a case written evidence is not the only medium of proof as to the warranty, even where the other terms are embodied in the form of a memorandum. Cassidy v. Bearden, 6 Jones & S. 321; Sutton v. Crosby, 54 Barb. 80; Boorman v. Jenkins, 12 Wend. 586; Filkins v. Whyland, 24 N. Y. 388; Hildreth v. O'Brien, 10 Allen, 104; Stacy v. Kemp, 97 Mass. 168; Wallace v. Rogers, 2 N. H. 506; Gordon v. Waterous, 36 U. C. Q. B. 321; Atwater v. Clancy, 107 Mass. 365; Koop v. Handy, 41 Barb. 454; Hazard v. Loring, 10 Cush. 317; Fletcher v. Willard, 14 Pick. 464; Schenck v. Saunders, 18 Gray, 37; Perrine v. Cooley, 39 N. J. L. 449; McMullen v. Williams, 5 Ont. App. 518.

It follows *a fortiori* that parol evidence of a warranty is competent, even in the presence of a written receipt for the purchase price. Filkins v. Whyland, 24 N. Y. 388.

The propositions of the text are further sustained by the following authorities: Sharp v. Radebaugh, 70 Ind. 547; Brown v. Owen, 94 Ind. 61; Bradford v. Manly, 18 Mass. 136; Davenport v. Mason, 15 Mass. 66; Irwin v. Thompson, 37 Kan. 643; Barker v. Bradley, 42 N. Y. 316; Foot v. Bentley, 44 N. Y. 166; Crocker v. Higgins, 7 Conn. 342; Riale v. Phenix Bank, 38 N. Y. 318; Kemp v. Byne, 54 Ga. 527; Brad-

shaw v. Combs, 102 Ill. 428; Hutchins v. Hebbard, 34 N. Y. 24; Lash v. Parlin, 78 Mo. 391; Green v. Randall, 61 Vt. 67; Lehnardt v. Schields, 18 Mo. App. 498; Amoret v. Montague, 63 Mo. 201; Brown v. Owen, 94 Ind. 81; Tomlinson v. Briles, 101 Ind. 588; Smith v. O'Donnell, 8 Lea. 468; Shepard v. Haas, 14 Kan. 443; Kinney v. Whiton, 44 Conn. 262; Brewster v. Countryman, 12 Wend. 446; Fisher v. Abeel, 66 Barb. 381; Richards v. Fuller, 37 Mich. 161; Tisdale v. Harris, 20 Pick. 9; Brigg v. Hilton, 1 Cent. Rep. 307, 99 N. Y. 517; Pike v. Fay, 101 Mass. 130.

It may be said that representations made in connection with an executory contract of sale, which, in case the contract was executed, would constitute an express warranty greater than the law would imply, become, upon the execution of the contract and delivery of the goods, an express warranty, which survives the acceptance of the goods. Foot v. Bentley, *supra*; Day v. Pool, 59 N. Y. 416; Parks v. Morris Ax & Tool Co. 54 N. Y. 582; Dounce v. Dow, 64 N. Y. 414.

#### *An English case in point.*

An early English case the force of which has never been questioned is almost a direct affirmation of the principle established by the decision of the learned judge in the case under review. The case is reported in 1 El. & El. and establishes a proposition which has received universal assent, to the effect that a warranty of soundness on the sale of a horse is broken if there is a malformation that has existed from the birth of the horse, and which, at the time of the sale, renders the horse less fit for reasonable use. Holliday v. Morgan, 1 El. & El. 1.

Where a horse has a malformation which existed from its birth, and it renders the horse less fit for reasonable use, as where there was an extraordinary convexity of the cornea of the horse's eye, which produced a short-sightedness, in consequence

mine from the evidence whether the horse had a ringbone, and whether defendant knew it; whether defendant practiced a deceit upon the plaintiff in palming the horses off onto him with that defect on one of them; whether there was any such deceit practiced in the sale of the horses as the evidence tended to show, and as must be shown in order to make the defendant liable on that ground. We think this was sufficient to give the jury to understand that they must find both that the defendant intended to mislead plaintiff by his representations, and that plaintiff was in fact misled by them, before they could make the defendant liable on this branch of the case. The language of the court imports an intentional deceit and palming off. To "palm off" means to impose by fraud; to put off by unfair means. The language also imports that plaintiff must have been deceived and cheated by the misrepresentations, which he could not have been had he not relied upon them. It was not error to submit to the jury to find whether there was a verbal warranty on the 2d of June, the last time plaintiff saw the horses before the purchase. Although he did not buy them that day, the price was then agreed upon at which he could have them. The testimony on the part of plaintiff, admitted without objection, presented two aspects as to warranty, namely,

that of a verbal warranty on June 2, and that of a written warranty on June 5. The defendant denied both, and said that the bill of sale did not contain a warranty, and that if it did he was not bound by it because of the circumstances in which he signed the bill. No objection was made to the admission of the parol evidence as varying the written contract. In this posture of the case it was the duty of the court to submit both aspects of that question; for it is not necessary that representations, in order to constitute a warranty, should be simultaneous with the conclusion of the bargain, but only that they should be made during the course of the negotiations that lead to the bargain, and should then enter into the bargain as a part of it. *Wilmot v. Hurd*, 11 Wend. 585; 2 Benjamin, Sales, Corbin's ed. § 929.

An important question is whether the words "sound and kind," contained in the bill of sale, constitute an express warranty as matter of law. The law of warranty has undergone much change since *Chandelor v. Lopus*, Cro. Jac. 4, decided in the Exchequer Chamber in 1803. It was there held that an affirmation that the thing sold was a bezoar-stone was no warranty; for, it was said, everyone, in selling his wares will affirm that they are good, or that the horse he sells is sound; yet, if he does not warrant them to be so, it is no cause of

of which he had a habit of shying; this was held to be such unsoundness as to constitute a breach of a general warranty of soundness. *Ibid*.

Such a defect as that in the eye of a horse, is not one of those patent defects which a purchaser is bound to notice when the horse is sold to him with an express warranty of soundness. *Ibid*.

The court said: "The animal had a defect of vision, which diminished its usefulness at the time of the sale. That is unsoundness within the ordinary definition. The defendant says that it was not so because the defect was congenital. But I dissent from the proposition that congenital defects cannot constitute unsoundness. The unsoundness may be either congenital or supervening after birth and before the sale."

#### *The American authorities reviewed.*

The most common case of dispute over the scope and meaning of warranties, is the warranty against unsoundness in animals. At one time it was supposed that a warranty as to soundness was not broken by a temporary and curable ailment; and even now this is held to be no breach of the warranty if the temporary ailment does not interfere with his present usefulness. But it has been held that any ailment, whether temporary or permanent, would be a breach of the warranty of soundness, if there has been any alteration of structure, or the prevalence of the disease in any way interferes with the present or future usefulness of the animals. On the other hand, temporary lameness has been held to be no breach of the warranty, and so, likewise, a simple cold, which could be controlled by ordinary remedies. But whatever variance there may be on this question, it seems to be settled that the fact that the disease is curable does not take it outside of the warranty of soundness. An incipient disease is as much a breach of the warranty as when it is fully developed. This has been held to be the case with glanders and rheumatism. "Cribbing" is an unsoundness. *Roberts v. Jenkins*, 21 N. H. 119; *Kenner v. Harding*, 35 Ill. 264; *Coates v. Stephens*, 2 Mood. & R. 187; *Schurtz v. Kleinmeyer*, 36 Iowa, 322; *Holliday v. Morgan*, 112 L. R. A.

*El. & El. 1*; *Kiddell v. Burnard*, 9 Mees. & W. 663; *Knoreg v. White*, 10 Ala. 255; *Brown v. Bigelow*, 10 Allen, 242; *Springstead v. Lawson*, 23 How. Pr. 302; *Thompson v. Bertrand*, 23 Ark. 731; *Alexander v. Dutton*, 58 N. H. 232; *Bolden v. Brogden*, 2 Mood. & Rob. 118; *Finley v. Quirk*, 9 Minn. 194; *Woodbury v. Robbins*, 10 Cush. 530; *Crouch v. Culbreath*, 11 Rich. L. 9; *Fondren v. Duffee*, 30 Miss. 323; *Hook v. Stovall*, 21 Ga. 66; *Stephens v. Chappell*, 3 Strobb. L. 80; *Dean v. Morey*, 38 Iowa, 120; *Washburn v. Cuddihy*, 8 Gray, 430; *Walker v. Hoisington*, 43 Vt. 608. See *Tiedeman, Sales*, § 194, where this entire subject receives exhaustive and discriminating treatment.

Among the defects which have been held to constitute unsoundness under the general warranty in horse sales, the text-books enumerate these: organic defects, such as that a horse had been nerved, bone spavin of the hock, and ossification of the cartilages. *Benjamin, Sales*, bk. 4, pt. 2, chap. 1, § 1; *Oliphant, Horses*, 224-225. And see *Croyle v. Moses*, 90 Pa. 250, as to implied warranty on fraudulent concealment.

Crib-biting has been declared to come in only under a warranty against vices (*Scholesfield v. Robb*, 2 Mood. & Rob. 210; but, on the other hand, it is pronounced unsoundness where shown to affect the general health and condition of the horse. *Washburn v. Cuddihy*, 8 Gray, 430. See also *Dean v. Morey*, 38 Iowa, 120; *Walker v. Hoisington*, 43 Vt. 608.

A warranty of soundness does not strictly cover mere badness of shape, the animal being sound when sold, not even, as it would seem, though the misshape tends to produce unsoundness. See *Brown v. Elkington*, 8 Mees. & W. 122; *Benjamin, Sales*, bk. 4, pt. 2, chap. 1 § 1.

But if the seeds of disease be shown to have been in the animal at the time of the sale, which afterwards develop with full disability, there is unsoundness within the general meaning of the warranty. *Woodbury v. Robbins*, 10 Cush. 530; *Kiddell v. Burnard*, 9 Mees. & W. 663. See note to *Schouler, Pers. Prop.*, § 341, where the subject receives extended treatment.



action. But latterly courts have manifested a strong disposition to construe liberally in favor of the purchaser what the seller affirms about the kind and quality of his goods, and have been disposed to treat such affirmations as warranties when the language will bear that construction, and it is fairly inferable that the purchaser so understood it. *Stons v. Denny*, 4 Met. 155; *Hawkins v. Pemberton*, 51 N. Y. 198. And now any affirmation as to the kind or quality of the thing sold, not uttered as matter of communication, opinion or belief, made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase, if so received and relied upon by the purchaser, is deemed to be an express warranty. And in cases of oral contracts it is the province of the jury to decide, in view of all the circumstances attending the transaction, whether such a warranty exists or not. *Foster v. Caldwell*, 18 Vt. 176; *Bond v. Clark*, 85 Vt. 577; *Shippen v. Bowen*, 122 U. S. 575, 30 L. ed. 1172. But when the contract is in writing, it is for the court to construe it, and to decide whether it contains a warranty or not (*Wason v. Rowe*, 16 Vt. 525); and by the great weight of recent authority positive statements in instruments evidencing contracts of sale, descriptive of the kind, or assertive of the quality and condition of the thing sold, are treated as a part of the contract and regarded as warranties if the language is reasonably susceptible of that construction, and it is fairly inferable that the purchaser understood and relied upon it as such. Thus, in *Hastings v. Lovering*, 2 Pick. 214, the sale note described the article as "prime quality winter sperm oil." The plaintiff declared in assumption on a warranty, and had judgment. In *Henshaw v. Robins*, 9 Met. 83, the bill of particulars affirmed the article to be indigo. The court said that that imported an express warranty if it was so intended, and that it must be taken to have been so intended, as there was no evidence to the contrary. In *Brown v. Bigelow*, 10 Allen, 242, a case exactly in point, these very words, "sound and kind" were held to constitute a general warranty of soundness. In *Gould v. Stein*, 149 Mass. 570, 5 L. R. A. 213, a bought and sold note described the article as "Ceara scrap rubber as per sample, of second quality." The court said that it did not admit of doubt that the note was intended to express the terms of the sale, and that the contract of the parties was to be found in what was thus written, read in the light of the attendant circumstances. Held a warranty that the rubber was of second quality, and that the fact that the plaintiff made such examination of it as he pleased did not necessarily do away with the warranty. *Osgood v. Lewis*, 2 Har. & G. 495, is a leading case on this subject. There the bill of particulars contained a statement that the article was "winter-pressed sperm oil," and the question was whether those words were *per se* a warranty; and it was held that they were, for it was said they could not be regarded as mere matter of opinion or belief, but as the assertion of a material fact that the defendant assumed to know and to warrant the existence of. In *Kearly v. Duncan*, 1 Head, 897, the words, "said negroes, sound in body

and mind," contained in a receipt for the price paid for them, were held clearly to constitute a warranty of soundness. The words, "being of sound mind and limb, and free from all disease," in a bill of sale of slaves, were held a warranty in *Cramer v. Bradshaw*, 10 Johns. 484. This case is criticised by Bennett, J., in *Foster v. Caldwell*, 18 Vt. 181, who would treat the words as a mere representation, descriptive of the property sold. But that case seems to have stood the test in New York, while *Seiras v. Woods*, 2 Cal. 43, and *Sweet v. Colgate*, 20 Johns. 203, to which he refers, and which held that no warranty arises from a description of the kind of property sold, have been expressly overruled by *Hawkins v. Pemberton*, 51 N. Y. 198, as not properly applying the doctrine that they correctly announce, wherein a contrary application is made, and wherein it is held that there is no distinction in principle between a representation as to quality and condition and a representation as to kind and character. And in 1 Smith, Lead. Cas., 7th Am. ed. 841, it is said that such a distinction is too refined to be practicable. In *Yates v. Pym*, 6 Taunt. 446, a description of bacon in a sale note as "prime singed" was held to be a warranty that it was prime singed. So in *Bridge v. Wain*, 1 Starkie, 504, the goods sold were described in the invoice as "scarlet cuttings." Held a warranty that they answered the known mercantile description of scarlet cuttings. The advertisement of the sale of a ship described her as a copper-fastened vessel," whereas she was only partially copper-fastened, and not what was called in the trade a "copper-fastened vessel." Held, a warranty that she was copper-fastened. *Shepherd v. Kain*, 5 Barn. & Ald. 240. A sold note described turnip seed as "Skirving's Swedes." Coleridge, J., said that there was no doubt that the statement was made by the defendant a part of the contract, and it was held to be a warranty that the seed was Skirving's. *Allan v. Lake*, 18 Q. B. 560. In *Welherill v. Neilson*, 20 Pa. 448, the bill of sale described the soda ash as being of a certain strength, whereas it was of a less strength and unmerchantable. Held, no warranty. It is said in 1 Smith, Lead. Cas., 7th Am. ed. 348, that this case stands almost, if not quite, alone, and cannot be reconciled with the general course of decisions in this country and in England. In *Barrett v. Hall*, 1 Aik. 269, the note was payable in "good cooking stoves." The court said that no definite quality could be intended from the term "good," and that it imported nothing but opinion, and was no warranty, and referred to *Chandelor v. Lopus*, Cro. Jac. 4, for authority, which is no longer authority. But we do not say that the court was wrong in that case, for "good" is a very common term of praise in trade, and as used in the note, ascribed no particular quality to the stoves, and might well be regarded, in that case, as mere matter of opinion or commendation, and as so understood by the parties. In *Wason v. Rowe*, 16 Vt. 525, the bill of sale said the horse was "considered sound." Held, no warranty, and with good reason, for "considered" was no assertion of a fact, but a mere expression of opinion. The more recent cases in this State recognize the general rule that positive statements of fact by the seller in re-

spect of the kind or the quality of the thing sold that constitute a part of the contract or form its basis, and that are fairly susceptible of such a construction, are to be regarded as warranties. Thus, in *Beals v. Olmstead*, 24 Vt. 114, one of the reasons given why the defendant's statements ought to be regarded as warranties is that they were made positively, and concerning matters as to which he was supposed and professed to have knowledge. Therefore, it is said, he ought to expect to be bound by them. See also *Drew v. Edmunds*, 40 Vt. 401, 6 New Eng. Rep. 855; *Enger v. Dawley*, 62 Vt. 164.

It is sufficiently certain, as matter of construction, that the words, "sound and kind,"

found in the bill of sale before us, were intended by the parties to be a part of the contract of sale, and as such it would be unreasonable to construe them as an expression of mere opinion when they positively ascribe to the horses a condition and a quality that the defendant assumed to know they possessed, and that he had peculiar means of knowing, whether they possessed or not, while the plaintiff had no such means. We think the words, reading the instrument in the light of the attendant circumstances, clearly constitute an express warranty of soundness, and that the chief judge was right in so holding.

*Judgment affirmed.*

## PENNSYLVANIA SUPREME COURT.

D. G. SPAULDING, Admr., etc., of Phœbe Baker, Deceased,

PENNSYLVANIA CO., Operating the Erie & Pittsburgh Railroad, *App't.*

(....Pa....)

**The price for which a volunteer would endure the suffering caused by a personal**

injury cannot be regarded as the standard in determining the amount of damages in an action for such injury, if it was not wantonly inflicted, and an instruction which suggests the idea of such a price in connection with the difficulty of fixing the amount is misleading.

(May 26, 1901.)

**A** PPEAL by defendant from a judgment of the Court of Common Pleas for Erie

*NOTE.—Measure of damages for personal injuries, pain and suffering.*

Damages for a personal injury include compensation for pain and suffering, but to the extent of compensation only according to the sound discretion of the jury. *Lindvall v. Woods*, 44 Fed. Rep. 355.

Money is an inadequate recompense for pain, but the law aids the sufferer to obtain it in such measure as a jury, considering all the circumstances, will allow. *Chicago v. Langlass*, 66 Ill. 361; *Scott v. Hamilton*, 71 Ill. 85; *Pierce v. Millay*, 44 Ill. 139; *Lucas v. Flinn*, 85 Iowa, 9; *Tefft v. Wilcox*, 6 Kan. 46; *Slater v. Sherman*, 5 Bush, 206; *Verrill v. Minot*, 51 Me. 299; *Elliott v. Van Buren*, 38 Mich. 49; *Welch v. Ware*, 32 Mich. 77; *Johnson v. Wells*, 6 Nev. 225; *Ransom v. New York & E. R. Co.* 15 N. Y. 415; *Swarthout v. New Jersey S. B. Co.* 45 Barb. 222; *Oliver v. North Pac. Transp. Co.* 3 Or. 84; *McLaughlin v. Corry*, 77 Pa. 109; *Pennsylvania R. Co. v. Allen*, 53 Pa. 276; *Beardaley v. Swann*, 4 McLean, 338.

Plaintiff is entitled to recover, in addition to what a jury might award him for his suffering and physical injuries, only his pecuniary loss. *Drinkwater v. Dinsmore*, 80 N. Y. 892; *Ransom v. New York & E. R. Co.* 15 N. Y. 415; *Hamilton v. Third Ave. R. Co.* 58 N. Y. 25.

A woman who was indecently assaulted is entitled to be fairly compensated for all injuries, temporary or permanent, directly caused to her person, including compensation for pain and suffering, mental and physical, which has been or may thereafter be caused by such wrong. *Campbell v. Pullman Palace-Car Co.* 42 Fed. Rep. 484.

*Direct and proximate consequences of a wrongful act.*

When sickness is the direct or proximate consequence of a wrongful act, the pain and suffering are also elements of the injury for which compensation may be recovered. *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill. 391; *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317; *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329; *Fillebrown v. Hoar*, 124 Mass. 580; *Mea-* 12 L. R. A.

*gher v. Driscoll*, 99 Mass. 281; *Whalen v. St. Louis, K. C. & N. R. Co.* 60 Mo. 323; *Klein v. Jewett*, 26 N. J. Eq. 474; *Johnson v. Wells*, 6 Nev. 224; *Ward v. Vanderbilt*, 4 Abb. App. Dec. 531; *Ransom v. New York & E. R. Co.* 15 N. Y. 415; *Pennsylvania R. Co. v. Brooks*, 57 Pa. 339.

Not only bodily pain, but, connected with bodily injury, mental suffering,—anxiety, suspense, fright, sense of wrong from insult or indignity,—may be treated when the facts justify it as an element of the injury for which damages should be allowed. *Fairchild v. California Stage Co.* 18 Cal. 599; *Seger v. Barkhamsted*, 22 Conn. 290; *Masters v. Warren*, 27 Conn. 298; *Lawrence v. Housatonic R. Co.* 29 Conn. 390; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 355; *Taber v. Hutson*, 5 Ind. 822; *Muldrow v. Illinois Cent. R. Co.* 36 Iowa, 463; *McKinley v. Chicago & N. W. R. Co.* 44 Iowa, 314; *Baltimore & O. R. Co. v. Blocher*, 27 Md. 277; *Canning v. Williamson*, 1 Oush. 451; *Quigley v. Central Pac. R. Co.* 11 Nev. 350; *Hamilton v. Third Ave. R. Co.* 58 N. Y. 25; *Smith v. Pittsburg & Ft. W. R. Co.* 23 Ohio St. 10; *Pennsylvania & O. Canal Co. v. Graham*, 63 Pa. 290; *Nones v. Northouse*, 48 Vt. 587; *Ripon v. Bittel*, 30 Wis. 614; *Illinois Cent. R. Co. v. Barron*, 72 U. S. 5 Wall. 60, 18 L. ed. 561.

*Mental suffering as an element of damages.*

Mental suffering alone will not support an action; it is only when some act is done which will constitute a cause of action that injury to the feelings can be considered. *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313.

The gist of the action for injuries to the person is injury to the person, and prospective damages are considered the immediate and natural consequences. *Cook v. Missouri Pac. R. Co.* 1 West. Rep. 451, 19 Mo. App. 339.

The jury should consider the mental anguish, as well as the bodily pain, suffered by the plaintiff (*Cook v. Missouri Pac. R. Co. supra*; *Davidson v. Southern Pac. R. Co.* 44 Fed. Rep. 476) including anxiety, suspense and fright. *Sherwood v. Chicago & W. M. R. Co.* 38 Mich. 373.

County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

(Mrs. Phoebe Baker was injured while a passenger on defendant's road in consequence of an accident by which the car in which she was riding was thrown into the ditch. Her husband and herself brought this action to recover damages for such injury, pending which she died and her administrator was substituted as plaintiff in the action.)

The case further appears in the opinion.

Mr. J. Ross Thompson for appellant.

Mr. S. A. Davenport for appellee:

Williams, J., delivered the opinion of the court:

The first, second and third assignments of error are hardly just to the learned judge of the court below. They rest on detached sentences taken from the charge which need to be read in their proper connection, and which when so read are unobjectionable.

The fourth assignment is directed to what is evidently an inaccurate expression which may seem to lay down the doctrine that remote as well as proximate causes are sufficient to sustain an action; but the context shows that this was not the meaning of the judge and that the jury could not have been misled by the use of

the word "remote" in the paragraph complained of. What was said was this: "The doctor tells you that the immediate cause of death was the wasting away or loss of strength, but that the loss of strength was caused by the injury." He then added, "so that the injury would be the remote cause of her last sickness," for the pain experienced, in which he had already said "she would be entitled to recover providing your verdict was in her favor." But upon the testimony of the doctor it is clear that the injury was not the remote but the proximate cause of her last sickness, for he says that the loss of strength and wasting away of which she died "were caused by the injury." There was therefore no disregard of the maxim *causa proxima non remota spectatur*, recognized and applied in *Pennsylvania R. Co. v. Hope*, 80 Pa. 878; *Lehigh Valley R. Co. v. McKeon*, 90 Pa. 122, and several other cases. It was simply a mistake to use the word "remote" in describing the relation between the injury and the sickness which the doctor described as the result of the injury.

The fifth assignment is of a more serious character.

The learned judge while speaking of the measure of damages told the jury that the plaintiff's cause of action rested mainly on the inconvenience and pain suffered by her in consequence of the injury she received; and to

Mental injury and anguish, intensified and aggravated by the physical condition of a person, may be regarded in estimating the damages for a wrongful injury, although the party guilty of the wrong did not know of such physical condition. *Fell v. Northern Pac. R. Co.* 44 Fed. Rep. 248.

The jury may consider the case with all its facts and circumstances, and may take into account, not only physical pain, but also such mental suffering as they are satisfied must have been the natural result of the injury inflicted. *South & North Ala. R. Co. v. McLeod*, 68 Ala. 206; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 813; *Wright v. Compton*, 53 Ind. 337; *Nossaman v. Rickert*, 18 Ind. 350; *Elkhart v. Ritter*, 66 Ind. 136; *Ferguson v. Davis Co.* 67 Iowa, 601; *Mason v. Ellsworth*, 32 Me. 271; *Prentiss v. Shaw*, 56 Me. 427; *Wadsworth v. Treat*, 43 Me. 163; *Goddard v. Grand T. R. Co.* 57 Me. 208; *Wyman v. Leavitt*, 71 Me. 229; *Smith v. Holcomb*, 99 Mass. 552; *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 66; *McMillan v. Union Press Brick Works*, 6 Mo. App. 434; *West v. Forrest*, 22 Mo. 344; *Giblin v. McIntyre*, 2 Utah, 384; *Fenelon v. Butts*, 53 Wis. 344; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657; *Hanson v. Fowie*, 1 Sawy. 539; *Blake v. Midland R. Co.* 18 Q. B. 110.

Damages recoverable for mental anguish. See note to *Chicago v. McLean* (Ill.) 8 L. R. A. 735.

#### *Damages held not excessive.*

Three thousand dollars is not an excessive allowance as a moiety of the damages recoverable by a comparatively young man having a family to support, who endured much pain and suffering for months, and whose earning capacity, which was about \$1,000 per year, was diminished very greatly by the loss of a leg. *Anderson v. The Ashbrook*, 44 Fed. Rep. 124.

A verdict for \$5,000 is not excessive where plaintiff was rendered unconscious by his fall, and had a rib broken, and, although his physical sufferings were not great, yet by a rupture of some membrane of the chest emphysema was produced, rendering respiration difficult and distressing, and the disease incurable. *Texas & P. R. Co. v. Brown*, 78 Tex. 397, 12 L. R. A.

Six thousand five hundred dollars damages are not excessive for injury to a sound man about thirty-two years of age, who suffered much pain and was permanently incapacitated for heavy work by a rupture, while one leg was made smaller than the other, with some stiffness in the ankle joint. *The Mineola*, 44 Fed. Rep. 143.

A verdict for \$7,000 damages for injuries rendering a four-year-old boy a cripple for life, and causing intense suffering for many months, is not excessive. *Ft. Worth St. R. Co. v. Witten*, 74 Tex. 202.

#### *Damages grossly inadequate.*

A verdict of \$1,000 damages for injuries resulting in the total disability of a woman twenty years of age, with continuous and severe suffering, who was previously healthy and earned \$4 per week, and who had, during three years after the injuries, expended more than \$3,000 in seeking to be relieved from the consequences of such injuries, is grossly inadequate. *Smith v. Dittman*, 34 N. Y. S. R. 306.

#### *Considerations too remote and sentimental.*

The mental pain and suffering of a mother on account of the death of her son, caused by the negligence or wrongful act of another, is too remote and sentimental to be a proper element of damages. *Webb v. Denver & R. G. W. R. Co.* (Utah) July 23, 1890.

Damages for the death of plaintiff's child, in an action under the Act of Congress of Feb. 17, 1885, are merely for the loss of the child's services by death, and possibly for funeral expenses, and cannot include damages for mental suffering and anguish. *Bunyea v. Metropolitan R. Co.* (D. C.) 18 Wash. L. Rep. 412.

In an action by the personal representative of one whose death was caused by the wrongful act or neglect of another, the mother of deceased is entitled to damages not only for her pecuniary loss but for the loss of his comfort, society, support and protection, but not for sorrow, grief or mental suffering occasioned by his death. *Munro v. Pacific Coast Dredging & R. Co.* 84 Cal. 515.

guide them in deciding what compensation to make for suffering he used this language: "It is of course difficult to give a money value to pain and suffering. No person would voluntarily endure such pain and suffering as it is proven Mrs. Baker endured, for any amount of money. But it is the duty of the jury if they find for the plaintiff to fix some sum which would be a compensation for this pain and suffering."

The effect of this was to suggest the price in money sufficient to induce a person to undergo voluntarily the pain and suffering, for which a recovery was sought in the action, as a measure of the compensation due the plaintiff for having been subjected to it.

The learned judge first spoke of the difficulty in the way of fixing a money value upon suffering. He followed this by the statement that no amount of money would be regarded as sufficient to induce a person to undergo the pain complained of in this case, which suggested a possible standard of value that might be applied. He then finished the presentation of the subject by telling the jury that if they found for the plaintiff it was their duty "to fix some sum which would be a compensation for this pain and suffering." The idea of a price as the measure of the plaintiff's compensation is not applicable to this class of cases. In actions upon contracts it often happens that the price of the article or of the services sued for is a proper measure of the plaintiff's damages for the failure to deliver the article or to render the services. So in actions founded on tort the cost of repairing or replacing the property injured or destroyed may show to what sum the plaintiff is entitled. Such a standard

cannot be applied in actions for a personal injury, not wantonly inflicted, which results in severe pain. There is no market in which the price of a voluntary subjection of oneself to pain and suffering can be fixed. There is no market standard of value to be applied, and to suggest the idea of price to be paid to a volunteer as an approximation to the money value of suffering is to give loose rein to sympathy and caprice. The true rule is that in addition to loss of time and expenses actually incurred by the plaintiff by reason of the injury, the jury may consider also the nature of the injury, the pain and inconvenience resulting from it, and make such allowance therefor as in view of all the attending circumstances may seem to be just and reasonable. The age, the health, habits and pursuits of the plaintiff must be taken into consideration in determining what is a reasonable allowance for inconvenience and suffering in any given case. The absence of a cruel or wanton purpose in the defendant must not be overlooked. From the whole case the question is what is a reasonable allowance for the suffering necessarily endured. This question is for the jury subject nevertheless to the supervisory control of the court whose duty it is to set aside a verdict that is unreasonable and excessive.

In all other respects this case seems to have been well tried, and we greatly regret the necessity for sending it back. There seems, however, no escape from the conclusion that the fifth assignment presents substantial error which requires correction.

*The judgment is reversed and a venire facias de novo awarded.*

## ALABAMA SUPREME COURT.

I. H. WEINSTEIN, *Appt.*,

v.

F. L. FREYER *et al.*

(.....Ala.....)

**The validity of the title acquired by a purchaser of personal property from one who obtained it under a conditional sale re-**

serving title in the vendor, made in another State where the sale was valid and from which the property was removed before the price was paid, must be determined by the laws of the State where the second sale is made, at least if that is the domicile of the parties and the situs of the property; and the question whether or not the conditional vendor has complied with the requirements made necessary by the law of the State where his contract was made to keep his

### *NOTE.—Conditional sales.*

Where a delivery on a sale for cash is made before payment, either conditionally or upon a trust, the vendor may reclaim the property as against the vendee, or any transferee of his who has not made advances of money on the faith thereof as bona fide purchaser. *Dows v. Dennistoun*, 28 Barb. 398; *Fleeman v. McKean*, 25 Barb. 479.

Upon a sale of goods for cash to be paid on delivery, the title does not pass to or vest in the purchaser for actual delivery without payment, unless the condition is waived. *Smith v. Lynes*, 5 N. Y. 41, reversing 3 Sandf. 308; *Strong v. Taylor*, 3 Hill, 330; *Fleeman v. McKean*, 25 Barb. 474.

A delivery of property on condition that title shall not pass unless the price is paid at a set time, and that, if it is not, the seller may resume possession, does not transfer the title. *Herring v. Hop-pock*, 15 N. Y. 409, affirming 3 Duer, 20, 12 N. Y. Legal Obs. 167; *Herring v. Willard*, 2 Sandf. 418; *Piser v. Stearns*, 1 Hill, 86.

13 L. R. A.

See also 13 L. R. A. 187; 27 L. R. A. 558.

### *When condition is not waived.*

Mere delivery of the goods sold for cash is not necessarily a waiver of the condition. The seller has a right to explain the delivery by evidence. *Fleeman v. McKean*, 25 Barb. 474.

It is not necessary to a qualified or conditional delivery that the qualification or condition intended to be annexed to the delivery should at the time be declared by the vendor in express terms. *Smith v. Lynes*, 5 N. Y. 41; *Buck v. Grimshaw*, 1 Edw. Ch. 140, 6 L. ed. 89; *Keeler v. Field*, 1 Paige, 312, 2 L. ed. 660; *Haggerty v. Duane*, 1 Paige, 321, 2 L. ed. 664; *Van Neste v. Conover*, 8 Barb. 509; *Leven v. Smith*, 1 Denio, 571; *Hays v. Currie*, 3 Sandf. Ch. 536, 7 L. ed. 968; *Root v. French*, 13 Wend. 570; *Barnard v. Campbell*, 55 N. Y. 453, 53 N. Y. 73; *Bassett v. Spof-ford*, 45 N. Y. 337.

### *Conditions, when enforced.*

Conditions as to title follow a delivery to a purchaser, and will be enforced, even against a bona

title good against bona fide purchasers from his vendee is therefore immaterial.

(May 2, 1891.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiffs in an action brought to recover possession of a piano. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Jackson E. Long and Morris Loveman* for appellant.

*Messrs. Cabaniss & Weakley*, for appellee:

Even though the contract of conditional sale in this case may have been void in the State of Georgia, as against third persons, because not recorded, when brought into this State it came under the operation of our laws, and, being still good as between the parties, was also good and valid in this State as against third persons, there being no requirement that such contracts should be recorded.

*Martin Safe Co. v. Norton*, 5 Cent. Rep. 341, 48 N. J. L. 410; *Le Prince v. Guillemot*, 1 Rich. Eq. 187; *Sumner v. Woods*, 67 Ala. 189; *Fairbanks v. Eureka Co.* 67 Ala. 109; *Castleman v. Jeffries*, 60 Ala. 380; *Green v. State*, 66 Ala. 40; *Donovan v. Pitcher*, 53 Ala. 411.

fide purchaser parting with value. *Dows v. National Bank of Milwaukee*, 91 U. S. 618, 23 L. ed. 214; *Farmers & M. Nat. Bank of Buffalo v. Hazeltine*, 78 N. Y. 104.

To constitute one a bona fide purchaser, within the rule for the protection of a bona fide purchaser against a prior equity, the conveyance must be executed and the purchase money actually paid before notice. *Dows v. Dennistoun*, 28 Barb. 393; 2 Sugd. Vend. 8th Am. ed. by J. C. Perkins, 522, 523 (762, 763); *Heatley v. Finster*, 3 Johns. Ch. 159, 1 L. ed. 330; *Jewett v. Palmer*, 7 Johns. Ch. 65, 66, 2 L. ed. 223, 224; *Clark v. Mauran*, 3 Paige, 373, 3 L. ed. 198.

If it can be inferred from the acts of the parties and the circumstances surrounding the transaction that it was the intent that delivery and payment should be concurrent acts, the title will be deemed to have remained in the vendor until the condition of payment is complied with. *Benjamin, Sales*, Am. ed. § 380, and notes; *Leven v. Smith*, 1 Denio, 571; *Hammett v. Linneman*, 48 N. Y. 300; *Smith v. Lynes*, 5 N. Y. 41; *Parker v. Baxter*, 36 N. Y. 566; *Russell v. Minor*, 22 Wend. 666.

The question of intent is one of fact, not of law. It is for the jury, not for the court, to pass upon. *Hall v. Stevens*, 40 Hun, 578; *Hammett v. Linneman*, *supra*.

It is abundantly settled that a conditional sale, with a lien for the purchase price reserved, although the contract is contained in papers calling the transaction a consignment, is worthless as to the creditors of the purchaser although good as between the parties. *Peek v. Helm*, 127 Pa. 500.

#### The code provisions.

This subject is regulated by code provisions in several of the States. Thus under Ga. Code, § 1935, the written contract of a conditional sale must be recorded in the clerk's office of the county where the vendee resides; and the record in some other county will not suffice. *Cohen v. Candler*, 79 Ga. 437.

The North Carolina Code, § 1975, provides that conditional sales of personal property in which the title is retained by the bargainor shall be reduced to *nil*.

*Clopton, J.*, delivered the opinion of the court:

By the written contract introduced in evidence Freyer & Co. agreed to sell the piano in controversy to Paul Franklin for \$300, payable in installments, stipulating that the title and ownership should remain in them until the entire purchase money is paid, and reserving the right, in case of default in the payment of any part thereof, and the failure of Franklin to return the property on demand, to take possession by legal process. Such contract being, according to our later decisions, a conditional sale, the title does not pass until the contract price is paid, notwithstanding delivery of possession; and a bona fide purchaser of the property from the vendee, acquiring only his conditional title, is not protected against a recovery by the original vendor, unless he has conferred on his vendee indicia of ownership other than mere possession, or has waived or forfeited his right in the property. *Sumner v. Woods*, 67 Ala. 189; *Fairbanks v. Eureka Co.* Id. 109.

The contract between Freyer & Co. and Franklin was made October 29, 1885, in the State of Georgia, where the vendors and the vendee then resided, and where the property was situated. Franklin having retained possession in that State for about two and a half

to writing and registered, like chattel mortgages. *Harrell v. Godwin*, 102 N. C. 330.

So by a parity of reasoning an agreement by which the title of the thing sold is to remain in the vendor until a promissory note representing the purchase price, payable by installments, shall have been fully met, is valid and effective; and on failure of such payments the vendor may recover possession of the property. *Goldie v. Rascony*, 4 Montreal L. Rep. 312.

An actual delivery of personal property into the possession of a vendee under an agreement to pay cash is a conditional sale, and is not absolute, unless payment is waived. *Lang v. Rickmers*, 70 Tex. 108.

#### No particular form required.

No particular words or forms of expression are really necessary for the creation of a conditional sale. Any words which indicate an intention to annex a condition to the sale will be sufficient. Such phrases, however, as "on condition," "provided," "if it shall so happen," etc., are found in constant use, in the making of conditional sales, and, if employed, will usually remove any doubt as to the sale or transfer being conditional. But whether these expressions are used or not, if the intention of the parties to make the sale dependent upon the happening of some event or the performance of some collateral obligation can be ascertained from the expressions of the parties, it will be a conditional sale, it matters not what may be the language used. See *Goldsborough v. Orr*, 21 U. S. 8 Wheat. 217, 5 L. ed. 600; *Gill v. Weller*, 52 Md. 3; *Fane v. Hood*, 13 Pick. 231; *Tipton v. Feitner*, 30 N. Y. 423; *Isaacs v. New York Plaster Works*, 67 N. Y. 124.

In the case of dispositions of personal property by will, it is more difficult, than in sales, to determine whether they are conditional, because the language used by testator is ordinarily looser and more inexact. *Tiedeman, Sales*, § 201.

#### When vendee's title vests.

Where the vendor waives his right to receive payment before the delivery of the article sold,

years, removed to this State, bringing the piano with him, and about a year thereafter sold it to defendant, who paid a valuable consideration without notice of Freyer & Co's title or right. The bill of exceptions recites: "The defendant further introduced in evidence certain sections of the Code of Georgia to the effect that, in conditional sales of personal property in that State, reserving title in vendor until property was paid for, the reservation of title is invalid as against third parties, unless the contract of sale is in writing and acknowledged, and duly recorded within thirty days from its execution; but that the same is valid as between the parties, whether in writing or not, and whether recorded or not."

Defendant insists that, the contract of sale having been made and executed in Georgia, his title is determined by the laws of that State, and that the reservation of title, the contract not having been recorded, is invalid as to him. The bill of exceptions making no special reference to nor identifying the particular sections of the Code by number or otherwise, we must take and consider the legal effect of the Statutes as set out in the record. The general rule is that, when the State where a contract is made is also the place of performance, and the *situs* of the property, the laws of that State become a part of the contract; and the suffi-

ciency of its execution, its validity, interpretation and legal effect, and the rights of the parties to the contract, will be governed by the laws of that State wherever its enforcement may be sought. The rule is founded in comity, extended by express or tacit assent, and the force to be given to the laws of one State in another depends "upon its own proper jurisprudence and polity."

When the legislation of a State where the suit is brought is positive, its own tribunals must conform thereto. Also "where the nation's customary, unwritten, or common law speaks directly on any subject, it is equally to be obeyed, being of equal obligation with the positive Code. When both are silent, then only can the question properly arise as to which law shall govern." 3 Am. & Eng. Encyclop. Law, 503 *et seq.* The application of this principle is essential to prevent injustice and the introduction of insecurity, uncertainty and confusion in the transaction of business.

The direct question involved in this case came before the Supreme Court of New Jersey in *Martin Safe Co. v. Norton*, 48 N. J. L. 410, 5 Cent. Rep. 341. The contract for the sale of the property was made and performed in Pennsylvania. The property was immediately transported to New Jersey, and afterwards sold to a bona fide purchaser. The reservation

and gives immediate possession to the vendee, with the understanding that the title is to remain in him until the full payment of the purchase price, upon a stipulated day, such payment constitutes a condition precedent; and the right of property is not vested in the purchaser until due performance of this condition. *The Kimball*, 70 U. S. 8 Wall. 45, 18 L. ed. 54; *Glenn v. Smith*, 2 Gill & J. 498; *Sheehy v. Mandeville*, 10 U. S. 6 Cranch, 264, 3 L. ed. 219; *Downey v. Hicks*, 55 U. S. 14 How. 249, 14 L. ed. 407; *Lyman v. Bank of United States*, 58 U. S. 12 How. 248, 13 L. ed. 972; *Tobey v. Barber*, 5 Johns. 71; 3 Parsons, Notes and Bills, 153, and notes, and authorities there cited; *Story*, Prom. Notes, 7th ed. § 104, and notes, and cases cited.

#### *Domiciliary law governs.*

The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him. By that law an owner of property may not be divested of it without his consent, or by due process of law. Though a transfer of personal property, valid by the law of the domicile, is valid everywhere as a general principle, there is to be excepted that territory in which it is situated and where a different law has been set up, when it is necessary for the purpose of justice that the actual *situs* of the thing be examined. (*Green v. Van Buskirk*, 74 U. S. 7 Wall. 139, 19 L. ed. 109.) Yet the statutes of another State have no extraterritorial force, *proprio vigore*, though often permitted by comity to operate for the promotion of justice, where neither the State nor its citizens will suffer any inconvenience from the application of them. The exercise of comity in admitting or restraining the application of the laws of another country must rest in sound judicial discretion, dictated by the circumstances of the case. *Blanchard v. Russell*, 13 Mass. 6.

The policy of this country has been, and is, to protect the right of ownership, and to leave the buyer to take care that he gets a good title. "Notions of property are slight, when a bona fide purchase of stolen goods gives a good title against the 12 L. R. A.

original owner." *Wheelwright v. Depeyster*, 1 Johns. 470. We are not required to show comity to that extent; especially as it is to our citizens alone that we are administering justice.

There are judgments to the end that the law of the *situs* of the movable property will determine who is entitled to it, and the matter of comity is not taken into account. A notable case in point is that of *Cammell v. Sewell*, in the exchequer chamber (5 Hurlst. & N. 728). But there the property had not been in England until after the sale in Norway, and had never been in the possession of the English owners.

It is doubtful if after a title to property has been acquired by the law of the domicile of the vendor, and of the *situs* of the thing, and of the forum in which the parties stand, in a contest between citizens of the State of that forum, it has ever been adjudged that such title has been divested by the surreptitious removal of the thing into another State and a sale of it there under different laws. There are, however, decisions that it has not. See *Taylor v. Boardman*, 25 Vt. 681; *Martin v. Hill*, 12 Barb. 681; *French v. Hall*, 9 N. H. 187; *Langworthy v. Little*, 12 Ouah. 109.

The plain and elementary principle that every State has exclusive jurisdiction over its own remedial laws, and may make such provision as it deems suitable for the collection of debts by attachment, or otherwise, within its own territory, and before its own tribunals, is admitted by Mullett, J., in *De Witt v. Burnett*, 3 Barb. 97; *Stedman v. Patchin*, 84 Barb. 218.

The views stated in the text have received abundant vindication, in a case recently decided by the Supreme Court of the United States. (*Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285.) In a singularly exhaustive opinion by Mr. Justice Bradley the present situation is admirably portrayed, and many of the leading cases implicated with the topic are cited.

#### *Possession as evidence of title.*

The rule is not universal that possession is the only evidence of title to personal property. *Forbes*

of title in a conditional sale is; by the law of Pennsylvania, invalid, as against creditors, and bona fide purchasers. The law of New Jersey is the same as in this State. In a suit by the original vendor to recover the property, the purchaser from the conditional vendee set up in defense the law of Pennsylvania. It was held that, his contract of purchase having been made in New Jersey, its legal effect, and the purchaser's rights under it, were determinable by the law of that State, by which law he acquired only such title as his immediate vendor had when the property was brought into it, and became subject to its laws. *Depue, J.*, in an able opinion, says: "If the right of a purchaser, under a purchase in this State, to avoid the reserved title in the original vendor on such grounds, be conceded, the same right must be extended to creditors buying under a judgment and execution in this State; for, by the law of Pennsylvania, creditors and bona fide purchasers are put upon the same footing. Neither on principle nor on considerations of convenience or public policy can such a right be conceded. Under such a condition of the law confusion and uncertainty would be introduced, and the transmission of the title to movable property, the *situs* of which is in this

State, would depend, not upon our laws, but upon the laws and public policy of sister States or foreign countries." Our own decisions, so far as they go, are in accord with this doctrine.

In *Marsh v. Ellsworth*, 37 Ala. 85, it was held that the lien created by a statute of Mississippi could not be enforced in this State against a purchaser, who here acquired the property in good faith for a valuable consideration, on the principle that liens on personal property given by a statute in one State have no priority of liens subsequently acquired in another State, to which the property is carried. The same principle was asserted in *Donald v. Hewitt*, 38 Ala. 534, and *McCoy v. Odom*, 20 Ala. 502. As a general proposition, when a contract is valid and binding by the *lex loci contractus*, it is valid and binding everywhere. The Statute of Georgia affirms the validity of the reservation of title as between the parties whether or not the contract is recorded. By the law of that State, the title was in the original vendors when Franklin brought the property into this State, of which they could not be divested except by their voluntary act, or due process of law. We have found no case, and presume none can be found, where

*v. Marsh*, 15 Conn. 397; *Hart v. Carpenter*, 24 Conn. 481; *Tomlinson v. Roberts*, 25 Conn. 478; *Lewis v. McCabe*, 49 Conn. 155.

The validity of conditional sales, and the principle that the owner may make what contracts he pleases in regard to his property, without endangering his title to it, are sustained in the following cases: *Hughes v. Kelly*, 40 Conn. 158; *Brown v. Fitch*, 48 Conn. 513; *Hine v. Roberts*, 48 Conn. 270; *Loomis v. Bragg*, 50 Conn. 233; *Appleton v. Norwalk Library Corp.* 3 New Eng. Rep. 644, 53 Conn. 8; *Cooley v. Gillan*, 2 New Eng. Rep. 826, 54 Conn. 83.

In the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction; and the further rule that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement of sale was made has been performed, is well established. *Harkness v. Russell*, 113 U. S. 633, 30 L. ed. 235; *New Haven Wire Co. Cases*, 5 L. R. A. 300, 37 Conn. 352.

#### "General rule in this country."

In nearly all of the United States conditional sales—that is, sales of personal property on credit, with delivery of possession to the purchaser, and a stipulation that the title shall remain in the vendor, until the contract price is paid—have been held valid, not only against the immediate purchaser, but also against his creditors and bona fide purchasers from him, unless the vendor has conferred upon his vendee indicia of title beyond mere possession, or has forfeited his right in the property by conduct which the law regards as fraudulent. The cases are cited in *Cole v. Berry*, 43 N. J. L. 303; *Midland E. Co. v. Hitchcock*, 37 N. J. Eq. 550, 559; 1 Benjamin, Sales, Corbin's ed. §§ 437-460; *Twyne's Case*, 3 Coke, 80, 1 Smith, Lead. Cas. 8th ed. 38-39; *Lewis v. McCabe*, 59 Conn. 141, 21 Am. L. Reg. N. S. 234, note, 15 Am. L. Rev. 380.

#### An important distinction stated.

The doctrine of the courts of Pennsylvania is founded upon the doctrine of *Twyne's Case*, 3 Coke, 12 L. R. A.

80, 1 Smith, Lead. Cas. 8th ed. 33, and *Edwards v. Harben*, 3 T. R. 537, that the possession of chattels under a contract of sale without the title is an indelible badge of fraud,—a doctrine repudiated quite generally by the courts of this country. *Runyon v. Groshon*, 12 N. J. Eq. 86; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Miller v. Panoast*, 29 N. J. L. 25.

The doctrine of the Pennsylvania courts is disapproved by the American editors of Smith's Leading Cases in the note to *Twyne's Case*, 3 Coke, 80, 1 Smith Lead. Cas. 8th ed. 33, 34; and by *Mr. Landreth* in his note to *Lewis v. McCabe*, 49 Conn. 141, 21 Am. L. Reg. N. S. 224; but, nevertheless, the supreme court of that State, in a late case on the subject,—*Forrest v. Nelson*, 108 Pa. 481, decided February 16, 1885,—has adhered to the doctrine. It must therefore be regarded as the law of Pennsylvania that, upon a sale of personal property with delivery of possession to the purchaser, an agreement that title should not pass until the contract price should be paid is valid as between the original parties, but that creditors of the purchaser, or a purchaser from him bona fide by a levy under execution or a bona fide purchase, will acquire a better title than the original purchaser had,—a title superior to that reserved by his vendor.

The validity, construction and legal effect of a contract may depend, either upon the law of the place where it is made, or of the place where it is to be performed, or, if it relates to movable property, upon the law of the *situs* of the property, according to circumstances; but where the place where the contract is made is also the place of performance and of the *situs* of the property, the law of that place enters into and becomes part of the contract, and determines the rights of the parties to it. *Frazier v. Fredericks*, 24 N. J. L. 162; *Dacosta v. Davis*, 24 N. J. L. 319; *Bulkley v. Hanold*, 60 U. S. 19 How. 390, 15 L. ed. 663; *Scoudder v. Union Nat. Bank of Chicago*, 91 U. S. 403, 23 L. ed. 345; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104; *Morgan v. New Orleans, M. & T. R. Co.* 2 Woods, 244; *Simpson v. Fogo*, 9 Jur. (N. S.) 408; *Wharton, Conf. L.* § 841, 845, 401, 403, 418; *Parr v. Brady*, 37 N. J. L. 201; *Marvin Safe Co. v. Norton*, 5 Cent. Rep. 341, 43 N. J. L. 410.

the reservation of title being valid by the law of the place where the parties resided and the property was situated, it was decided that the owner was divested of his title by the removal of the property without his knowledge, and its sale in another State. *Edgerly v. Bush*, 81 N. Y. 199. When Franklin removed into this State, bringing the piano with him, the property itself, its disposition and the transfer of title became subject to its laws. By the laws of this State the place of the domicile of the parties, and the *situs* of the property, the legal effect of a sale, and the rights of the parties thereunder, must be determined. By this law, Franklin could not transfer any other or higher title than that he acquired under his contract with Freyer & Co.,—a conditional title. The rule that the validity, interpretation and legal effect of a contract are governed by the *lex loci contractus* applies only to the determination of the rights and obligations of the parties to the contract. The Statute of Georgia does not affix a certain construction and legal effect to the contract, or impair the validity of any stipulation or condition as between the parties. It did not enter into the contract as an element, and did not affect the rights and obligations of the parties in its inception.

In *Harrison v. Sterry*, 9 U. S. 5 Cranch, 289, 8 L. ed. 104, it is said: "But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent upon the laws of the place where the property lies, and where the court sits, which is to decide the cause." Under the Statute, the reservation of title, if the contract is in writing, is valid against third persons during the thirty days allowed for recording, and is only rendered invalid by a failure to

record it within the specified time. Recording, which is to be done subsequent to the contract, is required to make the reservation of title complete against third parties. The omission to record operates in the nature of a forfeiture of the reservation of title as to creditors and purchasers. The question is not one of validity and construction, but of notice by registration and priority of right. The failure to record does not divest the original vendor of the title, but debars its assertion against third parties, conferring on them, if creditors, a lien, and if purchasers, a right, prior and superior to the vendor's reservation of title. The Statute is founded on the local policy of Georgia, different from the policy of this State. Defendant claims no right of property vested under the laws of Georgia, or any right other than that acquired under the laws of Alabama. To maintain the right of defendant to hold the property against the claim of the original vendors would be to make the disposition and transfer of property here situated dependent upon the statute of a sister State, which contravenes the laws and policy of this State,—a statute which may be regarded as remedial in its nature. When the validity and construction of the contract between the parties, their rights and obligations, was determined by the Statute of Georgia, that Statute had no further force. All questions pertaining to the nature and extent of the remedy are governed by the *lex fori*. *Jones v. Jones*, 18 Ala. 248; *Lewis v. Bush*, 80 Minn. 244. Franklin not having had possession of the property in this State for three years before defendant purchased, section 1817 of the Code has no application. *McCoy v. Odom, supra*.

*Affirmed.*



## SOUTH DAKOTA SUPREME COURT.

John A. BOWLER, *Appt.*,

v.

JERRY EISENHOOB, *Respt.*

(.....S. Dak.....)

\*1. The term "canvass," as used in section 1459, Comp. Laws, which provides that "any candidate or person claiming the right to hold an office contested, or any elector of the proper county desiring to contest the validity of an election or the right of any person declared duly elected to an office in said county, shall give notice thereof within twenty days after the canvass of the votes for such election," construed to include the decision of a tie vote by the clerk or auditor, as provided by section 23, chap. 84, Laws 1890.

2. Where the plaintiff and defendant had an equal and the highest number of votes for the office of sheriff, and the county auditor publicly decided by lot that the defendant should be "declared duly elected" sheriff, and made and delivered to the defendant so "declared duly elected" a certificate of his election,—*Held*, that the time within which a notice of contest by plaintiff could be served commenced to run from the time such defendant was "declared duly elected," and that a motion served within twenty days after such declaration was served in time.

3. *Held*, further, that an order of the circuit court setting aside such notice

\*Head notes by CORSON, P. J.

of contest, served within twenty days after defendant was declared duly elected sheriff, should be reversed.

(Kellam, J., *dissents*.)

(February 17, 1891.)

**A**PPEAL by plaintiff from an order of the Circuit Court for Brown County setting aside his notice of intention to contest defendant's alleged election to the office of sheriff of that county. *Reversed*.

The facts are stated in the opinion.

*Messrs. Crofoot & Stevens*, for appellant:

The duties of canvassing boards have been so frequently stated by the courts to include a determination of who is elected, that these words may almost be said, by common acceptance, to embrace that meaning.

*People v. Van Cleave*, 1 Mich. 366.

*Messrs. Taubman & Potter and F. E. Campbell*, for appellee:

The statute providing for the contest of elections was designed to afford a new and summary remedy.

*Saunders v. Haynes*, 13 Cal. 145.

In summary proceedings the law must be strictly construed.

*Dorsey v. Barry*, 24 Cal. 458; *Sedgw. Stat. and Const. Law*, 819; *Ford v. Wright*, 13 Minn. 518.

Service of the notice of contest within twenty days after the canvass is essential to the juris-

**NOTE.—Election contest; notice to contestee.**

In Arkansas the notice of contest performs the double office of writ and declaration. *Swepton v. Barton*, 39 Ark. 549; *Vance v. Gaylor*, 25 Ark. 28.

The notice of contest is the foundation of the suit, and performs the double office of a summons and complaint, and should contain the title of the cause, specifying the name of the court and the parties to the contest. *Whitney v. Blackburn*, 17 Or. 564.

All that the statute contemplates is fair notice of the subject matter of the contest within the time prescribed. *Dalley v. Estabrook*, 1 Bart. 290.

The county auditor is required to give notice in writing to the clerk of the circuit court to issue a notice to the county commissioners to meet for the trial of the contest, and to notify contestee to appear at the trial. The auditor is competent to administer contestant's oath. *Wheat v. Ragdale*, 27 Ind. 191; *Garrett v. Higgins*, 27 Ind. 162; *Curry v. Miller*, 42 Ind. 320.

Contested elections; notice to contestee. See *Palme, Elections*, §§ 820-825. See *note* to *Jones v. Gildewell* (Ark.) 7 L. R. A. 331.

**Verification by affidavit.**

Where the statute requires the notice to be verified, if it be verified by another than the contestant, the proceedings will be dismissed. *Holton v. Brown*, 46 Ind. 122. See *Curry v. Miller*, 42 Ind. 320; *Albee v. May*, 8 Blackf. 310.

An affidavit that the statement is true, except as to matters therein set forth on information and belief, and that as to those matters the affiant believes it to be true, is a sufficient compliance with the statute. *Kirk v. Rhoads*, 46 Cal. 306; *Curry v. Baker*, 31 Ind. 151.

A demurrer for want of sufficient facts to ground 12 L. R. A.

a contest presents no question as to the sufficiency of the affidavit. *Curry v. Miller*, 42 Ind. 320.

**Statement in notice.**

Under a statute authorizing any elector to contest an election, he shall within forty days file a statement with the county clerk, specifying that he is a qualified elector, and the notice is sufficient which alleges that he is at the time of filing it such an elector, without alleging that he was such at the time of the election. *Minor v. Kidder*, 43 Cal. 220.

A notice containing the averment that the board of county canvassers rejected and refused to count the votes cast in certain townships, without showing that this action affected the result, was held a sufficient compliance with the statute. *Steele v. Martin*, 6 Kan. 430.

Where illegal votes were alleged to have been cast at eight precincts, which could not have been less than eight, and the deduction of these from contestee's majority of three votes would show contestant entitled to the office, the alleged grounds of contest were well stated. *Nichols v. Ragdale*, 26 Ind. 181.

A ground of contest not specified in the notice cannot be set up on the trial. *Gause v. Hodges, Smith*, 291.

A notice of an election contest "stating the cause of such contest briefly," within the meaning of the Oregon Statute, is a notice stating briefly the facts or combination of facts which give rise to the right of contest; and this necessarily implies that such facts shall be stated so plainly as to advise the defendant of the "cause" for which his election is contested. *Whitney v. Blackburn*, 17 Or. 564. See *Buckland v. Gott*, 23 Kan. 287.

A notice based on the ground that voters were improperly influenced must give their names. Ap-

diction of the court. The statutory requirement as to time is to be regarded as a limitation.

*Ingerson v. Marlow*, 14 Ohio St. 568; *Borer v. Kolars*, 23 Minn. 445; 6 Am. & Eng. Encyclop. Law, p. 411; *Baberick v. Magner*, 9 Minn. 282; *Vigil v. Pradt* (N. M.) Jan. 1889; *McCrary, Elections*, § 892.

**Corson, P. J.**, delivered the opinion of the court:

At the general election held in Brown County on November 4, 1890, three persons were voted for the office of sheriff of that county, two of whom were the plaintiff and defendant herein. On November 10 following the election, a board of canvassers for that county was convened at the county seat of said county, and it proceeded "to open the returns from the various precincts in said county, and make abstracts of the votes," as provided by law, and on November 14 adjourned. This canvass disclosed the fact that the plaintiff and defendant had the highest and an equal number of votes for the office of sheriff. Subsequently, on November 22, the auditor of said county, pursuant to the provisions of section 26, chap. 64, Laws 1890, proceeded "publicly to decide by lot which of the persons so having an equal and the highest number of votes" should "be declared duly elected," and he having by such method decided that the defendant should be declared duly elected, issued to him a certificate of his election as provided in said Act. On the 12th day of December following said election, the plaintiff served upon said defendant a notice in writing that he in-

tended to contest his (defendant's) election as such sheriff, as provided in section 1489, Comp. Laws. On December 15 the judge of the circuit court made an order requiring said plaintiff to show cause why said notice of contest should not be set aside, not having been served within twenty days after the canvass; and on December 19 said order to show cause was heard, and the court thereupon made an order setting aside said notice of contest; to the making of which order said plaintiff excepted, and from it appeals to this court.

The question presented for our decision is: Did the twenty days allowed plaintiff to serve his notice of contest commence to run upon the adjournment of the board of canvassers on November 14, or at the time the tie was decided by lot on November 22, and the defendant declared elected? The determination of this question involves the construction of the term "canvass," as used in section 1489, Comp. Laws. This section, so far as it relates to the question in controversy, is as follows: "Any candidate or person claiming the right to hold an office contested, or any elector of the proper county desiring to contest the validity of an election or the right of any person declared duly elected to any office in said county, shall give notice thereof in writing to the person whose election he intends to contest, within twenty days after the canvass of the votes of such election, which notice shall be served in the same manner as a summons in a civil action." If the term "canvass," as used in this section, is limited and confined to the acts of the county board of canvassers, as constituted

*plegate v. Eagan*, 74 Mo. 258. See *Griffin v. Hall*, 23 Ala. 149; *Stat. Ark. Gen. Elect. Laws* 1875, § 12.

#### *What need not be stated.*

The complaint or notice of contest must show that contestant received more votes than the other candidate, but it need not show the number of votes cast for each, this being a matter of evidence. *People v. Ryder*, 16 Barb. 370.

Where blank ballots have been counted for contestee, the notice need not set forth the names of voters who cast them, though the statute requires "the names of all persons objected to," such objection being to the officers counting blanks as votes. *Moffatt v. Montgomery*, 68 Mo. 162.

It is not necessary to aver that contestants possessed the requisite qualifications for the office. *People v. Ryder*, 16 Barb. 370.

Where the law permits a contest by appeal to the district court from determination of the board of canvassers, the notice need not state that the appeal is taken. *Newton v. Newell*, 23 Minn. 529.

The reasons on which the charge of illegality is based, and the names of the voters, need not be given. *Weaver v. Given*, 1 Brewst. 140; *Batturs v. Megary*, Id. 162; *Gibbons v. Sheppard*, 2 Brewst. 1; *Thompson v. Ewing*, 1 Brewst. 67; *Wheat v. Ragdale*, 27 Ind. 191; *Mann v. Cassidy*, 1 Brewst. 11.

The notice of an election contest, under Mo. Rev. Stat., § 5523, stating that certain ballots were illegal because of writing thereon not allowed by statute, need not set out the names of the persons who cast them. *Gumm v. Hubbard*, 97 Mo. 311.

#### *Sufficiency of notice.*

Under a statute requiring service of notice on contestee, a notice is sufficient if supported by proofs which will warrant a recount of the ballots by the district court. *O'Gorman v. Richter*, 31 Minn. 25.

12 L. R. A.

Where the points specified in the notice are sufficient to apprise contestee of the general nature of the objections made, so as to enable him to meet them, the notice is sufficient. *Howard v. Shields*, 16 Ohio St. 184.

As the object of a notice of contest of an election is to inform the other party of the substance of the facts relied upon to defeat his claim, certainty is required, but not technical precision of averment, and when the words used therein, taken in their ordinary sense, fairly serve this purpose, it is sufficient. *Whitney v. Blackburn*, 17 Or. 564.

#### *Time to serve and file notice of contest.*

The statement of the grounds of contest must be filed within the time limited, to give jurisdiction of the case. *Farlow v. Hougham*, 37 Ind. 540.

The requirement that notice shall be given within a designated time after the official count is mandatory. *Bowen v. Hixon*, 45 Mo. 341; *Castello v. St. Louis Circuit Ct.* 23 Mo. 273; *Wilson v. Luona*, 43 Mo. 290.

The notice of contest must be served and filed within thirty days. *Whitney v. Blackburn*, 17 Or. 564.

The opposite party should have three days' notice of the illegal votes which the party serving expected to prove. *Misch v. Mayhew*, 51 Cal. 514.

The time of the three days' notice as to illegal votes, to be given before the trial, must be computed by including the first and excluding the last day. *Stinson v. Sweeney*, 17 Nev. 309.

Where the statute required the determination of the result of the election to be made within ten days after a certain date, but fixed no time for giving a certificate, it was held that contestant had thirty days from the last of the ten days to serve notice of contest. *Follet v. Delano*, 2 Bart. 113.

Under a statute providing that contestant shall,

under section 1, chap. 84, Laws 1890, then, as that board completed its labors and adjourned on November 14, the notice was not served within time, and the order of the court was right; but if, as is contended by appellant, the term "canvass" embraces and includes the further proceedings taken by the auditor on November 22, provided for in section 26 of said last-mentioned Act, then the notice was served in time, and the order of the court below should be reversed. Section 26, referred to, is as follows: "If the requisite number of county officers shall not be elected by reason of two or more persons having an equal and the highest number of votes for one and the same office, the county clerk, whose duty it is to compare the polls, shall give notice to the several persons so having the highest and equal number of votes to attend at the office of the county clerk or auditor, at the time appointed by said county clerk or auditor, who shall then and there proceed publicly to decide by lot which of the persons so having an equal number of votes shall be declared duly elected, and the said county clerk shall make and deliver to the person thus declared duly elected a certificate of his election, as hereinbefore provided." The term "canvass," as used in statutes relating to elections, has not, so far as our researches have extended, received any strictly legal definition, and, as generally understood, its meaning is not very definite or certain. Webster defines the term as a verb, "to examine thoroughly; to search or scrutinize;" and as a noun, "a close inspection to know the state of; as to canvass a vote." Mr. Bou-

vier, in his Law Dictionary (vol. 1, p. 288), defines "canvass" as "the act of examining the returns of votes for public officers. . . . The determination of the board of canvassers of the persons elected to an office is prima facie evidence only of their election." And under the head of "Canvassing Board," in 6 Am. & Eng. Encyclop. Law, p. 810, it is stated: "In nearly all the States the boards of canvassing officers are held to be ministerial officers, whose duty it is to receive returns from the various precincts or counties, as the case may be, and declare the results as shown by the face of the returns." The term "canvass," as used in our statutes, seems to have a broader and more comprehensive meaning than is given in either of the definitions above quoted, and is made apparently to include all the proceedings for determining the result of an election from the closing of the polls to the formal declaration of who are elected. Section 1464, Comp. Laws, provides that "as soon as the poll of the election shall be finally closed the judges shall immediately proceed to canvass the vote given at such election." Section 1, chap. 84, Laws 1890 (being § 1471, Comp. Laws, with a few slight changes), does not contain the term "canvass," but provides that the board, composed of certain county officers therein specified, "shall proceed to open the returns from the various precincts in said county and make abstracts of the votes; . . . and it shall be the duty of the county clerk, or the county auditor, as the case may be, to make out a certificate of election to each of the persons having the highest number of votes, . . . for county or

within thirty days after the person is declared elected, file notice of the contest, such notice may be filed at any time before midnight of the last day, regardless of the statutory office hours. *Zimmerman v. Cowan*, 107 Ill. 631.

Where contestee answers without objecting to the time of service, it is held a waiver of the objection. *Todd v. Jayne*, 1 Bart. 555.

Where no provision was made in the statute for appointment of a time for appointment of the board of examiners, or for the successful candidate to appear, or for other statutory requirements, the Act is too defective to be carried into execution unless by common consent. *Andrews v. Carney*, 74 Mich. 278.

A failure to specify the time of the election is fatal to a declaration or notice of contest. *People v. Ryder*, 18 Barb. 370.

Where the statute requires the contest to be determined at the first term of the court, and notice is given but no court is held, the day specified in the notice is material, and proceedings begun on the first day of the succeeding term cannot be sustained. *Adcock v. Leocompt*, 66 Mo. 40.

#### *Remedy by proceedings in the nature of quo warranto.*

In the absence of statutory provisions for contesting an election, an information in the nature of a quo warranto is the proper remedy. *Paine, Elections*, § 856, citing *People v. Scannell*, 7 Cal. 432; *People v. Matteson*, 17 Ill. 167; *Gass v. State*, 34 Ind. 426; *People v. Stevens*, 5 Hill. 616.

Where the statute creates a special tribunal, and prescribes special proceedings for the trial of contested election cases, courts will not take jurisdiction by quo warranto, even in cases of fraud on the part of election officers or candidates. *State v. Marlow*, 15 Ohio St. 114; *State v. Taylor*, Id. 187; 12 L. R. A.

*Com. v. Baxter*, 35 Pa. 263; *Com. v. Leech*, 44 Pa. 332; *State v. Watkins*, 1 Rich. L. 43.

#### *Under constitutional provisions.*

Under a constitutional provision granting to the supreme court power to issue writs such court has original jurisdiction of the writ of quo warranto in contested election cases. *Howard v. McDiarmid*, 28 Ark. 100; *State v. McDiarmid*, Id. 460; *Fitch v. McDiarmid*, Id. 432; *Price v. Page*, 25 Ark. 527.

Under a similar provision of the Constitution of Alabama under which the Legislature had established a new judicial circuit providing that the judge should not be required to alternate with judges of other circuits except when he thought it necessary, it was held that the supreme court could entertain an information in the nature of a quo warranto to try the eligibility of an individual elected to that circuit. *State v. Williams*, 1 Ala. 342; *Simonton's Case*, 9 Port. (Ala.) 383. See *Behols v. State*, 56 Ala. 131.

In Wisconsin it is held that the constitutional power to issue writs cannot be taken away by legislation; but that courts may adopt new proceedings adapted to the same end. *State v. Messmore*, 14 Wis. 118; *State v. Foote*, 11 Wis. 14; *State v. West*, Wisconsin B. Co. 34 Wis. 197; *Atty-Gen. v. Barstow*, 4 Wis. 567; *Atty-Gen. v. Blossom*, 1 Wis. 317.

#### *Rule in various States.*

In Alabama the remedy by procedure in the nature of quo warranto is available only in case of original ineligibility or of an illegal election. *State v. Gardner*, 43 Ala. 234.

Courts of common law are not deprived by legislation prescribing statutory remedies whereby the same redress may be obtained, unless it is clearly intended to take it away. *Moulton v. Reid*, 54 Ala. 320.

precinct officers." While, as before stated, the term "canvass" is not used in this section, it clearly appears by section 2 that such county board is a canvassing board, as that section provides that each of the aforesaid abstracts (mentioned in section 1) of the votes made as aforesaid shall be duly signed and certified by the said canvassers under the seal of the said county clerk. It will be further noticed by an examination of section 1 that no provision is made, in direct terms, that said canvassing board shall decide, determine or declare any person elected. Section 3 (relating to members of Congress) provides that "the person having the highest number of votes shall be considered duly elected," and also provides that when there is a tie the secretary of state, in presence of the governor, etc., shall decide by lot which of said persons shall be elected. The proceedings for the canvass of the vote for state officers under section 8 is more full and explicit. The section is as follows: "They shall make an abstract stating the number of ballots cast for such office, the names of all persons voted for, for what office they respectively received the votes, and the number of votes each received, in words at length, and stating whom they declared to be elected to each office, which abstracts shall be signed by the canvassers in their official capacity and as state canvassers, and have the seal of the

state affixed." Construing these various sections together as constituting our election system, it seems to us quite clear that the Legislature, in using the term "canvass," in section 1489, intended to include and embrace all the various acts of the canvassing board or officers necessary to fully decide or determine who of the persons voted for should be deemed or declared elected; and that such canvass cannot be said to have been made until that result is reached, or the fact—as in case of a tie of candidates for the Legislature—that no decision can be made except by another election by the people. In other words, that the expression "make out a certificate of election to each of the persons having the highest number of votes," etc., in section 1, "shall be considered duly elected or shall be elected" in section 8, "stating whom they declare to be elected to each office" in section 8, and "which of the persons so having an equal number of votes shall be declared elected" in section 26, were intended by the Legislature to mean substantially the same, namely, the ascertaining who of the persons voted for are deemed, considered or declared elected as shown by the final result of the canvass.

Can it be claimed that, in the case of two candidates for Congress having an equal number of votes, the vote is canvassed when that fact is ascertained, and that the subsequent

In Arkansas the original writ is still maintained, but is not granted on the relation of a private citizen. *Ramsey v. Carhart*, 27 Ark. 12.

The Supreme Court of California has no original jurisdiction of an action to try title to an office. *People v. Harvey*, 62 Cal. 508.

Statutory proceedings for election contests are not exclusive of quo warranto proceedings, unless the legislative intent to that effect is clearly expressed. *People v. Londoner*, 6 L. R. A. 444, 13 Colo. 303.

Provisions substantially similar have been held to create a cumulative remedy merely, and not to inhibit proceedings by quo warranto. See *Darrow v. People*, 8 Colo. 417; *State v. Camden*, 47 N. J. L. 64; *State v. Kempf*, 60 Wis. 470; *People v. Hall*, 80 N. Y. 117; *Hardin v. Colquitt*, 68 Ga. 598; *State v. Shay*, 101 Ind. 26; *State v. Adams*, 65 Ind. 303; *Com. v. Allen*, 70 Pa. 465.

As to election contests purely, the statutory remedy directed by the Constitution is exclusive. *People v. Londoner*, 6 L. R. A. 444, 13 Colo. 303.

The plea of respondent in quo warranto involving the right to office under an election must set up facts showing that he was elected. *State v. Anderson* (Fla.) June 6, 1890. See *State v. Saxon*, 25 Fla. 342.

In Indiana, the adoption of a statutory proceeding for the trial of contested election cases will not exclude the remedy by quo warranto in the absence of an express or implied provision to that effect. *Barkwell v. State*, 4 Ind. 179; *Huddleston v. Pearson*, 6 Ind. 337; *Reynolds v. State*, 61 Ind. 362; *State v. Adams*, 65 Ind. 303; *State v. Gallagher*, 81 Ind. 558; *State v. Shay*, 101 Ind. 26; *McGee v. State*, 1 West. Rep. 467, 108 Ind. 444.

In Kansas the writ of quo warranto, and the proceeding by information in the nature of quo warranto, have been abolished, and the remedies which were obtainable at common law in those forms are had by civil action. *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 432; *Foster v. Kansas*, 118 U. S. 305, 28 L. ed. 696.

But as the statute making provision to contest 12 L. R. A.

the election of one declared elected to a county office is inadequate to authorize a removal from office, quo warranto will lie at the suit of one who claims to have received the greatest number of votes for a county office, not only to try the title to the office, but to remove the defendant therefrom as well. *Tarbox v. Sughrue*, 36 Kan. 225.

In Massachusetts in the absence of statutory regulation the remedy by quo warranto exists. *Com. v. Allen*, 128 Mass. 303.

In Mississippi it will be allowed only in cases in which it would be granted at common law. *Lindsey v. Atty-Gen.* 38 Miss. 509.

An unsuccessful candidate cannot maintain a proceeding by quo warranto; although the State may institute a proceeding to oust a usurper. *Harrison v. Greaves*, 59 Miss. 453.

A quo warranto proceeding is not an election contest in the sense in which those terms are used in the Constitution. It adjudges the right to the office to no one, but simply adjudges an ouster. *State v. Francis*, 8 West. Rep. 295, 8 Mo. 557.

The Supreme Court of Nebraska has original jurisdiction in an action in the nature of quo warranto to determine conflicting claims to a public office. *State v. Frazier*, 23 Neb. 433.

A prima facie case must be made to show that where there is fraudulent voting at an election it is at least probable that sufficient false votes were cast to change the result, before an information in the nature of quo warranto will be allowed to test the title of an incumbent to office. *State v. Bruggemann* (N. J.) Nov. 19, 1890.

In North Carolina, an action in the nature of quo warranto must be brought in the name of the people; it cannot be brought by an individual in his own name. *Saunders v. Gating*, 51 N. C. 293. See *Davis v. Moss*, 51 N. C. 303.

In Ohio, if the prosecuting attorney refuses to proceed the court may substitute another prosecutor. *State v. Moffitt*, 5 Ohio. 353.

An action in the nature of quo warranto does not lie in the name of the State to determine the title to office. *State v. Bowen*, 8 S. C. 400.

proceedings by identically the same persons in ascertaining which of the two is elected or "shall be elected" is not a part of the canvass? This case, perhaps, presents the question a little stronger than the one before us, for the reason that there the same board continues, while in this case only a part of the old board continues, although the important member of the board—the one who organizes it—continues.

Returning to the consideration of section 1489, Comp. Laws, it will be observed that an elector can only contest the right of any person "declared duly elected." If the restricted construction of the term "canvass" insisted upon by the respondent is given that section, an elector could not contest the election of any county officer except in case of a tie vote, as the law makes no provision for declaring any officer elected by the county canvassing board. But we apprehend no one would insist upon such a construction, yet there is no doubt such elector could not serve any valid notice of contest in the case of a tie until the person whose right to the office he sought to contest had been "declared duly elected" under section 26, for such are the terms imposed. Can it be, then, that while an elector who seeks to contest in a case of a tie vote must wait until the tie vote is decided, and the person "declared duly elected," before he can give a valid notice, a person claiming the office himself, who desires to contest, may serve his notice before his competitor is declared elected, or it is in any manner determined whether he or his opponent is entitled to the office? We cannot think the Legislature intended to adopt a different rule in the same section as to the event when the time for serving the notice should commence to run in the case of an elector and that of a person claiming the office,—that the time in one case should commence to run from the adjournment of the canvassing board, and in the other from the time it is decided and declared by the auditor who is elected. Such a construction would seem to us to be clearly contrary to the intention of the Legislature, and should only be adopted when the language will admit of no other construction, which we think is not the case here.

Again, it will be noticed that section 1489 provides that the notice of contest shall be given "in writing to the person whose election he intends to contest." What is the meaning of the term "election," as used in this section? Do the law-makers refer to the candidacy of a person for an office,—one who simply claims that he has received the highest number of legal votes for the office? or do they mean the person who has been in some manner decided or declared to be elected? We think the Legislature intended by that term the person actually determined to have been elected. This view seems to be confirmed by the definition of the term "election" by law-writers. Bouvier, in his Law Dictionary (vol. 1, p. 519), defines "election:" "Choice; selection; the selection of one man from amongst more, to discharge the duties in a State, corporation or society." Mr. Anderson, in his Dictionary of Law (p. 394), defines the term: "A choosing or selecting; also the condition of having been chosen or selected; choice or selection." And this term, as generally used, is understood to

mean one who has by some legally constituted board been declared elected to an office. We think, therefore, that the expression "the person whose election he intends to contest" is a person who has been decided or declared to be elected by a board or officer authorized to determine the result of the election,—one no longer simply a candidate voted for or subject to be declared elected, but one so declared or decided to be elected, and who has received, or is found entitled to receive, a certificate of his election. It is earnestly contended by respondent that notwithstanding when the board of canvassers, as originally constituted, adjourned on November 14, it had not been determined whether the plaintiff or defendant should be declared to be elected, and the plaintiff did not then know whether or not he would desire to contest the election, as he might by the subsequent proceedings be the person "declared duly elected" yet it was his duty, in order to protect his rights, to initiate contest proceedings by serving his notice of contest within twenty days from the adjournment of such board, although the auditor might not have finally decided the election and declared the result until more than twenty days after the board had adjourned. We cannot accede to this proposition. The time within which the auditor must proceed to decide who shall be declared elected is not fixed or limited by law; and hence it is within his power to delay proceedings, if the construction of the law contended for by respondent is the true one, so as to compel a party awaiting his decision to commence contest proceedings, and thus present the anomaly of a party instituting and prosecuting a suit against an opposing candidate before it is determined whether he or his opponent is elected, or whether or not it will be necessary for him to initiate such a contest, and when the final proceedings of the auditor may result in declaring him elected. Will the law require of one so situated that he serve a notice of contest when such contest may never become necessary, and when he is unable to determine whether or not he desires to make such a contest, or whether he or his competitor will be declared elected? It seems to us no such useless proceeding was intended by our Legislature. As before stated, an elector is authorized to serve a notice of contest within twenty days after the canvass; but he cannot serve it until the person whose election he desires to contest is "declared duly elected." A board adjourns, and, in case of a tie vote, the auditor, on the twenty-first day thereafter, decides and declares who is duly elected. While it is undetermined who is duly elected the elector can serve no notice of contest. Says the respondent to such elector, "The canvass was made more than twenty days ago, hence your time for serving a notice has expired." What becomes of the right of contest of the elector? Is a construction of the Statute that might result in thus depriving the elector of his right to contest permissible except in a case where the Statute is so clear as to only admit of such construction? But in this case the Statute is clear that an elector has twenty days after the result is declared by the auditor, and thus the canvass continues, as to him, until one of the persons who has the highest and equal

number of votes is "declared duly elected." If, then, the canvass continues as to him until the result is declared, must it not receive the same construction as to a candidate who claims the office? Will it be seriously claimed that the term "canvass," as applied to an elector, means one thing, but as applied to a candidate claiming the office it means an entirely different thing? That in the one case the canvass is made and concluded only when the result of the election is ascertained by the auditor and the person "declared duly elected," and in the other case when the canvassing board adjourns? We think no such intention can be imputed to the law-makers. It is more reasonable, we think, to say that the Legislature intended that no person having the right to contest should be required to serve a notice of contest until it shall be determined that his competitor had been elected, and so declared. Then his right to contest commences. Then he can properly proceed to institute his proceedings, and take the necessary steps to vindicate his rights.

The views here expressed lead to the conclusion that *the order of the Circuit Court should be reversed*, and it is so ordered.

**Bennett, J.**, concurs.

**Kellam, J.**, dissenting:

I am unable to concur with the majority of the court in the determination of this case. Referring to section 1489, Comp. Laws, as quoted in the opinion of the presiding judge, our disagreement is principally as to the proper interpretation and effect of the expression "the canvass of the votes for such election," for it is within twenty days from that event that notice of contest must be given. I am quite satisfied to accept as a starting point the definition of the word "canvass" as found by the presiding judge in Webster's dictionary, to wit, "close inspection to know the state of;" and, so substituting the definition for the word itself, the expression, with its immediately preceding context, will be, "within twenty days after the close inspection to know the state of the votes for such election;" and this, I think, is precisely the thought the Legislature meant to and did express in said section. The canvass has exclusive reference to something which has already occurred, to wit, the votes cast at such election; and its office and object are to ascertain and "know the state of" such votes. It is provided by section 1484, Comp. Laws, that immediately upon the close of the poll on election day the judges shall "proceed to canvass the vote,"—that is, ascertain the state of,—for to do this they shall (§ 1467) count and ascertain the number of votes cast, and the clerks shall set down in their poll-books the name of every person voted for, written at full length, the office for which such person received such votes, and the number he did receive." The same section provides a form for this statement or return. When completed and certified to by the judges, one of such poll-books is to be inclosed and sealed, and delivered to the county clerk of the county in which such election was held. On or before the tenth day thereafter, the returns being all received by such clerk or auditor (§ 1, chap. 84, Laws 1890), occurs the canvass for the county. The county board of canvassers shall consist of the clerk or auditor,

if not a candidate, but, if so, "he shall take no part in the canvass," and two other qualified county officers, selected as provided in said section 1. These officers, called in section 18 of said chapter 84 the "board of canvassers for the county," shall "proceed to open the returns from the various voting precincts in said county, and make abstracts of the votes in the following manner: The abstracts of the votes cast for governor [and other state officers naming them] shall be on one sheet; . . . the abstracts of the votes for the members of the Legislature and of county and precinct officers shall be on one sheet." Section 2 of said chapter then provides that "each of the aforesaid abstracts of the votes made as aforesaid shall be duly signed and certified by the said canvassers, under the seal of the said county clerk or auditor, and shall be deposited in the office of said clerk or auditor." This is all the Statute directs or authorizes the board to do; and, having done this, the board and the canvassers have completed their work, and exhausted their powers as canvassers. The object of the canvass was to ascertain and show the state of the vote. This has been done, the result of the vote fully and particularly exhibited, certified to, signed, sealed and deposited in the clerk's office; and the board is thenceforth *functus officio*. It then becomes the duty of the county clerk or the county auditor, as the case may be, "to make out a certificate of election to each of the persons having the highest number of votes for members of the Legislature, . . . and for county and precinct officers, respectively, and to deliver said certificate to the person entitled to it," etc. But my brothers are of the opinion that the canvass is not complete until the canvassers have declared somebody elected to the various offices to be filled, which, in my judgment, can only mean that the canvass is not complete until the canvassers have done something which the Statute has not authorized them to do, and which they have no legal power to do. The canvassers in this case, if the Statute is allowed to define their duties, have nothing whatever to do with declaring which candidates are duly elected; and any declaration they might make in this respect would be assumptive and gratuitous. They are to make and certify a statement showing the condition of the vote, and the law itself does the rest by declaring that the person having the highest number of votes is elected. But suppose the law did in defining the duties of the canvassers—as it does in some instances—provide that they should declare which candidates were respectively elected; what would its plain intent and meaning be? Simply that they should declare which candidates, upon the canvass they had so made, had received the highest number of votes, and so were duly elected. It certainly could not mean that they should declare somebody elected in case of a tie, for in such case the law says there is no election. If a decision and declaration by the canvassers that some candidate was duly elected were an essential and indispensable part of the canvass, then, in case of a tie, requiring a new election, there never would be a completed canvass of the votes cast at the first election, for no candidate could be declared elected except as the result of the second election; or

perhaps it would more logically follow that the first canvass was still open and incomplete until it included the second election, so that the board of canvassers might be able to declare who was duly elected. This latter conclusion seems palpably unreasonable, but why does it not legitimately and necessarily follow the theory of the majority opinion? The determination by lot is but a substitute for a new election. The proceeding is just as separate from and independent of the first election as a new election would be. Or suppose the law had provided that in case of non-election in consequence of a tie the old incumbent should hold over, then there never would be a completed canvass, for nobody could ever be "declared duly elected." Suppose, upon complaint that the canvassing board in this case when properly organized had refused to make the canvass, mandamus were issued to compel such action, what would the writ command them to do? Unquestionably simply to examine and tabulate the returns as provided in said section, and certify to and file the abstract and a return that they had done this, would, in my judgment, be accepted by any court, as a full and complete answer to the writ. Or suppose, in this very case, the abstract showing a tie vote between appellant and respondent, the clerk had neglected or declined to decide the tie by lot, as required by law; to whom would the mandamus be issued, and who would be commanded to perform this duty,—the board of canvassers or the clerk as an individual and independent officer? I think there could be but one answer to this question.

That the term "canvass" was not intended to and does not include the decision by lot is made more clearly manifest by section 1471, Comp. Laws, changed in phraseology, but not in meaning, by section 2 of said chapter 84, Laws 1890, which provides that "immediately after canvassing the returns and making the abstracts of votes as provided in this section the clerk shall," etc. Now, the decision by lot is not provided for in this section, but subsequently, and still the canvassing is to be done as provided in that section, and all the requirements of that section are fully met long prior to the decision by lot. In my judgment, the canvass thus provided for is nothing more or less than an "official count," and the same proceeding is distinctly so called in the statutes of some of the States; and it was this official count or canvass, completed, verified, signed and filed in the office of the clerk, showing the state of the vote, and that no sheriff was elected because two had received an equal and the highest number of votes, that made it necessary to adopt some other and further proceeding to fill such office; in this case, by statute, a determination by lot; in others, by statute, a new election. This determination by lot was just as separate and distinct from the election as a new election would be. It does not assume to determine who was elected, for it is based by the Statute itself upon the fact that neither was elected. It is simply a plan for deciding who, under the circumstances, shall be "declared elected,"—who shall be deemed or taken to be elected,—precisely as though, under the same circumstances, the law had required the governor to designate which of the two should be considered elected. The board of canvassers is

an absolute stranger to the proceeding. In fact, when this drawing takes place, there is no board. It has disbanded, and is defunct. That the drawing is done by the clerk has, in my judgment, no important bearing upon the question. He may or may not have been one of the board of canvassers, and certainly in no case could he be the board itself. The construction of this Statute must be the same if this decision by lot were to be made by some party who could not under any circumstances be a member of the board. I think my brothers feel themselves rather forced into their position by what appears to them the threatening inconsistency of requiring a candidate to give notice of contest before he knows that a contest in his interest will be necessary. He might win in "the decision by lot," and then a contest would be unnecessary. This argument, it seems to me, can only follow a narrow and selfish view of the scope and spirit of the Contest Law. Offices are not created for the benefit of parties who may be temporarily entitled to hold them, nor are elections provided for and held in the exclusive interest of candidates. If, in this contest, appellant is only representing his own individual interest—his personal right to the emoluments of the office—I think it might well be argued that he is now estopped from asserting that he had received a plurality vote, because he had deliberately elected to take his chances with his competitor in a decision by lot, well knowing that such decision could only be resorted to if he had not received such vote. I would find the troublesome inconsistency not where my brothers find it, in the law itself, but in allowing a candidate to participate in a drawing by lot on the sole ground of a tie vote, and then, having lost, to assert there was no tie, but that he was entitled to the office by virtue of having received more votes than his competitor. In *People v. Robertson*, 27 Mich. 118, the court declined to apply the doctrine of estoppel upon such facts, but plainly intimated that it was because the action was brought by the attorney-general for the people that the conduct of the candidate ought not to estop the people, or preclude inquiry by them into the manner in which their Election Laws had been administered or their elections conducted. In my judgment, such practice can only be tolerated on the theory that the Election Contest Law has a broader purpose and function than simply to secure the personal rights, and protect the selfish interests, of the candidates themselves. The general public, more than any individual candidate or otherwise, has a paramount interest in the honesty and cleanness of election proceedings; and, in contesting the apparent result of an election on the ground that the will of the people has been thwarted by fraudulent votes which ought not to have been counted, other interests are involved, and ought to be considered, besides those of the candidate himself; and while he, as such contesting candidate, is perhaps in position to subordinate public interests to his own by declining to expose the frauds by which the law and the general body of electors have been cheated and wronged until he has unsuccessfully experimented with an easier and cheaper method based solely upon and provided by

the law for the solution of an honest tie. I do not think the law should be ingeniously strained or expanded for the purpose of giving him a personal advantage as a reward for so doing.

But let us examine section 1489 more closely. It plainly provides for two classes of contestants: (1) "any candidate or person claiming the right to hold an office contested;" (2) "any elector of the proper county desiring to contest the validity of an election, or the right of any person declared duly elected to any office in said county." To determine the relation of the contestant to these contest proceedings it is necessary, first of all, to ascertain to which of these classes he belongs. Upon this question he leaves the court in no doubt. His notice declares that he was a candidate, and that he claims the office for himself on the ground that he received the highest number of legal votes cast; and he brings this contest on his own motion, and in his own name as plaintiff. Section 1491 provides that "such contest cannot be brought by an elector without the notice is signed by the district attorney of the proper county; or, upon his refusal to so sign said notice of contest, the contest may be allowed by the court or judge thereof." The notice is not signed by the district attorney, nor is the contest brought on leave of court or judge. It is apparent that the contestant belongs to the first class, to wit, "a candidate or person claiming the right to hold an office contested." Dropping out, then, the words which only provide for and apply to the second class of contestants, to which appellant confessedly does not belong, the section reads thus: "Any candidate or person claiming the right to hold an office contested . . . shall give notice in writing to the person whose election he intends to contest within twenty days after the canvass of the votes for such election,"—that is, the votes cast at such election. In this case, what does the appellant assert as the ground of his contest? That he was duly elected sheriff, and claims the office by virtue of having received the highest number of votes,

but that the canvassing board, by throwing out the returns from one or more voting precincts, has made it appear that he was not elected. When and how did they so make it appear? By their "canvass of the votes for such election." Then, when must he serve his notice of contest? Within twenty days after such canvass; that is, the canvass which shows he was not elected, when in truth and in fact, as he alleges, it ought to show he was elected. This is his grievance. It occurred then, and then commences to run the twenty days within which he may institute a contest for its correction. Finally, I think the majority opinion is fairly criticisable in this respect: The expression "canvass of the votes" in connection with election proceedings is not an unusual one, and as such has a popular and generally accepted meaning, and was probably so used by the Legislature. I think the opinion invents for and attaches to it a new and unusual meaning, and that, too, for the purpose of making the law cover and control a case not within the contemplation of the law-makers, and perhaps not within the purview of the law itself. The opinion says that an elector cannot serve his notice of contest until a person is "declared elected" and that could not be done in this case until the tie was decided, and consequently the elector must have twenty days from that event in which to serve his notice. But is the proceeding then and thus initiated a contest against "the person whose election he intends to contest?" In the light of the authorities, it can hardly be claimed that respondent received his certificate or is now holding the office because he was elected thereto, or by election, for the Statute only authorizes the "decision by lot" in case he "shall not be elected." I think he holds the office, not by virtue of an election, nor because he was elected, but by virtue of a subsequent and independent proceeding, made necessary by the fact that neither he nor his competitor was elected. As a result of these views, I think the order of the circuit court was right, and should be affirmed.

## MAINE SUPREME JUDICIAL COURT.

Calvin BLAKE

v.

David SAWYER.

(...Me....)

**1. An application of a payment by a creditor to a debt already barred by statute will not remove the bar as to the balance of the debt.**

*NOTE.—Application of payment by the creditor.*

If some of the debts are secured, but others are not, and the debtor makes a general payment, without directing any special appropriation of the money, the creditor may apply the money to those debts which are not secured, and still retain his rights as to the secured debts. *Hutchinson v. Bell*, 1 Taunt. 558; *Clark v. Burdett*, 2 Hall, 197; *Langdon v. Bowen*, 46 Vt. 512.  
12 L. R. A.

**2. An application of a payment to a debt not already barred will interrupt the running of the statute and extend the time as to the balance.**

(December 15, 1890.)

**EXCEPTIONS** by plaintiff to instructions given to the jury by the Supreme Judicial Court for Somerset County (*Libbey, J.*) at the trial of an action brought to recover the

And if some of the items would be barred by the Statute of Limitations, the creditor may apply a general payment to them, and sue upon those not barred by the Statute. *Williams v. Griffith*, 5 Mees. & W. 800; *Mills v. Fowkes*, 5 Bing. N. C. 455. See 7 Wait, Act. and Del. p. 416.

*Rule of the United States Supreme Court.*

The Supreme Court of the United States in a



amount alleged to be due on a promissory note, which resulted in a verdict in favor of defendant. *Sustained.*

The note was for \$198.72, dated December 8, 1879, and was payable on demand. On its back it bore the indorsement "January 26, 1881. Rec'd \$12.80 in work." The writ in this case was dated January 18, 1887.

The principal defense was the Statute of Limitations.

On January 26, 1881, Sawyer was owing the holder of the note a store account and the amount due on the note. On that day he presented such holder bills for work done to the amount of \$12.80, with no direction as to which debt the amount of the bills should be applied to. The holder of the note thereupon indorsed the amount of the bills as a credit on the note.

The further facts sufficiently appear in the opinion.

*Mr. J. O. Bradbury*, for plaintiff:

The payment is an acknowledgment that the note was an existing one, and operated to destroy the operations of the Statute of Limitations and negatives a presumption of payment for mere lapse of time.

*Estes v. Blake*, 30 Me. 164.

A debtor owing several debts to the same creditor has a right to apply his payment at the time of making it to which debt he pleases. If he makes a general payment without appropriating it, the creditor may apply it as he pleases.

*Starrett v. Barber*, 20 Me. 461; *Hilton v. Burley*, 2 N. H. 198; *Buck v. Spofford*, 40 Me. 328.

If one of two demands is within the operation of the Statute of Limitations and the other

is not, this circumstance does not prevent the ascription of a general payment to the former demand when the debtor has not appropriated it at the time.

*Ramsay v. Warner*, 97 Mass. 12. See also *Pond v. Williams*, 1 Gray, 685.

*Messrs. Merrill & Coffin*, for defendant:

Part payment in order to take the balance of the claim out of the Statute of Limitations must be made under such circumstances as to warrant the inference that the debtor thereby recognized the debt and signified his willingness to pay it.

*Pickett v. King*, 84 Barb. 193; *Jewett v. Pettit*, 4 Mich. 508.

When the circumstances do not show that the debtor intended to recognize the debt, and especially where they show that he did not so intend, part payment will not interrupt the running of the Statute.

*Bangs v. Hall*, 2 Pick. 368; *Hale v. Morse*, 49 Conn. 481.

Payment, in order to take the claim out of the Statute of Limitations, must be made by the defendant or with his privity. A payment neither intended nor assented to by him will not have that effect.

*Elliott v. Mills*, 10 Ind. 368; *Roscoe v. Hale*, 7 Gray, 274; *Stoddard v. Doane*, 7 Gray, 381; *Brown v. Latham*, 58 N. H. 80, 43 Am. Rep. 568; *Harper v. Fairley*, 58 N. Y. 442.

Where the creditor holds two clear and undisputed debts, neither one is taken out of the Statute by evidence of a part payment not specifically appropriated by the debtor.

*Burn v. Boulton*, 2 C. B. 476, cited in notes to *Clarke v. Dutcher*, 9 Cow. 679.

The application of such a general payment by the creditor to a particular debt does not

series of well-considered decisions has reached conclusions quite in harmony with the current of English adjudication, and upon both principle and authority it is held that the debtor or the party paying money, may, should he so elect, direct its appropriation; but if he fails to give such direction, this right of appropriation devolves upon the creditor. Should he fail to apply the fund in liquidation of some particular debt, the law will make the application according to the equities of the case. It should be added that after a litigation has arisen neither party is at liberty to apply the payment, but the court will, in the furtherance of justice, order the amount credited upon that debt for which the security is the most precarious. *United States v. January*, 11 U. S. 7 Cranch, 572, 3 L. ed. 443; *Alexandria v. Patten*, 8 U. S. 4 Cranch, 317, 2 L. ed. 633; *Jones v. United States*, 48 U. S. 7 How. 681, 12 L. ed. 870; *United States v. Irving*, 42 U. S. 1 How. 260, 11 L. ed. 120; *Backhouse v. Patten*, 20 U. S. 5 Pet. 160, 5 L. ed. 82; *Taylor v. Sandiford*, 20 U. S. 7 Wheat. 13, 5 L. ed. 884; *Field v. Holland*, 10 U. S. 6 Cranch, 4, 3 L. ed. 138; *National Bank of New York v. Mechanics Nat. Bank of Trenton*, 24 U. S. 437, 24 L. ed. 176.

The creditor does not lose his right of election, although not immediately exercised; but after making it he is bound by it. *Alexandria v. Patten*, *supra*.

Neither debtor nor creditor has a right to make an appropriation after a controversy has arisen. *United States v. Kirkpatrick*, 22 U. S. 9 Wheat. 720, 6 L. ed. 199; *Backhouse v. Patten*, *supra*.

*Application of payments must be just and equitable.*

No general and uniform rule, applicable to all 12 L. R. A.

cases, can be deduced from the decisions. But the better opinion would seem to be that the application of indefinite payments need not be exclusively in accordance with the interests of either party, but may be such as is just and equitable under all the circumstances of the case. *Stone v. Seymour*, 15 Wend. 29. See *Baker v. Stackpole*, 9 Cow. 420; *Truscott v. King*, 6 N. Y. 147; *Allen v. Culver*, 3 Denio, 284; *Emery v. Tichout*, 13 Vt. 15; *Robinson v. Doolittle*, 13 Vt. 246; *Harker v. Conrad*, 12 Serg. & R. 301; *Gwinn v. Whitaker*, 1 Har. & J. 754; *Chester v. Wheelwright*, 15 Conn. 523; *Field v. Holland*, 10 U. S. 6 Cranch, 4, 3 L. ed. 138; *Baine v. Williams*, 10 Smedes & M. 113; *Gass v. Stinson*, 3 Sumn. 98; *Dent v. State Bank*, 13 Ala. 275; *Taylor v. Coleman*, 20 Tex. 772.

Under such circumstances it has been held that the debtor may make application to a debt barred by the Statute of Limitations, or within the Statute of Frauds. *Ramsay v. Warner*, 97 Mass. 8; *Jackson v. Burke*, 1 Dill, 311; *Haynes v. Nice*, 100 Mass. 327; *Ayer v. Hawkins*, 19 Vt. 23.

But a debtor would not have the right to apply general payments to any debt or item of account which is illegal, or contrary to law, as a claim for usurious interest, or for articles sold contrary to law. *Rumsey v. Warner*, *Jackson v. Burke*, *Haynes v. Nice* and *Ayer v. Hawkins*, *supra*.

But if the payment has been made on account of an illegal sale, as for instance of spirituous liquors sold without a license, the purchaser cannot afterwards rescind the payment, and insist upon the application to other debts. *Caldwell v. Wentworth*, 14 N. H. 431. See 3 *Field, Lawyer's Briefs*, p. 121.

interrupt the running of the Statute of Limitations thereon.

*Royston v. May*, 71 Ala. 898; *Armistead v. Brooks*, 18 Ark. 521.

The doctrine for a time prevailed that the Statute of Limitations was a discreditable defense, and should be upheld by courts only when it was impossible to find a pretext for avoiding its effect.

Wherever this view prevailed the slightest acknowledgment was held by courts to take a case out of the operation of the Statute.

*Burden v. McElhenny*, 2 Nott & McC. 60, 10 Am. Dec. 570.

Gradually this crude and mistaken view of the nature and purpose of the Statute was abandoned, and the Statute came to be regarded as having its foundation, not on a presumption of payment, but on sound considerations of public policy.

*Bell v. Morrison*, 26 U. S. 1 Pet. 360, 7 L. ed. 178.

Under the influence of this more enlightened view, it is now the law that there must be a clear and unequivocal acknowledgment of the debt to take a case out of the Statute, or suspend its running.

*Ibid.*; *Robbins v. Otis*, 1 Pick. 363.

The new promise must be unconditional in order to remove the bar of the Statute or prevent its running; or, if conditional, plaintiff must show that the condition has been fulfilled.

*Mumford v. Freeman*, 8 Met. 433; *Wetzel v. Bussard*, 24 U. S. 11 Wheat. 309, 6 L. ed. 481; *Mattocks v. Ohadwick*, 71 Me. 818; *Perley v. Little*, 3 Me. 97; *Porter v. Hill*, 4 Me. 41; *Lombard v. Pease*, 14 Me. 849; *Thayer v. Mills*, 14 Me. 800; *Pray v. Garcelon*, 17 Me. 145.

A general acknowledgment of indebtedness is not sufficient to take a particular debt out of the Statute.

*Clarke v. Dutcher*, 9 Cow. 674; *Conway v. Williams*, 10 La. 563, 29 Am. Dec. 466; *Stafford v. Bryan*, 3 Wend. 535; *Martin v. Broach*, 6 Ga. 21, 50 Am. Dec. 803.

The new promise to be effectual must be clear and positive, and must distinctly refer to the debt sued.

*Landis v. Roth*, 109 Pa. 631, 58 Am. Rep. 747; *Hussey v. Kirkman*, 95 N. C. 63; *Stafford v. Bryan*, *supra*; *notes to Whitcomb v. Whiting*, Dougl. 653, 1 Smith, Lead. Cas. 7th Am. ed. 955.

As the reviving effect of part payment is due to the acknowledgment and new promise implied therefrom, nothing is clearer than that the principles just stated which control the efficacy of acknowledgments and new promises should apply also to part payment.

*Winchell v. Hicks*, 18 N. Y. 559; *Shoemaker*

*v. Benedict*, 11 N. Y. 176; *Whitcomb v. Whiting*, 1 Smith, Lead. Cas. 7th Am. ed. 977.

Even some of the very cases which hold to the doctrine we are condemning have to admit that a payment or acknowledgment which may relate to either of two separate and unconnected debts will throw the burden of proof on the creditor to show which was intended, and leave both within the Statute, unless the uncertainty is removed by further evidence.

*Walker v. Butler*, 6 El. & Bl. 506; *Buckingham v. Smith*, 28 Conn. 458.

**Walton, J.**, delivered the opinion of the court:

The right of a debtor to determine to which of several debts a payment made by him shall be applied is unquestionable; but if he omits to exercise the right, the law allows the creditor to make the appropriation, and the latter may apply it to a debt already barred by the Statute of Limitations. But such an application of it will not remove the statutory bar with respect to the balance of the debt. To have that effect, the appropriation must be made by the debtor himself.

But the creditor may apply the payment to any debt not already barred by the Statute of Limitations, and thereby prolong the running of the Statute for six years from the time when the payment is made.

Apparently this distinction between a debt already barred and one not already barred was overlooked by the presiding judge in the trial of this cause, for the indorsement in question was made on the note declared on long before it would have become barred by the Statute of Limitations; and yet the presiding judge instructed the jury that to take the case out of the operation of the Statute the plaintiff must show that the party making the payment made it and applied it, or made it to be applied, upon the particular contract in suit. This would have been correct if the indorsement had been made upon a note then barred by the Statute. But the instruction, being given with reference to a payment made before the note on which it was indorsed had become barred, was clearly erroneous.

This distinction between debts barred by the Statute at the time when the payment is made and those not then barred, is recognized in *Pond v. Williams*, 1 Gray, 630, and expressly sanctioned in *Ramsay v. Warner*, 97 Mass. 8; And the law is so stated in *Buswell on Limitations*, § 81.

*Exceptions sustained.*

**Peters, Ch. J.**, and **Virgin, Emery, Foster and Haskell, JJ.**, concur.

## MISSOURI SUPREME COURT (2d Div.).

Marion SPARKS *et al.*, *Respts.*,

*v.*  
DESPATCH TRANSFER CO., *Appt.*

(....Mo....)

### 1. A corporation which uses mules in its

NOTE.—When company cannot evade liability.

If the president of a corporation was in the habit of acting as a business agent for the company 12 L. R. A.

business is liable on notes for mules given in its name by its president where he had frequently bought mules of the payee and given therefor notes of the corporation, which it had always paid, and the seller had no reason to suppose that the present purchase was not made for

with its knowledge and without objection, actual authority will be inferred from such acts, and the company will be bound by them. *Dougherty v.*

the corporation as the president represented it to be.

**3. Parol evidence is not admissible to show that a negotiable note, signed by an individual in his own name merely, with nothing on its face to show any intent to bind anyone but himself, was given by him as president of a corporation.**

(February 24, 1891.)

**A PPEAL** by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiffs in an action brought to recover the amounts due on certain promissory notes alleged to have been executed for defendant by its president. *Affirmed in part. Reversed in part.*

**Statement by Grant, J.:**

This is an action on five negotiable promissory notes, alleged to have been executed by defendant by and through one Stewart Jackson. The plaintiffs were co-partners, engaged in the horse and mule business in Kansas City, and had been for two years

prior to the making of the notes sued on. The defendant was a business corporation, organized under the laws of this State, and doing transfer business in Kansas City. On the 21st day of June, 1887, one Stewart Jackson, in payment for certain mules by him bought of plaintiffs that day, gave plaintiffs the following note:

"\$1,860.00. Kansas City, Mo., June 21, 1887.

"Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock eighteen hundred and sixty dollars, for value received, at the banking office of H. S. Mills, in Kansas City, Mo., with interest from date at the rate of ten per cent per annum until paid, and, if interest be not paid annually, to become as principal, and bear the same rate of interest. Due Aug. 20, 1887. Despatch Transfer Co., by S. Jackson, President."

And on July 5, 1887, said Jackson, in payment of mules that day bought of plaintiffs, gave plaintiffs the following note:

"\$1,840.00, Kansas City, Mo., July 5, 1887.

Hunter, 54 Pa. 380; 1 Lawson, Rights, Remedies and Practice, § 420.

And it is held that a corporation cannot evade liability on negotiable paper, indorsed with its name by its agent, for the accommodation of a third person on the ground that the agent had no authority so to indorse it, where it appears that the agent had frequently before indorsed its paper, and procured it to be discounted by the plaintiff, and received the avails, and that the corporation had recognized the validity of such previous transactions. Bank of Auburn v. Putnam, 1 Abb. App. Dec. 80, 3 Keyes, 343. See Percy v. Millaudon, 3 La. 568; 2 Wait, Act. and Def. 343.

The authority of a corporation or its officers to issue its promissory note need not be expressly given by its by-laws, or by formal resolution of the board of directors. Such authority can be inferred from the acquiescence of the corporation in, or the recognition by it of, the acts of its accredited officers in the regular course of its authorized business. First Nat. Bank of Hannibal v. North Missouri Coal & Min. Co. 86 Mo. 123.

Beyond the powers which usage and custom and the necessities and conveniences of business require in the executive officer of a corporation, the president has no more control over the corporate property and funds than any other director. He may, however, without any special authority from the board of directors, perform all acts of any ordinary nature which are incident to his office, and he may bind the corporation by contracts arising in the usual course of business. To this extent he becomes, in virtue of his election as president, the agent of the corporation. Stokes v. New Jersey Pottery Co. 46 N. J. L. 237; Titus v. Cairo & F. R. Co. 37 N. J. L. 98; Leggett v. New Jersey Mfg. & Bkg. Co. 1 N. J. Eq. 541; Westerfield v. Radde, 7 Daly, 326; Bliss v. Kaweah Canal & I. Co. 65 Cal. 602; Hien v. Bear River & A. W. & Min. Co. 20 Cal. 602; Riskey v. Indianapolis, B. & W. R. Co. 1 Hun, 202; Crump v. United States Min. Co. 7 Gratt. 262; Hodges v. Rutland & B. R. Co. 29 Vt. 220; Ashuelot Mfg. Co. v. Marsh, 1 Oush. 507; Bright v. Metairie Cemetery Asso. 33 La. Ann. 53; Bridgeport Sav. Bank v. Eldredge, 23 Conn. 556; Union Mut. L. Ins. Co. v. White, 106 Ill. 67; Allentown First Nat. Bank v. Hoch, 89 Pa. 324. See Second Ave. R. Co. v. Mehrbach, 17 Jones & S. 267; Twelfth Street Market Co. v. Jackson, 103 Pa. 268; 1 Waterman, Corp. § 126, p. 443.

13 L. R. A.

#### *Corporations act through their officials.*

Corporations, of necessity, must act solely through the instrumentality of their officers or other duly authorized agents; and such officers and agents must, like the agents of natural persons, be deemed to be clothed with all the powers and authority necessary or proper to effectuate the purposes of their creation, in the manner, with the means and appliances, and according to the usages customary in the conduct of the business and affairs intrusted to them. Lee v. Pittsburgh Coal & Min. Co. 56 How. Pr. 373.

The views we have expressed not only rest upon good reason, but they are abundantly supported by authority. Merchants Nat. Bank of Boston v. State Nat. Bank, 77 U. S. 10 Wall. 604, 644, 19 L. ed. 1008, 1018; New Hope & D. Bridge Co. v. Phenix Bank, 3 N. Y. 155; American Ins. Co. v. Oakley, 9 Paige, 466, 4 L. ed. 739; Emmet v. Reed, 8 N. Y. 312; Mumford v. Hawkins, 5 Denio, 355; Bates v. Keith Iron Co. 7 Met. 224; Clarke Nat. Bank v. Bank of Kent County v. Butchers & Drovers Bank, 16 N. Y. 125, 23 N. Y. 426; Wild v. New York & A. Silver Min. Co. 59 N. Y. 644.

The president's authority may be by parol, and collected from circumstances or implied from the conduct or acquiescence of the directors. It may be inferred from the general manner in which he has been suffered by the directors, without interference or inquiry, to conduct the affairs of the corporation; and when, during a series of years or in numerous business transactions, he has been permitted, in his official capacity and without objection, to pursue a particular course of conduct, it may be presumed, as between the corporation and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Martin v. Webb, 110 U. S. 7, 28 L. ed. 49.

Where a party deals with a corporation in good faith, and is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, the corporation is bound by the contract, if not *ultra vires*. Merchants Nat. Bank of Boston v. State Nat. Bank, 77 U. S. 10 Wall. 604, 19 L. ed. 1008.

The elementary treatises and authorities establish this view. Story, Ag. ed. 1863, § 87, p. 93.

"Thirty days after date we promise to pay to the order of Sparks Bros. and Hancock eighteen hundred and forty dollars, for value received, at the banking office of H. S. Mills & Son, in Kansas City, Mo., with interest from date at the rate of ten per cent per annum until paid, and, if interest be not paid annually, to become as principal, and bear the same rate of interest. Due Aug. 5, 1887. Despatch Transfer Co., by S. Jackson, President.

"Indorsed: Protest waived. S. Jackson."

On the 11th of June, 1887, said Jackson, for mules bought by him of plaintiffs, gave them this note:

"\$300.00. Kansas City, Mo., June 11, 1887.

"Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock three hundred dollars, with 10% interest from date, value received. Due Aug. 10, 1887. S. Jackson."

On June 11th said Jackson, for mules by him bought that day of plaintiffs, gave this note:

"\$375.00. Kansas City, Mo., June 11, 1887.

"Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock three hundred and seventy-five dollars, with 10 per cent interest from date, value received. S. Jackson."

And on June 15 this note:

"\$240. Kansas City, Mo., June 15, 1887.

"Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock, two hundred and forty dollars, for one mouse-colored mule bo't of C. Sparks, with 10 per cent interest from date, value received. Due Aug. 14, 1887. S. Jackson."

The plaintiffs declare upon each note separately, and charge that the defendant executed all five of the notes, by its president, Stewart Jackson. There is also a sixth count, which is as follows: "(6) Plaintiffs, for another cause of action, state that between the 10th day of June, 1887, and the 16th day of June, 1887, plaintiffs, at the request of the defendant, sold and delivered to the defendant certain mules as follows, to wit: On the 11th day of June three (3) mules, for \$675.00; on the 15th day of June, 1887, one (1) mule for \$240.00; amounting in all to the sum of \$915.00; which said sum defendant owes plaintiffs, and fails and refuses to pay the same, although payment has been demanded; wherefore plaintiffs demand judgment against defendant for the sum of \$915.00, and for costs."

The defendant, for its defense, denies that it executed either of said notes; denies that it ever authorized the execution of either of said notes; alleges that said notes were given to plaintiffs by said Jackson on his own private account, and that the consideration therefor was certain mules and horses sold by plaintiff to Jackson for his individual account, and in no way connected with defendant's business; that said mules and horses were never delivered to defendant, and were never bought by or for defendant; that Jackson was carrying on a general business buying and selling horses and mules for his own account, which plaintiffs well knew; and that the horses and mules for which these

notes were given were bought by said Jackson in the ordinary course of his business, and plaintiffs knew he did not buy said mules and horses for defendant. Defendant set up its charter, showing that by it it was only authorized to conduct a general transfer business in the City of Kansas, moving freight from point to point in said city; that it was never engaged in the business of buying or selling horses or mules, nor authorized anyone to do so for it; that said two notes were wrongfully executed in its name by Jackson; that it had no power to engage in the horse and mule business, and the notes and the trades for said mules were *ultra vires*; also pleaded especially that by one of its by-laws it was provided: "No debt for a sum larger than \$500 shall be contracted in behalf of the company by any officer thereof, without a vote of the board of directors authorizing same." That the debt sued for in the first and second and sixth counts exceeded \$500. That said mules were not bought for defendant by said Jackson in the usual routine of business; that they were not needed by defendant for its business; that they were not desired; that defendant knew nothing of their purchase, and its board of directors never authorized their purchase nor the contracting of the debt therefor. This answer was verified by Harry E. Overstreet, secretary and treasurer. The reply was a general denial. The cause was tried by a jury, and resulted in favor of plaintiffs on each count except the sixth.

The facts developed by the evidence are as follows: The defendant was a corporation engaged in the transfer business in Kansas City. Stewart Jackson was the president of the Company. The company, as originally organized, had a capital of \$10,000—100 shares. Jackson had the controlling interest—55 shares. Afterwards the stock was increased to \$30,000, of which Jackson had 160 shares—a majority of all the stock. Jackson was the president from the beginning until he left, in August, 1887, after the execution of the notes sued on. It also appears that Jackson purchased every mule and horse that defendant ever owned until he absconded; that defendant's business required mules to haul the freight it handled; that, beginning with November, 1885, and ending May 18, 1887, defendants had some thirteen different transactions in mules with plaintiffs or the firm which plaintiffs succeeded, aggregating some \$3,000; that in a number of these transactions the defendant gave its note in its name, by Jackson, who conducted all the trades. There was also evidence that the mules were all turned over to defendant's barns. Defendant offered evidence that it did not get the mules; that, although brought to its barns, they were taken out by Jackson, and shipped to St. Louis; that Jackson bought the mules on his own account, and that plaintiffs knew it. Plaintiffs offered evidence that they thought and were informed that the mules were bought by Jackson for the defendant; that when Jackson gave the three notes sued on in counts 3, 4 and 5, they directed him to give the Company's notes to the clerk of plaintiffs in their

counting-room, and did not know, till after Jackson had absconded, the notes simply bore his name; that they were selling the stock to defendant. On the trial defendant objected to the introduction of the three notes sued on in the third, fourth and fifth counts, for the reason that they were incompetent, irrelevant and immaterial, as they were the individual notes of S. Jackson alone; that defendant was not and could not be bound thereby. The court gave nine instructions for the plaintiff, in which the liability of defendant for the acts of Stewart Jackson, done in its name, was correctly defined. The eighth instruction is as follows: "(8) As to those notes here sued on, executed in the name of S. Jackson, the jury will ascertain whether these were executed for and in behalf of the Company; and if you find that they were so executed, then as to these the defendant is liable thereon to the same extent as if said notes had been executed in the name of the Company." For the defendant the court gave twenty-two instructions, fully submitting all the issues tendered in its answer, that the mules were purchased by Jackson on his individual account, that plaintiffs knew it, and whether the purchases were *ultra vires*. The court refused the twenty-third instruction, which is as follows: "(23) The jury are further instructed that, even if they should believe from the evidence that at the time of the execution of the notes in controversy, and signed in the name of the defendant Company, plaintiffs in good faith believed that they were dealing with defendant's Company, and yet, while the mules, which in return for said notes were delivered to S. Jackson, remained in his possession, and plaintiffs knew of their whereabouts before disposed of by said Jackson, plaintiffs or their authorized representatives became aware or had reason to know that said Jackson deceived them and misrepresented to them that said mules were for defendant Company, and, notwithstanding such knowledge, made no effort to recover their said mules, but suffered said Jackson to proceed and dispose of the same, then they cannot recover from defendant Company; and in determining these questions the jury should determine from the evidence whether said mules were shipped by said S. Jackson to St. Louis and whether Charlie Sparks was the authorized representative of plaintiffs, and whether he was present at the time of said shipment, or knew of the same in time to have notified plaintiffs and effected a recovery of the mules before they were finally disposed of by said Jackson, if you believe he did dispose of them." The jury returned the following verdict: "We, the jury, find for the plaintiffs on the first five counts of the petition as follows: First count, principal and interest, \$1,987.60; second count, principal and interest, \$1,909.49; third count, principal and interest, \$818.38; fourth count, principal and interest, \$891.66; fifth count, principal and interest, \$250.40. We also find for defendant on the sixth count of the petition. John J. Granfield, Foreman."

**Messrs. Lathrop, Smith & Morrow**, for appellants.

13 L. R. A.

**Messrs. Peak, Yeager & Ball**, for respondents:

From the previous course of dealing of defendant with plaintiffs, from the powers which defendant at all times allowed Jackson to exercise without let or hindrance, and from the powers which he actually possessed to purchase stock for defendant, plaintiffs were warranted in relying upon his representations in selling and delivering the stock in question, and defendant is bound by those representations.

*First Nat. Bank of Hannibal v. North Missouri Coal & Min. Co.* 86 Mo. 126; *Fifth Ward Sav. Bank v. First Nat. Bank*, 1 Cent. Rep. 488, 47 N. J. L. 857; *Edwards v. Thomas*, 66 Mo. 468.

It was no part of plaintiffs' duty, in the absence of anything exciting their suspicion or putting them on inquiry, to go behind the representations of defendant's chief officer and majority stockholder and investigate the question whether he lied when he stated that the stock was bought for defendant to be used in its business.

*Bank of Genesee v. Patchin Bank*, 18 N. Y. 809; *LaFayette Sav. Bank v. St. Louis Stone-ware Co.* 2 Mo. App. 299.

The defense of *ultra vires* cannot avail.

*Kansas Lumber Co. v. Kansas Cent. Bank*, 84 Kan. 636; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57.

Even in those jurisdictions where the courts hold to the most rigorous enforcement of the doctrine that no recovery can be had on a note or bill of exchange against one not named in the instrument, they will not reverse the judgment or order a new trial where recovery was had below on the instrument itself instead of on a common count, which the petition contained, for goods sold and delivered; the two counts being for the same amount and covering the same matter, and the jury having passed upon the merits.

*Pents v. Stanton*, 10 Wend. 271.

Moreover the doctrine itself here contended for by appellant was always a technical outrage and has been thoroughly exploded and repudiated in this State.

*Washington Mut. F. Ins. Co. v. St. Mary's Sem.* 52 Mo. 480, and cases cited; *Ferris v. Thaw*, 73 Mo. 446; *Franklin Ave. German Sav. Inst. v. Roscoe Board of Education*, 75 Mo. 406; *Snider v. Adams Exp. Co.* 77 Mo. 525; *Bushong v. Taylor*, 82 Mo. 660.

**Gantt, J.**, delivered the opinion of the court:

The notes sued on in this case were all executed by Stewart Jackson, who was at the time of their execution the president of the defendant below, appellant here. The first two were signed in the name of the Despatch Transfer Company, by Jackson as president; the other three by Jackson, without any reference to the corporation, or any words indicating that he intended to bind anyone but himself. The appellant seeks to avoid liability for any of these notes, but its defense differs, as to the first two, from its defense to the remaining three. Counsel for appellant argues that the evidence did not justify the instructions given for respondents, by

which appellant was held liable on the two notes signed with the corporate name. Those instructions, in substance, declared the law to be that if the jury should find that Jackson was the president of the defendant, and that defendant allowed him to act as its purchasing agent in buying stock in the name of the Company, and recognized his act as such by paying his orders given on the Company, or by paying his notes given by him for stock so purchased by him of plaintiffs, then defendant was bound by his acts in purchasing the mules of plaintiffs, and for the notes sued on in the first two counts, unless plaintiffs knew or had reasonable means of knowing that Jackson was buying these mules on his individual account. The power of Jackson to bind the defendant is governed by the Law of Agency. The principle underlying is the same whether the principal be a corporation or an individual. It is now well settled that when in the usual course of the business of a corporation an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. This is only the application of the principle that usual employment is evidence of the powers of an agent, and the principal is held responsible for the acts of his agent within the apparent authority conferred on the agent. *First Nat. Bank of Hannibal v. North Missouri Coal & Min. Co.* 86 Mo. 125; *Washington Mut. F. Ins. Co. v. St. Mary's Sem.* 52 Mo. 480; *Kiley v. Prosser*, 57 Mo. 890; *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49; *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. ed. 707.

The president of a business corporation is its chief executive officer. He may, without any special authority from the board of directors, perform all acts of an ordinary nature, which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business. *Boone, Corp.* § 144; *Stokes v. New Jersey Pottery Co.* 46 N. J. L. 237.

In the case at bar Stewart Jackson was president of defendant. He purchased every mule that defendant owned from its organization until after the execution of the notes sued on in this case. He had repeatedly signed notes in the name of the corporation, and the corporation had honored his orders and paid his notes so drawn. Plaintiffs had thirteen different transactions with him as the president and purchasing agent of defendant prior to the giving of the notes herein, and his acts had always been ratified. The defendant was engaged in a transfer business in which the motive power was mules, and it was in its written charter privileged to buy mules, and execute its notes therefor. Jackson had purchased mules for defendant of the plaintiffs; and on this occasion he informed them that he was purchasing the mules for which these two notes were given, for the defendant. His transaction, under the evidence, was within both his actual and apparent authority to bind the defendant. The evidence is amply sufficient to bind defend-

ant on these two notes; and there was no error in the instructions given for plaintiffs on these two notes, and certainly defendant ought not to be heard to complain.

The action of the court in admitting parol evidence to show that the defendant was liable on the three notes sued on in third, fourth and fifth counts, notwithstanding its name nowhere appeared on the notes, and in instructing the jury as it did in the eighth instruction for the plaintiffs, presents for our consideration a question of great practical importance, and much depends upon its right decision. The exact question here presented has not been passed on by this court in any case that we have been able to find, but it has been long settled in many of our sister States. In Massachusetts as early as 1814, in the case of *Stackpole v. Arnold*, 11 Mass. 27, it was held that, "where one makes a written contract, intending to act therein as the agent of another, and to bind his principal, it is necessary that it should appear in the contract itself that he acts as such agent;" and oral testimony was held inadmissible to contradict, vary or materially affect the written contract. The same question came before the same court again in 1868, in *Brown v. Parker*, 7 Allen, 387. In that case one N. H. Streeter had signed two negotiable notes, and it was sought to hold defendant Parker, on the ground that Streeter was his agent, and intended to bind defendant. The court says: "But in suits on promissory notes or bills of exchange no evidence is admissible to charge any person as principal whose name is not in some way disclosed on the face of the note or draft. This point has been often decided in this Commonwealth, and the reasons on which the rule rests have been fully stated in very recent decisions,"—citing *Swanson v. Loring*, 5 Allen, 840, and cases cited, in which it was said by Chief Justice Bigelow: "Being negotiable paper, all evidence dehors the drafts is to be excluded. It is wholly immaterial, therefore, that the defendant was in fact the agent of the company named on the face of the drafts, that the plaintiff knew that he was so, and that the defendant had no personal interest in the Company."

In New York, in *Pente v. Stanton*, 10 Wend. 271, the cases both in England and in the different States of the Union were reviewed, and the conclusion reached "that no person can be considered a party to a bill unless his name or the name of the firm of which he is a partner appear on some part of it,"—citing, *Chitty, Bills*, 22; *Fenn v. Harrison*, 8 T. R. 761; *Amly v. Lye*, 15 East, 7.

And this rule is universally accepted as the law by the recent text-writers on commercial paper. *Tiedeman, Com. Paper*, § 87; *Randolph, Com. Paper*, § 181.

"The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment. It is 'a courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments no evidence is admissible to charge any person as a principal thereto unless his name in some way is disclosed upon

the instrument itself." 1 Dan. Neg. Inst. § 808; Mechem, Ag. pp. 285-287; *Heaton v. Myers*, 4 Colo. 59.

And another good reason for the rule is that every part of commercial paper must be definite and certain and contained in the body of the paper itself, so that every taker and holder understands exactly what his rights in and to it are, and with whom he is contracting. Counsel for respondents claim that this doctrine has been repudiated by this court in a number of decisions, and the importance of the question, and the earnestness with which this is urged, demand that we should state our reasons for declining to take that view of the case.

The leading case relied upon by respondents is *Washington Mut. F. Ins. Co. v. St. Mary's Sem.* 52 Mo. 480. The note which was the basis of the action in that case was as follows:

"\$750.

"For value received in policy No. 2,969, dated the fourteenth day of March, 1866, issued by the Washington Mutual Fire Insurance Company of St. Louis, I promise to pay said company (or their secretary for the time being) the sum of seven hundred and fifty dollars, in such portions and at such time or times as the directors of said company may agreeably to their acts of incorporation require. Daniel McCarthy, Prest. Per Thomas Burke."

This court held that it was competent to explain the ambiguity on the face of the note itself. Speaking for the court, Judge Sherwood said in that case: "In the present case the note sued on is signed 'Daniel McCarthy, Prest.' But president of what? Just here, under the rules laid down in the above cases, parol evidence steps in, and affords a ready and satisfactory explanation. The word 'Prest.,' attached to the name of Daniel McCarthy, is an ear-mark of the official capacity in which the note was signed,—not evidence, it is true, that the note was signed in that capacity, but a sufficient basis for the introduction of testimony tending to establish that fact." Moreover in that case the note on its face referred to policy No. 2,969, which insured the seminary building and church building belonging to St. Mary's Seminary. It will be observed, first, that the above note is not negotiable, and, secondly, that the ambiguity appears on its face, growing out of the word "Prest.," affixed to McCarthy's name. In the case at bar the notes are by their terms negotiable, and contain nothing but Jackson's name as maker; so that this case is not authority, because the facts are entirely different. It is true, however, that in this case Judge Sherwood quotes from the decision in *Mechanics Bank of Alexandria v. Bank of Columbia*, 18 U. S. 5 Wheat. 827, 5 L. ed. 101, in which the Supreme Court of the United States says: "It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency." If this were all, it must be conceded that respondents are justified in claiming that this decision is broad enough to per-

12 L. R. A.

mit parol evidence in any case to explain who was the principal, notwithstanding there is no intimation on the face of the paper that anyone but the agent is a party to it. But the Supreme Court of the United States did not put its decision on that ground; but, on the contrary, Justice Johnson, who delivered the opinion, expressly says: "But the fact that this appeared on its face to be a private check is by no means to be conceded; on the contrary, the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate, and not an individual, transaction; to which must be added that the cashier is the drawer, and the teller the payee, and the form of ordinary checks deviated from by the substitution of 'to order' for 'to bearer.' The evidence, therefore, on the face of the bill predominates in favor of its being a bank transaction. But it is enough for the purposes of the defendant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other, and in such a case to resort to extrinsic evidence to remove the doubt." So that it seems clear that the supreme court placed its decision upon the fact that upon the face of the paper the ambiguity appeared. That court would never have held that there was any ambiguity on the face of the notes sued on in the third, fourth and fifth counts in the case at bar. *Falk v. Moebis*, 127 U. S. 597, 32 L. ed. 266.

In *Smith v. Alexander*, 31 Mo. 198, the action was on the following note:

"\$500. St. Louis, Mo., July 22, 1855.

Ninety days after date I promise to pay to the order of Messrs. Smith & Co., five hundred dollars, for value received, negotiable and payable without defalcation or discount. J. H. Alexander, Treas. Ohio & Miss. R. R. Co."

In that case Alexander, having been sued on this note, was allowed to show that he was treasurer of the said railroad, and that he gave the note simply as agent of said Company, Judge Ewing saying: "A mere addition to the name of the party signing the contract cannot be regarded as a certain indicium that it was made on behalf of another. Where, however, it is doubtful from the face of the contract whether it was intended to operate as a personal engagement of the party signing it or to impose an obligation on some third person as principal, evidence is admissible to show the character of the transaction." So we see that Judge Ewing places his ruling on the doubt appearing on the face of the note, whether it was the obligation of Alexander or the railroad company.

*Shuette v. Bailey*, 40 Mo. 69, was an action on a contract for half the value of a partition wall. It was not a negotiable instrument at all, and in that case the contract was signed, "Kenneth McKenzie, Agent for Volney Stevenson, on the first part," so that case is not similar in any legal feature to the one at bar.

In *Musser v. Johnson*, 42 Mo. 74, action was brought on a written assignment of a certain claim against Johnson and others by

Isaac H. Sturgeon, president North Missouri Railroad Company, "attested with the seal of the company, and countersigned by George H. Blood, Sec'y N. M. R. R. Co." It was held to be the act of the company. The instrument was not negotiable, and the paper on its face clearly showed it was the intention to assign the railroad company's right. The next case we are cited to is *Ferris v. Thaw*, 72 Mo. 446. In that case the note or instrument read:

"\$4,000. St. Louis, Mo., Oct. 8d, 1870.

"Twelve months after date I promise to pay to the order of John W. Luke, treasurer, \$4,000, without defalcation or discount, for value received, negotiable and payable at the Third National Bank of St. Louis, with ten per cent interest from date, payable semi-annually. Charlie Thaw, W. M. Polar Star Lodge No. 79. Indorsed: John W. Luke, Treasurer."

In that case the defendants were sued as members of Polar Star Lodge No. 79 of Ancient Free and Accepted Masons. Defendant Thaw was its chief officer, with the title of worshipful master. In that case it was shown that the lodge was an unincorporated body; that it had borrowed this \$4,000 for lodge purposes. The loan was reported to the lodge and was approved at its meeting, all the defendants voting therefor. It will be observed that in this case the ambiguity appears on the face of the paper, and the court properly permitted evidence to show who were the real principals, and the members of the lodge which received the money were held on it. It is true the learned judge quotes from *Story* on Agency and uses language that might be construed to include any undisclosed principal; but it is not practicable in every case to go over the entire law, and point out all the qualifications that might be mentioned, and, when the law, as quoted, applies to the controlling facts in the case, it must be understood as referring to those facts. It is clear to us that the learned judge who delivered that opinion had no intention of discussing the proposition now under consideration. The case was placed upon the ground that, the lodge having failed to become a corporation, its members were liable as copartners; and they were all shown to have ratified the act of the worshipful master, and his agency appeared on the paper itself, so that it was unnecessary to discuss the question as to the liability of a person on an instrument to which he was not a party. *Martin v. Fenell*, 79 Mo. 410; *Richardson v. Pitts*, 71 Mo. 128.

It remains only to notice *Franklin A. German Sav. Inst. v. Roscoe Board of Education*, 75 Mo. 408. That was an action on school bond, as follows:

"It is hereby certified that the special school district of the Town of Roscoe, County of St. Clair, State of Missouri, is indebted to —, or bearer, in the sum of \$500, payable —. This bond is issued under and by virtue of an Act of the Legislature of Missouri entitled 'An Act to Authorize Cities, Towns, and Villages to Organize for Schools with Special Privileges,' Jas. Smanger, Prest.; Henry Swann, Secretary."

12 L. R. A.

Of course, on the face of this bond, it was the bond of the school-district, and no such question as the one at bar was before the court.

In *Snider v. Adams Exp. Co.*, 77 Mo. 525, Snider was the consignee of the lost package, and this court held that, although the package was the property of his sister Louisa, Snider was the trustee of an express trust, and authorized to sue. No question of negotiable paper was involved in the case, so that it will appear from an examination of each of the cases relied on by respondents as sustaining the action of the court in admitting parol evidence to show that Jackson was in fact the president and purchasing agent of appellant, and executed the three notes described in the third, fourth and fifth counts in behalf of said company, that they are all unlike this case, in that in each of them there was some addition, such as "president," "worshipful master," "treasurer," or some title designating an agency on the face of the paper itself, and in such cases the law permits the ambiguity to be explained; and, indeed, in all other contracts except bills of exchange and negotiable promissory notes it is always permissible to show by parol evidence who is the real principal. *Tiedeman*, Com. Paper, § 87, and authorities cited. But wherever the cases have been reviewed we think it will be found that, although the rule has been relaxed in those cases where the maker or drawer adds the word "agent," or "president," or the like after his name, yet in negotiable instruments, when the principal's name does not appear, he is not liable on the bill or note as a party to the instrument. *Devendorf v. West Virginia Oil O. L. Co.* 17 W. Va. 185; *Fuller v. Hooper*, 8 Gray, 341; *Williams v. Robbins*, 16 Gray, 77; *Pease v. Pease*, 85 Conn. 181; *Keck v. Sedalia Brew. Co.* 23 Mo. App. 187, 4 West. Rep. 887; *Bartlett v. Tucker*, 104 Mass. 339.

What we have here said is not in conflict with another equally well-settled rule, that a party may bind himself by another than his true name, where he signs any instrument with intent to bind himself, or signs any name under which he is shown to have held himself out to the world and carried on business. In these cases he is as much liable as if he had signed his true name. *Bartlett v. Tucker*, 104 Mass. 339.

With this view of the law, then, we hold the court erred in the admission of parol evidence to show that Jackson executed the three notes sued on in the third, fourth and fifth counts, and in giving instruction No. 8, as prayed by plaintiffs. In regard to the refusal to give the twenty-third instruction asked by defendant, we think the court committed no error. We do not think any such issue was properly tendered the plaintiffs, nor do we think there was sufficient evidence to justify it, if properly pleaded.

We are driven by our views of the law to affirm the judgment of the Circuit Court on the first and second counts, and reverse the judgment on the third, fourth and fifth counts. *Hunt v. Missouri R. Co.* 89 Mo. 607, 6 West. Rep. 208, and cases cited.

All Judges of division No. 2 concur. Petition for rehearing overruled.



## MASSACHUSETTS SUPREME JUDICIAL COURT.

Thomas P. PROCTOR, Trustee under the Will of John T. Hancock, Deceased,

Irene A. CLARK *et al.*

(....Mass.....)

1. The question "who are the heirs-at-law" of a person within the meaning of a Massachusetts will which gives them an estate in a certain event if he is not then living is to be determined by the law of Massachusetts, although the person named is domiciled in another State.
2. The "then heirs" of a person to whom an estate is given, if he is not living on the death of another, are to be ascertained as of the moment of the latter's death.
3. A widow is an "heir" of her husband to the extent of \$5,000 up to which she is given an estate in fee by Stat. 1890, chap. 311, but not in respect to the life estate given by Gen. Stat., chap. 90, § 15, Stat. 1854, chap. 406, § 1, which is a purely optional interest in lieu of dower. Consequently she can take only the sum of \$5,000 under a will in favor of his "heirs."

(May 19, 1891.)

**R**EPORT by the Supreme Judicial Court for Suffolk County (Holmes, J.) for the opinion of the full court of a bill filed by the trustee under the will of John T. Hancock, deceased, for instructions how to proceed in the final distribution of the trust property under the third clause of the sixth item of the will.

**NOTE.—Heirs-at-law; significance of the term.**

The term "heir" has a very different signification at common law from what it has in those States and countries which have adopted the civil law. In the latter, the term applies to all persons who are called to the succession, whether by the act of the party or by operation of law. The person who is created universal successor by a will is called the testamentary heir; and the next of kin by blood is, in cases of intestacy, called the "heir-at-law," or heir by intestacy. The executor of the common law is in many respects not unlike the testamentary heir of the civil law. Again, the administrator in many respects corresponds with the heir by intestacy. By the common law, executors—unless expressly authorized by the will—and administrators have no right except to the personal estate of the deceased; whereas the heir by the civil law is authorized to administer both the personal and real estate. 1 Brown, Civ. Law, 344; Story, Conf. L. § 608; 1 Bouvier, Law Dict. title *Heir*.

A person who is appointed by the law to take the estate is called the heir. Technically one who takes property under a will is not an heir; and the word "heir" is also confined to those persons who take the real estate. One cannot be an heir to personal property. Bacon, Law Tracts, 128; Co. Litt. 191 a, note 77; Donahue's Estate, 36 Cal. 339; Tiedeman, Real Prop. § 668.

As intestacy is presumed until the will is produced, the heir is relieved from the burden of proving that his ancestor died intestate. Baxter v. Bradbury, 20 Me. 290; Stephenson v. Doe, 8 Blackf. 508; Lyon v. Kain, 36 Ill. 988.

The word "heirs," when unexplained or uncontrolled by the context or by other provisions, has a technical meaning which may not be departed from (Clarke v. Cordis, 4 Allen, 466), but it is often 12 L. R. A.

The principal question in the case was whether the entire fund belonged to Irene A. Clark, sister of Charles Henry Hancock, deceased, or whether Lydia A. George, widow of said Charles Henry Hancock, was entitled to share in it.

*Messrs. Marshall, Hamblett & Burke and George J. Burns*, for Irene A. Clark:

The language of the will imports a gift of both real and personal estate made in the same words, and in a gift of real and personal estate made in the same words, but one construction will be given, and that construction will be such as is proper in respect to a gift of real estate.

*Clarke v. Cordis*, 4 Allen, 466; *Lombard v. Boyden*, 5 Allen, 255; *Fabens v. Fabens*, 2 New Eng. Rep. 880, 141 Mass. 400.

The above rule is not varied by the fact that no real estate is included in the trust property at the date of the widow's decease.

*De Beauvoir v. De Beauvoir*, 8 H. L. Cas. 524, and cases before cited.

When the testator uses the same words in his will more than once, they must receive the same construction in each case.

2 Jarman, Wills, 5th Am. ed. 61, and note 1; *Lloyd v. Rambo*, 35 Ala. 709; *Carter v. Bentall*, 2 Beav. 551.

The plaintiff, as trustee under the will, was vested with all the property constituting the trust estate. He had a fee in the real estate, and the legal title to the personal property during the lifetime of the testator's widow.

used in a different sense, as meaning only children or issue (*Ellis v. Essex Merrimack Bridge Props.*, 2 Pick. 343; *Bowers v. Porter*, 4 Pick. 196); it is, in all cases, a question of intention. *Haley v. Boston*, 108 Mass. 576.

As no one can be the heir of a living person, and as the persons who will be heirs are uncertain while the ancestor lives, a devise to them as heirs, in the proper sense of the term, cannot take effect, and is therefore void. This is obviously so, if the devise be of a present estate, which must vest, if ever, as soon as created. *Campbell v. Rawdon*, 18 N. Y. 413.

A devise of property to be equally divided among "heirs" naming each child, but describing the grandchildren only as the children of a deceased son, means that the latter are collectively entitled only to the share which their father would have taken. *Eyer v. Beck*, 14 West. Rep. 232, 7 Mich. 179.

In a will giving testator's daughter a certain sum of money on arriving at the age of twenty-one years or the day of her marriage, but "if she should die without legal heirs or before she reaches twenty-one years," her share shall go to his mother, brothers and sisters, the term "legal heirs" means child or children. *Underwood v. Robbins*, 117 Ind. 306.

A remainder to "lawful heirs" after a devise for life vests in those who were testator's lawful heirs at the time of his death, and not at the death of the life tenant. *Re Tucker's Will* (Vt.) Jan. 6, 1891.

In a gift of personality to one for life and at her death to her heirs, the word "heirs" is not a word of limitation, but indicates the class in whom ownership is vested subject to the life interest. *Pillot v. Landon*, 46 N. J. Eq. 310.

Those technical words which in a deed are absolutely necessary to the creation of particular es-

Perry, Tr. 293, 316; *Doe v. Field*, 2 Barn. & Ad. 564; *Seare v. Russell*, 8 Gray, 86; 1 Redf. Wills; *Cleveland v. Ballet*, 6 Cush. 407.

Charles Henry Hancock was never seised or possessed of any interest in the trust estate.

2 Washb. Real Prop. p. 609 *et seq.*; *Colby v. Duncan*, 139 Mass. 398; *Kimball v. Lancaster*, 60 N. H. 278; *Smith v. Rice*, 180 Mass. 441, 442.

The trustee being vested with the whole estate during the lifetime of the testator's widow, the vesting of any interest in the trust property which might remain upon the death of his wife was postponed until her decease.

*Kimball v. Lancaster*, *supra*; *Knowlton v. Sanderson*, 2 New Eng. Rep. 100, 141 Mass. 323.

Charles Henry Hancock never had any contingent or transmissible interest in said trust property; his interest was at most that of a mere or naked possibility.

*Putnam v. Gleason*, 99 Mass. 455; 4 Kent, Com. 6th ed. 208.

The gift is an original, independent gift to the "heirs-at-law" of Charles Henry who might be living at the decease of the life tenant.

The words "heirs-at-law" are technical words, having long since acquired a definite legal signification, and must be construed according to their well-defined legal meaning; and the testator will be presumed to have used them in their strict technical sense, unless there is something in the context of the will which

satisfies the court that the testator used them in a different sense.

*Putnam v. Gleason*, 99 Mass. 456; 2 Jarman, Wills, 61, 62; *Harvey v. Olmstead*, 1 N. Y. 489; *Campbell v. Rawdon*, 18 N. Y. 418; *Guthrie's App.* 37 Pa. 93; 2 Redf. Wills, p. 67, and note (86); *Haley v. Boston*, 108 Mass. 576, 579; *Wilkins v. Ordway*, 59 N. H. 878; Pub. Stat. chap. 3, § 3, cl. 3.

When the word "heirs" is used in a will, not to denote succession but to describe a legatee, and there is no context to explain it otherwise, the natural and ordinary sense of the word "heirs" should not be departed from.

2 Lomax, Executors, 21; *Wallace v. Minor*, 86 Va. 550.

The reason for special or peculiar interpretation of the word "heirs-at-law" fails altogether where the limitation is of a future estate.

*Lombard v. Boyden*, 5 Allen, 254; *Campbell v. Rawdon*, *supra*; *Richardson v. Wheatland*, 7 Met. 169; *Irvine v. Newlin*, 68 Miss. 193.

In a gift of real and personal estate to "heirs-at-law," that term means relations by blood.

*Putnam v. Gleason*, *supra*; *Merrill v. Preston*, 135 Mass. 451; *Cummings v. Cummings*, 6 New Eng. Rep. 123, 146 Mass. 501, 507; *Wilkins v. Ordway*, *supra*.

The term "legal heirs," or "heirs," when used in a technical sense does not include the widow.

*Lombard v. Boyden*, *supra*; *Lord v. Bournes*,

tates are not required in a devise. *Jenkins v. Clement*, 1 Harp. Eq. 73, 14 Am. Dec. 698; *Peyton v. Smith*, 4 McCord, L. 476, 17 Am. Dec. 758; *Boone*, Real Prop. § 361.

#### Descent of real property.

The descent of real property is governed by the law of the place where the land is situated, the *lex loci rei sitæ*. The law of the domicile, *lex domicilii*, does not apply to real property. And that Law of Descent governs which was in force at the decease of the ancestor. The Law of Descent varies according to the civil polity of each State, or, as Blackstone has it, it is "the creature of civil polity and *juris positivi*." In every State of the American Union there is a statute regulating the descent of real property, and for any special question arising under the Law of Descent reference must be had to the Statute of the State in which the land lies. But these statutes have many points in common, and are controlled by certain general principles which may be collated and presented in the various text books on real property. But for the minor details of the law, the inquirer must look to the state statutes, an excellent compendium of which may be found in volume 8 of Mr. Washburn's *Treatise of the Law of Real Property*, p. 21 *et seq.* *Story*, Conf. L. § 434; *Potter v. Titcomb*, 23 Me. 300; *Smith v. Kelly*, 23 Miss. 167; *Miller v. Miller*, 10 Met. 393; *Marshall v. King*, 24 Miss. 36; *McGaughey v. Henry*, 15 B. Mon. 383; *Jones v. Marable*, 6 Humph. 116; *Price v. Tally*, 10 Ala. 946; *Eslava v. Farmer*, 7 Ala. 543.

#### The word "heirs" generally denotes succession.

In general, where there is a gift to a person or his heirs, the word "heirs" denotes succession or substitution, the gift being primarily to the person named, or, if he is dead, then to his heirs in his place. In such cases it has often been held that the word "heirs" should be construed to mean the persons who would legally succeed to the property. 12 L. R. A.

according to its nature or quality; and that the heirs-at-law would take the real estate, and the next of kin or persons entitled to inherit personalty would take the personal estate. Such were the cases, among others, of *Kaye v. Bolton*, 8 T. R. 133, 134, and *Wingfield v. Wingfield*, L. R. 9 Ch. Div. 653, of *Vaux v. Henderson*, 1 Jac. & W. 383, and of *Doody v. Higgins*, 9 Hare, App. 82.

But where the gift is directly to the heirs of a person, as a substantive gift to them of something which their ancestor was in no event to take, this element of succession or substitution is wanting, and the heirs take as the persons designated in the instrument to take in their own right; and in such cases the courts have usually held that the word "heirs" must receive the meaning which it bears at common law, as the persons entitled to succeed to real estate in case of intestacy. *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524; *Forster v. Sierra*, 4 Ves. Jr. 766; *Swaine v. Burton*, 15 Ves. Jr. 305; *Mounsey v. Biamire*, 4 Russ. 384.

This distinction was recognized in *Massachusetts* in *Clarke v. Cordis*, 4 Allen, 466, 469, where the court, in speaking of the word "heirs" as used in the will then under consideration, said: "It was not intended to denote succession, that is, to vest the estate in the legatees as successors of or substitutes for the sons of the testator, so that they would take the same estate in nature and quality as that which would have come to them by descent. They are to take by force of the will as purchasers. The word is used to designate the persons who are to take the real and personal estate as independent objects of the gift. It is therefore to be interpreted as a mere term of description of a class of persons who . . . are to take the estate."

The weight of authority and the better reason favor the giving of a strict construction of the word "heirs," and this has been the manifest tendency in *Massachusetts* and in other jurisdictions. *Fabens v. Fabens*, 3 New Eng. Rep. 330, 141 Mass. 395. See also *Merrill v. Preston*, 135 Mass. 451; *Lom-*

63 Me. 379; *Buck v. Paine*, 75 Me. 582; *Unfried v. Heberer*, 68 Ind. 68, 72; *Tillman v. Davis*, 95 N. Y. 17; *Richardson v. Martin*, 55 N. H. 45.

Even when a widow is given by statute a portion of her husband's real estate in fee, she is not thereby made his "heir" in the general sense in which that term is usually used and understood.

*Unfried v. Heberer*, *supra*; Acts 1880, chap. 211; Pub. Stat. chap. 124, §§ 1, 3.

The trust fund in question did not vest until the decease of the testator's widow, and only those who sustained the relations of "heirs-at-law" at the time the estate vested in possession can share in this estate.

1 Redf. Wills, p. 392; *Sears v. Russell*, 8 Gray, 86.

At the time of the decease of the testator's widow, the only person who sustained the relation of "heir-at-law" to Charles Henry Hancock was his sister, Irene A. Clark. If the defendant Lydia A. George ever sustained that relation, she had ceased to do so long before the death of the testator's widow by marrying again.

*Com. v. Powell*, 51 Pa. 488; *Blodgett v. Brinsmaid*, 9 Vt. 27, 30; *Paddock v. Wells*, 2 Barb. Ch. 381, 5 L. ed. 668. See also *Daggett v. Slack*, 8 Met. 450; *Bassett v. Granger*, 100 Mass. 848; *Rand v. Sanger*, 115 Mass. 124.

If, under any view of the law and facts, it shall be held that the defendant George was, on the decease of the testator's widow, one of

her former husband's "then heirs-at-law," in the sense in which the testator used that term, and as such heir is entitled to anything in this trust estate, her interest therein must be limited to an amount not exceeding \$5,000 in value.

*Watson v. Watson*, 150 Mass. 84; *Lincoln v. Perry*, 4 L. R. A. 215, 149 Mass. 368, 374.

*Messrs. Causten Browne and J. Henry Taylor*, with Mr. Millard F. Bowen, for Lydia A. George:

Upon the death of the testator's widow, the heirs of Charles Henry Hancock took this fund as purchasers under the will of John T. Hancock, and not by descent from him. The property passed, not as the estate of Charles, but as the estate of his brother, to those persons who should be heirs of Charles at his decease and upon the testator's widow's decease.

*Barton v. Bigelow*, 4 Gray, 358; *Upham v. Emerson*, 119 Mass. 509.

A distinction has been made between the significance of the word "heirs" when used in conveyances or devises of real estate, and when used in reference to personal estate. As to the former, it has been held that it refers to heirs proper; and if the intent be to designate those only who are strictly heirs, it should be clearly so stated.

*Clarks v. Cordis*, 4 Allen, 466; *Loring v. Thorndike*, 5 Allen, 257; *Merrill v. Preston*, 135 Mass. 451.

After this "trust fund" was transformed, under power in the will, entirely into personal securities, and at the time of the death of tes-

tor v. Boyden, 5 Allen, 249; *Loring v. Thorndike*, 5 Allen, 257.

#### *The rule in Shelley's Case.*

The celebrated rule in *Shelley's Case* enforces the proposition that the word "heirs," as used in its technical sense, must be construed as meaning that the distribution is affected by the methods anciently in vogue under the common law. But resort may be had to the contrary to show that the term as employed by the testator is merely *descriptive* of persons, and where this occurs the question naturally arises, What persons were intended to share in the testator's bounty? Similarly it may be affirmed, that where the context of a will shows that the word "heirs," as employed by the testator, was intended to embrace children of certain parentage, the will must be so construed as to effectuate this intent. *Fahney v. Holsinger*, 65 Pa. 388; *Hinton v. Milburn*, 23 W. Va. 166; *Stuart v. Stuart*, 18 W. Va. 675; *Bland v. Bland*, 103 Ill. 12; *Berg v. Anderson*, 72 Pa. 87; *Haverstick's App.* 106 Pa. 394; *Bradlee v. Andrews*, 137 Mass. 50; *Lockwood's App.* 4 New Eng. Rep. 579, 55 Conn. 187. See note appended to the case of *Vanolinder v. Carpenter* (Ill.) 2 L. R. A. 455; also *Boston Safe Deposit & Trust Co. v. Coffin* (Mass.) 8 L. R. A. 740.

There is a growing tendency on the part of the American court, when called upon to place a construction upon this word and determine the particular class of individuals who are entitled to a benefit under it, to rely in part at least upon the species of property bequeathed. Thus, a bequest of personal property "to heirs," is construed to include those only who would be entitled under the Statutes of Distribution, while a bequest of real estate, or of a mixed estate consisting of an amalgam of realty and personalty, is regarded as a gift to those who would be entitled to inherit the testator's real property. *Hackney v. Griffin*, 6 Jones, Eq. 363; *Tillman v. Davis*, 95 N. Y. 17; *Nelson v.* 12 L. R. A.

*Blue*, 68 N. C. 660; *McCabe v. Spruill*, 1 Dev. Eq. 190; *Rogers v. Brickhouse*, 5 Jones, Eq. 304; *Scudder v. Vanarsdale*, 13 N. J. Eq. 109; *Clarke v. Cordis*, 4 Allen, 460; *Ferguson v. Stuart*, 14 Ohio, 140; *Hascall v. Cox*, 49 Mich. 435; *Ward v. Saunders*, 3 Sneed (Tenn.) 391; *McCormick v. Burke*, 2 Dem. 137; *Corbitt v. Corbitt*, 1 Jones, Eq. 117; *Loring v. Thorndike*, 5 Allen, 250; *Ireland v. Parmenter*, 48 Mich. 631; *Clay v. Clay*, 2 Duvall, 296; *Eddings v. Long*, 10 Ala. 305.

#### *Rule as established in the New York courts.*

The word "heirs" is not necessary in New York to create or convey an estate in fee, nor does its use distinguish a fee-simple absolute from a defeasible fee or a conditional fee. The distinction must be made and sought in words of defeasance or of condition. 1 Rev. Stat. 749; 2 Rev. Stat. Banks' 6th ed. 1130, § 1, 722, 1100, § 2.

A gift, by will, of personal property to the "heirs" of any person in the event of his death is a gift to those who, if such person died intestate, would succeed to his personal property according to law, unless the "heir-at-law" is the person "designated" in the will to take the personal property. *Holloway v. Holloway*, 5 Ves. Jr. 399; *Vaux v. Henderson*, 1 Jac. & W. 389, note; *Gittings v. Modermott*, 2 Myl. & K. 69; *Jacobs v. Jacobs*, 16 Beav. 557; *Low v. Smith*, 2 Jur. N. S. 344; *Doddy v. Higgins*, 2 Kay & J. 729; *Re Porter's Trust*, 4 Kay & J. 188; *Re Philip's Will*, L. R. 7 Eq. Cas. 151; *Finlason v. Tatlock*, L. R. 9 Eq. Cas. 253; *Re Stevens' Trusts*, L. R. 15 Eq. Cas. 110; *Wingfield v. Wingfield*, L. R. 9 Ch. Div. 658; *Croom v. Herring*, 4 Hawks, 393; *Freeman v. Knight*, 2 Ired. Eq. 72; *Eddings v. Long*, 10 Ala. 203; *Corbitt v. Corbitt*, 1 Jones, Eq. 114; *Scudder v. Vanarsdale*, 13 N. J. Eq. 109; *Houghton v. Kendall*, 7 Allen, 72; *Sweet v. Dutton*, 109 Mass. 589; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524; *Re Boote*, 1 Drew. & S. 223; *Clarke v. Cordis*, 4 Allen, 466.

tator's widow, the trustee was bound to treat it all as personality, and to distribute it as in *White v. Stanfield*, 6 New Eng. Rep. 56, 146 Mass. 424, where it was held that the term "heirs-at-law" meant next of kin, or persons entitled under the Statute of Distributions relating to personal estates.

The word "heirs" when used in a gift of personality, refers primarily to those who would be entitled to take under the Statute of Distributions.

*Houghton v. Kendall*, 7 Allen, 72; *Sweet v. Dutton*, 109 Mass. 589; *Merrill v. Preston*, 185 Mass. 455; *Lavery v. Egan*, 8 New Eng. Rep. 439, 143 Mass. 839.

The fact that Charles Henry Hancock died before testator's widow does not affect Mrs. George's claim, because his death was contemplated by testator, and provided against in the will; and the same persons who were in the mind of the testator at the time of his making the will cannot be changed by the death of his brother before his widow's death.

*Watson v. Watson*, 150 Mass. 84, does not touch this case; there the tenant for life of real estate being in possession, the widow's claim was not upheld, because her husband died with only a vested remainder.

*Lincoln v. Perry*, 4 L. R. A. 215, 149 Mass. 368, is distinguished from the case at bar, for there was no trustee, with authority to sell and convert into personal securities, appointed by that will,—and it was not contemplated in that will that the estate should be divided as existing in the trustee's hands at the time of the death of testator's widow.

Holmes, J., delivered the opinion of the court:

This is a bill for the construction of a clause in a Massachusetts will, which clause is the final disposition of a trust of the residue of the testator's estate, "real, personal and mixed" and is as follows: "8d. Upon the decease of my said wife, then to pay and convey in fee all the trust property, as it then exists, to my said brother, Charles Henry Hancock, if then living, but if he is not then living then to convey the same in fee to his then heirs-at-law,—whereupon this trust shall end." The testator's widow is dead. Charles Henry Hancock died before the testator and the question is, Who take as his heirs-at-law? More specifically the question is whether the whole fund goes to his sister Irene Clark, or whether his widow, now Lydia A. George, is entitled to any and what share.

The trust fund consisted of both real and personal estate at the time of the testator's death, and is contemplated as including land by the will. This fact, the use of the words "convey in fee" and the use of the similar phrase, "convey the same in fee to his then heirs-at-law" in the fifth section of the will, which deals only with land, show that "heirs-at-law" must be construed to mean those who would be entitled to succeed to real estate in case of intestacy. *Lincoln v. Perry*, 149 Mass. 368, 378, 4 L. R. A. 215; *Fabens v. Fabens*, 141 Mass. 395, 399, 2 New Eng. Rep. 890; *Merrill v. Preston*, 185 Mass. 451.

The facts that the trustee is to convey the property as it then exists, and that he had

power to sell and had sold the land, are not sufficient to distinguish this case from the foregoing and to bring it within *White v. Stanfield*, 146 Mass. 424, 6 New Eng. Rep. 56; *Codman v. Krell*, 153 Mass. 214; *Kendall v. Gleason*, 153 Mass. 457.

Charles Henry Hancock died domiciled in Minnesota, but it has been decided that the words under consideration must be taken to mean those who would be entitled by Massachusetts law to succeed to land in Massachusetts. *Lincoln v. Perry* and *Codman v. Krell*, *supra*.

Again, the words mean those who would have been entitled if Charles Hancock had died at the moment appointed for the conveyance, that is, at the death of the testator's widow on January 6, 1890. The gift is to Charles Hancock's "then heirs." The word "then" takes the case out of the general rule illustrated by *Dove v. Torr*, 128 Mass. 38; *Abbott v. Bradstreet*, 3 Allen, 587, and *Whall v. Converse*, 146 Mass. 345, 5 New Eng. Rep. 823, and brings it within the exception established by *Knobton v. Sanderson*, 141 Mass. 323, 2 New Eng. Rep. 100; *Fargo v. Miller*, 150 Mass. 225, 5 L. R. A. 690; *Wood v. Bullard*, 151 Mass. 325, 335, 7 L. R. A. 304; for qualifying "heirs" as it does it can only mean heirs ascertained as of that time.

It follows that we must look to Pub. Stat., chap. 124, § 8, in order to ascertain whether the widow falls within the words of the will. If her husband had died intestate and had left no issue living she would have taken his real estate in fee to the amount of \$5,000. To that extent at least under our decisions she is an heir-at-law. *Lavery v. Egan*, 143 Mass. 389, 3 New Eng. Rep. 439; *Lincoln v. Perry*, 149 Mass. 368, 374, 4 L. R. A. 215; *McMahon v. Gray*, 150 Mass. 289, 290, 5 L. R. A. 748. *Novo jure sunt heredes omnes qui ex senatus consultis aut ex constitutionibus ad hereditatem vocantur*. Dig. 5, 3, 8.

The fund is given as one whole to the heirs. Therefore, when it is settled that the widow is an heir, the will gives her a share in the whole fund and not merely in such part as happened to be land at the testator's death. But we must look to the Statutes of Descent to determine the proportion which will come to her as well as to discover whether she is one of the donees. "A devise to heirs designates not only the persons who are to take, but also the manner and proportions in which they take." *Cummings v. Cummings*, 146 Mass. 501, 507, 6 New Eng. Rep. 128; *Rand v. Sanger*, 115 Mass. 124, 128; *Holbrook v. Harrington*, 16 Gray, 103, 104; *Houghton v. Kendall*, 7 Allen, 72, 77, 78; *Lavery v. Egan*, *supra*; *Bullock v. Downes*, 9 H. L. Cas. 1, 14, 23, 30.

It is clear, then, that she takes \$5,000. Her right to that amount would have vested at once upon her husband's death and would not have been divested by her subsequent marriage. See *Foster v. Fifield*, 20 Pick. 67, 70. But the fund is stated to amount to \$21,000, and the question remains whether she is "entitled during her life to one half of the other real estate," here represented by the rest of the fund, according to the further provision of Pub. Stat., chap. 124, § 8. The answer depends on whether she is to be regarded as an heir in respect of

this life interest as well as of what she gets in fee.

Undoubtedly there is nothing in the nature of things to prevent the inheritance, status or estate of an ancestor being continued by more than one successively as well as conjointly. When the inheritance descended to several persons as parceners they were said to be but one heir to their ancestor. Year Book 20 Edw. I. 200, 226; Litt. § 241; Dyer, 29 a, pl. 194. In like manner it was said that "he in the reversion and this particular tenant are but one tenant." *Brooker's Case*, Godbolt, 876, 877; Co. Litt. 49 a, b, 148 a; Wing, Max. 55, pl. 3, 118; *Haynes v. Boardman*, 119 Mass. 414. The continuity of person or fictitious identification of heir and ancestor (*Day v. Worcester, N. & R. R.* 15 Mass. 302, 307, 306) is reconcilable with either form of internal subdivision. The *persona* is one, although the individuals sustaining it are different. It may follow from *Sears v. Sears*, 121 Mass. 267, that a widow in possession claiming her statutory interest would stand better for the purpose of acquiring a title by prescription or adverse possession by tacking the time of her adverse use or occupation to that of her husband, than one having only a right of dower unassigned was held to do in *Sawyer v. Kendall*, 10 Cush. 241. To that extent there might be sufficient privity or partial identification between them, as there is between vendor and purchaser. *Leonard v. Leonard*, 7 Allen, 277.

But, on the other hand, the notion of heir always has been that of one on whom the law casts an estate of inheritance immediately on the death of the owner. *Lavery v. Egan*, 148

Mass. 389, 392, 3 New Eng. Rep. 439; Co. Litt. 7 b. The takers of the life estate heretofore created by the common law or by statute on the owner's death, such as dower, curtesy or homestead are not heirs. The life estate in question, although now given the widow by the same section of the Public Statutes which gives her the fee up to \$5,000, comes from a different statute and is given with a different end. The fee is given her by Stat. 1890, chap. 211; the life estate by Gen. Stat., chap. 90, § 15, Stat. 1854, chap. 406, § 1. The latter is a purely optional interest in lieu of dower and is substantially equivalent to the "estate by the curtesy or other life interest" given the husband by Pub. Stat., chap. 124, § 1.

In *Sears v. Sears*, 121 Mass. 267, the Statute of 1854 is said to be a modification of the Statute of Descents. The suggestion was not necessary to the decision. But whether it be true or not of the first section, as no doubt it is of others, plainly the court did not regard the widow as an heir, inasmuch as they said that immediately on the death of her husband she becomes a tenant in common with his heirs. So, in Pub. Stat., chap. 124, § 10, a widow having an undivided life interest by the provisions of law is contrasted with the heirs; "if her right is not disputed by his heirs" the interest may be assigned to her, etc.

Taking these considerations into account and also that so far as we know the contrary was never argued in this case or any other, we are of opinion that we cannot extend the principle of *Lavery v. Egan* to the widow's life interest, and therefore that she takes only \$5,000.

*Decree accordingly.*

## LOUISIANA SUPREME COURT.

Frank T. COPP, *Appt.*,

LOUISVILLE & NASHVILLE R. CO.

(43 La. Ann.....)

\* 1. A legal or equitable right under state laws may be prosecuted before state courts, and, when the parties reside in different States, before federal courts, subject to this qualification, that, when a right arises under a law of the United States, Congress may give the federal courts exclusive jurisdiction.

2. If an Act of Congress gives a penalty to a party aggrieved, without specifying a remedy therefor, it may be enforced in a state court; but if a right is conferred by statute, or a

specific remedy is provided, or a new power and means of execution are granted, the right can be enforced only in the mode prescribed by the Act.

3. A party who seeks damages, alleged to have been sustained in consequence of the violation by a common carrier of the Interstate Commerce Law, as the Act provides for redress by procedure either before the commission, or by suit before the federal court, cannot bring suit before the state court, which is without jurisdiction to enforce the right, but is relegated exclusively to the commission or the federal court; otherwise, the party would have a third alternative or mode of redress, not contemplated by the Act, by which he is restricted to one of two remedies.

(April 27, 1891.)

NOTE.—*Concurrent jurisdiction of federal and state courts.*

The power of Congress to constitute inferior courts endows it with the power to define their jurisdiction. *De Groot's Cases*, 7 Ct. Cl. 2.

Though the sovereignties of the general and state government are distinct, and neither can interfere with the proper jurisdiction of the other (*Ableman v. Booth*, 62 U. S. 21 How. 506, 16 L. ed. 169), yet concurrent jurisdiction with state courts is given by the Judiciary Act to the circuit courts of the United States in any suit at law or in equity. See Judiciary Act Sept. 24, 1789; 1 Stat. at L. 73; Rev. 12 L. R. A.

Stat. § 629; Act March 3, 1875, as amended in 1887, 1888; 25 U. S. Stat. 433.

Rights, whether legal or equitable, may be asserted in either the federal or state courts, subject, however, to the qualification that where a right arises under a law of the United States, Congress may, if it sees fit, give to the federal courts exclusive jurisdiction. See *The Moses Taylor*, 71 U. S. 4 Wall. 429, 18 L. ed. 401; *Martin v. Hunter*, 14 U. S. 1 Wheat. 324, 4 L. ed. 104; *Ex parte McNeil*, 80 U. S. 13 Wall. 236, 20 L. ed. 624.

When a right is given by statute and a specific remedy is provided, or a new power is granted and

**A** PPEAL by complainant from a judgment of the Civil District Court for the Parish of Orleans dismissing his complaint filed to recover damages for unlawful discriminations against him in the rates for transporting coal, contrary to the provisions of the Interstate Commerce Act. *Affirmed.*

The case sufficiently appears in the opinion.

**Mr. B. R. Forman**, for appellant:

The state courts have jurisdiction (concurrently with the United States circuit courts) of all suits of a civil nature, when the amount in dispute exceeds \$2,000, arising under the Constitution and laws of the United States, including the Act to Regulate Commerce as one of those laws.

24 Stat. at L. 1887, p. 552; *Clafin v. Houseman*, 98 U. S. 180, 23 L. ed. 838; *Eyster v. Gaff*, 91 U. S. 525, 23 L. ed. 408; *McHenry v. La Société Française*, 95 U. S. 58, 24 L. ed. 870; *Davis v. Friedlander*, 104 U. S. 570, 26 L. ed. 818; *Goodrich v. Wilson*, 119 Mass. 429; *Kidder v. Horrobin*, 72 N. Y. 159; *Clark v. Boing*, 3 Fed. Rep. 83; *Saunders v. Taylor*, 6 Nova Scotia, 520.

**Messrs. Bayne, Denegre & Bayne**, for appellee:

When a right is given by statute, and a specific remedy provided, or a new power and also the means of executing it are therein granted, the power can be executed and the right vindicated in no other way than that prescribed by the Act.

Sutherland, Stat. Const. § 399; *Dudley v. Mayhew*, 8 N. Y. 9.

**Bermudes, Ch. J.**, delivered the opinion of the court:

This is an appeal from a judgment sustaining a plea to the jurisdiction of a state court, relegating the plaintiff to that of a federal court. The action arises under the Act of Congress known as the "Interstate Commerce Act," and is for the recovery of damages for averred unlawful discriminations by defendant, injurious to plaintiff, for the transportation of coal from another State, for several years. *Vide* 24 Stat. at L. p. 882, § 9. The section relied on is to the effect "that any person or persons, claiming to be damaged by any common carrier, subject to the provisions of this Act, may either make complaint to the commission as herein-after provided for, or may bring suit, in his or their own behalf, for the recovery of damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said

remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." After referring to the ruling of the United States Supreme Court in the *Case of Clafin*, 98 U. S. 186, 187, 23 L. ed. 838, which is in point on the question, the district judge has well said: "The general rule is that, where a particular remedy is provided by law, such remedy must be sought, to the exclusion of all others, in the cases contemplated by the Statute; . . . otherwise a person claiming injury, under the Act of Congress, instead of being compelled to elect which one of the two methods of procedure provided by the Act he will adopt, would be afforded a third alternative, not contemplated or provided for by the said Act; and this in violation of its express terms, whereby he is limited to a choice between two remedies." The authority referred to contains the following language: "A legal or equitable right acquired under state laws may be prosecuted in the state courts, and also, if the parties reside in different States, in the federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts competent to decide rights of the like character and class, subject to this qualification, that, where a right arises under a law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction. This jurisdiction is sometimes exclusive by express enactment, and sometimes by implication. If an Act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise, by some Act of Congress, by a proper action in a state court." In the instant case the right asserted by the plaintiff is claimed under an Act of Congress which specifies the remedy for its enforcement. This circumstance suffices to evidence that Congress saw fit to give the federal courts exclusive jurisdiction. The motive which induced such legislation may have been, and no doubt is, to create one entire and complete system, and provide for the necessary uniform machinery to make it effective on an important and vital subject of national interest. See further Sutherland, Stat. Const. § 399; *Dudley v. Mayhew*, 8 N. Y. 9; *The Moses Taylor*, 71 U. S. 4 Wall. 429, 18 L. ed. 401; *Martin v. Hunter*, 14 U. S. 1 Wheat. 384, 4 L. ed. 104; *Ex parte McNeal*, 80 U. S. 13 Wall. 236, 20 L. ed. 624.

The authorities referred to by the appellant do not sustain his position.

*Judgment affirmed.*

the means of its exercise is provided, the power can be exercised and the right indicated only in the manner prescribed. *Janney v. Buell*, 55 Ala. 408; *Phillips v. Ash*, 63 Ala. 414; *Chandler v. Hanna*, 78 Ala. 300; *Hollister v. Hollister Bank*, 2 Keyes, 245.

The courts of the United States may enforce equitable rights whether they originate by contract, local usage, or by the statute of a State, in either real or personal actions. *Clark v. Smith*, 38 U. S. 13 Pet. 195, 10 L. ed. 123; *Lorman v. Clarke*, 2 McLean, 568; *Smith v. Fort Scott, H. & W. R. Co.* 99 U. S. 398, 25 L. ed. 437.

If the parties have the required citizenship, the federal court has jurisdiction to enforce the remedy.

edy given by a state statute. *Goshorn v. Alexander*, 2 Bond. 158; *United States v. Block*, 3 Bies. 208; *Ex parte Biddle*, 2 Mason, 472; *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 270, 20 L. ed. 571; *Broderick's Will*, 68 U. S. 21 Wall. 503, 23 L. ed. 599.

And although the state law gives exclusive jurisdiction to the state court. *Payne v. Hook*, 74 U. S. 7 Wall. 425, 19 L. ed. 280; *Parsons v. Lyman*, 5 Blatchf. 170.

The jurisdiction of a court is not impaired by statute conferring upon other tribunals jurisdiction of the same kind, unless the statute expressly takes away the former jurisdiction. *Gittings v. Crawford*, Taney, C. C. Dec. 1.

## TENNESSEE SUPREME COURT.

M. ROSSON, *Appt.*,

v.

John R. CARROL.

(....Tenn....)

1. The time for notice of dishonor of a note is the same whether it was indorsed before or after maturity.
2. A notary's testimony that he has an "impression" that he sent a notice of protest to a certain person by mail is insufficient proof of that fact where his certificate states merely that he handed the notices to an express agent from whom the notes had been received.
3. One who sends paper for collection, whether he indorses it or not, is entitled to notice of dishonor and to one day thereafter to notify prior indorsers.
4. Testimony that a notice of dishonor was given by a witness a "day or two after he received notice, and that it was on the 16th or 17th of April immediately after" he received notice, is insufficient to show that it was given in due time.
5. Demand of payment of a note indorsed when overdue, which is ineffectual because not followed by protest or notice, prevents any effectual demand and protest on a subsequent date.
6. Acknowledgment of liability by an indorser will not prevent his discharge for lack of notice of dishonor, unless distinctly made with full knowledge of his discharge.

7. Proof of statements by an indorser to third persons, merely showing that he thought himself still liable on a note from which he had been discharged by failure to give him notice of dishonor, does not establish an admission of liability.

(April 14, 1891.)

**A**PPEAL by complainant from a decree of the Chancery Court for Gibson County held at Trenton in favor of defendant in an action brought to enforce the alleged liability of an indorser of a promissory note, payment of which had been refused by the maker. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Neil & Deason and T. L. Mosely*, for appellant:

While demand and notice are necessary in order to hold an indorser upon over-due paper, yet the demand need only be made, and the notice need only be given, in a reasonable time.

*Stothart v. Parker*, 1 Overt. (Tenn.) 280; *Chadwick v. Jeffers*, 1 Rich. L. 397, 44 Am. Dec. 260; *Gray v. Bell*, 3 Rich. L. 67, 44 Am. Dec. 277; *Van Hoesen v. Van Alstyne*, 3 Wend. 75; *Union Bank v. Ewell*, 10 Humph. 385. See also *Duffy v. O'Connor*, 7 Baxt. 500.

Defendant's conduct and dealing about the note furnish plenary proof that he had been duly served with notice.

*Bogart v. McClung*, 11 Heisk. 114, 115; *Chitty*, Bills, 533.

**NOTE.**—Commercial paper; presentation, demand and notice essential.

The fact that the shop of the maker of a note is closed, and the holder is told that he has absconded, does not excuse presentation, demand and notice. *Glaser v. Rounds*, 16 R. L. 235, 6 New Eng. Rep. 500, citing *Tebbetts v. Dowd*, 23 Wend. 379; *Thornton v. Wynn*, 25 U. S. 12 Wheat. 183, 6 L. ed. 595; *Low v. Howard*, 11 Cush. 268; *Edwards v. Tandy*, 38 N. H. 840.

The insolvency of the maker does not dispense with presentment to him. *Bassenhorst v. Wilby*, 11 West. Rep. 370, 45 Ohio St. 333. See note to *Turner v. Iron Chief Min. Co.* (Wis.) 5 L. R. A. 533.

Payment must be demanded from the maker of a note, and notice of nonpayment forwarded to the indorser within due time, in order to render him liable. *Magruder v. Union Bank of Georgetown*, 28 U. S. 3 Pet. 87, 7 L. ed. 612; *Cox v. New York Nat. Bank*, 100 U. S. 712, 25 L. ed. 741.

If a demand of payment is made by the holder within banking hours, and payment is refused or neglected to be made, the holder is entitled to maintain his action for such dishonor. *Bank of United States v. Carneal*, 27 U. S. 2 Pet. 543, 7 L. ed. 513, cited in *Chicopee Bank v. Philadelphia Seventh Nat. Bank*, 75 U. S. 8 Wall. 649, 19 L. ed. 425.

Demand note, when due; necessity of presentment, demand and notice and time for making. See note to *Turner v. Iron Chief Min. Co.* *supra*.

*Presentment and demand for payment.*

A note payable to bearer requires a physical presentation of the instrument before payment. *Citizens Nat. Bank v. Brown* (Ohio) 10 West. Rep. 435.

Unless the liability of the indorser be fixed by demand and notice of nonpayment, the indorsed note 12 L. R. A.

cannot be proved as a claim against the estate in insolvency. *House v. Vinton County Nat. Bank*, 1 West. Rep. 155, 43 Ohio St. 344, commenting on *Callahan v. Bank of Kentucky*, 82 Ky. 231; *Ex parte Tremont Nat. Bank*, 3 Low. 409.

Except in the case of a partnership note, demand must be made upon all the several makers at maturity. *Shurts v. Fingar*, 1 Cent. Rep. 732, 100 N. Y. 339, citing *Gates v. Beecher*, 60 N. Y. 518.

The term "holder," within the meaning of the rule as to demand and protest and giving notices, includes the bank at which the note was payable and the notary who holds it as agent for those purposes. *Bowling v. Harrison*, 47 U. S. 6 How. 243, 13 L. ed. 425.

A delay of more than ten months in making a demand of payment and giving notice of protest, after the indorsement of a promissory note payable on demand, is unreasonable. *Turner v. Iron Chief Min. Co.* 5 L. R. A. 533, and note, 74 Wis. 355.

Where the holder does not know the place of residence or of business of the maker, a demand of the maker is excused if he has the note when due ready to be presented at the place where it is dated. *Davis v. Eppler*, 38 Kan. 623, citing *Orcutt v. Hough*, 54 N. H. 472; 1 Dan. Neg. Inst. § 640.

*Place of presentment, demand and notice.*

Making and dating a note at a particular place does not supersede the necessity for presentment and demand at the residence or place of business of the maker. *Oxnard v. Varnum*, 3 Cent. Rep. 53, 111 Pa. 193, citing *Spies v. Gilmore*, 1 N. Y. 321; *Taylor v. Snyder*, 3 Denio, 151; *Parsons, Notes and Bills*, 453.

Notice may be given at the place of residence or at the place of business; and when the place of business is not the place of domicile, notice at the

Under the facts concerning the insolvency of the Paragould Stave Manufacturing Company no notice was necessary.

*Stothart v. Parker*, *supra*.

When the indorser at the time of the indorsement knows the insolvency of the maker or drawer this is a matter of evidence simply, and need not be specially pleaded or set up in the declaration or bill.

*Ibid*.

An indorsement is not a written contract within the rule that it cannot be explained by parol.

*Dick v. Martin*, 7 Humph. 263; *Taylor v. French*, 2 Lea, 257, 261; *Kimbro v. Lamb*, 8 Humph. 17; *Hall v. Rodgers*, 7 Humph. 586; *Neuell v. Williams*, 5 Sneed, 209; *Comparres v. Brockway*, 11 Humph. 860.

*Messrs. Cooper & Harwood*, for appellee:

When demand is made and payment refused of a note indorsed after due to bind the indorser notice must be given to him immediately—that is, with the same promptness that is required in giving notice in cases where notes are indorsed before due. After demand made the same diligence is required in giving notice in the one case as in the other.

*Stothart v. Lewis*, 1 Overt. (Tenn.) 256; 1 Parsons, Notes and Bills, pp. 381, 382, 519, 520, and notes; *Berry v. Robinson*, 9 Johns. 121, 6 Am. Dec. 267; *Graul v. Strutzel*, 53 Iowa, 712, 36 Am. Rep. 250, citing *McKiver v. Kiriland*, 38 Iowa, 348; *Pryor v. Bowman*, 38 Iowa, 92; *Blake v. McMillen*, 38 Iowa, 150; *Red Oak Bank v. Orest*, 40 Iowa, 332; *Coll v. Barnard*,

18 Pick. 266, 29 Am. Dec. 584, citing *Course v. Shackleford*, 2 Nott & McC. 233; *McKinney v. Crawford*, 8 Serg. & R. 357; *Bishop v. Deater*, 2 Conn. 419; *Nash v. Harrington*, 2 Aik. 9, 16 Am. Dec. 678; *Esfort v. Des Oudres*, 1 Mill, Const. 69, 12 Am. Dec. 610; *Pool v. Tolleson*, 1 McCoord, L. 199, 10 Am. Dec. 663, citing *Blesard v. Hirst*, 5 Burr. 2670, and *Goodall v. Dolly*, 1 T. R. 718; *Jones v. Robinson*, 11 Ark. 504, 54 Am. Dec. 218; Dan. Neg. Inst. § 611; Wade, Notice, § 788; *Leavitt v. Putnam*, 3 N. Y. 494; Story, Prom. Notes, 6th ed. §§ 201, 207, 209, 319, 330; *Kirkpatrick v. McCullough*, 3 Humph. 170; *Patterson v. Todd*, 18 Pa. 426; Byles, Bills, 7th Sharwood's ed. pp. 169, 170, note 1, and authorities cited near the middle of note.

When a note is payable on demand, and demand is made and payment refused, notice must be given to the indorser immediately, as in ordinary cases of demand made on day of maturity.

1 Parsons, Cont. 260; Story, Prom. Notes, §§ 209, 319; *Lookwood v. Crawford*, 18 Conn. 361; Parsons, Notes and Bills, ed. 1868, pp. 38, 376, 519.

Notice of the protest must be sent to the indorser by the first mail (where the parties live at different places) that leaves after the opening of business hours of the day next succeeding the day on which the note fell due and was presented for payment.

*Colins v. Bank of Tennessee*, 4 Baxt. 424; 8 Kent, Com. \*106, 107; 1 Parsons, Notes and Bills, pp. 506-511; *Beckwith v. Smith*, 23 Me. 125, 38 Am. Dec. 290.

place of residence is sufficient. *Bank of America v. Shaw*, 2 New Eng. Rep. 572, 143 Mass. 290, citing *Chouteau v. Webster*, 6 Met. 1; *Young v. Durgin*, 15 Gray, 264.

Where the parties reside in the same city or town, the notice should be given at the dwelling-house or place of business; either mode is sufficient. *Williams v. Bank of United States*, 27 U. S. 2 Pet. 93, 7 L. ed. 390, cited in *Dickens v. Beal*, 35 U. S. 10 Pet. 561, 9 L. ed. 541; *Wiseman v. Chiappella*, 64 U. S. 23 How. 377, 16 L. ed. 499; *Bank of Columbia v. Lawrence*, 26 U. S. 1 Pet. 573, 7 L. ed. 299, cited in *Harris v. Robinson*, 45 U. S. 4 How. 345, 11 L. ed. 1004.

Where the indorser lives in the same town as the holder, notice must be given personally, either verbally or in writing, or a written notice be left at his dwelling-house or place of business, unless he has agreed to receive it elsewhere, or, by custom of the bank at which it was payable, notice might be left at the postoffice. *Bowling v. Harrison*, 47 U. S. 6 How. 248, 12 L. ed. 423.

Notice should be sent to the place where the party to be notified will be most likely to receive it. *Bank of America v. Shaw*, 2 New Eng. Rep. 572, 142 Mass. 290, citing *Biles v. Nichols*, 12 Allen, 443.

Notice to a partnership should be made at its place of business. *Bank v. America v. Shaw*, *supra*.

When a partnership is indorser of a note, proof of notice of its dishonor is sufficient, when left either at the place of business of such firm with someone in charge, or at the domicile or residence of one of the partners. *Fourth Nat. Bank v. Althelmer*, 8 West. Rep. 563, 91 Mo. 120; Story, Prom. Notes, § 812.

#### Notice of indorser of nonpayment.

An indorser, to be held on a dishonored note, must have legal notice of nonpayment, if his address is ascertainable by exercise of reasonable diligence. *Hart v. McLeellan*, 6 New Eng. Rep. 133, 30 Me. 96.

Where an indorser of a promissory note assigns all his property for the benefit of his creditors before maturity, notice of the demand of payment and nonpayment at maturity should be given to him; notice to the assignee is not sufficient. *Johnson and Owen, JJ., dissent. House v. Vinton County Nat. Bank*, 1 West. Rep. 155, 43 Ohio St. 346.

The indorser of a promissory note for the accommodation of the maker is entitled to strict notice. *French v. The Bank of Columbia*, 8 U. S. 4 Cranch, 141, 2 L. ed. 576, cited in *Dickens v. Beal*, 35 U. S. 10 Pet. 577, 9 L. ed. 540.

A notary or any other agent of the holder may give the notice. *Harris v. Robinson*, 45 U. S. 4 How. 336, 11 L. ed. 1000, cited in *Lambert v. Ghieselin*, 50 U. S. 9 How. 558, 13 L. ed. 257.

Holding a note after dishonor, without notice to the indorser within a reasonable time, discharges him. *Robertson v. Vogle*, 1 U. S. 1 Dall. 232, 1 L. ed. 123; *Steinmetz v. Currey*, 1 U. S. 1 Dall. 264, 1 L. ed. 116; *Bank of North America v. Vardon*, 2 U. S. 2 Dall. 73, 1 L. ed. 297; *Warder v. Carson*, 2 U. S. 2 Dall. 233, 1 L. ed. 361; *Ball v. Dennison*, 4 U. S. 4 Dall. 163, 1 L. ed. 733.

#### Form of notice.

No particular form of words in the notice of protest of a note is required. If it contain a true description of the note and states that it has been presented at maturity and dishonored, and that the holder looks to the indorser for payment, this is sufficient. *Glicksman v. Barley (Wis.)*, Nov. 25, 1890, citing *Aiken v. Marine Bank*, 16 Wis. 679.

If it conveys to the party a sufficient knowledge of the particular note dishonored, it is sufficient. *Mills v. Bank of United States*, 24 U. S. 11 Wheat.



The notice must be given to the party sought to be charged.

*Cooke v. Bank of Tennessee*, 6 Humph. 52.

Knowledge of nonpayment does not take the place of notice. The indorser is entitled to have notice regularly given him, so he will know whether the holder intends to look to him for payment.

1 Parsons, Notes and Bills, p. 629; *Cooke v. Bank of Tennessee*, *supra*; *Lane v. Bank of West Tennessee*, 9 Helsk. 485; *Alton v. Robinson*, 2 Humph. 844.

Proof that the notice was mailed must be clear and distinct.

*Weakly v. Bell*, 9 Watts, 273, 36 Am. Dec. 119, 120.

When an indorser receives notice of non-payment he is allowed just the same time in which to give notice to a prior indorser that the holder had to give him notice.

*McNeil v. Wyatt*, 3 Humph. 126; Story, Prom. Notes, § 831.

He must be careful not to let a day intervene before he gives such notice, for if he does it will be fatal to his right of action against such prior indorser.

Story, Prom. Notes, § 832.

As complainant had not in fact indorsed the note, and it had not been indorsed by anyone in blank, he was not entitled to the rights and privileges of an indorser.

*Butler v. Duval*, 4 Yerg. 268; Byles, Bills, 7th ed. p. 296; and *note c*.

If the maker of a note is insolvent when the note is transferred, and this is known to the indorser, still the holder must make demand and give notice to bind the indorser.

431, 6 L. ed. 512, cited in *Musson v. Lake*, 45 U. S. 4 How. 281, 11 L. ed. 975; *Dennistoun v. Stewart*, 58 U. S. 17 How. 608, 15 L. ed. 229; *Browning v. Andrews*, 8 McLean, 578; *Bank of Alexander v. Swana*, 24 U. S. 9 Pet. 33, 9 L. ed. 40.

A notice of protest of negotiable paper designating dates by the figures "3-15-1884" and "2-11-'84" is sufficient. *Brown v. Jones*, 125 Ind. 375, citing *Henry v. Indiana State Bank*, 3 Ind. 216; *Tiedeman*, Com. Paper, § 845; *Randolph*, Com. Paper, § 1224.

A letter to the indorser stating a demand and dishonor of the note need not inform him he is looked to for payment. *Bank of United States v. Carneal*, 27 U. S. 2 Pet. 543, 7 L. ed. 512, cited in *Chiopees Bank v. Philadelphia Seventh Nat. Bank*, 75 U. S. 3 Wall. 649, 19 L. ed. 425.

A mistake as to the date of the note will not vitiate a notice of dishonor. *Mills v. Bank of United States*, *supra*.

*Notice of dishonor must be made in reasonable time.*

An indorser's liability upon a negotiable note depends upon notice of dishonor within a reasonable time. *Bank of North America v. Pettit*, 4 U. S. 4 Dall. 127, 1 L. ed. 770; *Bank of North America v. Wycoff*, 4 U. S. 4 Dall. 151, 1 L. ed. 778; *Lenox v. Prout*, 16 U. S. 3 Wheat. 520, 4 L. ed. 449, cited in *Mitchell v. Degrand*, 1 Mason, 180.

What is a reasonable time for notice to the indorser of nonpayment of a note is, in Pennsylvania, a question for the jury. *Bank of North America v. McKnight*, 2 U. S. 2 Dall. 153, 1 L. ed. 330; *Robertson v. Vogle*, 1 U. S. 1 Dall. 223, 1 L. ed. 123; *Ball v. Dennison*, 4 U. S. 4 Dall. 163, 1 L. ed. 783.

Where an overdue note is transferred by indorsement, the indorser is still liable if it is presented to the maker within a reasonable time, and notice 12 L. R. A.

*Alton v. Robinson*, *supra*, citing Chitty, Bills, 529; 1 Parsons, Notes and Bills, p. 446, and *notes*; 8 Kent, Com. \*110, 111, and authorities cited; *Nash v. Harrington*, 2 Alk. 9, 16 Am. Dec. 672; Byles, Bills, 7th ed. p. 808, and *note c*; *Randolph*, Com. Paper, §§ 1831, 1832.

When a party is once discharged from the payment of a note, as indorser, for want of notice, etc., a subsequent promise to pay it will not bind him unless he knew, when he made the promise, that, as a matter of law, he was discharged from its payment. A full knowledge of his discharge, as a matter of law as well as fact, is indispensable to the binding effect of such subsequent promise, and this must be shown by complainant.

*Spurlock v. Union Bank*, 4 Humph. 336; *Golladay v. Union Bank*, 2 Head, 64; *Addison*, Cont. 998; 8 Kent, Com. 113; *Fitzgerald v. Gardner*, Mass. April Term, 1889, at Jackson, Tenn.

The burden is on complainant to show notice was given in due time, by mail or otherwise, to bind the indorser. His proof must not be general and leave the matter in doubt, but explicit and clear that notice was given in due time.

Byles, Bills, 7th Sharswood's ed. p. 289; Dan. Neg. Inst. §§ 1051-1053.

**Caldwell, J.**, delivered the opinion of the court:

This is an action in the chancery court by an indorsee against the indorser of an overdue promissory note. His bill being dismissed by the chancellor, complainant appealed. The substance of the pleadings is well stated in the

given in case of non-payment. *Bassenhorst v. Wilby*, 11 West. Rep. 270, 45 Ohio St. 332.

*Diligence required; a question of law.*

Due diligence having once been exercised, the liability of the indorser is fixed, and subsequent information imposes no new duty on the holder. *Lambert v. Ghieslin*, 50 U. S. 9 How. 533, 13 L. ed. 254, cited in *Hudgins v. Kemp*, 50 U. S. 15 How. 519, 13 L. ed. 510.

The law does not require of the holder the highest and strictest degree of diligence, but only such reasonable diligence as will ordinarily bring home notice to the party. *Bank of United States v. Hatch*, 31 U. S. 6 Pet. 250, 8 L. ed. 337.

Such diligence is not shown where the holder of a note, after its protest, mailed notice to an incorrect address, which was given to him by a clerk at the office of him from whom he received the note. *Hart v. McLellan*, 6 New Eng. Rep. 138, 80 Me. 9; *Utica Bank v. De Mott*, 13 Johns. 423.

Where the indorser had left town on a visit, notice left at a neighbor's, with a request to hand to the indorser when he should return is due diligence on the part of the holder. *Williams v. Bank of United States*, 27 U. S. 2 Pet. 94, 7 L. ed. 360.

When notice of protest has not been actually received in due time by an indorser, the question is whether due diligence in giving notice has been shown; and this, when the facts are all found, is a question of law. *Bank of America v. Shaw*, 2 New Eng. Rep. 572, 142 Mass. 290. See *Wheeler v. Field*, 6 Met. 290.

If due diligence is used in sending the notice to the indorser, it is immaterial whether it is received or not. *Bank of Columbia v. Lawrence*, 26 U. S. 1 Pet. 578, 7 L. ed. 269; *Dickens v. Beal*, 35 U. S. 10

assignment of errors and brief by complainant's counsel, as follows: "On the 29th day of October, 1887, the complainant, M. Rosson, filed his bill in the Chancery Court at Trenton against the defendant, John R. Carrol, in which bill he charged that on the 25th day of December, 1886, the Paragould Stave Manufacturing Co., of Paragould, Ark., executed to the firm of Ware, Bittick & Co. a promissory note for the sum of \$2,087, with interest at 10 per cent per annum and payable one day after date. That said Ware, Bittick & Co., on the 1st day of April, 1887, indorsed and transferred said note to the complainant, and that he was the holder and owner of the same. That on the 12th day of April, 1887, the said note was duly presented for payment to the said Paragould Stave Manufacturing Company, by John M. Davis, a notary public, and payment refused, and due protest thereof made by said notary; and on the same day due notice was given to said Ware, Bittick & Co., and to all the parties. That the said Ware, Bittick & Co., at the time of said indorsement and said demand and notice and these transactions, was a partnership composed of G. T. Ware, Frank Bittick and John R. Carrol. That Bittick died insolvent in Arkansas, and the residence of Ware was unknown to complainant, and that he sued the defendant, John R. Carrol, alone. That said John R. Carrol had due notice of said protest, and of said demand and failure to pay, both as a member of the firm of Ware, Bittick & Co. and otherwise, and that he is bound upon said indorsement personally, and as a member of the firm of Ware, Bittick

& Co.; and that he is bound *in solido* to the complainant. That said defendant, John R. Carrol, likewise received reasonable notice of said demand and failure to pay outside of and in addition to said protest and notice thereof by said notary. That the said note was overdue when indorsed to complainant; and the home of the Paragould Stave Manufacturing Co. was in the Town of Paragould, Ark., and complainant's home was in Obion County, Tennessee; and demand was made and notice given within a reasonable and lawful time. That said note was an Arkansas contract, and bears ten per cent by special stipulation upon its face, and that such was the lawful rate in Arkansas. That John R. Carrol was a citizen of Gibson County, Tenn." The prayer was for judgment, etc., in the usual form, and the oath to the answer was waived.

On the 24th of February, 1888, the defendant filed his answer. In this answer he admits that complainant is the holder and owner of the note described in the bill, and also admits the indorsement; and also admits that the home of the maker was in Paragould, Ark.; and also admits that the note bears 10 per cent, as charged, but insists that the maker was a corporation, and submits the question to the court whether the note would be usurious for that reason. He denies that on the 12th day of April, 1887, demand and notice and protest were made, as charged in the bill; denies that either he or Ware, Bittick & Co. received any notice; denies that due demand was made and notice given; denies that he received legal notice in any manner; denies that "demand

Pet. 572, 9 L. ed. 538, cited in *Harris v. Robinson*, 45 U. S. 4 How. 336, 11 L. ed. 1000.

Whether or not due diligence is used in making inquiry for the residence or place of business of the maker or indorser of a note is, in most cases, a mixed question of law and fact. *Ornard v. Varnum*, 2 Cent. Rep. 53, 11 Pa. 193, citing *Stuckert v. Anderson*, 3 Whart. 116.

Where the parties do not reside in the same place, diligence consists in sending notice by the first mail of the day of protest, and this is all that is necessary, if the notice is properly directed. *Dickens v. Beal*, *supra*.

A married woman returning to her mother's residence after a temporary absence was properly regarded as a resident of that place for the purpose of a notice by mail of the dishonor of a note which she had indorsed. *Wachusett Nat. Bank v. Fairbrother*, 148 Mass. 181.

An abandoned residence may be considered as still subsisting, if no new residence has been established, and if the holder of the note does not know of the change. *Bliss v. Nichols*, 12 Allen, 443; *Importers & T. Nat. Bank v. Shaw*, 4 New Eng. Rep. 344, 144 Mass. 421; *Bank of Utica v. Phillips*, 3 Wend. 408; *Saco Nat. Bank v. Sanborn*, 63 Me. 340.

#### *Demand and notice, when not necessary.*

A declaration that at the making of, and until the time for paying, a note, the maker had no effects of the indorser, and had not received any consideration from him for making or paying the note, but on the contrary made it for his accommodation, presents a legal excuse for failure to present the note for payment and give notice of dishonor. *Blendermann v. Price* (N. J.) 11 Cent. Rep. 349. See, as to the drawer of a bill of exchange, *Bickerdike v. Bollman*, 1 T. R. 406, 2 Smith, Lead. Cas. 4th Am. ed. 51; *Rogers v. Stephens*, 2 T. R. 715; *Legge v. 12 L. A.*

*Thorpe*, 12 East, 171; *Claridge v. Dalton*, 4 Maule & S. 226; *Sharp v. Bailey*, 9 Barn. & C. 44; *Terry v. Parker*, 6 Ad. & El. 502.

The indorser of a promissory note stands in the same position as the drawer of a bill of exchange for accommodation. *Heylyn v. Adameson*, 2 Burr. 609; *Nicholson v. Gouthit*, 2 H. Bl. 609; *French v. Bank of Columbia*, 8 U. S. 4 Cranch, 141, 2 L. ed. 578.

The guarantor of a promissory note whose name does not appear on the note is bound without notice, where the maker was insolvent at its maturity. *Reynolds v. Douglass*, 37 U. S. 12 Pet. 497, 9 L. ed. 1171; *Rhett v. Poe*, 43 U. S. 2 How. 457, 11 L. ed. 338. See *Ex parte Russell*, 16 Nat. Bankr. Reg. 477.

When, by arrangement between the maker and the indorser, the latter has become primarily liable as when he is supplied by the maker with funds to pay it, no notice need be given. *Ray v. Smith*, 84 U. S. 17 Wall. 411, 21 L. ed. 666.

It is for the jury to find whether he had become the principal debtor. *Ibid*.

Where the indorser has discharged the maker of a note by a release and settlement, he is not entitled to a notice of nonpayment. *Burke v. McKay*, 43 U. S. 2 How. 66, 11 L. ed. 181.

Where notes are deposited for collection, by way of collateral security for an existing debt, notice is not essential. *Lawrence v. McCalmont*, 43 U. S. 2 How. 426, 11 L. ed. 326.

In such case the holder is liable only in case of damage, loss or prejudice to the pledgor and then only to the extent of such damage. *Kennedy v. Rosier*, 71 Iowa, 671.

If it is known that an indorser has abandoned his residence, and if upon reasonable inquiry the place of his present residence cannot be ascertained, no notice at all need be given. *Blakely v. Grant*, 6 Mass. 386; *Story, Prom. Notes*, § 516; *Walker v. Stetson*, 14 Ohio St. 90; *Blodgett v. Durgin*, 32 Vt. 351;

was made and notice given in a reasonable and lawful time," as charged; and avers "that the first that respondent ever heard of the fact that the maker thereof had failed to pay the said note was some months after it was indorsed to complainant," etc. He admits that the members of the firm of Ware, Bittick & Co. were correctly set forth in the bill, and states his own residence as at Kenton, Tenn. The answer also pleads as an offset a note of \$50 which he held against the complainant, which he asks be set off against complainant's recovery, if complainant shall succeed in holding him, defendant, liable as indorser, etc. The note was payable to "Ware, Bittick & Co., or order," and when indorsed was three months and five days past due. The transfer was negotiated and made by the defendant, for his firm, in these words: "For value received, we transfer this note to M. Rosson, this 1st day of April, 1887. [Signed] Ware, Bittick & Co."

Before referring further to the facts of the case, the principal legal questions involved will be considered. What duties, with respect to demand and notice, does the indorsee of an overdue note owe to his indorser, or what legal steps must he take to convert the conditional liability of the indorser into an absolute obligation to pay the debt? The distinguishing feature of the liability of an indorser of any negotiable paper is that such liability is contingent upon due presentment for payment and notice of dishonor. Though a note transferred after maturity "comes disgraced to the indorsee" (as said by Lord Ellenborough in *Tin-*

*son v. Francis*, 1 Campb. 19), and is, in his hands, subject to all equitable defenses attaching to it and existing between the maker and payee at maturity, it is nevertheless negotiable; and, in order that the indorser may be held liable, demand must be made of the maker and notice of non-payment given. Tiedeman, Com. Paper, § 886; Chitty, Bills, 159, 160; Byles, Bills, 163, 169; Randolph, Com. Paper, §§ 674, 675; 2 Am. & Eng. Encyclop. Law, 399, 407, 408; Story, Prom. Notes, § 178; Dan. Neg. Inst. § 996; *Leavitt v. Putnam*, 3 N. Y. 494; *Berry v. Robinson*, 9 Johns. 131; *Kirkpatrick v. McCullough*, 8 Humph. 171; *Duffy v. O'Connor*, 7 Baxt. 500; *Pool v. Tolleson*, 1 McCord, L. 199; *Esfert v. Des Coudres*, 1 Mill. Const. 69; *Nash v. Harrington*, 2 Aik. 9; *McKinney v. Crawford*, 8 Serg. & R. 353.

Yet the same strictness as to time of demand and notice is not in all particulars required with respect to such a note as must be observed in case of one indorsed before due. As between indorser and indorsee, a note transferred after maturity is deemed equivalent to a note payable on demand, and is subject to the same rule of diligence in the matter of presentment for payment and notice of dishonor. To bind the indorser in such a case it is incumbent on the indorsee to see that due demand is made in a reasonable time, and that notice is promptly given if payment be refused. Randolph, Com. Paper, §§ 671, 673, 1046, 1096; Dan. Neg. Inst. §§ 611, 996; 2 Am. & Eng. Encyclop. Law, 396, 397; 1 Parsons, Notes and Bills, 381, 382, 519, 520; Byles, Bills, 7th ed. by Sharswood, 211, 212, and note, 169, 170; *Colt v. Barnard*,

*Fugitt v. Nixon*, 44 Mo. 205; *Upham v. Prince*, 13 Mass. 14; *Bateman v. Joseph*, 2 Campb. 461.

#### *Sufficiency of notice to indorser.*

After demand of the maker of a note on the third day of grace, notice to the indorser on the same day is sufficient. *Lindenberger v. Beall*, 19 U. S. 6 Wheat. 104, 5 L. ed. 216; *Bussard v. Levering*, 19 U. S. 6 Wheat. 102, 5 L. ed. 215.

Notice actually delivered to a person of discretion at the place of residence or business of such party apparently acting for him is sufficient. *Kellogg v. Pacific Box Factory*, 57 Cal. 327; *McFarland v. Pico*, 6 Cal. 636; *Pierce v. Schaden*, 55 Cal. 406; *Thompson v. Williams*, 14 Cal. 160.

Notice of dishonor sent to former place of business of the indorsers,—an insolvent firm,—where it was received by the trustees for creditors, is sufficient. *Casco Nat. Bank v. Shaw*, 4 New Eng. Rep. 473, 79 Mo. 376, citing *Bank of America v. Shaw*, 142 Mass. 290, better reported in 2 New Eng. Rep. 572.

Notice to assignee of payee for the benefit of his creditors is sufficient. *Callahan v. Bank of Kentucky*, 32 Ky. 231; *Chitty, Bills*, 228; *Byles, Bills*, 216; *Dan. Neg. Inst.* § 1002.

Where the assignee of an indorser continued the business at the same place, it may be inferred that assignee had authority from indorser to receive notices of protest sent there. *Importers & T. Nat. Bank v. Shaw*, 4 New Eng. Rep. 344, 144 Mass. 421.

The facts being undisputed, sufficiency of notice is a question of law. *Lambert v. Ghieslin*, 50 U. S. 9 How. 552, 13 L. ed. 254; *Bank of Columbia v. Lawrence*, 26 U. S. 1 Pet. 573, 7 L. ed. 296; *Harris v. Robinson*, 45 U. S. 4 How. 333, 11 L. ed. 1000.

But where the residence of the indorser was known, a notice given to his son, though at the place where notices for the indorser were usually left, was held not sufficient. *Bank of United States* 12 L. R. A.

*v. Corcoran*, 27 U. S. 2 Pet. 121, 7 L. ed. 368, cited in *Fowler v. Warfield*, 4 Cranch, C. C. 71.

Notice to indorser of nonpayment, sent to the proper address when the note was issued, is sufficient, although he has changed his residence. *Importers & T. Nat. Bank v. Shaw, supra*; *Bank of Utica v. Phillips*, 3 Wend. 408; *Saco Nat. Bank v. Sanborn*, 63 Me. 340; *Rowland v. Rowe*, 48 Conn. 432; *See Berridge v. Fitzgerald*, L. R. 4 Q. B. 641.

It is not necessary to state in the notice who is the holder; it is sufficient that it states the fact of non-payment, and that the holder looks to the indorser for indemnity. *Mills v. Bank of United States*, 24 U. S. 11 Wheat. 431, 6 L. ed. 512, cited in *Bank of United States v. Watterston*, 4 Cranch, C. C. 445.

Nor need it contain a formal allegation that it was demanded at the place of payment. *Mills v. Bank of United States, supra*.

Notice of a note's dishonor is sufficient if addressed to the indorser and left in his office, in his absence, in a conspicuous place. *Hobbs v. Straine*, 149 Mass. 212, citing *Importers & T. Nat. Bank v. Shaw, supra*; *Bank of America v. Shaw*, 2 New Eng. Rep. 572, 142 Mass. 290.

A variance between the note and the notice to the indorser, if it does not mislead him, and if it conveys to him the real fact without any doubt, cannot be material. *Bank of Alexandria v. Swann*, 34 U. S. 9 Pet. 33, 9 L. ed. 40.

#### *Service of notice by mail.*

The provision as to deposit of notice of non-payment, etc., of a note in the postoffice, is intended to cover and be applied to all kinds of places. *Morse v. Chamberlain*, 4 New Eng. Rep. 211, 144 Mass. 406; *Stat. 1871, chap. 239*; *Pub. Stat. chap. 77, § 16*.

A statute making deposit in the postoffice notice

18 Pick. 200; *Jones v. Robinson*, 11 Ark. 504; *Gravel v. Struvel*, 53 Iowa, 713; *Union Bank v. Beall*, 10 Humph. 386; *Patterson v. Todd*, 18 Pa. 426.

The point most contested in argument at the bar—one ably and learnedly debated on both sides—concerns the time in which notice of the dishonor of a note indorsed when overdue shall be given to the indorser. It is urged for complainant that the indorsee of such an instrument should have reasonable time in which to make demand, and like time in which to give notice. For defendant it is conceded that reasonable time is permitted for demand, but as to notice it is contended that it must be given with the same promptness as is required in case of indorsement before maturity. The authorities are somewhat in conflict, but we think the great weight of juridical opinion, as expressed in the text-books and in judicial decisions, is in favor of the rule we have just stated, and sustains the proposition that the same diligence must be used in giving notice of dishonor to the indorser of an overdue note as is required by the law-merchant in notifying one who indorses before maturity. In our opinion, the rule as to notice of non-payment to indorsers of time notes before due and of demand notes is and should be the same. We have seen no difference stated as to that matter in any authority, and do not perceive how a sound distinction could be taken, the reason for the notice being the same in each case. Then, if it be true, as announced by numerous authorities already cited, that indorsed demand

notes and time notes indorsed after maturity are governed by the same rule in regard to notice of non-payment, it follows that one and the same rule of notice is to be applied to all the three classes of notes mentioned,—time notes indorsed before due, notes payable on demand, and time notes indorsed after maturity. Why should not this be so? It simplifies the law-merchant and facilitates transactions in commercial paper, in respect to which simplicity and uniformity in the rules of law are all-important and conducive to the prosperity and welfare of every community, especially of commercial people. Why should one who acquires an overdue note have or need more time to give notice of non-payment than the indorsee of a note acquired before maturity? He is justly allowed more indulgence in demanding payment of the maker, because the indorser knew at the time of the transfer that the maker was then in default; but when he has had all reasonable time for that purpose, the reason is not so satisfactory for extending the same indulgence with respect to notice. Certainly no more time for notification is needed by the one indorsee than by the other. We quote the language of some of the writers on this subject:

"If a negotiable note is indorsed after maturity it becomes in effect a demand note, and payment must be demanded within a reasonable time, and notice of dishonor at once given to the indorser." Randolph, Com. Paper, § 1098. "When a negotiable instrument is indorsed after maturity payment must be de-

contemplates two modes of its delivery to him: at the postoffice where it is deposited, and by a letter carrier; and requires that it shall be sufficiently directed to his residence or place of business, for both modes. *Morse v. Chamberlain*, *supra*.

The notice of protest may be deposited in a street letter-box. *Casco Nat. Bank v. Shaw*, 4 New Eng. Rep. 673, 79 Me. 376.

It has been held that delivery to a letter carrier is sufficient. *Pearce v. Langrit*, 101 Pa. 507.

If parties live in different post towns, notice through the postoffice is sufficient. *Bank of Columbia v. Lawrence*, 26 U. S. 1 Pet. 678, 7 L. ed. 209; *Bussard v. Levering*, 19 U. S. 6 Wheat. 102, 5 L. ed. 215, cited in *Harris v. Robinson*, 45 U. S. 4 How. 345, 11 L. ed. 1004.

When notice is sent by mail, it is sufficient to direct it to the town where the party resides, if it is a post town; if it is not, then to the postoffice or post town nearest to his residence, if it is known. *Bank of United States v. Carneal*, 27 U. S. 2 Pet. 543, 7 L. ed. 513; *Glicksman v. Earley* (Wis.) Nov. 25, 1890.

Notice mailed to an indorser, at his place of business in another State where he kept a clerk or agent and had various men employed, is sufficient service by mail. *Woolley v. Lyon*, 5 West. Rep. 180, 117 Ill. 244.

A notice of dishonor of a negotiable promissory note sent by mail to the last known place of residence of the indorser, who receives the same, is sufficient. *Cornett v. Hafler*, 43 Kan. 60; 3 Randolph, Com. Paper, § 1219.

Where the indorser receives his mail at the place where the note indorsed is payable, notice actually received by him through the mail is sufficient. *Hendershot v. Nebraska Nat. Bank*, 25 Neb. 127. See *Phelps v. Stocking*, 21 Neb. 443; *Davis v. Eppler*, 38 Kan. 629.

His receipt of the notice through the mail cures an omission to address the notice itself. *Glicksman v. Earley*, *supra*.

12 L. R. A.

Evidence of the postmaster and his deputy, as to the course of mail and the usages of the office, is uniformly received in cases arising on the notice of dishonored bills. *Dickens v. Beal*, 35 U. S. 10 Pet. 672, 9 L. ed. 536.

The fact that the letter containing the notice was taken from the mail-bag in violation of a postal regulation is immaterial. *Stanley v. McElrath*, 10 L. R. A. 545, 549, 36 Cal. 449.

Notice sent to parties residing in a different place, by the mail, the next day after the dishonor of the note, is in due time. *Bank of Alexandria v. Swann*, 34 U. S. 9 Pet. 38, 9 L. ed. 40; *Lenox v. Roberts*, 15 U. S. 2 Wheat. 373, 4 L. ed. 264.

If the party is in the habit of receiving his letters at a more distant postoffice, or through a more circuitous route, and the fact is known to the person sending notice, notice sent by the latter mode will be good. *Bank of United States v. Carneal*, 27 U. S. 2 Pet. 543, 7 L. ed. 513.

#### *Insufficient notice by mail.*

Notice of protest mailed to a person who resided in the same town as the indorser, deposited by him the next day in the local postoffice, and delivered on the third day to the indorser, is insufficient to charge the indorser. *Cassidy v. Kreamer* (Pa.) 13 Cent. Rep. 286.

Where a note was payable at a certain bank notice directed to an indorser at the place where the bank is situated, but who lives eight and one half miles distant, and near another postoffice, at which he gets his mail, does not constitute a valid service. *Citizens Nat. Bank v. Cade*, 73 Mich. 449.

A memorandum on a note, that the "third indorser, J. P. H., lives at Vicksburg," is not sufficient to show an agreement on his part to receive notice through the Vicksburg postoffice. *Bowling v. Harrison*, 47 U. S. 6 How. 243, 12 L. ed. 423.

manded of the payor within a reasonable time, and notice, in the event of a refusal, given to the indorser, in order to charge him; it being regarded as equivalent to one payable on demand." Dan. Neg. Inst. § 611. It will be observed that the latter author does not in terms state when the notice shall be given, but he does say, in effect, that the same rule as to notice is applicable to a note indorsed after maturity as to one payable on demand. He makes substantially the same statement in section 996 of the same learned and valuable treatise; and at the same time mentions the fact that some of the cases have been less strict on the subject of notice, thereby departing from the principle by him deemed "clearly correct." Those cases are among the number relied on by complainant's counsel, and will be referred to again. Says Parsons: "We have already seen that in order to charge an indorser of a note payable on demand presentment must be made within a reasonable time. But if, after such presentment, the note is dishonored, there is no good reason why the same rules as to the time within which notice is to be forwarded to the indorser should not apply, as in the case of other notes and bills. We have also seen that a note or bill in which no time of payment is specified is to be considered as payable on demand. We should say in this case also that notice should be given within the same time as in the other cases. It has already been remarked that a note indorsed when overdue is by the best authorities considered equivalent to a note or bill on demand, though some cases hold that the same strict rules are not to be applied. It has been said that the holder has a reasonable time after presentment within which to notify the indorser, and that this reasonable time may be as long as two months, and an opinion has been expressed that no notice at all is necessary. To maintain these views would seem to be introducing unnecessary distinction, and in our opinion the notice should be transmitted as soon in the case of such notes and bills as of any others. If the analogy between notes and bills on demand and those indorsed when overdue, and notes and bills payable at sight, is to be carried out, the same notice of dishonor would certainly be requisite, for no distinction that we are aware of has ever been attempted to be drawn between the time necessary in forwarding notice to an indorser of a bill at sight and one in which there is a fixed time for payment." 1 Parsons, Notes and Bills, 519, 520. The two cases here disapproved by Parsons are the same referred to by Daniel (in § 996) as being contrary to the correct principle. "The authorities," says Wade, "are not in perfect accord as to the right of an indorser of negotiable paper which at the time of indorsement was past due, to notice. The doctrine is announced in *Gray v. Bell*, 2 Rich. L. 67, and *Van Hoesen v. Van Alstyne*, 8 Wend. 75, that indorsers of overdue paper are not entitled to notice of its dishonor beyond such as would arise from the bringing of a suit within a reasonable time, which might extend to several months. In the latter case three months was regarded as a reasonable time. But, notwithstanding the views expressed in these two cases, the current of authority seems to be de-

cidedly against the exception therein contended for. Indorsers after maturity, as well as indorsers of paper due at sight or on demand, sustain the same relations to each other and to other parties, in regard to the matter of notice, as indorsers of time paper before maturity, with the single exception that they have a right to insist upon the exercise of diligence on the part of the holder in demanding payment. Such indorsement is regarded as equivalent to drawing a new bill, or making a new note, payable at sight or on demand." Wade, Notice, § 738. The two cases here declared to be decidedly against the current of authority are the same subjected to criticism by the two preceding authors. "In every case of the dishonor of a promissory note it is the duty of the holder to give due notice thereof to all the prior parties on the note who are liable to make payment to him, and to whom he means to look for payment. [And this is equally true if the note is payable on demand.]" Story, Prom. Notes, 6th ed. § 299. Though this distinguished author does not in this quotation specify notes indorsed before maturity or notes indorsed after maturity, nor define the time in which notice shall be given further than to say it shall be "due notice," it is obvious from the comprehensiveness of his language that he intended to embrace both in the same general rule. Having discussed the subject of the indorsement of time notes before and after maturity, and of sight and demand notes, in preceding chapters, it was sufficient, in laying down a rule deemed applicable to all alike, to say: "In every case of the dishonor of a promissory note it is the duty of the holder to give due notice," etc. It is elsewhere said: "When a note is indorsed after maturity it must be demanded of the maker within a reasonable time, and immediate notice given of non-payment." Byles, Bills, 7th ed. by Sharswood, 170, note.

In *Cott v. Barnard*, the suit was by indorsees against indorser of overdue note. Neither demand nor notice was proved. The head note of the case is as follows: "Indorser of a note overdue is not liable thereon unless demand is made upon maker within reasonable time, and immediate notice of non-payment given to such indorser; so, though the maker is insolvent and has absconded." Chief Justice Shaw, in the opinion says: "It is very clear that a promissory note is negotiable after it falls due, as well as before. . . . It is like drawing a bill at sight, on which a drawer or indorser cannot be holden without presentment and notice of non-payment. All the reasons which require a demand and notice, in any case, to charge the indorser, apply to this. There is the same reason for prompt notice, namely, that the indorser may take measures to secure payment if the note is dishonored on presentment. . . . As between maker and promisee, a note is payable on demand, at any time after it becomes due. When it is indorsed after due, it is in legal effect a note on demand; and it is to be understood by the parties as if written 'on demand.' In that case the law is well settled the demand must be made within reasonable time, and, if not paid, immediate notice of non-payment must be given to the indorser." 18 Pick. 260.

In *Jones v. Robinson* the indorsee of an overdue note sued the indorser. The testimony produced to show notice of non-payment was not admissible. The court said: "When a note has been indorsed after maturity, as in the case at bar, it is in legal effect, as between the indorser and indorsee, an inland bill of exchange, payable on demand; while between the indorsee and maker it remains a note, in effect payable on demand. Consequently, to charge the indorser, it must be presented within a reasonable time after the transfer, and, if payment be refused, immediate notice must be given to the indorser, all the incidents of an inland bill payable on demand having place as between these two parties as to due diligence and lawful excuse for want of it; and this, because the indorser's undertaking is predicated upon conditions, and unless these are performed they cannot be made absolute, so as to entitle the holder to an action against him. And in this respect there is no difference whether the paper be indorsed before its maturity or afterwards. Although there is a difference in another respect,—that is to say, when a note is indorsed before due that is payable at a day certain, it must be demanded on the day it becomes due, without regard to circumstances to fit the indorser; whereas that same note, if indorsed after maturity, need not of necessity be presented on any given day, it having become in legal effect a note payable on demand. But, whether the paper be indorsed before or after maturity, all the reasons which require demand and notice equally apply, and in each case there is the same necessity for prompt notice of non-payment, that the indorser may take measures to secure the payment if the note be dishonored on presentment." 11 Ark. 504.

In *Patterson v. Todd* the court said: "The questions for decision in this case have relation to the effect of indorsing a promissory note overdue. . . . Where a note is indorsed before it is due the holder must present it for payment at maturity, and, in case of default, must give immediate notice of the dishonor. But after the note becomes due it is payable whenever the holder chooses to demand it, and for this purpose an action at law is sufficient as between the holder and the maker. Like a contract for the payment of money when no time of payment is specified, it is legally payable presently. So that, when a note is indorsed, the indorser still stands in the condition of the drawer of an inland bill of exchange; and we refer to the note, as before, for the purpose of ascertaining the amount, and time and place of payment. The time of payment having passed, the note is, in law, payable on demand; and this shows that the indorsement is to be considered as if made upon a new note payable on demand, and the legal effect of it is precisely the same as if the indorser had drawn an inland bill of exchange upon the maker, payable at sight. It is the duty of the holder of such a bill to present it for payment within a reasonable time, and, if the bill be dishonored, to give immediate notice thereof to the drawer. In the case of an indorsement of a note overdue, the holder is, in like manner, bound to present it for payment within a reasonable time; and, in case of non-payment, to give immediate notice of the dishonor to the indorser; otherwise

12 L. R. A.

the latter is discharged from liability. This doctrine is fully sustained by the authorities." 18 Pa. 426.

In *Graul v. Strutzel* the court said: "It is contended by counsel for the plaintiff that as to the note, which was overdue when it was indorsed, no demand of payment and notice of non-payment to the indorser was necessary. But such is not the rule. A note indorsed after due must be presented to the makers for payment within a reasonable time; and notice of non-payment must be given to the indorser immediately, which means at furthest the next day after default, where the parties reside in the same town." 53 Iowa, 712.

In our own case of *Union Bank v. Keell*, the suit was against the indorser of an overdue bill of exchange. It was drawn on a citizen of Philadelphia, Pa., and indorsed by the Union Bank at Columbia, Tenn., to the plaintiff, who presumably resided at the latter place. The plaintiff caused the bill to be presented for payment twenty six days after indorsement, which being refused by the drawee, protest was made, and the indorser "duly notified thereof." In the opinion this court, speaking through Judge Green, said: "Two questions are made upon the record by the counsel for the plaintiff in error. (1) It is insisted that a bill of exchange, after due, is *functus officio*, and that, if indorsed, no action lies on the instrument against such indorser. We understand the settled doctrine to be otherwise. A bill may be transferred as well after as before it is due. The difference is that, if it is transferred after due, as there is no time fixed for payment, it is, in such case, payable on demand. The party who indorses a bill after it is due, and negotiates it, gives to it, as far as he is concerned, all the character and efficacy of a bill payable on demand. (2) It is insisted that his honor erred in telling the jury that, the bill being overdue when the plaintiff got it, it was necessary for him to show that he had presented it for payment in a reasonable time; and that what was reasonable time to make demand of payment was a question of fact, to be judged of by the jury, according to the circumstances of the case. We think this construction strictly correct." 10 Humph. 386. Nothing is said in respect to notice in this case, except that the indorser was "duly notified" of presentment and non-payment; but the bill in suit was declared to have "all the character and efficacy of a bill payable on demand." From this it follows that it was subject not only to the same rule as to demand, but also as to notice.

In *Kirkpatrick v. McCullough*, 8 Humph. 171, and *Duffy v. O'Conner*, 7 Bart. 500, no rule is laid down as to the time in which either demand or notice is required. The adjudication in each case is simply that the liability of an indorser of an overdue note is contingent upon demand and notice.

The principal question in the early case of *Stothart v. Lewis*, decided by this court in 1807, was upon the point of notice. The note in suit was indorsed after maturity. No notice of the maker's failure to pay was ever given the indorser except by commencement of suit against him. In that case the court said: "When a negotiable paper, under the Act of 1763 or 1786, is indorsed, it should be presented for:

payment within a reasonable time, and, if refused or neglected, the indorser ought to have notice immediately of such failure, and that the holder intends to look to the indorser.

Where a bill of exchange is indorsed after the time of payment it is usually taken on the credit of the indorser, but this does not seem to be the case with an indorsement of a promissory note. It is taken, whether before or after the note is due, with a view to the drawer in the first instance, and should in either case be presented for payment and notice given." 1 Overt. (Tenn.) 356. Taking the first and last sentences of this quotation together, it is seen that the court in effect places an indorser before maturity and one after maturity on the same footing with respect to notice, and says that in either case "the indorser ought to have notice immediately." Such is the clear meaning of the language used, and the doctrine so announced is in substance the same as that laid down in the later decisions and text-books from which we have made quotations on the same subject. The case of *Stothart v. Parker*, which was decided in the same month, and reported in the same book (Id. 260) and which is now relied on as announcing a contrary doctrine, and thereby sustaining the contention here made for complainant, will be noticed hereafter.

There are four adjudicated cases from other States in conflict with the proposition that the same diligence must be used in giving notice of the dishonor of a note indorsed when overdue as is required in case of one indorsed before maturity; three of them holding that more time is allowed in the former than in the latter case, and the other holding that commencement of suit is sufficient notice in the former case. These cases are: *Van Hoesen v. Van Alstyne*, 3 Wend. 75; *Gray v. Bell*, 2 Rich. L. 67, 44 Am. Dec. 277; *Chadwick v. Jeffers*, 1 Rich. L. 397, 44 Am. Dec. 260; *Jordan v. Hurst*, 12 Pa. 269. In the first of these the court said: "The note, having been transferred long after it was due, is to be considered as a note payable on demand; and the demand and notice must be made in a reasonable time. What is a reasonable time depends on the circumstances of the case. From the remark of the defendant below, that Cooley would get into business again, and pay, it is evident an immediate demand and notice was not contemplated. The demand was in fact made within a few weeks, and the notice given within two or three months. I am inclined to think this was sufficient, under the circumstances of the case, to charge the indorser." 3 Wend. 75. Though notice given within two or three months after demand is here held to be sufficient to bind the indorser, the holding is predicated upon the peculiar circumstances of the case, among which was the fact that he evidently did not contemplate immediate notice. This is one of the two cases referred to disparagingly by Daniel, Parsons and Wade. It is also "commented upon, and its correctness denied, by Church, *Ch. J.*, in *Lockwood v. Crawford*, 18 Conn. 361," says a note to 1 Parsons, Notes and Bills, 519. The opinion is in accord with authorities heretofore considered in the announcement that "the note, having been transferred long after it was due, is to be

considered as a note payable on demand." The head note in *Gray v. Bell* is as follows: "Demand and notice by the indorsee of a note past due are necessary to render the indorser liable as a new maker of the note. What is reasonable diligence in making demand of the drawee, and giving notice to the indorser of a note past due, is a question which should be left to the jury." The indorser of an overdue note is in this case held to be in the attitude of an additional maker, and not subject to the rules of an ordinary indorser. In the opinion the court said: "The paper being past due, and, in mercantile contemplation, dishonored, it was not subject to the same rules that would be applicable to a note indorsed before it was due. The invariable presumption of the law should be that where one indorses a note when past due he does so on the knowledge that payment has been demanded, and refused by the maker. The indorsee takes the note, under such circumstances, as much on the credit of the indorser as upon that of the maker. . . . The doctrine is this: That an indorser of a promissory note, whether to bearer or order after it is past due, is an additional maker, with a postponed liability, depending on the diligence of his indorsee, which must always be left as a question of fact to the jury." 3 Rich. L. 67, 44 Am. Dec. 277. This is the other case referred to with disapprobation by the three text-writers just mentioned. Parsons and Daniel speak of it as dispensing with notice altogether. In *Chadwick v. Jeffers*, the head note states the points decided. It is this: "Rules of diligence in demanding payment of negotiable instruments indorsed before due do not apply to those indorsed after due. These rules are designed for the security of parties secondarily liable, and when demand or notice is not necessary for their protection it is dispensed with. Commencing suit and notice thereof to indorser is sufficient notice and demand when the note was overdue when transferred, and the suit was begun in a reasonable time, and at the request of the indorser." 1 Rich. L. 397, 44 Am. Dec. 260. The last two cases were decided by the Supreme Court of South Carolina in 1845. Though not expressly they seem impliedly to modify the cases of *Esfert v. Des Coudres*, 1 Mill, Const. 69, and *Poole v. Tolleson*, 1 McCord, L. 199, decided by the same court in 1817 and 1821, respectively. Especially is this so of *Poole v. Tolleson*, in which the majority of the court said immediate notice was required as much in case of the indorsement of an overdue note as in that of any other, and the minority expressed the opinion that notice at any time before action brought was sufficient. The point decided in *Jordan v. Hurst* is well stated in the syllabus as follows: "An indorser of an overdue note is not discharged by want of notice for three months of the subsequent demand and refusal, there being no evidence that he was injured by such want of notice." 12 Pa. 269. This case is much criticised, and virtually overruled, by the same court in *Patterson v. Todd*, 18 Pa. 426, to which we have already referred, and from which we have made free quotation. So, the only one of the four adverse cases that has escaped unfavorable criticism is *Chadwick v. Jeffers*: and it may have met the same fate and the fact be unknown to us. Certainly it

cannot stand against so nearly all the other authorities.

*Stothart v. Parker*, 1 Overt. (Tenn.) 260, decided by this court in 1807, is also relied on by complainant's counsel to sustain their contention with respect to the matter of notice. The report of the case is very brief. The plaintiffs, who were the indorsees of an overdue note, made demand of payment without effect, but failed to give notice of non-payment to the indorser. The court said: "In relation to promissory notes, there is the same necessity for demand of the drawer and notice of non-payment if assigned after being due as before. The general rule is that there should be this notice within a reasonable time." 1 Overt. (Tenn.) 262. It is the "general rule" with which we are now dealing, and by that rule, it is said, in the last case, "a reasonable time" is allowed in which to give notice. It will be observed, however, that no difference is made between the rule where the note is indorsed before due and where it is indorsed after due. The reasonable time meant by the court is alike applicable to both. Many of the older authorities state without reference to the time of indorsement, whether before or after maturity, that notice of dishonor must be given "within a reasonable time," and that what constitutes such reasonable time is a question of fact for the jury in each case. But the courts have now fixed this period so definitely that it has become a question of law by the weight of authority, and cannot so appropriately be now spoken of as merely reasonable time. Byles, Bills, 285, 286, and notes; 1 Parsons, Notes and Bills, 506, 507, 510, 511; Story Prom. Notes, § 819; Chitty, Bills, 11th ed. 323; Tiedeman, Com. Paper, § 337; Randolph, Com. Paper, § 1251 *et seq.* The modern authorities do not mean, of course, that the time allowed shall be so short as to be unreasonable, but simply that the period is now so well fixed as a matter of law that it can be better defined otherwise than by using the rather indefinite phrase of some of the cases. Whatever terms may be used, they generally mean the same thing, in legal contemplation, or nearly so, and refer to indorsements before and after maturity without distinction as to the time of notice. "Notice of dishonor," says Randolph, in his very learned work, "must be sent in all cases within a reasonable time. The indefiniteness of this phrase has, however, been closely restricted and defined by modern decisions. In sending notice of dishonor every party through whom it is transmitted is bound to use reasonable diligence in forwarding it. And the rule requiring notice of dishonor to be sent in a reasonable time applies to notice given to an indorser after maturity; no greater diligence being required in his case than in that of an ordinary indorser or drawer." Randolph, Com. Paper, § 1251. The language employed by the court in *Stothart v. Parker*, *supra*, does not authorize the distinction counsel would make, or justify the contention that more time for giving notice is allowable where the indorsement was made after the maturity of the note than where it was made before maturity. Then the irresistible conclusion from the authorities is that the rule with respect to the time within which notice of non payment must

be given to the indorser is the same whether the indorsement be made before or after the maturity of the note.

The next inquiry is as to the time within which the notice must be sent—how soon after dishonor. The authorities seem to be agreed that it must be sent on the next regular business day; but, in case the parties reside in different places, and the notice is to be transmitted by mail, there seems to be some conflict as to whether it must be sent at all hazards by the mail of that day, depart when it may, or whether, if the departure be at an unreasonable hour, it will be sufficient to send it by the first mail of the second day; and again, whether if there be two mails on the first day after dishonor, it will answer to send the notice by the latter. Byles says: "If the post does not go out on the next day, notice need not be posted till the day after, or till the next post day." Byles, Bills, 286. Chitty says: "And if there be no post on the next day, or if the post go at an unreasonable hour in the morning, then he must send notice by the very next post. But he is not bound, on account of there being no post on the day after he receives notice, to forward it on the very day he receives it." Chitty, Bills, 11th ed. 326. Kent expresses the opinion that it is sufficient if the notice be mailed at any time on the day after dishonor (3 Kent, Com. 106, note); and Story says this is now the established doctrine (Story, Prom. Notes, 411); but Parsons thinks it too liberal to the indorsee, as almost necessarily giving him more than one whole day (1 Parsons, Notes and Bills, 508); and with him Daniel seems to agree. Dan. Neg. Inst. § 1040. A later author says: "The rule requiring notice to be given in a reasonable time has been narrowed down so as to require notice to be given at latest on the next day after the maturity of the paper." Randolph, Com. Paper, § 1259. Again: "But the better rule is now generally recognized that notice must be mailed in time to go by the mail of the next day, if there is any; and that any mail of that day is sufficient." Id. § 1266. Daniel states a rule, which he says is sanctioned by numerous and eminent authorities, and may be safely followed in all cases thus: "In other words, the notice must be sent by the first mail which leaves after the day of dishonor is passed, and does not close before early and convenient business hours of the day succeeding the day of dishonor; the design of the law being to afford the holder an opportunity to mail the notice on the day succeeding that of dishonor." Dan. Neg. Inst. 8d. ed. § 1089. By another learned jurist the rule is stated as follows: "The older authorities state that the notice must be given a reasonable time after the dishonor. But the present rule of the law-merchant is that the holder has until the expiration of the next day after dishonor in which to give notice, subject to certain modifications, necessary in the cases where the notices have to be sent away from the place of protest. When the party entitled to notice resides in the place of protest, the notice may be sent to him at his residence at any time during the day following the dishonor of the paper before the hours of rest. But if he is to leave the notice at the party's place of business it must be left



during business hours. When the notice is to be sent to one resident elsewhere, the holder has until the last mail of the day after dishonor is made up, provided the mail on that day does not leave at an unreasonable hour. If it leaves at an unreasonable hour, the holder has until the next mail to send out his notices." Tiedeman, Com. Paper, § 837. The rule deduced by Parsons from what he calls "the most recent authorities" and that which he approves, is "that the holder is bound to forward the notice as early as by a mail of the day after dishonor which does not start at an unreasonably early hour; and if there is no mail which leaves on that day after a reasonably early hour, the notice is to be forwarded by the next mail which starts thereafter." 1 Parsons, Notes and Bills, 511.

On the next day after the indorsement complainant placed the note in charge of the Southern Express Company at Union City for collection from the maker at Paragould, with special instruction to "protest if not paid." This instruction was written on the shipping envelope of the company in which the note was sent to Paragould and returned. On this envelope, when returned, after the printed words, "When presented," and in the space allowed for answer, were written the following figures: " $\frac{3}{4}$  —  $\frac{1}{4}$ ," indicating clearly that the note had been twice presented for payment,—once on the 4th, and again on the 12th of April. The president of the Paragould Stave Manufacturing Company, which was the maker of the note, testifies that the agent of the express company twice demanded payment of him, but when this was he does not state. The fair inference is that the figures indorsed on the envelope indicate the dates at which such demands were made. On the 12th of April John M. Davis, as notary public, wrote on the note, "Protested for non-payment," and made full and formal certificate of protest, reciting, among other things, presentment of the note by himself to the maker for payment, and the refusal to pay. In addition to the production of this certificate, complainant read as evidence on the trial the deposition of the notary, in which he deposed positively that he made the demands as in the certificate recited. This is plenary proof of the formal presentment and protest of the note by the notary, though the president, of whom the demand is said to have been made, does not recollect that anyone except the agent of the express company ever presented the note to him for payment. The certificate alone would have been sufficient to establish the facts therein stated in the absence of contrary proof, being prima facie evidence of the facts, which the notary, in virtue of his office, was authorized to certify. *Golladay v. Union Bank*, 2 Head, 58; *Sulzbacher v. Charleston Bank*, 86 Tenn. 201; Code, §§ 1800, 1801; *Randolph, Commercial Paper*, §§ 1810, 1812; *Gardner v. Tennessee Bank*, 1 Swan, 419; *Caruthers v. Harbert*, 5 Coldw. 862; *Colms v. Tennessee Bank*, 4 Baxt. 429; *Spence v. Crockett*, 5 Baxt. 576. The notary's certificate also recites that he had on the same day "given due notice to the parties concerned, in writing, . . . in the manner following: To Paragould Stave Manuf. Co., Ware, Bittick & Co., M. Rosson, by handing

to agent of Southern Express Co." Though the recital is that he gave notice to Ware, Bittick & Co., as a firm only, and that he did that "by handing" it to the express agent, the notary states in his deposition that he thinks he sent notice to the defendant individually, at Kenton, Tenn. Since much stress is laid on his evidence, the statements of the notary on this point will be noticed more at length. His answer to the general question whether he gave notice of non-payment and protest, when and to whom is: "I did. On the 12th day of April, 1887, I sent notices to Paragould Stave Manuf. Co., Ware, Bittick & Co. and M. Rosson;" failing to mention the name of defendant, or to say that he sent him notice. When asked pointedly if he sent notice to the defendant, J. R. Carrol, at Kenton, Tenn., he replied: "Think I did, but cannot say positively." Being further interrogated by complainant's counsel, he said: "My best recollection is that I asked Mr. John Rosson Mr. John R. Carrol's address, for the purpose of giving him notice of protest of note, and suppose he had notice." The next question and answer is as follows: "How did you give him notice? Through the U. S. mail? Answer. Don't remember; suppose in same manner, of course, as the others." On cross-examination this witness said this was the first note he ever protested; that he could not say "positively" how many notices he handed the express company, and did not remember to what point the notice to Ware, Bittick & Co. was addressed. John Rosson corroborates the notary to the extent of saying that the latter asked him for the address of defendant, and that the desired information was given.

Notice was sent by mail to the complainant on the 12th day of April. This is demonstrated by the post-mark on the envelope containing the notice. But whether mailed by the notary, or by the express agent after receiving it from the notary, does not appear. The supposition that it was done by the agent would be consistent with the certificate of protest. However, if assumed to have been done by the notary himself, that would be only a circumstance indicating at most that he made duplicate notices for each party to be notified, handing one sent to the express agent, and mailing the other himself. It would not establish the insistence that notice was in fact mailed to the defendant, either in his own name or in that of the indorsing firm of which he was a member. If the express agent mailed one of the notices handed to him by the notary to complainant, it would be reasonable to suppose that he mailed the others likewise to the parties for whom intended. But this would be one supposition based on another, which, of course, cannot be a substitute for proof of the fact. What the express agent did with any of the notices stated in the certificate of protest to have been placed in his hands is not disclosed in the record. His testimony was not taken. The defendant denies that he received any notice for himself or his firm. The evidence alluded to, which is substantially all that is to be found in the record on the subject of notice by mail, is not sufficient to show that any notice of dishonor was ever mailed to the defendant in his individual name or for Ware, Bittick & Co.,

either by the notary or any other person. At best it but discloses an impression on the mind of the notary that he mailed notice to defendant, and raises a mere inference that the express agent likewise gave him notice by the same method. Impressions and inferences are not enough. To meet the requirement of the law evidence of an affirmative and positive character must be produced. *Whitaker v. Morrison*, 1 Fla. 25; Byles, Bills, 289; Randolph, Com. Paper, § 1312. A notary's belief, based on entry in his notarial book and his habit "is good evidence," though he have no independent recollection of the transaction. *Tennessee Bank v. Cowan*, 7 Humph. 70. So entries on such book, opposite the protest, reciting, "Indorser duly notified in writing," and "Indorser duly notified verbally," have been held sufficient proof of notice, when coupled with proof of notary's habit of business. *Bell v. Perkins*, Peck (Tenn.) 262; *McNeill v. Elam*, Id. 268. It has also been decided by this court that the notary's certificate, reciting that he gave notice, in connection with his statement as a witness that he was "satisfied in his own mind that he had given the notice as stated in his certificate on the protest," is sufficient proof of the fact, though he at the time of the trial had no recollection of having given the notice. *Worley v. Waldran*, 3 Sneed, 549. But those cases are not in point here, for in this case there is no confirmatory entry on the notarial book, no recital in certificate of protest that the notary gave defendant notice, and no proof that to have done so would be in accord with his business habits. On the contrary, he shows that he made no entry; that he had no business habit at that time, it being his first official act, and the certificate of protest produced is in direct conflict with his impression, for it recites that he gave notice to the parties concerned "by handing" same to agent of the express company.

But complainant's case is not rested alone on the assumption that notice was duly sent to defendant from Paragould,—the place of demand and protest. On the contrary, he claims that he was himself entitled to the rights of an indorser with respect to notice, having placed the note in the hands of the express company for collection, though without indorsement; and that, in exercise of a legal right, he gave the defendant in person proper notice in due time after receiving his own notice, whereby defendant's liability became fixed, the same as if notice had been sent him direct from the home of the maker and place of demand. It is a well-established rule of law that where there are two or more indorsements of negotiable paper the holder may give notice of dishonor to all the indorsers, and also that each successive indorser, reckoned inversely, likewise has the right to notify his immediate indorser and those before him; and that to do this he is entitled to the same time after the receipt of his own notice as was allowed the holder originally. Furthermore, that one who holds a note as collecting agent is allowed the same time for receiving and transmitting notice as a beneficial holder; and his principal is entitled to notice as an indorser. Randolph, Com. Paper, §§ 1261, 1262; Dan. Neg. Inst. §§ 992, 998, 965, 995a, 1044; Story, Prom. Notes, § 826; Byles, Bills, 292, notes; *Butler* 12 L. R. A.

*v. Duval*, 4 Yerg. 265; *McNeill v. Wyatt*, 3 Humph. 126; *Hill v. Planters Bank*, Id. 670; *Simpson v. Turney*, 5 Humph. 419.

In our own cases, *supra*, and in several other cases cited by the text-writers for the proposition that the principal is entitled to notice as an indorser and to time after its reception to notify those antecedent to him on the paper, the beneficial owners had nominally indorsed the paper to the collecting agent; but we do not understand that the rule depends on the indorsement as a prerequisite. Certainly there is the same reason for the rule in each case. The agent has no beneficial interest in the paper in either instance. His relation and his duty to his principal is the same whether he receives the paper by nominal indorsement or by delivery merely. His obligation is to his principal only, and that obligation, as a matter of law, does not in any case require him to give notice to anyone except his principal, though it may be otherwise by special contract. *United States Bank v. Goddard*, 5 Mason, 366, 3 Myers, Fed. Dec. §§ 1016, 1017. In New York it was decided that an attorney, to whom a note was sent for collection without indorsement, was entitled to one day in which to notify his client of the dishonor, and that the client was allowed still another day to send notice to his indorser. *Farmers Bank of Bridgeport v. Vail*, 21 N. Y. 485. "And it has been held," says Randolph, "that where the holder employs an attorney to ascertain the residence of an indorser, the attorney, after learning the fact, may take a day to inform his principal of it, and, after receiving such information, he may have until the next day to give notice." Randolph, Com. Paper, concluding sentence of section 1262, citing *Firth v. Thrush*, 8 Barn. & C. 887. Under the head of "Banks and other Agents for Collection," Daniel cites the same case for the same proposition, and concludes the section by giving the reason for the general rule as follows: "The factor or other agent or attorney may not know which of the prior parties his principal may desire to hold bound to him, or he may not know where notice would find them, as he has no interest in the bill or note, or privity with the parties; and the rule placing such agents on the footing of a distinct holder is essential to the convenient collection and management of negotiable paper." Dan. Neg. Inst. § 992. Another distinguished writer bases the rule on the same reasoning (Story, Prom. Notes, § 826), which, as we have already said, applies with the same force and propriety to a note or bill passed to the agent by delivery merely as to one indorsed to him for collection. So, on the authorities cited, and on the reason of the rule, we are of the opinion that the question of indorsement or no indorsement to the collecting agent is entirely immaterial in the decision of this case; and therefore complainant, though he placed the note in the hands of the express company by delivery merely, and without indorsement, was nevertheless entitled to one day after receiving information of its dishonor in which to give the defendant notice thereof, provided complainant's agent exercised due diligence in making demand, and informing him of non-payment. If there was any negligence in those

matters on the part of the agent, that negligence is to be imputed to the principal, as in every other case, and, if sufficient in degree, will defeat the action.

We are aware of the statement in at least one case that the owner of a paper placed in the hands of a collecting agent by mere delivery should not be allowed any of the advantages of an indorser, because he has none of an indorser's obligations; but the same process of reasoning is applicable to the beneficial holder, who has indorsed his paper for collection, for his obligations to the collecting agent are not those of an indorser,—he can in no event be forced to pay the debt to his collecting agent; yet the rule is well established that he is entitled to notice of dishonor from his agent, and to time thereafter to notify those antecedent to himself in the bill or note. In each case, and alike in both, the object is to facilitate due presentment, without requiring the beneficial holder to go in person and demand payment of the maker, when they reside at different places. The stamp of postmaster at Union City, on back of envelope containing notice to complainant, shows that it reached his office April 14th. Complainant testified that he received his notice "about the 14th or 15th of April," again, "about the 15th of April, 1887;" that at the same time and place, and by mail, he received another notice just like his own, though in a different envelope, and without any instruction or explanation as to use to be made of it, so far as recollected; that "a day or two after" receiving his notice,—“about the 16th or 17th of April,—immediately after” he received his notice, he went to Kenton on a delayed train, and “after night” handed the other notice to the defendant, and told him of the return of the note protested; that he “needed the money on it, and looked to him for it.” Now, assuming that complainant notified defendant exactly as he said he did (though defendant denies it altogether), the notification is not shown to have been in time,—that is, on the next day,—or that any holiday intervened. As to both the day on which he received the notice and that on which he handed it to defendant, he speaks by approximation only, and not with that definiteness and certitude which is required in proving notice of the dishonor of a negotiable instrument. Whether he received the notice on the 14th or on the 15th of the month, and whether he delivered it on the 16th or on the 17th, he did not, and presumably could not, state with certainty. The notice must have been received on the 15th,—the latter of the dates named for reception,—and delivered on the 16th,—the former of the dates named for delivery,—to be in time to bind the indorser. Complainant's recollection with regard to the transaction seems not to have justified him in fixing these two dates definitely; hence he used the indefinite word “about,” and linked with each of these dates another one. His statement that he went to Kenton, to notify defendant, “immediately after” receiving his own notice, did not cure this defect in his testimony, for those words, when considered in connection with the other language used, as must be done, cannot fairly be held to mean the next day. He did not say that it was the next day, as he no doubt would naturally have

done, or been required to do by his able counsel, if he knew such to be the fact. The court cannot bring certainty, and that, too, in his favor, out of his own uncertainty. Says Lord Ellenborough, in *Lawson v. Sherwood*, 1 Starkie, 251: “The witness says ‘two or three days,’ but the third day would be too late. It lies upon you to show that notice was given in due time, and I cannot go upon probable evidence without positive proof of the fact.” This language is quoted in Byles, Bills, 289, as a correct statement of the English rule. Citing the same case, and American authority in addition, another writer says: “The plaintiff must distinctly show that notice was given on the proper day. It will not suffice to show that it was given on one of two days, because the latter would be too late.” Dan. Neg. Inst. § 1051.

Already it has been seen that the fact of formal demand and protest on the 12th of April is amply proven. Whether it is shown to have occurred within reasonable time is yet to be considered. In sending the note for collection the next day after acquiring it, with special instruction to “protest if not paid,” the complainant exercised even greater diligence than the law required of him; and the demand of payment, which seems to have been made by the express agent on the 4th of April, was certainly within a reasonable time after the indorsement. Had the note been then protested, there would have been no room for denying that demand and protest were soon enough. But, in fact, the note was not protested, or attempted to be protested, until the 12th of April, the day on which the express agent seems to have made his second demand, and on which the notary show she made demand. In view of the fact that there had been a demand on the 4th without protest, we are of the opinion that the subsequent demand and protest were not good in law. The demand on the 4th could not be made effectual by protest on the 12th; and, demand having been made on the former date, it was then out of the power of the indorsee to bind the indorser by a second demand on the latter date. Protest on the one day cannot be coupled with demand on the other day; nor can a demand, ineffectual against the indorser because not followed by due protest, be abandoned and another one, without such defect, substituted for it after the lapse of eight days, so as to charge the indorser. That the demands by the express agent may not have been made at the maker's office is unimportant in this litigation, since the maker made no objection on that account. Nor does it help complainant's case that he specially instructed the express company to protest the note if not paid, and had a right to believe that it would be done promptly and legally; for, as between complainant and defendant, the failure of the express company to have proper demand made is chargeable to complainant. It was his agent, and its negligence must be regarded as his negligence in this action.

Again, passing the question of demand and notice altogether, and irrespective of them, it is insisted in behalf of complainant that he is entitled to a recovery on two other grounds: (1) that the maker of the note was insolvent, and known by the defendant to be so at the time of

the indorsement, and that he therefore is liable without demand and notice; (3) that defendant admitted his liability for the debt, and took steps to have it paid after the refusal of the maker to pay, thereby superseding the necessity of demand and notice, and rendering himself liable without respect to either. Neither of these grounds of relief was alleged in the bill, but pending the argument of the cause before the chancellor, complainant asked leave to amend so as to include them. Motion to amend was overruled. This action of the court is assigned as error; and, besides, it is urged that without the proposed amendment the facts mentioned should be considered under the original bill, and relief granted accordingly. Premitting the questions of pleading, and also that as to whether insolvency of the maker of a promissory note known to the indorser at the time of indorsement will excuse demand and notice (it was decided in *Stothart v. Parker*, 1 Overt. (Tenn.) 262, that it would), it is sufficient to say that the fact of insolvency is not established. The Paragould Stave Manufacturing Company is shown to have made an assignment for the benefit of creditors on the 10th of May, 1887, and its assets, administered thereunder, proved insufficient for the payment of its debts. The proof does not show, however, that it was insolvent on the first of April, when the note was indorsed. The impression we get from the rather indefinite testimony on this point is that the business of the company was not at that time in a prosperous condition, but that its assets were to all appearances ample to meet its liabilities if applied for that purpose. The doctrine is well established that if an indorser, with full knowledge that he has been discharged from liability by the failure of his indorsee to make proper demand and give due notice of non-payment, promise to pay the note, or acknowledge his liability therefor, he thereby binds himself, and may be proceeded against as if his liability had been legally fixed in the first instance. To have this effect the promise or acknowledgment must be distinctly made. If it be not unequivocal, or be not with full knowledge of his discharge, it will not avail the indorsee anything. *Bogart v. McClung*, 11 Heisk. 105; *Spurlock v. Union Bank*, 4 Humph. 336; *Golladay v. Union Bank*, 3 Head, 58; *Martin v. Ewing*, 2 Humph. 559; *Williams v. Tennessee Union Bank*, 9 Heisk. 441; *Bank v. Rawlings*, 1 Leg. Rep. 226; *Seay v. Ferguson*, 1 Tenn. Ch. 293, 294; *Gregory v. Allen*, Mart. & Y. 76.

It is not claimed that defendant ever promised complainant, or anyone for him, that he would pay the note; hence he must succeed, if he succeed at all, on this branch of the case, on the ground of an acknowledgment or admission of liability. Ware, who, as well as defendant, was a member of the firm of Ware,

Bittick & Co., states that defendant told him at Paragould, between the 15th and 20th of April, 1887, that the note had been protested, and complainant had been to see him about the money; that he (defendant) in same conversation asked witness why the note had not been paid, and "said it would have to be paid." The next two questions and answers are explanatory of defendant's declaration that the note "would have to be paid," and disclose the only admission or evidence of admission supposed to have been made to this witness. They are: "(19) Who did he say would have to pay the note? Answer. We, I think. (20) Who did he mean by 'we'? A. I could not say whether he meant the firm of Ware, Bittick & Co., or the Paragould Stave Manufacturing Company." John Rosson says he had a conversation with defendant at Paragould after the 10th of May; that defendant told him the note had been left out of the assignment, and said "that they would have it to pay." By "they" he understood defendant to mean Ware, Bittick & Co. On the 22d of April, 1887, defendant wrote complainant that he had just been to Paragould, "but failed to accomplish anything as yet;" that if a trade pending there "is accomplished your debt is to be paid off;" and concluded with the statement that he would write again as soon as he should "hear from the parties." On the 27th of May following he wrote complainant in these words: "We were at Paragould last week, and found the business in such condition that we attached all the company's property for what it owed us and you. We [meaning himself and a confidential friend and adviser] put your claim in with ours, and got the business in a shape that it will be closed out as soon as it can be done, and the property all sold. This is the best we could do, as we could see no way to get any cash out of it for you now . . . [Signed] J. R. Carrol."

While these facts show that the defendant thought his firm, which had indorsed the note to complainant, was probably liable to him for its payment, and that he was taking such steps as he deemed best to obtain collection from the maker, they do not establish an admission of liability on his part. They fail to show that explicit acknowledgment of accountability which is necessary to revive the previous obligation, and preclude an indorser from relying on the laches of his indorsee as a discharge. Moreover, there is no proof that what he said and did was said and done with full knowledge that he had previously been discharged. The other assignments of error need not be mentioned further than to say that they relate to rulings of the chancellor on evidence, and that we have considered all the evidence that was competent and none that was incompetent.

*Let the decree be affirmed.*

## MINNESOTA SUPREME COURT.

John B. ATWATER *et al.*, *Respts.*,  
v.  
MANCHESTER SAVINGS BANK *et al.*,  
*Appts.*

Sampson A. REED, *Respt.*,  
v.  
SAME, *Appts.*

(... Minn. ....)

\*1. Where land has been conveyed in trust to pay certain charges upon it, and certain specified debts of the grantor, the residuary interest or estate of the grantor is subject to the lien of an attachment or judgment, and to sale on execution. In this State equitable, as well as legal, estates in land are subject to sale on execution.

2. One who has brought suit upon a contract, express or implied, for the payment of money only, and has attached the real estate of the defendant, is "a creditor having a lien," within the meaning of Gen. Stat. 1878, chap. 63, § 823, and chapter 81, § 18, relating to the redemption of real estate.

3. In judgment by confession, a statement of the facts out of which the confessed indebtedness arose is sufficient, if it contains enough to enable creditors and others to investigate the bona fides of the judgment.

4. The owner of land, whose title was in litigation, made a contract with his attorney to convey to him, for his services, one third of the land in case he succeeded in recovering the land. The attorney brought the litigation to a successful termination, but in the mean time certain mortgages executed by the owner having been foreclosed, and the time of redemption about to expire, and the owner not being able to redeem, he confessed judgment in favor of his attorney for his services, for an amount which does not appear to have been in excess of the value of one third of the land. The judgment was confessed to enable the attorney to redeem the land, and thereby secure compensation for his services. Held, that the confession of judgment was not a fraud on the purchasers at the mortgage sales.

(February 12, 1891.)

**A** PPEALS by defendants from orders of the District Court for Hennepin County in

\*Head notes by MITCHELL, J.

**NOTE.—Judgment by confession; statement in.**

A sworn statement upon which a judgment by confession is based, which states the execution of promissory notes by the defendants and refers to and makes part thereof copies of the notes thereto attached, sufficiently states the facts out of which the indebtedness arose, where the notes recite that they were given "for value received in one sweepstakes separator." *Brown v. Barngrover* (Iowa) Feb. 6, 1891. See *Miller v. Clarke*, 37 Iowa, 328; *Van Fleet v. Phillips*, 11 Iowa, 560.

If the record, as it remains in the circuit court, does not state the facts as they actually occurred, defendant should make application to have the court correct it so as to have it speak the truth. *Richardson v. Beldam*, 7 West. Rep. 439, 119 Ill. 330, 12 L. R. A.

favor of plaintiffs in suits brought to compel purchasers at a foreclosure sale and the sheriff who made the sale to accept redemption money and issue certificates of redemption. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Hawley & Hall and Ueland, Shores & Holt* for appellants.

*Messrs. A. B. Jackson and J. B. Atwater*, in *propria persona* for respondents *Atwater et al.*

The authorities support the general right of an attaching creditor to redeem.

2 Jones, Mort. § 1069; *Chandler v. Dyer*, 37 Vt. 345; *Bridgeport v. Blinn*, 43 Conn. 274; *Kling v. Ohlids*, 80 Minn. 366.

The lien of plaintiffs' attachment must be held valid in this action. For, under the statutes and decisions of this State, the conveyance by Mrs. Nell was *per se* fraudulent and voidable as to existing, non-consenting creditors.

Gen. Stat. 1878, chap. 41, §§ 18, 23; *May v. Walker*, 35 Minn. 194; *Gere v. Murray*, 6 Minn. 305; *Truitt v. Caldwell*, 8 Minn. 364; *Greenleaf v. Edes*, 2 Minn. 284.

This instrument is such as, under the repeated decisions of this court, could not stand except by the unanimous consent of all existing creditors.

*Smith v. Conkright*, 28 Minn. 23.

*Mr. James W. Lawrence*, for respondent *Reed*:

The statement for the judgment was sufficient.

*Harrison v. Gibbons*, 71 N. Y. 59; *Cleveland Co-op. S. Co. v. Douglas*, 27 Minn. 177.

"Certainty to a common intent and a statement of the consideration with such conciseness" as to direct the attention of third persons to its true and actual nature, is all that is required.

*Van Fleet v. Phillips*, 11 Iowa, 558; *Neubaum v. Keim*, 24 N. Y. 325; *Thompson v. Van Vechten*, 27 N. Y. 568; *Read v. French*, 29 N. Y. 285; *Freligh v. Brink*, 29 N. Y. 418; *Marvin v. Tarbell*, 19 Iowa, 98; *Miller v. Clarke*, 37 Iowa, 325.

A creditor, having a lien by virtue of a confessed judgment, may redeem even where the judgment was confessed for the purpose of permitting him to make such redemption.

**Redemption from sale of real estate.**

The Minnesota statute provides that creditors having a subsequent lien, legal or equitable, on real estate or some part thereof, may sell it upon execution, judgment or decree, in the order of their respective liens. Gen. Stat. chap. 63, § 823, chap. 81, § 18. See *Tinkoom v. Lewis*, 21 Minn. 132. See also *Williams v. Lash*, 8 Minn. 493.

In order to redeem, the creditor must, within the year given for redemption, file notice of his intention to redeem in the office of the register where the mortgage is recorded. Gen. Stat. chap. 63, § 823, chap. 81, § 18. See *Watkins v. Hackett*, 30 Minn. 103, 203.

Mrs. Nell had, on December 14, 1889, an interest in the land subject to the lien of a judgment and the levy of an execution.

See *Kennedy v. Nunan*, 53 Cal. 826; *James v. Throckmorton*, 57 Cal. 868; *Biggs v. Dickel*, 12 Ohio St. 49; *King v. Remington*, 36 Minn. 15, and cases cited; *Woodgate v. Fleet*, 44 N. Y. 1; *McCurthy v. Van Der Mey*, 42 Minn. 189.

Mitchell, J., delivered the opinion of the court:

In each of these cases the question involved is the right of the plaintiffs to redeem from a mortgage sale; and as both grow out of the same general state of facts, and are more or less connected with, and dependent upon, each other, they can be better considered together. So far as material to explain the legal questions involved, the facts are these: A Mrs. Nell, who owed a 40-acre tract of land, but the title of which was then in litigation (*Nell v. Dayton*, 43 Minn. 242), in March, 1886, executed two mortgages,—one on the west half and the other on the east half of the tract. Default having been made in the conditions of these mortgages, they were both foreclosed, and the premises sold on December 14, 1888. The time for redemption would of course expire December 14, 1889. On August 1, 1889, Mrs. Nell executed to Seagrave Smith the trust-deed, Exhibit A, upon the entire tract. On December 12, 1889, Atwater & Hill commenced an action against Mrs. Nell to recover a debt which they alleged she owed them for services as attorneys, and on the same day caused an attachment to be issued in the action, and levied on the whole tract. On December 14, 1889, Mrs. Nell confessed judgment in favor of plaintiff Reed for a debt due him for services performed and money expended for her as attorney. This judgment was docketed on the same day. On December 14, 1889, Atwater & Hill and Reed each filed notices of intention to redeem from both foreclosure sales,—Atwater & Hill under their attachment lien, and Reed under his judgment lien. Smith had never done anything with the land under the trust deed, Exhibit A, nor did either he or Mrs. Nell make any redemption. Within five days after the expiration of one year from the date of the sales, and on December 19, Atwater & Hill did everything necessary to effect a redemption of the west half of the tract, but made no attempt to redeem the east half. Within five days thereafter, and on December 21, Reed did everything necessary to effect a redemption of the east half. But in both cases the sheriff, who made the sales, and the defendant bank, who held the certificates of sale, refused to accept the money or to execute certificates of redemption. Hence these suits to compel them to do so.

1. The first question that arises is whether, after the execution to Smith of Exhibit A, Mrs. Nell had remaining any interest or estate in the land upon which plaintiff's attachment and judgment were liens; for if not, then plaintiffs were not "creditors having a lien," and had no right to redeem. Counsel have discussed at great length the questions whether Exhibit A was a trust

or merely a power in trust, and, if the former, whether it was valid under the Statute of Uses and Trusts. Under the view we have taken of the case, it becomes unnecessary to consider these questions. We shall assume that the instrument is all that defendants claim it to be, viz., a valid trust,—a conveyance of the land to Smith in trust to pay certain charges upon it and to pay certain specified debts of the grantor. Defendants' contention is that, as thus construed, it vested in Smith the whole estate in the land, so that no title or interest remained in Mrs. Nell to which a lien could attach. That she had a residuary interest in the land cannot be questioned. The deed itself expressly provides that, "if there be more than sufficient to pay all of said claims in the manner as aforesaid, then the said trustee shall grant, convey and set over to said Nell, her heirs," etc., "all of the rest and remainder of said property." This is nothing more than the law would imply, for such a residuary interest necessarily arises in every case where property is assigned in trust to pay debts or to satisfy other specified objects. Had Mrs. Nell herself paid all the charges and debts specified in the deed of trust, the entire beneficial interest in the land would have been in her. Or if the trustee had accomplished all the purposes of the trust by executing mortgages, the land subject to the mortgages would have been hers. So if he had accomplished these purposes by selling only a part of the land, the residue would have been hers. In speaking of the similar residuary interest of a bankrupt in real estate assigned to an assignee in bankruptcy, this court said that it may be classified under our Statute (Gen. Stat. chap. 45, §§ 12, 33) as a reversion, subject to be defeated by a sale by the assignee; that after the purposes of the trust are accomplished the residuum of the property would revert by operation of law without any reconveyance. *King v. Remington*, 36 Minn. 15-32. If this be so, then Mrs. Nell's interest in the land was subject to the lien of an attachment or judgment, and to sale on execution, for, of course, a reversion in land is a legal estate. But if her interest was merely an equitable one, the same result would follow. At common law the rule undoubtedly was that a mere equitable estate in land could not be sold on execution, for the familiar reason that courts of law did not recognize equitable estates, and could not deal with them. But a judgment creditor was not in such cases without remedy. He could file his bill in a court of chancery, which always held that, for its purposes, these equitable interests were just as much bound by the judgment as legal estates, and could be subjected to its satisfaction by equitable process; and in adjusting the conflicting rights of creditors it always followed, by analogy, the rules of the common law. It is true that the courts of chancery held that the lien or right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose dated from the filing of the bill. But this was also in strict analogy with the law, for at common law the judgment was not a lien on real property, but it

was the judgment creditor who first extended the land by *elegit*, or whose execution was first begun to be executed, who was entitled to priority; and a bill in equity to reach the property for the satisfaction of a judgment was considered as being in the nature of an equitable execution. But when the law was changed so as to make judgments liens from the date of their docketing there can be no reason why a court of equity, still following the analogy of the law, should not and would not hold that equitable interests in land were subject to the liens of judgments in the order of their priority in date. See *Hale v. Horne*, 21 Gratt. 112. The modern tendency of both courts and Legislatures is, as far as possible, to do away with the distinction between legal and equitable estates. The old rule that a judgment lien did not attach to a more equity has been abolished in England, and in the great majority of the States of the American Union, by statutes expressly declaring that a judgment shall be a lien on all the interests of the judgment debtor in real estate, whether legal or equitable. In Pennsylvania the same result is reached without the aid of a statute, upon the ground that, as they have no courts of chancery from which the creditor might have relief, therefore, from necessity, they must establish the principle that both judgments and executions have an immediate operation on equitable estates. *Auwerter v. Mathiot*, 9 Serg. & R. 402. In this State there is no express statute declaring that a judgment shall be a lien on an equitable estate, but when we consider that the common-law rule on the subject was purely technical, and arose out of the supposed inability of courts of law to deal with equitable estates, and that in this State all distinction between courts of law and courts of equity has been done away with, and that the same court now administers both legal and equitable remedies in the same action, it must be evident that all reasons for the old rule have ceased to exist. And there is nothing in our Statutes indicating any intention to retain any distinction in this respect between legal and equitable estates. Gen. Stat. 1878, chap. 66, § 277, provides that "the judgment, from the time of docketing the same, becomes a lien on all the real property of the debtor;" and section 800 of the same chapter provides that "all property, real, personal or mixed, . . . may be levied upon and sold on execution." This language is certainly broad enough to include both legal and equitable interests in real property; and, in view of all the circumstances, we do not think it is going too far to hold, as we do, that it was so intended, and that now any interest or estate, either legal or equitable (at least if a vested one), of the debtor, is subject to the lien of an attachment or judgment, and to sale on execution. The decision of this court that the interest of a vendee under an executory contract for the sale of land is subject to the lien of a judgment, and to sale on execution, proceeds, and can only be sustained, upon this ground. *McCarthy v. Van Der Mey*, 42 Minn. 189.

Our conclusion, therefore, is that Mrs. Nell  
12 L. R. A.

had an interest in this land which was subject to the liens of plaintiffs' attachment and judgment.

2. The next question which arises in the case of *Atwater & Hill* is whether an attaching creditor who has not yet obtained judgment is "a creditor having a lien, legal or equitable," within the meaning of Gen. Stat., chap. 66, § 823, and chapter 81, § 16.

A "creditor," even in the strict technical sense of the term, is anyone who has a right to require the fulfillment of an obligation or contract for the payment of money,—anyone who has a debt or demand against another upon contract, express or implied, for the payment of money. A "lien" is defined as a hold or claim which one person has upon the property of another as security for some debt or charge. And while an attachment on *mesne process* differs in some respects from either common-law, maritime or equitable liens, yet it is a statutory lien, constituting a hold on the property of the defendant, for the payment of such judgment as the plaintiff may recover. Both in statutes and the decisions of courts it is everywhere denominated a "lien." Hence one who has brought an action upon a contract for the payment of money only, as did *Atwater & Hill*, and attached the property of the defendant, is "a creditor having a lien," within the ordinary and literal meaning of that expression. But defendant's contention is that the liens to which the Statute refers are those which he terms absolute and perfect,—fixed and definite,—either by judicial determination, or by the contract of the parties, as by judgment or mortgage; that the Statute does not refer to or include a mere provisional and inchoate lien like that of an attachment on *mesne process*. No such limitation is to be found in the language of the Statute itself, and if it is to be imported into it by implication the reasons for it must be found elsewhere. Such a limitation of this apparently unambiguous language can only be justified on the grounds, either that it is implied from other provisions of statute on the same subject, or that a literal construction is inconsistent with the general purpose of the laws, or would be impracticable, and lead to unreasonable or absurd results. The Statute provides for two kinds of redemption,—one, within a year after sale by the mortgagor or judgment debtor or his assigns, which annuls the sale, and which, for convenience, may be called an "owner's" redemption; the other, after the expiration of the year, by creditors, which operates as an assignment of the right acquired under the sale, and which may be called a "creditor's" redemption. Both are made out of court, by the mere act of the parties, without any judicial determination of their rights. This "creditor's" redemption is wholly the creation of statute, and unlike anything known to equity jurisprudence. The great object of it is to have the debtor's property go, as far as possible, towards the payment of his debt; and this is for the benefit of both debtor and creditor. This being the policy of the law, it is just as much to the interest of the debtor to have a debt satisfied which is not in judgment or

secured by mortgage as one which is; and a creditor whose claim is not in judgment or secured by mortgage is just as much entitled to have his debt paid as a judgment creditor or mortgagee. So there is nothing in the policy of the law which requires any such restricted construction of its language as contended for by defendants. Neither is there anything in the history of legislation on the subject in this State as to indicate that the law-makers intended to use the language in any such limited sense. Under the Revised Statutes of 1851 (chap. 71, §§ 112-117), in case of an execution sale, a "creditor's" redemption was in express terms limited to judgment creditors and mortgagees; and in case of a mortgage sale (chap. 85, § 11) no "creditor's" redemption was allowed at all, unless it was under section 18, to mortgagees, which, however, seems to have been an "owner's" redemption, which annulled the sale. This remained the state of the law until the enactment of chapter 60, Laws 1858 (Comp. Stat. 1858, p. 646), amending section 115, chap. 71, Rev. Stat., which attempted, although in a very crude manner, to provide a comprehensive system of redemption from all "sales upon the execution, judgment, order or decree of any court of this State, or upon the foreclosure, by advertisement or otherwise, of any mortgage, contract or liability." This Act provided for an "owner's" redemption within one year from the date of sale; also that "other creditors of the original judgment debtor or mortgagor" might also redeem within the year, the owner, however, having a right to redeem within a year from each such redemption. The expression "other creditors" was not defined, although the use of the word "other" would seem to imply that they were creditors of the same class as those by whom the property had been sold, that is, creditors having a judgment decree, order or mortgage upon which the premises might be sold, which would leave the right of redemption as limited as before. That it did not mean creditors generally, is apparent from the fact that section 117, chap. 71, providing what proof a redemptioner should produce, was left unchanged. The Act of 1862 (Laws 1862, chap. 19) made no change in respect to the parties who had a right to redeem, although section 5 made some changes in regard to the proof which a redemptioner should produce, which, however, are not here important. The next change was by the Statutes of 1866, which revised the whole law on the subject, and left it in substantially the same shape in which we have it to-day. In making this revision, the commissioners retained many of the provisions of previous Acts, but introduced some entirely new sections, particularly section 328, chap. 66, and section 16, chap. 81, Gen. Stat. 1878, in which, for the first time, appeared the expression, "a creditor having a lien, legal or equitable." Section 5 of the Act of 1862, providing what proof a redemptioner should produce, was retained without change, and is now found as section 325 of chapter 66 and section 14 of chapter 81.

It is a noticeable fact that, when the Revised L. R. A.

vision of 1866 was made, in every other State (some fifteen in number), with one possible exception, in which a "creditor's" redemption after sale was allowed, as well as in our own State, at least under the Statutes of 1851, the right was limited in express terms to creditors having a lien by mortgage, judgment or decree. It is highly probable that the commissioners were familiar with this fact, and had it in mind when introducing changes in our Statutes. And if they intended to incorporate or retain any such limitation in our laws it would seem that they would have expressed it in plain and unambiguous language. The fact that they did not, but on the contrary coined and adopted a new expression of their own, strongly indicates that they intended to extend the right of redemption beyond what had previously obtained here or elsewhere, and that they used the phrase "a creditor having a lien" in its common and literal sense. In support of his contention that an attachment is not a lien, counsel quotes some remarks of *Judge Story in Ex parte Foeter*, 2 Story, 181, to the effect that an attachment was not a lien within the meaning of section 2 of the Bankrupt Act of 1841; that it did not come up to the exact definition or meaning of a lien in the general sense of either a common-law, maritime or equitable lien; which is perhaps true. But, as against his construction of the Act referred to, we may cite *Kittredge v. Warren*, 14 N. H. 509; *Same v. Emerson*, 15 N. H. 227; and *Davenport v. Tilton*, 10 Met. 320,—in which last case *Judge Shaw* very pertinently remarks that, in the construction of Statutes, not much aid can be derived from considerations of mere expediency or general equity; that, however strongly they may influence the Legislature in forming statutes, they cannot change their construction when the terms are not doubtful. Neither do we find, in other provisions of statute relating to redemptions, anything that, by implication or otherwise, excludes attaching creditors from the class of redemptioners. The only one that has any bearing upon the question is the section providing what proof a proposed redemptioner must produce. The requirements of that section (sec. 14, chap. 81) clearly imply that the lien must be of record. This is implied, not only from the nature of the proof required, but also from the fact that it is essential for the purpose of fixing the order in which parties are to exercise the right of redemption. But an attachment lien on real property is as much a matter of record as the lien of a mortgage or judgment. The requirement of an affidavit of the amount actually due would, by implication, limit the term "creditor" to its strict and proper sense, of one who has a claim for money due on contract, to the exclusion of those whose claims are for unliquidated damages, at least in actions for torts, who could not well make such an affidavit. See *Fisher v. Consequa*, 2 Wash. C. C. 382. But we see no serious difficulty of this kind in the case of a demand due on a contract for the payment of money, where the contract itself, either expressly or by implication of law, furnishes the standard.



by which the amount of the debt is to be measured.

Much stress is laid by counsel upon the supposed practical difficulties and evils which would arise from allowing redemptions on attachment liens, where the plaintiff may never obtain judgment, or where his attachment may be vacated. While there is some force in these suggestions, yet they go to the expediency of the Statute, rather than its construction. The objections obtain with greater or less force to all redemptions out of court, without any judicial determination as to the rights of the parties. Even if the right of redemption be limited to mortgage and judgment creditors, it may prove, after the redemption has been made, that the mortgage or judgment was void, or had been previously satisfied. But these difficulties are more imaginary than real. Our impression is that it has been the general understanding of the bar that attaching creditors were redemptioners under the Statute, and yet we have never heard of many serious complications growing out of such a construction of the law. And the fact that the profession has generally put this construction upon the Statute for so many years is an additional, although not a controlling, reason why the courts should adopt it. An illustration of how the Statute has been generally construed is to be found in *Kling v. Childs*, 80 Minn. 366, in which, while the point was not raised, both counsel and court seem to have assumed that an attaching creditor had a right to redeem.

8. In the *Reed Case* the defendants attack the validity of the plaintiff's judgment on two grounds: (1) that the statement for judgment is on its face insufficient, for the reason that it does not state the facts out of which the confessed indebtedness arose; and (2) that the judgment was fraudulent, and not confessed for any actual indebtedness. The statement is that "the said indebtedness is due from me, the said Nell, to said Reed, on account of services and moneys paid out by Scagrove, Smith and said Reed, late co-partners as Smith & Reed, paid and performed at my special instance and request, between the first day of October, 1887, and the first day of March, 1889, and that said amount has not been paid, but is now all justly due and owing; that the said Smith & Reed, for a valuable consideration to them paid prior to the confession of this judgment, sold, assigned and set over the same to the said Reed." This is a good statement, even as against subsequent creditors, in whose favor such statements are strictly construed, and who would stand in a much better position to attack them than do these defendants. Formerly some courts were inclined to hold with exceeding strictness against statements for confessions of judgment, when attacked by creditors; but the general doctrine of the later cases is to the effect that the requirement that the facts be stated out of which

the indebtedness arose is intended to enable other creditors to test the bona fides of the transaction by which a particular debt is preferred; that it is not the object of the Statute to compel the debtor to state sufficient of the transaction to enable other creditors to form an opinion, from the fact stated, as to the integrity of the debtor in confessing judgment, but that all that is required is to state facts sufficient to enable them to investigate the transaction, and form their opinion of the honesty of the judgment from the facts thus ascertained. *McDowell v. Daniels*, 88 Barb. 148; *Harrison v. Gibbons*, 71 N. Y. 59; *Kern v. Chalfant*, 7 Minn. 487 (Gil. 898); *Cleveland Co-op. Store Co. v. Douglas*, 27 Minn. 177. This in substance is recognized as the correct rule in *Wells v. Gieseke*, 27 Minn. 478. Tested by any such rule, the statement in this case is amply sufficient. Plaintiff contends that the defendants cannot attack the judgment collaterally in this action on the second ground. Passing this question without deciding it, we are of opinion that the evidence does not sustain this objection to the judgment. It appears that, the title to this property being in litigation, Mrs. Nell employed Smith & Reed as her attorneys in the matter, and made a contract with them to give them for their services and expenditures in her behalf, in case of their success, one third of the land upon termination of the suit; that in pursuance of this agreement they performed services and expended money, and prosecuted the suit to a successful termination, but in the mean time, by reason of the foreclosures already referred to, the land was about to be wholly lost to both her and them, she being unable to redeem. In this juncture of affairs, Mrs. Nell, recognizing her obligation to them for their successful services, for the purpose of enabling them to secure compensation out of the land by redeeming it, confessed judgment in their favor for a sum of money that is not shown to be greater than the value of the share of land to which they were entitled, thereby changing her liability to them from an obligation to convey them one third of the land to an absolute moneyed indebtedness to the amount of the confessed judgment. She had a perfect right to do this, if she saw fit, and it constituted no fraud on the defendants. She might, under her original contract, have conveyed them one third of the land, which would have given them the same right to redeem the whole that they had under this judgment. Neither is the amount of the judgment important to them, as it might have been to subsequent creditors, because, if it had been for one dollar, it would have given the same right to redeem, and by paying precisely the same amount, as if it had been for a million. Under any circumstances, the defendants receive the full amount due them, and interest, and we fail to see how they have any grounds for complaint.

*Orders affirmed.*

## MISSOURI SUPREME COURT (3d Div.).

Michael RODDY, *Respt.*,

v.

MISSOURI PACIFIC R. CO., *Appt.*

(.....Mo.....)

1. A railroad company which has contracted to furnish cars for stone at a quarry is not liable to a servant of the other party to the contract for injuries resulting from any breach of duty arising purely under the contract; but if it was charged with the duty of selecting the cars it is liable to such servant for injuries resulting from a failure to use ordinary care to provide cars which are reasonably safe.
2. A car with defective brakes is not such an imminently dangerous instrument as to make the owner liable for the simple act of leaving it upon the track, to one who is injured by it, if he has no contractual or other relation to the owner.
3. A servant is not justified in assuming that a car furnished his employer by a railroad company is in good repair and supplied with proper brakes, if he knows that of other cars so furnished many have been defective.

(April 12, 1891.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Johnson County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts appear in the opinion.

Messrs. H. S. Priest and Adams & Buckner, for appellant:

The court erred in refusing to give the defendant's instruction, at the close of the evidence, that the plaintiff could not recover.

*Central R. & Bkg. Co. v. O'Hara*, 46 Ga. 417; *Burdick v. Oheadle*, 26 Ohio St. 893; *Maguire v. Megee* (Pa.) 12 Cent. Rep. 414; *Heaven v. Pender*, L. R. 9 Q. B. Div. 308; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Kahl v. Love*, 87 N. J. L. 5; *Collis v. Selden*, L. R. 3 C. P. 495; *Burke v. De Castro & D. Sugar Ref. Co.* 11 Hun. 354; *King v. New York Cent. & H. R. R. Co.* 68 N. Y. 181; *Norton v. Wiswall*, 26 Barl. 618; *District of Columbia Nat. Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621; *Loose v. Clute*, 51 N. Y. 494; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Necker v. Harvey*, 49 Mich. 517; *Murray v. Deneer & R. G. R. Co.* 11 Colo. 124; *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265; *Stevens v. Armstrong*, 6 N. Y. 435; *Deford v. State*, 30 Md. 179; *Boswell v.*

*Laird*, 8 Cal. 469; *Fanjoy v. Seales*, 29 Cal. 248; *Buffalo v. Holloway*, 7 N. Y. 498; *Sprout v. Hemmingsway*, 14 Pick. 1; *Blake v. Ferris*, 5 N. Y. 48; *Pack v. New York*, 8 N. Y. 222; *Laughler v. Pointer*, 5 Barn. & C. 558; *Bisbee v. Boden*, 84 Mo. 63; *Hallihan v. Hannibal & St. J. R. Co.* 71 Mo. 116; *Gordon v. Livingston*, 12 Mo. App. 267; *Kinealy v. Chicago, K. O. & N. R. Co.* 69 Mo. 666; *Mann v. Chicago, R. I. & P. R. Co.* 86 Mo. 350; *Speed v. Atlantic & P. R. Co.* 71 Mo. 308.

The injury which plaintiff suffered was not proximate to the wrong attributable to the defendant. A voluntary action intervened between the act charged and the injury. The defendant placed the car on its main track; it was thence moved to Pickle's switch by himself or servants and placed on a grade, and from thence put in motion.

*Henry v. St. Louis, K. C. & N. R. Co.* 76 Mo. 288; *Seale v. Guif, O. & S. F. R. Co.* 65 Tex. 274; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55; *Proctor v. Jennings*, 6 Nev. 88; *Doggett v. Richmond & D. R. Co.* 78 N. C. 305; *Wood v. Lake Shore & M. S. R. Co.* 49 Mich. 370; *Pearson v. Duane*, 71 U. S. 4 Wall. 605, 18 L. ed. 447; *Francis v. St. Louis Transfer Co.* 5 Mo. App. 7; *Kistner v. Indianapolis*, 100 Ind. 210; *Fullman Palaces Car Co. v. Barker*, 4 Colo. 344; *Scheffer v. Washington, V. M. & G. S. R. Co.* 105 U. S. 249, 28 L. ed. 1070; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 32; *Blake v. Newfield*, 68 Me. 365; *Pennsylvania Co. v. Marion*, 2 West. Rep. 284, 104 Ind. 239; *Hyde v. Jamaica*, 27 Vt. 458; *People v. Rockwell*, 39 Mich. 508; *Michigan Cent. R. Co. v. Burrows*, 38 Mich. 6; *Morrison v. Davis*, 20 Pa. 171; *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill. 39; *Pittsburgh, C. & St. L. R. Co. v. Staley*, 41 Ohio St. 118; *Selleck v. Lake Shore & M. S. R. Co.* 58 Mich. 195; *Gould v. Chicago, B. & Q. R. Co.* 66 Iowa, 590; *Jackson v. Nashville U. & R. Co.* 13 Lea, 491; *Smith v. Western U. Teleg. Co.* 8 Am. & Eng. Corp. Cas. 22.

Mr. Samuel P. Sparks, for respondent:

The Railway Company owed Roddy, as the servant of Pickle, its contractee, a legal duty to furnish cars with which to perform his master's work in safety.

*Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; *Wood, Mast. and S. pp.* 910-921, note; *Heaven v. Pender*, 49 L. T. N. S. 857, 17 Rep. 511; *Eason v. Sabine & B. T. R. Co.* 65 Tex. 577; *Carroll v. Minnesota Valley R. Co.* 18 Minn. 30; *Horner v. Nicholson*, 56 Mo. 220; *Wright v. London & N. W. R. Co.* L. R. 1 Q. B. Div. 252;

**NOTE.**—Duty of railway company to furnish proper cars.

A railway company is bound to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry. *Lyon v. Wells*, 6 East, 428; *Shaw v. York & N. M. R. Co.* 13 Q. B. 247.

It will be liable for injury from the defects of a car, even if it belongs to another company, if it adopts it for the purposes of its own transit. *Combe v. London & S. W. R. Co.* 81 L. T. N. S. 612. But it is sufficient if the company provides a carriage which, without extraordinary accident, will probably perform the journey. *Amies v. Stevens*, 12 L. R. A.

1 Strange, 128; *Great Western R. Co. v. Blower*, 41 L. J. C. P. 268, L. R. 7 C. P. 655.

The company is required to have suitable brakes upon its cars and in suitable repair; and if it neglects this duty, and an accident results from such neglect, liability attaches for resulting injuries. *Costello v. Syracuse, B. & N. Y. R. Co.* 65 Barb. 92; *Illinois Cent. R. Co. v. Baehes*, 55 Ill. 379.

Liability of railroad company as carrier for injuries from defects in cars and appliances. See note to *Dodge v. Boston & B. S. S. Co. (Mass.)* 2 L. R. A. 83.

Duty to furnish cars for transportation and for safe mode of delivery. See note to *Duntley v. Boston & M. R. (N. H.)* 9 L. R. A. 449.

*Holmes v. North Eastern R. Co.* L. R. 4 Exch. 254, affirmed L. R. 6 Exch. 128; *Shearm. & Redf. Neg.* 8d ed. § 54a, p. 69.

A legal privity exists between one contracting party and the servants of the other when they are exposed to risks arising from some duty or obligation by reason of the contractual relation.

*Lake Superior Iron Co. v. Erickson*, 89 Mich. 492; *Whittaker's Smith*, Neg. 1st Am. ed. p. 2; *Abraham v. Reynolds*, 5 Hurlst. & N. 141.

Actionable negligence consists in the failure to exercise ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care, by which failure the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.

*Heaven v. Pender*, 49 L.T. N. S. 357; *Bishop*, Non-Cont. L. § 436, and note.

Privity of contract is not always essential to create a liability in the case; it may arise as well out of the relative situation of the parties.

*Stewart v. Harvard College*, 19 Allen. 58; *Wood, Mast. and S.* p. 912; *Lancaster v. Connecticut Mut. L. Ins. Co.* 10 West. Rep. 409, 92 Mo. 460; *Whittaker's Smith*, Neg. p. 2.

The injury complained of was not due to any negligence on the part of Roddy or his master in handling the car with the defective brake after it was furnished by the Railway Company, but was due wholly to its act in furnishing a car with a defective brake. The company could not shift its responsibility for this default on to Pickle, who was in no way responsible.

*Lancaster v. Connecticut Mut. L. Ins. Co.* supra; *Horne v. Nicholson*, 56 Mo. 220.

Notwithstanding that Roddy was on the track and handling the property of appellant, he did not become its servant thereby, nor was he merely a volunteer, for he was engaged at the moment of the injury in expediting the work of his master.

*Abraham v. Reynolds*, 5 Hurlst. & N. 141; *Bacon v. Sabine & E. T. R. Co.* 65 Tex. 577; *McIntire Street R. Co. v. Bolton*, 1 West. Rep. 65, 43 Ohio St. 224, 54 Am. Rep. 203, 21 Am. & Eng. R. R. Cas. 501; *Holmes v. North Eastern R. Co.* L. R. 4 Exch. 254; 2 Thomp. Neg. § 42, p. 1045.

It was not only the duty of the Railway Company but it assumed, by its contract with Roddy's master, to furnish cars with safe and whole brakes.

*Hanna v. Chattanooga & N. R. Co.* 6 L. R. A. 727, 88 Tenn. 810.

The causal connection between the acts of defendant in furnishing the car with the defective brake and the injury of plaintiff is so plain that there is no room for any doubt about it.

*Jucker v. Chicago & N. W. R. Co.* 52 Wis. 180; *Campbell v. Stillwater*, 32 Minn. 308; *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 Tex. 148.

An employé has a right to assume that the master has done his duty in supplying suitable and safe machinery.

*Parsons v. Missouri Pac. R. Co.* 12 West. Rep. 615, 94 Mo. 286; *Sellers v. Richmond & D. R. Co.* 94 N. O. 664.

A railroad company permitting another company to use its track is liable to an employé of 12 L. R. A.

the latter for damages caused by a failure to keep the track repaired.

*Smith v. New York & H. R. Co.* 19 N. Y. 127; *Sawyer v. Minneapolis & St. L. R. Co.* 38 Minn. 103; *Killian v. Augusta & K. R. Co.* 79 Ga. 284.

*Macfarlane, J.*, delivered the opinion of the court:

This is an action for damages on account of serious personal injuries received by plaintiff by reason of alleged negligence on the part of defendant in furnishing a defective car which plaintiff was required to handle. The petition charges and the evidence shows that the main line of defendant's road between St. Louis and Kansas City passes through the Town of Warrensburg, in Johnson County; that about three miles northwest of the Town of Warrensburg are extensive stone quarries owned and operated by one Pickle. Defendant owns and operates a branch railroad running out from Warrensburg to these quarries, which is used for transporting the stone taken from the quarries. From this branch road, at a point near the quarry, was a switch, which connected the road with another railroad track running into the quarry. This latter track was owned by Pickle, and was used for loading stone upon the cars. Cars intended for transportation of stone were brought out on this branch road, and were left standing on this quarry track, or convenient thereto, by defendant, and were then handled by Pickle until loaded, when they were carried out by defendant. Plaintiff at the time of his injury was in the employ of Pickle, working in the quarry, and had been so employed for about thirteen years. At the time of his injury a part of his duty was to load stone into the cars by means of a derrick erected near the quarry and quarry track. After the empty cars had been placed on the quarry track they were managed, controlled, and, when necessary, moved to proper position for loading, by Pickle and the men in his employ. This duty of moving cars frequently devolved upon plaintiff. The grade to the quarry from the branch road was descending, and brakes were required to hold cars in position. Plaintiff testified, in substance, that on the 18th of June, Antoine Pickle, manager of the quarry, directed him to load a car with stone. Two flat-cars stood upon the quarry track, 50 or 60 feet from the derrick. He got upon the north car, nearest the derrick, and found the brakes set. He walked on top of the cars to the back end of the south car, and, as he supposed, set the brake tight on that one. He then uncoupled the cars, let the brake off the north one, sat on the end of the other, and with his feet put the north car in motion. He then got down on the ground between the cars, and with his hands—one on the draw-head, and the other on the end of the car—commenced pushing the car to the derrick. He had moved but a short distance when the south car struck him, crushing his arm, and causing permanent injury. It appeared from other evidence that while the brake, from what could be seen from the top of the car, and from what could

be known from turning it, appeared to be in good condition, it was found that the rod connecting the brakes beneath the car was down, and the brake-shoe was in consequence too low to touch the wheel, and turning the brakes in the usual way did not set the shoe against the wheel. The brake was, in that condition, wholly useless. When the first car was moved out of the way, the second was set in motion by its own weight, and followed the first on the descending grade, and struck plaintiff as stated. The evidence showed further that the defect in this brake could have been easily detected by an examination beneath the car. Cars were frequently sent out with defective brakes. Plaintiff testified himself that "half the time they had no brakes on them." Pickle kept chains, which were used in making temporary repairs of the brakes, and this one could have been easily repaired with such chain. The superintendent of the quarry usually examined the cars, and notified the employes if any were defective. The contract between Pickle and the Railroad Company, if in writing, was not offered in evidence. From the testimony of Pickle, the superintendent, the arrangement between them was that defendant should furnish cars at the quarry when requested. The cars were left on the track near the quarry, and were handled at the quarry and loaded by the men employed and paid by Pickle. Defendant had no control over Pickle's men. After the cars were loaded they were billed from the quarry to their destination and charges for transportation were paid from the quarry. Defendant, when notified, received at the quarry, and carried off, the loaded cars. Defendant's answer was a general denial and plea of contributory negligence. Defendant offered no evidence, and asked no instruction except in the nature of a demurrer to the evidence, which was refused. At the request of the plaintiff the court gave to the jury the following instructions: "(1) The court instructs the jury that if you should find and believe from all the evidence in the case that at the time of the injury complained of by plaintiff he was engaged at work in the employment of one Pickle and in his interest, and that defendant had furnished cars to said Pickle to be loaded by him with stone belonging to said Pickle for transportation by defendant over its road for pay, on or about the 18th day of June, 1886; that of the cars so furnished by defendant there was one the brake of which needed repairing at the time the same was furnished, and for the want of such repairing was insufficient, with proper use and management, to fasten, manage and control said car; and that defendant knew of the condition of the brake, or by the exercise of reasonable diligence could have known its condition; and that plaintiff did not know the condition of said brake until the happening of the injury complained of, and the defect in said brake was not patent to plaintiff, or such as would have been disclosed to him had he been ordinarily observant; and that plaintiff, while engaged in the service of said Pickle, loading another of defendant's cars, the car to which was fixed

the brake being out of repair ran down and against plaintiff, whereby he was hurt, injured and damaged; and that the injury occurred without the fault or negligence of plaintiff contributing thereto,—then your findings should be for plaintiff. (2) The court instructs the jury that if you should find and believe from all the evidence in the case that the defendant furnished cars to said Pickle to be by him loaded with stone at his quarries for transportation over its railroad, then it became and was the duty of the defendant to have furnished cars provided with appliances in such a state of repair as that the said Pickle and his employes could, with proper management and reasonable care and prudence, safely manage and control same while so engaged in said work. And if you should find that plaintiff, before the time of the alleged injury, did not know that defendant's cars were not in such condition or repair, he had a right to presume that defendant had done its duty, and that the appliances to said car were in such state of repair and condition as to safely manage and control said cars, with proper use and management, to do the work for which such appliances were designed, and to rely and act upon such presumption." "(4) The court further instructs the jury, if you should find and believe from the evidence in the case that the plaintiff did not know of the alleged condition of the brake referred to in the testimony, until after the happening to him of the injury referred to in testimony, and that the condition of said brake would not have been observed by him by the exercise of ordinary and reasonable prudence and observation on his part, it was not incumbent on plaintiff to search for and examine for defects in its condition not so observable, but that he had the right to assume that such brake was in a suitable and safe condition as to its being repaired; that it would, with proper management, do the work for which it was designed." The jury found for plaintiff, and assessed his damages at \$6,000. Defendant appealed.

The action is for negligence. It is charged in the petition "that it was the duty of said defendant to furnish cars to said Pickle, properly constructed, and provided with suitable and safe brakes, properly constructed and sufficiently repaired, and in condition to manage, hold, control and stop its said cars; but plaintiff charges that the said defendant, by its carelessness and negligence, failed to furnish cars so properly constructed, and with suitable and safe brakes, constructed and sufficiently repaired to manage, hold and control the same." Definitions of actionable negligence have been given in great variety of forms by courts and text-writers, but, whatever the form of simple definition, there is unanimity of expression and opinion that it consists in the breach or non-performance of some duty which the party charged with the negligent act or omission owed to the one suffering loss or damage thereby. Brett, *M. R.*, in *Heaven v. Pender*, 17 Rep. 511, defines "actionable negligence" "to consist in the failure to exercise ordinary care or skill towards a person to whom the defend-

ant owes the duty of observing ordinary care, by which failure the plaintiff, without contributory negligence on his part, has suffered injury to his person or property." This definition is cited and approved by counsel for plaintiff, and may be accepted for the purposes of this case. The question then, is, Did defendant owe plaintiff the duty of using ordinary care to furnish cars in which to load stone, which were properly constructed and provided with suitable brakes? It is insisted that the duty arose either out of the contract between defendant and Pickle, or by virtue of the relationship between plaintiff and defendant, arising out of their respective duties under the contract. Assuming that the contract between defendant and Pickle either expressly or by implication imposed upon the former the duty to supply the latter with cars provided with suitable brakes, and that there was a breach of that duty, whereby plaintiff was injured, does the contract afford him indemnity for his injuries? The right of a third party to maintain an action for injuries resulting from a breach of a contract between two contracting parties has been denied by the overwhelming weight of authority of the state and federal courts of this country and the courts of England. To hold that such actions could be maintained would not only lead to endless complications in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others which parties would not voluntarily assume. *Winterbottom v. Wright*, 10 Mees. & W. 109; *Burdick v. Chendle*, 26 Ohio St. 893; *Maguire v. McGee* (Pa.) 12 Cent. Rep. 414; *Necker v. Harrey*, 49 Mich. 518; *District of Columbia Nat. Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621; *Deford v. State*, 30 Md. 195; *Marrin Safe Co. v. Ward*, 46 N. J. L. 19; *Sprout v. Hemmingway*, 14 Pick. 1; *Mann v. Chicago, R. I. & P. R. Co.* 86 Mo. 350; *Lampert v. Laclede Gas-Light Co.* 14 Mo. App. 376; *Gordon v. Livingston*, 12 Mo. App. 267. The rule is put upon two grounds, either of which is unquestionably sound. One ground is given by the court in the opinion in *Winterbottom v. Wright*, as follows: "If we were to hold that plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that there is no reason why we should not go fifty." The other ground is thus stated in the New Jersey case above cited: "The object of parties in inserting in their contracts specific undertakings with respect to the work to be done is to create an obligation *inter se*. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts." Plaintiff, not being a party to the contract, cannot maintain this action on account of injuries resulting from any breach of duty defendant owed Pickle, 12 L. R. A.

arising purely out of the terms of the contract between them.

2. It is clear from the evidence that plaintiff was in no sense the servant or employé of defendant. He was employed and paid by Pickle, and was subject only to his control and direction. Defendant had no authority over him, had no power to discharge him for any cause, and had no contract with him. The relation between plaintiff and defendant was not that of master and servant, and the rules of law peculiarly applicable to the duties and liabilities of one to the other have no application. Plaintiff shows no cause of action growing out of any duty defendant owed him arising from the relationship of master and servant. *Wood, Mast. and S.* §§ 1, 281; *Speed v. Atlantic & P. R. Co.* 71 Mo. 808.

3. There is a class of cases in which one has been held liable to another in the absence of any contractual or other relationship between them. The rule in such cases is laid down in *Sutherland on Damages* (vol. 2, p. 485), as follows: "Where an act of negligence is imminently dangerous to the lives of others the guilty party is liable to the one injured by the negligence, whether there be a contract between them violated by that negligence or not." The principle is illustrated by the case of *Thomas v. Winchester*, 6 N. Y. 397. That was a case in which a dealer in drugs had carelessly labeled a poison as harmless medicine, and sent it, so labeled, into the market. It was held that the dealer was liable to any person who might be injured by the use of the drug. In considering what articles can be regarded imminently dangerous, the same court, in *Loop v. Litchfield*, 42 N. Y. 357, says: "They are instruments and articles in their nature calculated to do injury to mankind, and are generally intended to accomplish that purpose; they are essentially and in their elements instruments of danger." It cannot reasonably be contended that a railroad car, though supplied with defective brakes, is an imminently dangerous instrument. Unless put in motion it is perfectly harmless, and when in motion it is not essentially dangerous. We do not think defendant incurred any liability to plaintiff by the simple act of leaving a defective car upon the track. *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265; *Gurley v. Missouri Pac. R. Co.* 93 Mo. 445, 12 West. Rep. 330.

4. What, then, was the true relationship between these parties, and what, if any, duty did defendant owe to plaintiff, as the employé of Pickle? Defendant was engaged in the general business of a common carrier. It operated a railroad between St. Louis and Kansas City. Pickle was the owner of large and valuable stone quarries, situated some distance from defendant's road. The stone taken from these quarries was merchantable, and was a subject of commerce. The stone was of value only when it could be transported to market. It thus became a matter of mutual interest and profit to defendant and Pickle to provide means for the transportation of this merchandise from the quarry to points at which it could be sold. A con-

tract was entered into between them, by which defendant built a branch or spur road from its main line to the quarries, and also tracks from this spur into the quarries. These were paid for by Pickle. In order to facilitate the transportation of stone, which was beneficial to both parties, it was agreed that defendant should, when cars were needed, place them on the quarry tracks, or conveniently near to them, and that Pickle should move them, when needed, into position for loading, and when loaded defendant should take them out, and transport them to their destination. Plaintiff was employed by Pickle,—a part of his duty consisting in moving and handling these cars. It did not appear from the evidence what, if any, compensation Pickle received for loading the cars. The manner of conducting the business is thus detailed by Pickle, superintendent: "The Missouri Pacific Railway built that track on the west side of the quarry. Pickle paid for it. The company claims it. They simply constructed it for Pickle. About shipping stone, the bill reads from Warrensburg, of course; but the freight commences from the quarry. The person to whom these cars are sent pays the freight. As to rates, they allowed us a certain amount off from Warrensburg to the quarry. I believe it is \$2.50 or \$5. The freight is included from the quarry, not from town. We don't charter these cars to haul stone to the main line, but charter the cars to wherever the cars are consigned. We don't simply charter the cars to haul the stone from the quarry to Warrensburg. If we have orders to Warrensburg we bill to Warrensburg. All that the railroad company had to do with the movement of these cars is simply to haul the empties out there, and when we have loaded them the engine comes out and takes them away; that is all they have to do with it. That is not the first car that they sent out there that was out of fix. I have seen as many as ten cars standing there with only two brakes on them."

Under this evidence it is clear that what was to be done by the respective parties under the contract was for their mutual profit, and each was a contractor with the other to perform a particular part of the work necessary to carry out the common purpose. It is now well established that the employer of a contractor is not responsible for the negligence of the contractor or his servants in case the contractor is given entire freedom in the use of means to accomplish the result. Where the employer, however, reserved the right to direct the manner of performance in any particular, or where he undertakes to provide any of the instrumentalities, he owes to the contractor and his employes the duty of care in respect to such matters over which he retains control, or undertakes to perform. *Whittaker's Smith*, Neg. 172-174; *Wood, Mast. and S. § 337*; *Stewart v. Harvard College*, 12 Allen, 58; *Lancaster v. Connecticut Mut. L. Ins. Co.* 92 Mo. 480, 10 West. Rep. 409; *Horner v. Nicholson*, 56 Mo. 220; *Devlin v. Smith*, 89 N. Y. 470; *Coughtry v. Globe Woolen Co.* 56 N. Y. 124; *Deford v. State*, 30 Md. 179; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; *Smith v. New* 12 L. R. A.

*York & H. R. Co.* 19 N. Y. 127; *Hanna v. Chattanooga & N. R. Co.* 88 Tenn. 810, 6 L. R. A. 727; *Killian v. Augusta & K. R. Co.* 79 Ga. 241; *Conlon v. Eastern R. Co.* 185 Mass. 195, 15 Am. & Eng. R. R. Cas. 99.

We think each of these contracting parties owed to the other and his employes the duty of properly discharging his part of the joint undertaking in respect to any matter exclusively devolving upon him. Pickle had nothing to do with selecting or providing the cars. That duty was intrusted entirely to defendant. They were intended for the use of Pickle and his servants in discharging his part of the contract, and we think the obligation rested upon defendant to use ordinary care to provide such as would be reasonably safe for such use.

5. The evidence does not show conclusively such contributory negligence on the part of plaintiff as should, as a matter of law, preclude a recovery. Plaintiff, in testifying as a witness, it is true, admitted that one half the cars furnished Pickle by defendant were without brakes. On the other hand, Pickle's superintendent testified that he generally examined the cars himself, and, if any were found defective, he gave notice of such defects to those who handled them. Whether, under these circumstances, and the fact that the brakes appeared, from plaintiff's position on top of the car, and from his efforts to set them, to be in good condition, plaintiff used such precautions as ordinary care and prudence required of him, was a question for the jury. It is not every case in which there is no conflict in the facts that the court will declare, as a matter of law, the legal effect of the evidence. If upon all the facts and circumstances there is room for fair and sensible men to differ in their conclusion the jury should decide. *Petty v. Hannibal & St. J. R. Co.* 88 Mo. 306, 8 West. Rep. 297; *Buesching v. St. Louis Gas-Light Co.* 73 Mo. 219; *Reilly v. Hannibal & St. J. R. Co.* 94 Mo. 609, 13 West. Rep. 658; *Thorpe v. Missouri Pac. R. Co.* 89 Mo. 651, 6 West. Rep. 671; 8 Wood, Railway Law, 1460; *Wood, Mast. and S.* 761.

6. The instruction, in directing the jury that plaintiff had the right to assume that defendant would furnish Pickle with cars properly supplied with brakes, in good repair and condition, properly declared the law as applied to the duty a master owes his servant. But if the servant was informed by the master, or had learned by observation, or from any other source, that some of the instrumentalities furnished him were defective and dangerous, and, without promise that they would be repaired, he continued in the master's service, then the risk of injury from such defective instrumentalities would become an incident to such service, which he would assume. *Price v. Hannibal & St. J. R. Co.* 77 Mo. 508; *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 66; *Devitt v. Pacific R. Co.* 50 Mo. 302; *Thorpe v. Missouri Pac. R. Co.* 89 Mo. 650, 6 West. Rep. 671.

While the relation of master and servant did not exist between these parties, defendant owed to plaintiff the observance of rea-

sonable care in the selection of its cars for his use, which is the same degree of care the master is required to observe in providing his servant with the instrumentalities for carrying on his business. No reason can be seen why, if plaintiff knew that defective and dangerous cars were frequently left for his use, he would not assume the risk of injuries from such defects as could have been ascertained by reasonable inspection on his part. While defendant may have been negligent in the discharge of the duties it owed to plaintiff, if plaintiff neglected such precautions as common prudence demanded under all the circumstances, he was guilty of contributory negligence, which should have defeated a recovery. In view of the fact that plaintiff himself testified that one

half the cars were without brakes, it was not proper to instruct the jury that he had the right to rely on defendant's performance of its duty in furnishing such as were properly supplied with brakes. The knowledge plaintiff had of the common neglect of defendant imposed upon him, for his own protection and safety, the duty of reasonable care in ascertaining for himself the condition of the cars before he attempted to handle them, and a failure to do so would constitute contributory negligence on his part. Whether such care was used on the occasion of his injury should have been submitted to the jury.

For the errors mentioned *the judgment is reversed*, and cause remanded.

All concur.

## PENNSYLVANIA SUPREME COURT.

### CITY OF PHILADELPHIA

v.

John BAXTER, Impleaded, etc., *Appt.*

(....Pa....)

**A certificate by the register of unpaid taxes that he finds none against certain land is conclusive in favor of one who purchases the land in reliance upon the certificate.**

(May 12, 1891.)

**A PPEAL** by defendant Baxter from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County, in favor of plaintiff in an action brought to enforce payment of delinquent taxes. *Reversed.*

The facts are stated in the opinion.

*Mr. Thomas B. Taylor*, for appellant:

The certificate should have been admitted as evidence of an estoppel.

Acts and admissions of the officers of municipal corporations in the line of their official duty and within the scope of their authority are binding upon the body they represent.

Dillon, Mun. Corp. § 237, *note 1*, p. 262.

The acts of the receiver in this case are the acts of the City.

*Philadelphia v. Matchett*, 7 Cent. Rep. 907, 116 Pa. 103; *Lawrence v. Philadelphia*, 14 W. N. C. 421.

Where the conduct of a party has been such as to induce action by another, he shall be precluded from afterwards asserting, to the prejudice of that other, the contrary of that of which his conduct has induced the belief.

*Hill v. Epley*, 31 Pa. 384; *Philadelphia v. Gladding*, 26 W. N. C. 319. See also *Gray's App.* 10 W. N. C. 458; *Waters' App.* 35 Pa. 525; *Brooks v. New York, L. E. & W. R. Co.* 1 Cent. Rep. 123, 108 Pa. 529.

Following are several cases from other States illustrating the doctrine of estoppel as applied to municipal corporations:

*Curnen v. New York*, 79 N. Y. 518, 520; *Union Depot Co. v. St. Louis*, 76 Mo. 894; *New Haven, M. & W. R. Co. v. Chatham*, 42 Conn. 465; *Society for Savings v. New London*, 29 Conn. 193; *Chicago & N. W. R. Co. v. People*, 91 Ill. 251; *Martel v. East St. Louis*, 94 Ill. 67.

*Messrs. Isaac H. Shields, Abraham M. Bettler and Charles F. Warwick* for appellee.

*Williams, J.*, delivered the opinion of the court:

In the recent case of *Crouse v. Murphy*, (Pa.) 12 L. R. A. 58, in which an opinion was filed at the present term, we had occasion to note the evident purpose pervading the legislation of this State to protect bona fide purchasers of real estate against unrecorded liens and incumbrances. The same general subject is brought to our attention from a different standpoint by the facts now before us. These are that Baxter purchased in 1878 a house and lot on the south side of Indiana Street in the twenty-eighth ward of the City of Philadelphia from one F. C. Paxson. His conveyancer in order to secure for his employer an unincumbered title to

**NOTE.**—Taxation, landowner cannot be prejudiced by negligent acts of tax officers.

The owner of property assessed for taxes should not be caused to suffer by reason of the acts or omissions of the taxing officers. *Baird v. Cahoon*, 5 Wats. & S. 540.

So if the owner applies at the proper office for a list of taxes standing against his land on the books of the office, and through mistake of the officer an incomplete list is furnished, which he pays, it will be deemed a full payment so far as to invalidate a sale for the taxes omitted by the officer. *Breisch* 12 L. R. A.

*v. Coxe*, 31 Pa. 386; *Jiska v. Ringgold Co.* 57 Iowa, 680.

But the mistake of the officer in merely saying that there are no back taxes due will not prevent their recovery, he being under no obligation to give such information. *Elliott v. District of Columbia*, 3 McArthur. 396.

So where it appears that the tax for the land sold had been actually paid, but by some misunderstanding of the receiving officer it was wrongly applied, the sale would be void and would pass no title. *Hickman v. Kempner*, 35 Ark. 505; *Dougherty v. Dickey*, 4 Wats. & S. 146; *Laird v. Hlester*, 24 Pa. 452.

the premises he desired to buy, applied to the register of unpaid taxes and requested him to "certify any taxes registered against the above property in the name of Franklin C. Paxson or that of any other person." On the 15th of May, 1878, he received from the register's office a certificate properly executed setting forth that, "on examining the register of unpaid taxes for the City of Philadelphia for the years 1878 to 1877 inclusive, I find nothing against the above described premises except as per bill of 1877."

The conveyancer upon the receipt of this certificate of no lien except for taxes of 1877 concluded the transaction and the purchase money was paid over. Three years afterwards the City, in 1880, filed a claim against the same premises for the taxes of 1875. A writ of *act. fa.* was issued on the claim in 1885, which was eight years after the certificate was made and ten years after the taxes are alleged to have accrued. The defendant replied to the writ with the certificate of the register that the City had no lien on the premises for the taxes of 1875 and with the fact that relying on the certificate he had paid over the purchase money. His position was that if the certificate was true the city had no lien even if the taxes were unpaid. If it was untrue, he having been misled by it into paying out the money when it was in his hands, the city was estopped from alleging its untruth against him.

The court below entertaining a different opinion upon the effect of the certificate directed a verdict in favor of the City. The defendant appealed and assigns the ruling of the learned judge in the court below as error. The effect of the certificate is therefore the only question before us. It is well to remember at the outset that taxes upon seated property were originally a personal charge against the owner for which his personal property and his person were liable to seizure, but which were not a lien upon land. *Burd v. Ramsay*, 9 Serg. & R. 109. In regard to unseated land a different rule prevailed, the land being treated as the debtor, and not the owner. Payment was compelled by the sale of the land without any personal demand on the owner. In order to facilitate their collection the Legislature has from time to time made seated taxes a lien on the lands on which they are assessed by a series of Acts of Assembly applicable to different portions of the State. In Philadelphia they were made a lien under certain limitations as early as 1824 by an Act passed on the third of February in that year. It provided that taxes imposed on real estate in Philadelphia "shall be a lien on the said real estate on which they may hereafter be imposed or assessed" and that such lien should have priority over liens for debts due to individuals by recognizance, mortgage or judgment against the same real estate. The duration of this lien was limited by the Act of 1845 to the first day of July in the year following that for which the tax was imposed unless before that time the tax was registered in a book to be kept by the register of unpaid taxes for that purpose. If it was registered in time then the lien was continued to

the end of five years from the time the lien began. If before the expiration of the five years a claim was filed for the tax in the office of the prothonotary, this continued the lien for five years from the entry of the claim. The tax was thus made a lien during the year for which it was levied and until the first day of July following without any formal registry. The lien thereafter was lost unless the tax was entered on the registry of unpaid taxes, and at the end of five years it ceased altogether unless proceeded for by claims filed in the court of common pleas. A purchaser was therefore bound to take notice of the current taxes for six months after the end of the year. He was then bound to take notice of the registry for the balance of five years. After five years he was not bound to inquire beyond the lien dockets. To enable him to know with certainty what the registry showed, the Act of 1845 made it the duty of the register "to furnish certificates of all taxes and claims which are a lien on real estate," and provided a fee to be charged for such service. The certificate held by Baxter was made under the direction of the Act of 1845. Does it protect the purchaser who procures and acts upon it? The court below held that it did not and gave three reasons for entertaining that opinion: 1. The register is an elective officer over whose selection and term of office the city has no control and for whose certificates she is therefore not responsible. 2. The law does not make it his duty to certify to the absence of liens, and when he gives such a certificate he "becomes the special agent of the purchaser" who asks for it. 3. The certificate, by reason of its form, or want of it, imposes no liability even if it was the duty of the register to make certificates of search and no lien.

As authority for the first of these positions, *Alcorn v. Philadelphia*, 44 Pa. 348, is cited. The plaintiff in that case sought to hold the city for the negligence of the city surveyor in locating the lines of plaintiff's lot at his request. This court held that the act of the city surveyor was in no sense that of the city nor was the duty in which he was engaged a municipal duty. The location of lines between adjoining owners, and surveying lots, was held to be "not a duty incumbent on cities in their corporate capacity . . . but a private one falling on the lotowners themselves." The city surveyor, like county surveyors and other public officers, is elected not to represent the municipality but to serve the public as occasion may require at the instance and upon the employment of individuals. But the collection of taxes is a municipal purpose. They are levied, collected and disbursed under the authority and direction of the city by officers appointed or elected for the purpose who represent the city. When levied the duplicates are charged to the register. He is the only authorized collector and receiving officer. He is required to open his books for the receipt of taxes on the first day of January of the year for which the taxes are assessed. His daily collections must be reported to the city comptroller and his daily cash receipts deposited in the banks



designated for that purpose. Taxes not paid during the year or within fifteen days thereafter he is required to enter upon the register of unpaid taxes in order to continue their lien. If this is not done the lien ceases and the real estate may pass by sale discharged therefrom. *Smalls v. Donohue*, 11 W. N. C. 230. The entries on the register if made in time are valid liens on the real estate affected by them, and must be taken notice of and provided for in case of sale. These liens are not the result of legal proceeding in a court of record which are notice to everybody, but of the act of the City in carrying the unpaid taxes upon the book kept for that purpose in the office of her receiving officer. This is the book of the City, made up by the officials who represent her, and remaining in their custody. It is the evidence of her demands upon real estate within her borders. A purchaser must take notice of this book and to enable him to know with certainty what appears upon it the law makes it the duty of the register of unpaid taxes to certify the liens against any particular piece of real estate. This is a specific duty imposed upon him by law as the representative of the City, the collector of its taxes, and the custodian of its records. In its discharge he represents his principal, speaks for it, and binds it. If his certificate is false and misleading, one who acts upon it in good faith has a right to insist that the City is bound by it. The City is not above the duty to deal fairly and justly with its citizens and to speak the truth to them when the duty to speak for their information rests clearly on it.

The second reason does not seem to us tenable. When taxes were made a lien on the real estate on which they were levied in the City of Philadelphia it was necessary to provide some record of the liens unpaid at the end of the current year. For this purpose a book was provided upon which unpaid taxes were to be entered. Taxes not appearing there were presumed to be paid and they were not liens. Taxes appearing there were valid liens upon the real estate on which they were assessed. This book was thus made the lien docket of the City. It was the proper and the only reliable source of information open to the interested inquirer. It was kept by,

and in the custody of, the register, whose duty it was to certify liens appearing upon it. When applied to it was his duty as the representative of the City to state truly the liens against the real estate inquired about. Baxter's conveyancer applied for a search, which made an examination for five years necessary. The register certified that he had examined for five years, viz., 1873 to 1877 inclusive, and that there were no taxes registered against the lot except those of 1877. It was as important to the purchaser to know that there were no taxes registered for 1875 as to know that there were taxes unpaid for 1877. It was the amount of liens the purchaser was interested to know and that the City was bound to tell him, for they were to be taken into consideration and adjusted in the purchase about to be closed. In giving this information he was in no sense the agent of the purchaser. He was discharging an official duty, viz., certifying the liens against the lot inquired about, and he was under a legal obligation to certify their amount truly.

Nor do we regard the form of the certificate as a matter of any consequence in this case. The purchaser applied for and had a right to receive a certificate in proper form informing him of the exact amount of the demands of the City for unpaid taxes. A certificate intended to convey the needed information was furnished, and relying on the truth of its statement the title was taken and the purchase money paid over. Having thus led the purchaser to pay the amount of the taxes of 1875 to his vendor as purchase money, the City cannot now be permitted to set up the mistake of its officer as a reason for compelling the payment of the money a second time. If it was a mistake, as it was acted upon in good faith by the purchaser, the City cannot now assert a lien for the taxes of 1875 nor deny the facts which the certificate asserted.

The subject of the want of form in a certificate and of negative statements therein was considered in *Ziegler v. Com.*, 12 Pa. 227, in which a certificate similar to the one before us was held sufficient in form to justify a recovery.

*The judgment in this case is reversed, and a venire facias de novo awarded.*

## UNITED STATES CIRCUIT COURT, MIDDLE DISTRICT OF TENNESSEE.

UNITED STATES OF AMERICA  
v.  
JELICO MOUNTAIN COKE & COAL  
CO. et al.

(46 Fed. Rep. 432.)

### 1. Circuit courts of the United States may constitutionally be given juris-

isdiction of suits by the government to enjoin illegal combinations in restraint of interstate commerce, and it does not depend on diverse citizenship of the parties.

2. Authorizing an injunction by a federal court against illegal combinations in restraint of interstate commerce, although they are made misdemeanors, does not violate the provisions of the Constitution of the United States requiring the trial of crimes to be by jury.

NOTE.—Monopolies as public nuisances; may be restrained.

A court of equity has jurisdiction to restrain a public nuisance by injunction at suit of the State, or the people, or the municipality; and Acts of a State Legislature granting a corporate franchise 12 L. R. A.

repugnant to that clause of the Federal Constitution which authorizes Congress to regulate commerce cannot be sustained. *Gibbons v. Ogden*, 23 U. S. 9 Wheat. 1, 6 L. ed. 23; *North River S. B. Co. v. Livingston*, 3 Cow. 718.

Every contract, combination in the form of trust

**3. A combination between coal producers in one State and coal dealers in another, to regulate prices of coal in a certain city and to divide any advances in price in excess of the advances in freights, and tending to monopolize the coal trade of the city among members of the combination, is in violation of the Act of Congress of July 2, 1890, prohibiting conspiracies in restraint of trade and commerce.**

(June 4, 1891.)

**S**UIT in equity to enjoin defendants from unlawfully combining to restrain interstate trade and commerce in coal at Nashville contrary to the provisions of a United States statute. *Relief granted.*

On September 25, 1890, a petition for injunction was filed setting forth as follows:

That the defendants, a number of whom are Kentucky mining companies, and another number are coal dealers in Nashville, Tennessee, secretly entered into an illegal contract and combination in the form of a trust, and entered into a conspiracy with one another, and engaged at Nashville in a combination and conspiracy which restrained the trade and commerce in coal at Nashville between the States of Kentucky, Alabama and Tennessee.

That the defendants combining and confederating, by articles of agreement more particularly set forth in the decision (see decision), under the name of the "Nashville Coal Exchange" monopolized the trade in coal which is produced in Kentucky and shipped from thence to Nashville, Tennessee, contrary to the provisions of an Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"Sec. 1. Every contract combination, in the form of trust or otherwise, or conspiracy, in

restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 3. Every contract combination, in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several

or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared by statute illegal, and the persons combining are guilty of a misdemeanor (see 26 U. S. Rev. Stat. 200); and the circuit court has jurisdiction to make such temporary restraining order or prohibition as shall be deemed just in the premises. *Id.* § 4.

#### *Remedy by injunction.*

The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance. *Carleton v. Rugg*, 5 L. R. A. 198, 149 Mass. 550; *Atty-Gen. v. Hunter*, 1 Dev. Eq. 12; *People v. St. Louis*, 10 Ill. 261; *Bwell v. Greenwood*, 26 Iowa, 377; *Minke v. Hopeman*, 87 Ill. 450, 29 Am. Rep. 63.

A proceeding to abate a nuisance looks only to the property, that the use made of it constitutes the nuisance, while the proceeding to punish the offender is for the crime of maintaining the nuisance. *Carleton v. Rugg*, *supra*.

Hence a statute which gives jurisdiction in equity to abate a common nuisance, which is also declared to be a crime, is not unconstitutional as depriving a party of the right of trial by jury. See, in illustration, *Fisher v. McGirr*, 1 Gray, 1; *The License Cases*, 46 U. S. 5 How. 504, 12 L. ed. 255; *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 120, 21 L. ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 909; 13 L. R. A.

*Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 206; *Com. v. Certain Intox. Liquors*, 115 Mass. 153; *Kansas v. Ziebold*, 123 U. S. 623, 31 L. ed. 235; *People v. St. Louis and Minke v. Hopeman*, *supra*; *Atty-Gen. v. New Jersey R. & T. Co.* 3 N. J. Eq. 123, 140; *Columbia v. Jaques*, 30 Ga. 503, 512, 513; *State v. Mobile*, 5 Port. (Ala.) 230, 307, 30 Am. Dec. 564; *Atty-Gen. v. Hunter*, *supra*; *District Atty. of East Dist. v. Lynn & B. R. Co.* 16 Gray, 245; *Hamilton v. Whitridge*, 11 Md. 129; *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 426, 449, 450. *State v. Crawford*, 23 Kan. 723, 42 Am. Rep. 183. See 2 Dan. Ch. Fr. chap. 38, § 1, p. 1699; 2 Story, Eq. Jur. § 923 et seq.; *Adams*, Eq. 427 (211).

The proper proceeding in equity to restrain a public nuisance is by information by the attorney-general. *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 98, 9 L. ed. 1015.

Contracts in derogation of public rights, such as monopolies, are unlawful. See notes to *Leslie v. Lorillard* (N. Y.) 1 L. R. A. 453.

Such contracts are void. See notes to *People v. North River Sugar Ref. Co.* (N. Y.) 2 L. R. A. 33; *Carroll v. Giles* (S. C.) 4 L. R. A. 154.

Monopolies are contrary to public policy, and contracts creating them are not enforceable. See notes to *Richardson v. Buhl* (Mich.) 6 L. R. A. 457; *Pittsburgh Carbon Co. v. McMillin*, 7 L. R. A. 44, 119 N. Y. 46.

district attorneys of the United States, in their respective districts, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"Sec. 5. Whenever it shall appear to the court before which any proceeding under section 4 of this Act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

"Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this Act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"Sec. 8. That the word 'person' or 'persons,' wherever used in this Act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

The prayer of the petition is that the defendants be enjoined or otherwise prohibited from violating the provisions of the said Act of Congress, and that they be enjoined and restrained from further monopolizing and carrying on the coal trade in Nashville under the combination and confederation as aforesaid.

Mr. John Ruhm, U. S. Atty., for complainant:

The power of Congress to enact the Statute which is the basis of this law-suit is derived from U. S. Const., art. 1, § 8, subsec. 8, 18, giving Congress power to regulate commerce among the States. This power is unlimited and paramount; it is co-extensive with the entire field of commerce.

*Welton v. Missouri*, 91 U. S. 275, 28 L. ed. 347; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 16. L. ed. 23; *United States v. Marigold*, 50 U. S. 12 L. R. A.

9 How. 560, 13 L. ed. 257; Hare, Am. Const. Law, 438.

Interstate commerce consists of traffic and transportation between the States; and Congress may regulate the traffic, or the transportation, or both.

*Mobile County v. Kimball*, 103 U. S. 691, 26 L. ed. 238; *Welton v. Missouri* and *Gibbons v. Ogden*, *supra*; *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Groves v. Slaughter*, 40 U. S. 15 Pet. 449, 10 L. ed. 800; *United States v. Bailey*, 1 McLean, 234; *Brig Wilson v. United States*, 1 Brock. 423; *United States v. Marigold*, *supra*; *Kidd v. Pearson*, 123 U. S. 20, 32 L. ed. 350. See also *State v. Welton*, 55 Mo. 288; *People v. Brooks*, 4 Denio, 469; *Ogden v. Gibbons*, 4 Johns. Ch. 150, 1 L. ed. 797; *State v. Delaware, L. & W. R. Co.* 30 N. J. L. 473, 31 N. J. L. 531.

The power to regulate is unlimited, so long as it is confined to interstate commerce.

*Kidd v. Pearson*, *supra*; Tiedeman, Pol. Powers, § 202.

Congress may confer little, or much, or all, jurisdiction upon the existing inferior federal courts, or may create other courts and clothe them with jurisdiction in all matters, where the subject of legislation is within the power delegated by the Constitution.

*United States v. Union Pac. R. Co.* 98 U. S. 596, 25 L. ed. 150; *Osborn v. United States Bank*, 23 U. S. 9 Wheat. 836, 6 L. ed. 225.

In the absence of a statute the United States may become a party to a suit in the federal courts brought in its own name where it has a pecuniary interest.

*United States v. Barker*, 25 U. S. 12 Wheat. 559, 6 L. ed. 728.

Or where the subject matter arises under an Act of Congress, or where a fraud has been committed in a matter arising under an Act of Congress.

*United States v. San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747.

The power of Congress to expressly authorize a suit in the federal courts in the name of the United States has never been questioned.

*United States v. San Jacinto Tin Co.* *supra*; *Jessup v. United States*, 106 U. S. 150, 27 L. ed. 86; *United States v. Tingey*, 30 U. S. 5 Pet. 115, 8 L. ed. 66; *United States v. Bradley*, 35 U. S. 10 Pet. 348, 9 L. ed. 448; *United States v. Linn*, 40 U. S. 15 Pet. 290, 10 L. ed. 742; *Nashville v. Cooper*, 73 U. S. 6 Wall. 251, 18 L. ed. 852.

At common law contracts are held void:

1. Where their effect is in general restraint of trade.

2. Where the restraint is partial only, either as to time or place, but where it is unreasonable, or where it injuriously affects the public, or where there is no consideration to support it.

3. Where there is a combination to stifle competition, or to control the prices of the necessities of life.

4. What is an unreasonable restraint and whether or not the contract is injurious to the public is always a question of law for the court to be determined from the face of the contract.

1. Wharton, Cont. § 433; Bishop, Cont. § 517; 2 Pom. Eq. Jur. § 934.

5. Courts will not inquire whether or not the agreement entered into has in fact caused an injury to the public or has caused an unreasonable restraint. The inquiry merely is, whether the agreement has a tendency to produce the effect.

*Mitchel v. Reynolds*, 1 P. Wms. 181, and note in 1 Smith, Lead. Cas. 9th Am. ed. 712 et seq.; *Angier v. Webber*, 14 Allen, 211, and editorial note, 92 Am. Dec. 751; *Leslie v. Lorillard*, 1 L. R. A. 456, and notes, 110 N. Y. 519; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Horner v. Graves*, 7 Bing. 748; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178, 8 Am. Rep. 159; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *Taglor v. Blanchard*, 18 Allen, 870; *Crawford v. Wick*, 18 Ohio St. 190; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *West Virginia Transp. Co. v. Ohio R. P. L. Co.* 22 W. Va. 617, 46 Am. Rep. 527; *People v. North River Sugar Ref. Co.* 2 L. R. A. 38, and note, 22 Abb. N. C. 164.

The present Statute adopts these principles of the common law so far as they relate to interstate commerce, but goes one step further and removes the difficulty of investigating whether the restraint is partial or general—it applies the regulation *ex vi terminis* to “any part of interstate trade.”

Mr. James Trimble, Special Asst. to U. S. Atty., made the following additional points for complainant:

As courts of equity, the United States circuit courts, by their inherent jurisdiction, regardless of the Act of July 2, 1890, have jurisdiction of the subject matter to grant the relief prayed.

Foster, Fed. Pr. chap. 1, § 5; Story, Eq. Jur. §§ 921, 928; Morawetz, Priv. Corp. § 1048; Pom. Eq. Jur. § 1349; *Atty-Gen. v. Oleana*, 18 Ves. Jr. 211; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 91, 9 L. ed. 1012; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 518, 14 L. ed. 249; *Mississippi & M. R. Co. v. Ward*, 87 U. S. 2 Black, 485, 17 L. ed. 811; *Gilman v. Philadelphia*, 70 U. S. 8 Wall. 725, 18 L. ed. 99; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629.

Article 1, sec. 8, of the Constitution confers upon Congress the power “to regulate commerce” etc., and “to make all laws, which shall be necessary and proper for carrying” the foregoing powers “into execution.”

“The power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.”

*Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1-197, 6 L. ed. 23-70; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238. Also *Gilman v. Philadelphia*, 70 U. S. 8 Wall. 725, 18 L. ed. 99; *Leisy v. Hardin*, 135 U. S. 100-109, 34 L. ed. 128-132.

As to “interstate commerce,” the United States, as a government, possesses unlimited power, and can by congressional action exercise all the rights of “a sovereign government.” One of the well-recognized powers of a sovereign government is to institute proceedings in 12 L. R. A.

its own name on behalf of the public, or to permit its name to be used by private individuals specially injured, to prevent and restrain public nuisances.

Story, Eq. Jur. §§ 928, 924; *Atty-Gen. v. Tudor Ice Co.* 104 Mass. 244; *Dist. Atty. of East Dist. v. Lynn & B. R. Co.* 16 Gray, 245; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 98, 9 L. ed. 1015; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 518, 14 L. ed. 249.

A combination, the tendency of which is to prevent general competition and to control prices, is detrimental to the public and unlawful.

*People v. North River Sugar Ref. Co.* 2 L. R. A. 38, 22 Abb. N. C. 164; *Hooker v. Vandewater*, 4 Denio, 349; *Morris Run C. Co. v. Barclay C. Co.* 68 Pa. 186; *Central Ohio S. Co. v. Guthrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 346; *Richardson v. Buhl*, 6 I. R. A. 457, 77 Mich. 632; *DeWitt Wire Cloth Co. v. New Jersey Wire Cloth Co.* 9 R. & Corp. L. J. 814.

All commerce and trade among the several States shall be free and untrammelled of all restraints and restrictions, unless otherwise prescribed by Act of Congress.

*Robbins v. Shelby County Taxing Dist.* 120 U. S. 493, 30 L. ed. 696; *Philadelphia & S. Mail & S. S. Co. v. Pennsylvania*, 123 U. S. 826, 30 L. ed. 1200; *Leisy v. Hardin*, 135 U. S. 109, 34 L. ed. 182.

The following have been held to be restraints upon trade and commerce among the States:

A State law granting the exclusive right of navigating the Hudson River.

*Gibbons v. Ogden*, 22 U. S. 9 Wheat. 196, 6 L. ed. 70.

A state law imposing a tax upon an importer, and requiring a license before he is permitted to sell goods.

*Brown v. Maryland*, 25 U. S. 12 Wheat. 446, 6 L. ed. 668.

A state law imposing a tax on steamers for each passenger landed within a State.

*Passenger Cases*, 48 U. S. 7 How. 268, 12 L. ed. 702.

A state law requiring a stamp upon bills of lading for gold or silver exported from the State.

*Atmy v. California*, 65 U. S. 24 How. 169, 16 L. ed. 644.

A special tax by the State on railroad and stage companies for every passenger carried out of the State.

*Orandall v. Nevada*, 78 U. S. 6 Wall. 89, 18 L. ed. 745.

A special tax imposed upon the transportation of freight from one State to another.

*State Freight Tax Cases*, 82 U. S. 15 Wall. 282, 21 L. ed. 146; *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 456, 22 L. ed. 678.

A special tax imposed upon the sale of goods not manufactured within the State.

*Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

A state law imposing burdensome conditions on the shipmaster as a prerequisite to the landing of passengers, or else to pay a sum on each passenger.

*Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550.

A state law granting a telegraph company the exclusive right to erect and operate a telegraph line within the State.

*Pensacola Telegr. Co. v. Western U. Telegr. Co.* 96 U. S. 1, 24 L. ed. 708.

A state tax imposed upon telegraph messages sent without the State.

*Western U. Telegr. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1087.

A special tax imposed upon every alien passenger brought by steamships to a State.

*New York v. Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 888.

A special tax by a city imposed upon persons running tow-boats from the city to certain points without the State.

*Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 658.

A state tax imposed upon steam ferries for the transportation of passengers and freight from one State to another.

*Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158.

A state tax imposed upon an occupation which necessarily discriminates against the sale of goods brought from another State.

*Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691.

A state tax imposed upon sleeping cars run through the State.

*Pickard v. Pullman Southern Car Co.* 117 U. S. 84, 29 L. ed. 768.

Interstate Commerce cannot be taxed at all by a State, even though the same amount be taxed on domestic commerce.

*Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694.

A special tax by the State upon the gross receipts for the carriage of passengers and freight into, out of or through the State.

*Fargo v. Stevens*, 121 U. S. 280, 30 L. ed. 888.

A general license tax upon a telegraph company.

*Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 811.

A license tax upon a "drummer."

*Asher v. Texas*, 128 U. S. 129, 32 L. ed. 868; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 687.

A state statute prohibiting the sale, in original packages, of liquor brought into the State, except for medicine, upon license.

*Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150.

A license tax is imposed upon the agent of a railroad engaged in soliciting travel over his road out of the State.

*McCall v. California*, 136 U. S. 104, 34 L. ed. 391.

A license tax imposed upon a railroad company of one State for the privilege of keeping an office in another State.

*Leisy v. Hardin*, 135 U. S. 114, 34 L. ed. 184.

A state law providing for the inspection of meat, which practically forbids the importation of meat from another State.

*Minnesota v. Barber*, 136 U. S. 318, 34 L. ed. 455.

*Mr. Lee Brock, Asst. U. S. Atty.*, also for complainant.

*Messrs. Tillman & Tillman*, for defendants.

The subject of the agreement is not interstate 12 L. R. A.

commerce, although the intention is to transport the coal to Nashville, although it is purchased for that purpose.

Until actually launched on its way to another State, it is not under the jurisdiction of the United States.

*Cos v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 846.

These sales, with reference to which the agreement regulates prices, are sales of coal having its *situs* in Nashville. The whole transaction is wholly within the State. This is not interstate commerce. The fact that the coal is brought from another State does not prevent the jurisdiction of Tennessee from attaching.

*Brown v. Houston*, 114 U. S. 622, 29 L. ed. 287.

The only limitation upon the State, with reference to property brought from another State, and over contracts relating thereto, is, that it cannot take away or impair the right of the importer to sell it in the "original package," "unbroken" and "unopened."

*Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150.

With these limitations the State has jurisdiction over the property even in the "original package."

*Woodruff v. Parham*, 75 U. S. 8 Wall. 128, 19 L. ed. 882; *Hinson v. Lott*, 75 U. S. 8 Wall. 148, 19 L. ed. 867.

The right of the United States to maintain a suit in equity is governed by the same principles which apply to other parties. It must have an interest in the subject matter.

*United States v. Union Pac. R. Co.* 96 U. S. 569, 25 L. ed. 148; *United States v. San Jacinto Tin Co.* 125 U. S. 265, 31 L. ed. 751; *United States v. American Bell Teleph. Co.* 128 U. S. 815, 32 L. ed. 450.

The bill in this case is nothing else than an "information in equity," charging defendants with a misdemeanor. The Constitution provides that the "trial of all crimes, except in cases of impeachment, shall be by jury," whether that trial is followed by an injunction or a sentence.

*State v. Uhrig*, 14 Mo. App. 418; *Eilenbecker v. Plymouth County Dist. Ct.* 134 U. S. 81, 33 L. ed. 801.

The jurisdiction of equity in England to issue injunctions in behalf of the public at the suit of the government is limited to the three following classes of cases:

1. To restrain perjuries of public highways and navigations.

*Dist. Atty. of East Dist. v. Lynn & B. R. Co.* 16 Gray, 242; *Atty-Gen. v. Cambridge*, 16 Gray, 247.

2. To restrain threatened nuisances dangerous to the health of the whole community.

*Atty-Gen. v. Blount*, 4 Hawks, 384; *Atty-Gen. v. Hunter*, 1 Dev. Eq. 12.

3. To restrain *ultra vires* acts of corporations injurious to public right.

*Atty-Gen. v. Litchfield Corp.* 18 Sim. 546; *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425.

The provision of the Act of July 2, 1890, authorizing this proceeding in equity is unconstitutional.

*Mugler v. Kansas*, 128 U. S. 678, 31 L. ed.

314; *Powell v. Pennsylvania*, 127 U. S. 678, 83 L. ed. 258.

An agreement between a number of persons to act concernedly in fixing prices at which they will sell a particular product in a particular city is not illegal as being in restraint of trade, unless it appears that they have a monopoly of that product.

*Ladd v. Southern Cotton Press & Mfg. Co.* 58 Tex. 173; *Seeligson v. Taylor Compress Co.* 56 Tex. 319; *Wickens v. Beane*, 8 Younge & J. 318; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; *Ontario Salt Co. v. Merchants Salt Co.* 18 Grant, Ch. 540; *Marsh v. Russell*, 66 N. Y. 288. See Senate Debate, Congressional Record, 1st Session, 51st Congress, p. 2642; *Com. v. Hunt*, 4 Met. 111; *Masters' Stevedores Assn. v. Walsh*, 3 Daly, 1; *Kellogg v. Larkin*, 3 Pinn. 124; *Pratt v. Hutchinson*, 15 East, 511.

The defendants in this case control but an insignificant part of a vast supply of coal. Each coal company has its sole or exclusive agents, or dealers, and will not sell to or through others. This is not illegal or against public policy.

*Brown v. Rounsavell*, 73 Ill. 589; *Lightner v. Menzel*, 35 Cal. 452; *Van Marter v. Babcock*, 28 Barb. 688; *Greenhood*, Pub. Pol. p. 708.

*Meers, Henderson & Jouriolman* and *Hill & Granberry* also for defendants.

**Key, J.**, delivered the following opinion:

The petition in this case is filed against the members of the Nashville Coal Exchange. The membership of the exchange is composed of various coal-mining companies operating mines in Kentucky and Tennessee, chiefly in Kentucky, and of persons and firms dealing in coal at Nashville, Tenn. It is alleged that the purposes, objects and agreement of the defendants are in violation of an Act of Congress approved July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," and the petition seeks to restrain and prevent the violations of the Act by injunction under section 4 of the Law. The first section of the Act declares that "every contract or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, is declared illegal." The second section declares that, "every person who shall monopolize or combine or conspire with another person or persons to monopolize any part of the trade or commerce among the several States . . . shall be guilty of a misdemeanor." A violation of the first section is a misdemeanor also. By the fourth section jurisdiction is conferred upon the circuit courts of the United States to prevent and restrain violations of the Act, and it is made the duty of district attorneys in their respective districts, under the direction of the Attorney-General of the United States, to institute proceedings in equity to prevent and restrain such violations. The articles of agreement between the defendants provide, amongst other things, that the objects of this exchange are, "to do all in its power to advance the interests of the coal business at Nashville, to treat all parties to this agreement in a fair and equitable manner, and to establish prices on coal at Nashville, Tenn., and to change same from time to time, as occasion

may require." Prices to consumers at Nashville are to be established so as to sell coal at a fair and reasonable price so as to allow all parties a fair profit for their product. Every person, firm or corporation owning or operating mines who ship coal to Nashville shall be eligible to membership in this exchange, and all coal dealers in the City of Nashville are also eligible to membership. None others are eligible. Any member of the exchange who may withdraw from it and continue in the coal trade in Nashville or ship any coal to Nashville shall forfeit and relinquish all interest of any and every kind, however obtained or accrued. The exchange will from time to time establish prices at which coal shall be sold in Nashville. Coal classed as No. 1 shall be valued at the mines at 4½ cents minimum price of eighty pounds lump, and freight being 4 cents, and the dealer's margin to be 4½ cents, making the price of lump coal 18 cents per bushel. No. 2 to be valued at 5 cents at the mine. No. 3 at 6 cents, and when the above prices are advanced in excess of the advance in freights, then one half the advance shall go to the mine owners and one half to the dealers. Every member found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, shall be fined 3 cents per bushel and \$10 for the first offense, and 4 cents per bushel and \$20 for the second offense. A majority of all the members shall constitute a quorum for the transaction of business.

Owners or operators of mines shall not sell or ship coal to any person, firm or corporation in Nashville, or West Nashville, or East Nashville, who are not members of the exchange, and dealers shall not buy coal from anyone not a member of the exchange. All coal used for manufacturing and steamboat purposes shall be exempt from prices made by the exchange until all mines tributary to this market shall become members of the exchange, or until the exchange can control prices to govern coal used by manufacturers. No coal shall be sold in any month to be delivered in any following month except at prices fixed for the particular month in which coal so sold is to be delivered. Fines and penalties are declared so as to enforce the stipulations embodied in the Constitution and by-laws of the exchange.

It can hardly be denied that such provisions as these, by a body of persons such as compose this exchange, is not a contract or combination in restraint of trade or commerce, or an attempt between different persons to monopolize a part of the trade or commerce between parties who are citizens of or reside in different States. It is shown that several mining companies in Kentucky engaged in raising coal, and most of the coal dealers of Nashville, Tenn., have entered into the foregoing mentioned arrangement. It is insisted for the defendants that the subject of agreement is not interstate commerce; that the obligation as to the mining companies ends at the mines. The price is fixed and paid at that point, and consequently controversies in regard to the contract as to them belong exclusively to the courts of the State of Kentucky; that so far as the dealers are concerned the price of the coal is fixed for its sale at Nashville, and

after it becomes their property by delivery to them, and therefore the courts of Tennessee have the jurisdiction as to them. Various authorities are cited, and the debates in the Senate of the United States are read to sustain this view of the case. As I understand the contention of defendant's counsel it is that the agreement is not violative of the terms of the Act of July 2, 1890. But if it is the Act is unconstitutional; first, because the Constitution confers upon the courts of the United States in such a case jurisdiction over "controversies between citizens of different States." That the fact that parties to a contract are citizens of different States does not confer jurisdiction. There must be a controversy between the parties to the contract, and this litigation is not a dispute between the contracting parties, but between the government and these parties. Second, that the Act creates and defines criminal offenses, and the Constitution provides that the "trial of all crimes except in cases of impeachment shall be by jury, and that section 4 of the Act, so far as it attempts to give circuit courts of the United States equitable jurisdiction over the violations of the Act, is unconstitutional. It is insisted the proceeding authorized is in substance an information in equity charging defendants with a misdemeanor.

I shall not enter into a discussion of the constitutionality of the law. A court, especially an inferior one, should hesitate long and consider carefully before it should declare an Act of Congress, passed after deliberation and debate and approved by the president, unconstitutional. The reasons for such a decision in such a case should be clear and undeniable. If doubtful or questionable the doubt should be resolved in favor of the law.

The arguments against the validity of the Act have been urged with great plausibility and strength, and an army of authorities have been read as sustaining the views of defendant's counsel. The positions of defendant's counsel have been met with equal force and ability by those representing the government, and many authorities have been referred to in support of the power of Congress to pass the law; and without nicely adjusting and weighing the opposing views of counsel, enough appears to prevent me from declaring the Act, or any part of it, as outside of the powers granted to Congress by the Constitution.

The remaining question is whether the agreement and regulations between the defendants are a "contract or combination in restraint of trade or commerce between States;" are they evidence of a combination to monopolize "any part of the trade or commerce" between the States of Tennessee and Kentucky. The coal mines are in Kentucky, and the coal is to be mined there for a certain price, and the agreement contemplates its shipment to Nashville. To be sure it is not to be transported thither by the defendants or any of them, but the price for which it is to be shipped is fixed or stated, and becomes a part of the price for which the coal is to be sold at Nashville; and when the prices fixed "are advanced in excess of the advance in freights, the one half of the advance shall go to the mine owners and one half to the dealers." In making the agreement

the transportation of the coal from Kentucky to Nashville was a necessary incident to and element in the arrangement, and its execution would have been impossible without it. The instrumentality of transportation did not belong to, nor was it controlled by, them, but it was used by them and paid by them for services rendered. The contract provided for the sale of coal in Kentucky, its shipment to Nashville, Tenn., to dealers there, for its retail to consumers. It was to all intents and purposes a traffic trade, commerce between States.

Was the purpose of the exchange to monopolize a part of this trade, or to combine in restraint thereof? The exchange does not propose to be governed and controlled by the public markets arising from competition and the operations of the laws of supply and demand. On the contrary, it announces that its purpose is "to establish prices on coal at Nashville, Tenn., and to change the same from time to time as occasion may require," and in carrying out this object it asserts that "the exchange will establish prices at which coal shall be sold in Nashville, subject, however, to the following conditions and basis: Coal classed as No. 1 to be valued at the mines at 4 cents minimum price per bushel of eighty-five pounds for lump, and freight being 4 cents, the dealer's margin to be 4½ cents, making the price of lump coal 13 cents per bushel; No. 2 to be valued at 5 cents at the mines; No. 8, 6 cents; and when the above prices are advanced in excess of the advance in freights, the one half of the advance shall go to the mine owners and one half to the dealers." "Any member found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, shall be fined 2 cents per bushel and \$10 for the first offense, and 4 cents a bushel and \$20 for the second offense." These provisions, so far as this combination could do so, fixed the lowest price of coal to consumers in and near Nashville at 18 cents per bushel and prevented coal being sold there at a cheaper rate, no matter how much less it might cost in an open and unobstructed market. Nor is this all. The exchange ordains that "owners or operators of mines shall not sell or ship coal to any firm, person or corporation in Nashville or West Nashville or East Nashville who are not members of this exchange, and dealers shall not buy coal from anyone who is not a member of the exchange." The coal trade is confined to dealings, so far as the market supply is concerned, to transactions between the miner and dealer; the prices are fixed by them and the miner and dealer only are eligible to membership. The miners of the concern cannot sell to any dealer in or near Nashville who is not a party to the agreement, nor can such dealer purchase coal of any miner anywhere who is not a member of the body. The operations of both are confined within the membership. So far as Nashville is concerned, they cannot go to cheaper or more favorable markets, or deal with those who would give more favorable terms. The restraint is positive and undeniable. Moreover, in the first section of the by-laws of the exchange it is asserted that "all coal used for manufacturing and steamboat purposes shall be exempt from prices made by this exchange

until all mines tributary to this market shall become members of the exchange, or until the exchange can control prices to govern coal used by manufacturers." This clearly indicates the purpose of the association to be to control the price of coal in the Nashville market used in manufacturing and in steamboats whenever it could; that the mines of coal tributary to Nashville were all expected to become members of the exchange, whereupon the prices of coal could be fixed absolutely, and the necessary inference from this declaration and the entire organic structure of the body is that it felt strong enough already to regulate and establish the prices of domestic coal in that market, to a large extent at least, and that this exchange might now monopolize the business of dealing in domestic coal in the Nashville market, and in the future monopolize by and confine to its membership the entire trade in coal at that point. It seems to me that the purpose and intentions of the association could hardly have been more successfully framed to fall within the provisions of the Act of July 2, 1890, had the object been to organize a combination, the business of which should subject it to the penalties of that Statute, and that there is no need of authorities to sustain such view of the case. Regarding the Act as constitutional, I see no way for the defendants to escape its condemnation.

Proof has been taken, on one hand, to establish that the people of Nashville have been and are being injured by the high prices which have been and are being paid for coal, and the extent of the injury. On the other hand, defendants have introduced proof to show that the higher freight rates to Nashville and the want of facilities for transportation by railroad and water are the causes for the higher prices of coal at Nashville than at Louisville or Memphis, but it is needless to enter upon this branch of dispute. "The attempt to monopolize or combine" is denounced by the second section of the Act, and the first section, "every contract or combination in restraint of trade or commerce among the several States." The attempt, the contract to do the thing prohibited, is enough to incur the penalties of this law.

I conclude that the defendants, by the organization of the Nashville Coal Exchange, and their operations under it, have been, and at the time of filing the petition in this cause were, guilty of a violation of sections 1 and 2 of the Act of July 2, 1890, and should be enjoined from further violations of the law, as provided by the fourth section thereof.

*The petition will be dismissed as to such of the defendants as are not, or were not members of the exchange at the time of the filing of the petition.*

## KANSAS SUPREME COURT.

Joseph ROSS, *Plff. in Err.*,

v.

James HIXON.

(....Kan....)

**"The finding of an examining magistrate that 'an offense has been committed and that there was probable cause to believe the defendant guilty thereof,' is only prima facie evidence of probable cause in an action for malicious prosecution brought by such defendant against the prosecuting witness.**

(June 6, 1891.)

**ERROR** to the District Court for Bourbon County to review a judgment in favor of  
\*Head note by SIMPSON, C.

defendant in an action brought to recover damages for malicious prosecution. *Reversed.*

The facts appear in the commissioner's opinion.

*Messrs. Hulett & Fletcher, with Messrs. Cory & Hulbert, for plaintiff in error:*

That the examining magistrate had made a finding of probable cause, and had committed the accused for appearance at the district court, was mere conclusive evidence of probable cause.

*Bauer v. Clay*, 8 Kan. 580-585; *Diemer v. Herber*, 75 Cal. 287; *Ganea v. Southern Pac. R. Co.* 51 Cal. 140; *Ash v. Mariou*, 20 Ohio, 119; *Spalding v. Lowe*, 56 Mich. 366; *Hamilton v. People*, 29 Mich. 178-176; *People v. Lynch*, Id. 274-279; *Haupt v. Pohlmann*, 16 Abb. Pr.

**NOTE.**—*Malicious prosecution; defense of reasonable and probable cause.*

A defendant in an action of malicious prosecution may be protected by reasonable and probable cause, although he was mistaken honestly upon a matter of fact, and not upon a matter of law. *Rex v. Stewart*, 6 Manitoba L. Rep. 257.

The judgment of a justice's court convicting a defendant of a criminal charge, though appealed from and an acquittal had in the circuit court, is, in the absence of fraud, perjury or any improper motive, conclusive of probable cause. *Adams v. Bloknell*, 128 Ind. 210.

So the judgment in favor of a plaintiff in a circuit court of the United States is sufficient proof of probable cause, although contrary to a former decision of a state court, and although reversed subsequently by the Supreme Court of the United States. 12 L. R. A.

*States. Crescent City L. S. L. & S. H. Co. v. Butchers Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614.

Where a *nolle prosequi* is entered by procurement of the party prosecuted, or by procurement of his attorney, such party cannot maintain an action for malicious prosecution. *Langford v. Boston & A. R. Co.* 4 New Eng. Rep. 209, 144 Mass. 431.

When a prosecution before a magistrate is abandoned and the defendant discharged, he can sue for malicious prosecution. *Murphy v. Moore* (Pa.) 10 Cent. Rep. 92.

So after hearing and discharge by a committing magistrate, the defendant may sue for malicious prosecution. *Zebbley v. Story*, 10 Cent. Rep. 826, 117 Pa. 478.

Nature of action. See notes to *Pope v. Pollock* (Ohio) 4 L. R. A. 255; *Antcliff v. June* (Mich.) 10 L. R. A. 621.



301; *Ewing v. Sanford*, 19 Ala. 605; 14 Am. & Eng. Encyclop. Law, 67, and *note*.

Whether or not the evidence was sufficient to satisfy a jury that such a state of facts and circumstances existed "as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty is a matter peculiarly within the province of the jury, and a refusal to submit the cause to the jury is error.

*Hayne v. Blair*, 63 N. Y. 19-22; *Besson v. Southard*, 10 N. Y. 236; *Masten v. Deyo*, 2 Wend. 424.

*Meers, Hill & Chenault* for defendant in error.

*Simpson, C.*, filed the following opinion:

On the 17th day of January, 1887, Hixon filed an affidavit before a justice of the peace in Bourbon County, charging Ross with having mixed certain poison with a quantity of flour, with the intent and for the purpose of causing the death of certain persons. Upon said complaint a warrant was issued, and Ross was arrested. A preliminary trial was had on the 4th of February before the justice who issued the warrant. At the preliminary examination twelve witnesses were examined for the State, and seven for the defendant. After the hearing of all the evidence, the justice bound Ross to appear at the district court and answer the charge. He failed to give bond, and was committed to jail. The finding of the justice was as follows: "After hearing the evidence, I find that said offense has been committed, and that there is probable cause to believe the defendant guilty thereof." Ross was in jail from the 17th day of January, 1887, until May 2, 1887. On the latter date, the District Court of Bourbon County being in session, the county attorney filed a statement showing cause for non-prosecution, and Ross was discharged. On the 8th day of August, 1887, he commenced this action for malicious prosecution against James Hixon, the prosecuting witness. Trial was had at the May Term, 1888. The plaintiff in error offered evidence showing the proceedings before the justice of the peace on the criminal charge, and tending to prove every material allegation in such an action. When the plaintiff rested, the defendant Hixon introduced a large number of witnesses, when he was interrupted by the court. The trial was stopped, and a verdict was ordered for the defendant. The jury returned a verdict for the defendant, and a motion for a new trial was overruled. The record itself discloses no reason for the ruling of the court, but counsel agreed that the reason assigned by the trial court was that the examining magistrate had made a finding of probable cause, and that such finding was conclusive upon that question. It is further claimed by counsel for the defendant in error that the trial court made the further statement: "That, as the petition does not charge fraud or undue means in obtaining the finding of probable cause by the magistrate, the same cannot be attacked." The sole question discussed in the oral argument of counsel for defendant in error, and the briefs on both sides, is as to the

weight to be given to the finding of the examining magistrate as to whether it is prima facie or conclusive on the question of probable cause, and whether or not, in either case, the finding must be attacked for fraud or undue means by proper allegations in the petition.

1. In the case of *Sweeney v. Pernoy*, 40 Kan. 102, this court incidentally noticed the conflict in authorities as to whether or not proof of arrest, committal and indictment is prima facie proof of probable cause; and the case of *Ricord v. Central Pac. R. Co.*, 15 Nev. 167, was cited on one side, and that of *Womack v. Circle*, 29 Gratt. 192, on the other. The question in this case is closely allied to this controversy, but authorities cannot be found on both sides of this question. In the case of *Bauer v. Clay*, 8 Kan. 585, Justice Valentine says: "The proof showing that the justice ordered that Clay should be bound over for his appearance at court, or, in default of bail, that he should be committed to the county jail, is only prima facie, and not conclusive, evidence of probable cause." The cases of *Ash v. Marlow*, 20 Ohio, 119, and *Ewing v. Sanford*, 19 Ala. 605, are cited in support. The force of this decision is sought to be destroyed by counsel for defendant in error by an assertion that it is dictum. It is sometimes difficult to draw the line between what is authoritative and what is not in a judicial opinion. The report of the case does not give either the pleadings, the assignment of errors or the briefs, but it is evident that the question was necessarily involved in the rulings of the trial court; and this court thought it necessary to give this as one of the reasons for affirmance of the judgment below, because, if counsel for defendant in error are now right in their contention, Clay had no cause of action, and the case was decided wrongfully in both the trial and the appellate courts. However the rule may be in cases in which the magistrates have jurisdiction to hear and pass judgment, we are satisfied that the case of *Bauer v. Clay* states the true rule in cases in which the magistrates have only power to bind over. This rule is upheld by the cases of *Ash v. Marlow*, 20 Ohio, 119; *Ewing v. Sanford*, 19 Ala. 605; *Raleigh v. Cook*, 60 Tex. 438; *Ricord v. Central Pac. R. Co.* 15 Nev. 167; *Hale v. Boylen*, 23 W. Va. 284; *Bacon v. Towne*, 4 Cush. 217; *Spalding v. Lowe*, 56 Mich. 366; *Ganea v. Southern Pac. R. Co.* 51 Cal. 140; *Diemer v. Herber*, 75 Cal. 287.

These are all express adjudications on that particular question. In one of these cases, decided in 1885, being that of *Spalding v. Lowe*, 56 Mich. 366, the defendant requested the trial court to instruct the jury as follows: "It appears from the proofs in this case that an examination was had upon the charge made against Spalding, and that the justice upon such examination determined that this offense charged against Spalding had been committed, and that there was probable cause to believe said Spalding guilty thereof. This was a judicial determination the justice was authorized to make, and unless such action and determination of the justice was corrupt or collusive, or was wrongfully procured by the defendant herein, it is final as to the question of probable cause, and your verdict should be for the de-

fendant." The trial court refused to so instruct the jury, and this refusal was assigned as error in the supreme court, but that court says (p. 372, 56 Mich.): "No authority has been produced in support of it, and we think none exists."

We have been unable to find a reported case in which the rule is held as claimed by counsel for defendant in error. There are cases that so hold when the magistrate has power to render a judgment of conviction. How much weight as proof of probable cause shall be attributed to the judgment of a court in an original action, when subsequently reversed for error, is elaborately discussed by the Supreme Court of the United States in the case of *Crescent City L. S. L. & S. H. Co. v. Butchers Union S. H. & L. S. L. Co.* 120 U.S. 141, 80 L.ed. 614,—a case much relied on by counsel for defendant in error. To our mind, however, the distinction between that case and the one at bar is plain and distinct. If the magistrate in Bourbon County had possessed the statutory power to hear the evidence and determine the guilt or innocence of the defendant, and to punish by fine or imprisonment if guilt was found, then his finding and judgment would come within the rules established by that case to be the law of the land. The question in this case is how much weight, as proof of probable cause, shall be attributed to the finding of an examining magistrate that "an offense had been committed, and that there is probable cause to believe the defendant guilty thereof," when the defendant is subsequently discharged, the prosecution against him confessedly ended, and he has instituted a suit for malicious prosecution against the complaining witness. In the one case there is a solemn judgment rendered by a court having full and complete jurisdiction both of the parties and subject matter, binding on all until reversed on appeal or error. In the other case there is a finding, in effect, that sufficient facts have been developed that justify a magistrate in sending the parties before a court compe-

tent to ultimately deal with the question of guilt or innocence. Again, while a conviction is generally conclusive of probable cause, yet it may be overcome by a showing that it was procured by fraud, undue means or the false testimony of the prosecution. *Womack v. Circle*, 20 Gratt. 192; *Olson v. Neal*, 68 Iowa, 214; *Cloon v. Gerry*, 18 Gray, 201; *Whitney v. Peckham*, 15 Mass. 248; *Peck v. Chouteau*, 91 Mo. 138, 8 West. Rep. 818; *Bowman v. Brown*, 62 Iowa, 487; *Palmer v. Avery*, 41 Barb. 290; *Bichey v. McBean*, 17 Ill. 63; *Payson v. Caswell*, 22 Me. 212; *Herman v. Brookerhoff*, 8 Watts, 240; *Jones v. Kirksey*, 10 Ala. 889.

In such a case the petition in the action for malicious prosecution must directly attack the judgment of conviction, or it will be suicidal. It is therefore unimportant whether the words used by the court in *Bauer v. Clay* are dicta or authoritative in that case, as they express the law as universally held by all courts of last resort that have spoken on this subject. It follows that the other suggestion of counsel, that the finding of the magistrate must be directly attacked in the petition for fraud or undue means, is without force, because, as that finding is only prima facie, all that is necessary for the plaintiff to do to win is to overthrow it by a preponderance of evidence. It can be fairly said that there was evidence submitted at the trial by the plaintiff in error, other than the transcript of the proceedings before the examining magistrate, bearing upon the question of probable cause; which the court below permitted to go to the jury, from which they might have found that the prima facie case made by the magistrate's finding was overcome. It is recommended that the judgment of the District Court of Bourbon County be reversed, and the cause remanded, with instructions to grant a new trial.

**Per Curiam:**

*It is so ordered.*

All the Justices concur.

## NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*  
UNION TRUST CO. of New York, *Appl.*,  
v.

Michael COLEMAN *et al.*, Comrs. of Taxes  
and Assessments, *Respts.*

(.....N. Y.....)

1. The "capital stock" of a corporation liable to taxation under Laws 1857, chap.

**NOTE.**—Taxation of corporate stock.

The words "capital stock," in legal contemplation, mean all the property belonging to a corporation, tangible or intangible, of whatever species, which must be valued for the purposes of taxation. *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Porter v. Rockford*, R. I. & St. L. R. Co. 70 Ill. 561.

It means not only stock subscription, but the actual tangible property of the corporation. *Michigan Cent. R. Co. v. Porter*, 17 Ind. 380; *Whitesell v. Northampton County*, 49 Pa. 528; *State v. Hamilton*, 5 Ind. 310; *Floyd County Auditor v. New Albany & S. R. Co.* 11 Ind. 570; *McKane v. State*, Id. 195; *State v. Branin*, 23 N. J. L. 484.

456, § 3, is the actual capital owned by the corporation and not the share value of the stock.

2. Assessors have no discretion to take the value of the shares of stock of a corporation as that of its capital stock where they know the value of the latter.

(June 2, 1891.)

**A** PPEAL by relator from a judgment of the General Term of the Supreme Court, First

ton, 5 Ind. 310; *Floyd County Auditor v. New Albany & S. R. Co.* 11 Ind. 570; *McKane v. State*, Id. 195; *State v. Branin*, 23 N. J. L. 484.

And the means that the company have to meet existing indebtedness should be subjected to taxation precisely as if held by an individual. *Porter v. Rockford*, R. I. & St. L. R. Co. *supra*.

It constitutes the whole fund paid in by stockholders, the legal right to which is vested in the trustees, to be used for the benefit of the individual stockholders; it is the fund subscribed and paid

Department, affirming an order of the Special Term for New York County, which dismissed a writ of certiorari which sought to review and set aside an assessment of taxes against relator for the year 1889. *Reversed.*

The facts are stated in the opinion.

**Mr. Wheeler H. Peckham** for appellant.

**Messrs. David J. Dean and George S. Coleman**, with **Mr. William H. Clark**, for respondents.

**Finch, J.**, delivered the opinion of the court:

The relator has been assessed upon an "actual value" of its capital stock derived entirely from the market value of its shares. These are selling at the large premium of something over \$500 for each share of \$100, and the assessors have concededly taken that valuation, or the principal part thereof, as the "actual value" of the Company's stock liable to taxation, instead of its own proved and established value. The relator challenges the assessment, and through all the proceedings has persistently raised and pressed the inquiry, not so much as to the mode or manner of ascertaining value, but, rather, as to what is the precise thing to be valued,—whether the capital stock of the Company, or the capital stock held in shares by the corporators. If these are the same, or, in any just sense, equivalents, either might be valued without substantial error; but, if they are not such, we must determine which is to be valued before we can solve the problem of how to value it. Now, it is certain that the two things are

neither identical nor equivalents. The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money or property or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend-earning power, of franchise, and the good-will of an established and prosperous business. The capital stock of the Company is owned and held by the Company in its corporate character; the capital stock of the shareholders they own and hold in different proportions as individuals. The one belongs to the corporation; the other, to the corporators. The franchise of the Company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock; while the same franchise does enter into and form part, and a very essential part, of the shareholder's capital stock. While the nominal or par value of the capital stock and of the share stock are the same, the actual value is often widely different. The capital stock of the Company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both; but that surplus is no part of the Company's capital stock, and therefore is not itself capital stock. The capital cannot be divided and distributed; the surplus may be. But that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value

in to effectuate the purposes of the organization, and retains its characteristic of capital stock, even after it has been converted into property necessary to the prosecution of its business. *Bank Tax Case*, 40 U. S. 2 Wall. 208, 17 L. ed. 736; *Farrington v. Tennessee*, 35 U. S. 698, 34 L. ed. 560; *Jones v. Davis*, 35 Ohio St. 477.

#### *Value, how ascertained.*

This paid-up capital stock is liable to assessment and taxation like any other personal property. Its value is to be ascertained either from its quoted market price or in any other legitimate manner. *New Orleans City Gas Light Co. v. Board of Assessors*, 31 La. Ann. 475.

But the market value of shares of stock in a corporation is not the proper and sole test of the value of corporate stock. *Albany City Nat. Bank v. Maher*, 19 Blatchf. 175, 178; *Van Allen v. The Assessors*, 70 U. S. 3 Wall. 573-584, 18 L. ed. 229-234.

So the market value of the shares of capital stock may sometimes be above and sometimes below the actual value. Such value may be greatly enhanced or depressed for speculative purposes without any change in the actual value. *People v. Coleman*, 10 Cent. Rep. 266, 107 N. Y. 541.

But there is no law which compels assessors to resort to market value to find the actual value of capital stock. That standard is sometimes illusory and untrustworthy. The buyers or sellers may be too few and the transactions not sufficiently numerous to furnish a real test of value. *Ibid.*

#### *Distinction between capital and shares of stock.*

In *Deady on Taxation*, § 74, this distinction is clearly indicated. He says: "Capital and capital stock are in legal intent synonymous, and are used in legislative Acts as equivalent terms, though strictly not of the same meaning" (*New Orleans* 12 L. R. A.

*City Gas Light Co. v. Board of Assessors*, 31 La. Ann. 477). Capital stock means not shares of stock, either separately or in the aggregate, but is intended to designate the property of the corporation subject to taxation, not in separate parcels, but as a homogeneous unit, partaking of the nature of personality, and subject to the burdens imposed on it, at the domicile of the owner where it exercises its corporate functions, and where its business is done (*Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 324; *Quincy Bridge Co. v. Adams County*, 88 Ill. 621; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 661). They are distinct properties, although the shares of stock have no value save that which they derive from the corporate property and franchise; and a tax levied upon the property of the one is not, in any legal sense, levied upon the property of another." *Porter v. Rockford, R. I. & St. L. R. Co. supra*; *Belo v. Forsyth County Comrs.* 83 N. C. 415.

3 *Redfield on Railways*, 3d ed., p. 453, says: "We find the clear recognition of three kinds of corporate property taxable to the corporation, and the shares in the hands of corporators distinctly defined as a fourth species of corporate property, which is taxable only to the owners or holders; (1) the capital stock; (2) the corporate property; (3) the franchise of the corporation; all of which is taxable to the corporation; and the shares in the capital stock, which is taxable only to the shareholders." The owner of stock, who has hypotheicated or pledged the same, is the proper party to be assessed on such stock. *Tucker v. Aiken*, 7 N. H. 118.

It follows in strict analogy that the pledgee of stock is liable to tax levied on the shares held by him. *Waltham Bank v. Waltham*, 10 Met. 384.

It should be borne in mind that capital and shares of stock are distinct property, and that the statutory exemption of one is not to be construed as ex-

surplus as well as capital, and the franchise in addition, so that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus and its franchise; but these three things, several in the ownership of the company, are united in the ownership of the shareholders. The share stock covers, embraces, represents all three in their totality; for it is a business photograph of all the corporate possessions and possibilities. A company also may have no surplus, but, on the contrary, a deficiency which works an impairment of its capital stock. Its actual value is then less than its nominal or par value, while yet the share stock, strengthened by hope of the future and the support of earnings, may be worth its par, or even more. And thus the two things, the company's capital stock and the shareholder's capital stock, are essentially and in every material respect different. They differ in their character, in their elements, in their ownership and in their values. How important and vital the difference is, became evident in the effort by the state authorities to tax the property of the national banks. The effort failed, and yet the share stock in the ownership of individuals was held to be taxable as against them. The corporation and its property were shielded, but the shareholders and their property were taxed.

Now, some degree of confusion and trouble have come in because these two different things are denominated alike "capital stock," making the expression sometimes ambiguous. It is the important and decisive phrase in the Law of 1857 under which the as-

essment here resisted was made, and requires of us to determine at the outset in which sense it was used. The section reads thus: "The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or shall have been exempted by law, together with its surplus profits or reserved funds exceeding 10 per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as the other real and personal estate of the county." There are reasons in abundance for the conclusion that by the phrase "capital stock" the statute means not the share stock, but the capital owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise, and the chief factor of its safety. One ample reason is derived from the fact that the tax is assessed against the corporation, and upon its property; and not against the shareholders, and so upon their property. In theory, every tax is charged against some person, natural or artificial, resident or nonresident, known or unknown. It is assessed, not upon property irrespective of ownership, but against persons in respect to their property (*New York v. New York Tax Commr.* 23 N. Y. 215); and effects, not merely a lien, but also a personal liability. On the assessment rolls in this case appeared the name of the relator as the person assessed, and the

empting the other; and so the levy of a tax on one is not the imposition of a similar tax on the other. *People v. New York Tax Commr.* 71 U. S. 4 Wall. 259, 18 L. ed. 350; *Van Allen v. The Assessors*, 70 U. S. 3 Wall. 573, 18 L. ed. 239; *Memphis v. Farrington*, 8 Baxt. 539.

Mr. Waterman says, in his valuable treatise on Taxation (§ 259): "Exemption from taxation is not favored by the courts, and it is, in general, strictly construed; and it has been held in Maryland that the Legislature cannot grant to a corporation an immunity from taxation or any other corporate privilege beyond the power of a subsequent Legislature to repeal or revoke." *State v. Northern Cent. R. Co.* 44 Md. 181.

It may be affirmed that the taxation of corporate stock to meet and defray the ordinary expenses incident to good government is a principle of very extensive application, and one that has been enforced by all courts from a very early period.

"The taxing power is of vital importance," said Chief Justice Marshall in *Providence Bank v. Billings*, 29 U. S. 4 Pet. 561, 7 L. ed. 955; "its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."

#### *Duty of assessors.*

It is not a controlling fact in the assessment of the capital stock of a corporation that the whole capital was originally invested in real estate; it is the duty of the assessors to ascertain the present value of the stock, and from this to deduct the assessed value of the real estate. While the indebtedness of the corporation is a proper subject for consideration in estimating the value of stock, there is no authority for its deduction from the value after an estimate of the same has been made. *People v. Astin*, 1 Cent. Rep. 770, 100 N. Y. 597. 12 L. R. A.

If the stock of the corporation be assessed at its actual value, it would seem necessarily to follow that all the property of the corporation "capable of private ownership" was included in the valuation (*Burke v. Badlam*, 57 Cal. 599); but where the assessment of the franchise of a corporation is specially provided for, either by statute or as part of the organic law, and it is also provided that "stock" and "everything capable of private ownership" shall be taxed, it is within the province of the Legislature to provide the rule for taxing the property of corporations by excluding "stocks," or the shares of capital stock, and including the property and the franchise only. *San José Gas Co. v. January*, 57 Cal. 614; *Burke v. Badlam*, 57 Cal. 601; *Spring Valley Water Works v. Schottler*, 63 Cal. 114; *Porter v. Rockford*, R. I. & St. L. R. Co. 76 Ill. 591.

Power of taxation is an incident of sovereignty employed to secure a revenue for its maintenance. Its exercise belongs to the States independent of the United States government, affected only by those laws which Congress may enact with respect to the property of the United States, and the revenues thereof (*McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 4 L. ed. 579; *Lane County v. Oregon*, 74 U. S. 7 Wall. 77, 19 L. ed. 104; *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. 29, 21 L. ed. 788); and it attaches alike upon everything within the jurisdiction of the State, not the property of the United States nor means employed for the performance of the functions of the United States. *People v. Coleman*, 4 Cal. 47.

The power is supreme, in the absence of constitutional restrictions. *McCulloch v. Maryland*, *supra*; *McCauley v. Brooks*, 16 Cal. 11; *Beals v. Amador County*, 35 Cal. 624; *People v. Pacheco*, 27 Cal. 175; *Taylor v. Palmer*, 31 Cal. 240; *Stockton & V. R. Co. v. Stockton*, 41 Cal. 148; *San José v. San José & St.*

amount of the tax became a charge against it. Of course, it could only be assessed and taxed in respect to its own property,—that which in its corporate character it owned and possessed; and so it follows inevitably that the Statute concerns the company's capital stock,—that is, its real and actual capital,—and not in any respect the share stock which it does not own, and whose possessors have not been assessed.

Another reason is found in those terms of the Statute which include and exclude, respectively, specific kinds or classes of property in the corporate ownership. Thus, the assessment is to be laid, not merely upon the capital stock of the corporation, but also upon its surplus. No such explicit direction was necessary, except on the assumption that by the words "capital stock" was meant simply "capital" which would not include surplus, and so required that it be subjected by name to the valuation. If the share stock was meant, its value would include surplus, and make its specification not only needless, but confusing. But while the Statute includes surplus by specific mention, it excludes franchise by omitting it. The omission of franchise is emphasized by the careful inclusion of surplus. It is fully and definitely settled that the tax imposed by the Statute is not upon franchise. *New York v. New York Tax Comrs.* 67 U. S. 2 Black, 620, 17 L. ed. 451. But, if that be so, it is not upon the share stock, for that represents the value of the corporate franchise as a part of the total of the corporate property; and so, both by what it specifically includes and silently excludes, the Statute itself

informs us that by "capital stock" it means and intends the company's actual capital paid in and possessed, and not at all or in any sense the share stock. The same thing becomes apparent from a study of the whole line of legislation which culminated in the Law of 1857. It was traced in detail upon the argument with great industry and wealth of illustration. We have verified it by traveling over the same track, and without taking pains to reproduce it, may assert the general result which it discloses, and select out one or more illustrations. The investigation shows that the word "capital" and the phrase "capital stock" are used interchangeably and synonymously, and, where, the latter phrase occurs, there is almost always something in the Statute which stamps and labels it as referring to the actual capital of the company. Thus the Law of 1823 (chap. 262), after providing for the taxation of all persons owning or possessing property, proceeds to declare that corporations shall be deemed persons for the purposes of the Act, and requires them to furnish a statement of the amount of "capital" actually paid in; and then, referring to turnpike and bridge companies, requires them to state "the amount of capital stock actually paid in or secured to be paid in." Both clauses refer to the same assets or fund, naming it indiscriminately "capital" and "capital stock." Again, in the Law of 1825 (chap. 254), the assessors, after putting the corporation by name on the assessment roll, are required to add the amount "of its capital stock paid in or secured to be paid in," and to designate how much of it is in real and

C. R. Co. 53 Cal. 475; *Mason v. Kennebec & P. R. Co.* 31 Me. 215; *Mount Washington Road Co's Petition*, 35 N. H. 126; *Bank of Chenango v. Brown*, 25 N. Y. 407; *Swan v. Williams*, 2 Mich. 442; *Bennington v. Park*, 60 Vt. 178.

#### *What the tax includes.*

A tax upon capital stock is a tax upon the bonds and securities of which it is exclusively composed. No tax can be imposed by the law or authority of any State, upon the bonds in which the capital of a bank is invested, nor upon any person, society or corporation in the relation of owner of said bank; yet this would be done by taxing the capital stock of the bank. These doctrines are well settled by adjudged cases in this and other courts. *Weston v. Charleston*, 27 U. S. 2 Pet. 449, 7 L. ed. 481; *New York v. New York Tax Comrs.* 67 U. S. 2 Black, 620, 17 L. ed. 451, 69 U. S. 2 Wall. 200, 17 L. ed. 793; *Whitney v. Madison*, 23 Ind. 331.

#### *Judicial construction of the Illinois statute.*

The words "capital stock," as used in the Revenue Law of Illinois, mean the property of the corporation, and not the shares of the stock owned by the shareholders, either separately or in the aggregate.

It was competent for the Legislature, under the State Constitution, to require the capital stock of corporations, as thus construed, to be assessed for the purpose of taxation against the corporation.

The franchise of a corporation is property, and as such it may be a proper object of taxation, in proportion to its value, the same as other property.

This construction of the Statute is sustained by the general current of authority. *Bank of the Republic v. Hamilton County*, 21 Ill. 53; *Rome R. Co. v. Sullivan*, 14 Ga. 275; *Hannibal & St. J. R. Co. v. Shacklett*, 30 Mo. 650; *New Haven v. New Haven* 12 L. R. A.

*Bank*, 31 Conn. 106; *Abb. Dig. of Law of Corp.* § 126, p. 46; *Van Allen v. The Assessors*, 70 U. S. 3 Wall. 583, 18 L. ed. 234; *Louisville First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 353, 19 L. ed. 701; *New York v. New York Tax Comrs.* 71 U. S. 4 Wall. 253, 18 L. ed. 350; *Porter v. Rockford, R. L. & St. L. Co.* 78 Ill. 551; *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 290, 21 L. ed. 168; *Society for Savings v. Coita*, 78 U. S. 6 Wall. 594, 18 L. ed. 397; *Cooley, Const. Lim.* 496.

In "Duty on Taxation" it is said: "The mode of collecting the tax on the shares of a corporation, by requiring its officers to pay the tax directly into the treasury of the State, is a valid mode, even in the case of the national banks. *Louisville First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 353, 19 L. ed. 701; *McVeagh v. Chicago*, 49 Ill. 313; *State v. Mayhew*, 2 Gill, 457; *New Orleans v. Louisiana Sav. Bank*, 31 La. Ann. 329; *Barney v. State*, 42 Md. 480.

A railroad company required to pay to the State one fifth of its fares collected cannot plead the unconstitutionality of the Statute requiring such payment, in a suit for the recovery of the moneys so collected." *State v. Baltimore & O. R. Co.* 34 Md. 344.

It will be necessary always to consult the charter law of the corporation to be assessed, or the statute law under which the assessment is to be made, in order to determine the course to be pursued in making the assessment. Corporations are generally required to furnish sworn statements of their property with values. These furnish the basis for the assessment, but are not conclusive; other values may be given by the assessors, ascertained from other sources of information. *Walty, Assessments*, § 121.

#### *Comments of the New York Court of Appeals.*

Commenting upon this position, the New York

how much in personal property, and so, no doubt is left that by "capital stock" was meant simply the "capital" possessed in cash or invested in securities or real estate.

The illustrations might be multiplied and fortified by reference to numerous acts relating to the formation or management of manufacturing, railroad business, and telegraph companies, in which the two forms of expression are used indiscriminately and as convertible terms; but I think quite enough has been said to require unhesitating assent to the proposition that, under the Law of 1857, the thing to be taxed is the capital of the Company, and not the shares of the stockholders. Indeed, I should feel bound to apologize for arguing what seems to me so simple and plain a proposition, were it not for the fact that it has been largely ignored by assessors, and not always clearly kept in mind by the courts, and but for the further fact that the right to adopt, as the taxable valuation, the value of the shares, totally disregarding the value of the Company's capital, has been asserted in this case, maintained by the courts below, and claimed to be fully justified by very much which we ourselves have decided or said. Before examining the cases in detail, to see whether they hamper our freedom of judgment upon the question presented, I think it safe, and also prudent, to assert three things as applicable generally, and to all the cases alike: *first*, this court has never decided, either by a direct determination or by necessary implication, that the Law of 1857 authorizes the imposition of a tax upon anything else than the

actual capital of the corporations, together with their surplus; *second*, that the precise question whether the capital of the companies or the share stock of the shareholders forms the basis of valuation, and the thing to be assessed, has not been heretofore formally and distinctly presented; and, *third*, that all seemingly erroneous expressions of opinion are corrected at once when they are referred to the permissible conditions under which the value of the share stock in the market may be referred to, not as the thing to be valued and assessed, but as an aid or help in discovering the value of the other and different thing which is to be valued and assessed. Keeping these general propositions in mind, we now recur to the cases.

The most important, because it opened the door and led the way to some doubtful modes of expression, is that of *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449. That was an action against the assessors to recover damages for having laid an assessment upon the plaintiff company without jurisdiction and in violation of law. Two grounds of liability were asserted,—one, that the business residence of the corporation was at Auburn, in the County of Cayuga, and the assessors of Oswego had no jurisdiction to assess it at all; and the other, that the valuation was excessive, and based upon the share value and the fact of a successful and lucrative business. The report of the case shows merely that, after deducting from the par capital the assessed value of the real estate, the assessors added to the balance 75 per cent to reach actual value. I have examined the original case preserved in our records, and it de-

Court of Appeals, through Mr. Justice Denio, says: "If it were alleged that this" (the nominal capital) "did not represent its" (the stock's) "actual value it would be their duty to look at its market price, and if necessary, to ascertain the character and worth of the securities in which its funds had been invested. It would be equally their duty to inquire whether any of his property, into which the capital had been converted, was exempt by law from taxation. Prima facie, it may be that the nominal amount of the capital would be considered its actual value, but where it should be shown that it" (the corporation) "had met with losses, or that its investments had otherwise depreciated, other means would have to be resorted to, in order to ascertain the actual value of the assets in which its capital consisted. The market price of its shares would ordinarily furnish a practical test; but either the assessor or the taxpayer would have a right to examine and have an estimate made of the value of the securities." *People v. New York Tax Commrs.* 28 N. Y. 194.

#### Comments of the Missouri Supreme Court.

In the case of *State v. Hannibal & St. J. R. Co.*, 37 Mo. 268, the court says: "If the property of a corporation is taxed in the hands of the stockholders, it cannot be taxed in the hands of the corporation also. A corporation is taxable, like a natural person, but it is not to be taxed twice."

#### Comments of the California courts.

The courts of California expressly recognized the effect of an assessment upon corporate property and the assessment of its shares in the hands of its stockholders as involving a double taxation, and hence illegal. Section 3608 of the Political Code is an expressly legislative prohibition of such a method of assessment, and is couched in the following language:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder be taxed therefor."

Under judicial interpretation of this section, it had been held that to assess all the corporate property to the corporation and the shares of the stock to the holders thereof is double taxation, and is prohibited. *Burke v. Badlam*, 57 Cal. 594.

"Capital," *eo nomine*, was held taxable in *San Francisco v. Spring Valley Water Works*, 54 Cal. 571, but a corporation cannot be taxed on capital stock which it does not hold. *People v. National Gold Bank*, 51 Cal. 508.

National bank stock invested under the Banking Act of 1864, in federal securities, cannot be taxed, nor can the corporation be taxed as the owner of such securities. *Bank Tax Case*, 69 U. S. 2 Wall. 200, 17 L. ed. 738; *Collins v. Chicago*, 4 Ill. 472; *Sumner County v. National Bank of Gainesville*, 62 Ala. 464; *New York v. New York Tax Commrs.* 37 U. S. 3 Black, 620, 17 L. ed. 451; *New Orleans v. People's Bank*, 27 La. Ann. 646.

#### Tax on shares of stock as distinguished from the other methods.

The distinction outlined in the principal case sufficiently indicates the importance of distinguishing a tax on shares of stock held by individual holders and a tax on capital stock. In an exhaustive note appended to section 563, *Cook on Stock and Stockholders* says: "In the case, *Porter v. Rockford*, R. I. & St. L. R. Co. 76 Ill. 561 (1875), the

velopes a state of facts very much broader than the report of the case indicates. The corporation had made no list or statement of its assets, as required by law. It chose to leave the assessors in the dark, and furnish them with no information. They were compelled to act upon such facts as they could ascertain. They knew the prosperous character of the business, and had reason to believe that the company had a large surplus, but could not ascertain how much. In this dilemma they inquired as to the value of the share stock, and claim that they found it worth nearly double its par. Thereupon they added a part of that premium to the nominal capital, as being the actual value of the capital and its accretions in the form of surplus. In all this there was no attempt to assess the share stock, but simply an effort to get at the actual value of capital and surplus together. On the day for the hearing of objections, the president of the corporation appeared. He made an affidavit which claimed that the company could only be assessed at Auburn, but which uttered no word of complaint against the valuation put upon capital and surplus, and furnished no information on that subject. On the trial he testified that no other proof than his affidavit was put before the assessors. The latter in their answer explicitly deny that they took into account the value of the profitable business, or that they took as a basis the full value of the share stock. On such a state of facts, the decision which upheld the action of the assessors was entirely correct and sound, and in complete accord with the views which I have

herein expressed. But, while the decision was right I am compelled to admit that some of the reasons in the opinion are open to criticism. Judge Denio does say, in substance, that the actual value of the capital may be swollen above its par value by crediting to it the money value of the fact that "the enterprise was happily chosen and skillfully conducted." But the Statute does not tax either the choice or the conduct. Those are the chief elements in the value of the franchise, and the law does not tax the franchise. If, as I think, may be the truth, the learned judge had in his mind that the happy choice and skillful conduct of the enterprise fairly indicated an accretion to capital of accumulated surplus, and meant only to say that the value of that accretion should be added to capital, then he kept within the boundaries of the Statute. But, beyond that, he intimated quite plainly that the value of the share stock is the fair equivalent of capital and surplus. In that conclusion I cannot concur, but I disagree with less reluctance because the learned judge himself, in a later case, very nearly corrected the error, even if he did not acknowledge it. That was the case of *People v. Tax Comrs.*, 23 N. Y. 192. The question there involved was the right of the corporation to have deducted from the assessment that portion of its capital invested in United States bonds which had been issued without an express enactment exempting them from taxation. Judge Denio on this occasion again referred to the Statute of 1857, and modified his views so far as to say that the assessors "may look" at the value of the share

court clearly recognised this distinction, and said: "The legal property of the shareholder is quite distinct from that of the corporation, although the shares of stock have no value save that which they derive from the corporate property and franchise, and a tax levied upon the property of the one is not, in a legal sense, levied upon the property of the other." See also *Bradley v. Bauder*, 36 Ohio St. 28 (1860). Cf. *The Delaware R. Tax*, 35 U. S. 18 Wall. 206, 230, 21 L. ed. 838, 894; *Farrington v. Tennessee*, 36 U. S. 679, 24 L. ed. 558, where the distinction is clearly drawn; *Quincy Bridge Co. v. Adams County*, 88 Ill. 615. In the case of *North Ward Nat. Bank v. Newark*, 39 N. J. L. 380, the court said: "The moneyed capital of a bank is an entirely different thing from its capital stock. The former is the property of the corporation. It may consist of cash or of bills discounted, or be in part invested in real estate or in the securities of the federal government. In whatever form it is invested, it is owned by the bank as a corporate entity and not by the stockholders. The stock or shares represent the interests of the shareholders, which entitle them to participate in the net profits of the bank in the employment of its capital, and is a distinct and independent interest or property in the shareholders held by them like other property." The case of *Porter v. Rockford*, 21 L. & St. L. R. Co. *supra*, holds also that a tax on the 'capital stock' means the property of the corporation and not the aggregate of the shares of stock. See also *State v. Hamilton*, 5 Ind. 310 (1854), where the word 'stock' was construed to mean the tangible property of the corporation. But see *Trask v. Maguire*, 35 U. S. 18 Wall. 391, 21 L. ed. 938 (1873).

"And even though the value of the capital stock is estimated by the aggregate value [of the shares], it is still a tax on the capital stock. *New Orleans & C. R. Co. v. Board of Assessors*, 22 La. Ann. 19 12 L. R. A.

(1880). See also *Virginia State Bank v. Richmond*, 39 Va. 113.

"So also where the franchise is valued in that manner for taxation. *Com. v. Hamilton Mfg. Co.*, 94 Mass. 298 (1866); *Atty-Gen. v. Bay State Min. Co.*, 99 Mass. 148 (1868). *Hamilton Mfg. Co. v. Massachusetts*, 73 U. S. 6 Wall. 632, 18 L. ed. 904 (1867), holds that a tax on the excess of the market value of the corporate realty and machinery is a franchise tax. In Indiana it is held that a tax on the shares of stock is the proper mode of taxation, unless the statute provides otherwise. *Whitney v. Madison*, 23 Ind. 331.

"The mere fact that the corporation is compelled to pay the tax does not prevent its being considered a tax on the shares. *Louisville First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 353, 360, 19 L. ed. 701, 703, per Miller, J."

#### *Extended review of the authorities.*

Suggestive commentary is found upon laws regulating corporate stocks, and the method of their taxation in section 74 of *Desty on Taxation*, from which we extract the following: "A tax on the shares is in the nature of a tax on incomes. *Memphis v. Ensley*, 6 Baxt. 555; *Union Bank v. State*, 9 Yerg. 490. It is not a charge against the corporation, and is not payable by the receiver of a dissolved corporation. *Relfe v. Columbia L. Ins. Co.*, 11 Mo. App. 374; *Lionberger v. Rowe*, 48 Mo. 97. Where they are taxable to the shareholders, it is not competent to tax the corporation itself, or the shares of nonresidents. *State v. Thomas*, 26 N. J. L. 181. Shares and stock are synonymous, within the requirement of the statute that each corporation must give in for taxation the part or portion of the capital stock which he owns. *Harrison v. Vines*, 46 Tex. 15. Shareholders are liable to be taxed on the market value of their stock, regard-

stock, which, he adds, "would ordinarily furnish a practical test," and he cites his own previous decision. Four of the judges, concurring in the result, disagreed as to the construction of the Statute, and one, *Judge Comstock*, dissented entirely, and wrote out his views at length. That opinion shows that "capital" and "capital stock" are used indiscriminately to designate the estate of the corporation, and that such estate, and not the share stock, is the subject of the valuation. The report of the case leaves it probable that a majority of the court to that extent concurred. It is to be noted that in neither of these cases was the precise question now discussed formally or definitely presented, or necessarily involved, and that in neither opinion is it asserted that the share stock, instead of the capital, is the subject of taxation. That doctrine has arisen, if at all, as an inference from what was said, and not from what was decided. It is further to be observed that in these two cases *Judge Denio* betrays a consciousness that his test of share value is both unsound and applicable only in instances which compel it as a necessity; for—*first*, he says "there is, doubtless, an incongruity in including the accumulated profits above ten per cent in the assessment where the capital is assessed at its market value," and assigns as a reason what I have already said, that to assess the share stock assesses the surplus, and makes its specific mention wholly superfluous, and, *second*, he explicitly admits that "either the assessor or the taxpayer would have a right to examine and have an estimate made of the securities." That admission is fatal to any theory that the share stock is the subject of valuation, for, if it is, the value of the securities representing the capital is totally immaterial, and the right to have it valued depends upon its being the very subject of taxation.

less of the fact that the capital of the corporation has also been taxed, and that the same has been paid. *Memphis v. Enaley*, 6 Baxt. 553; *Porter v. Rockford*, R. I. & St. L. R. Co. 75 Ill. 551; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449; *People v. Tax Comrs.* 23 N. Y. 218; *Minot v. Philadelphia, W. & B. R. Co.* 85 U. S. 18 Wall. 206, 21 L. ed. 888; *People v. Bradley*, 39 Ill. 144; *Bank of Republic v. Hamilton County*, 21 Ill. 54; *Quincy Bridge Co. v. Adams County*, 88 Ill. 615. The stock of a corporation is to be assessed at its actual value, whether above or below the nominal par, and irrespective of its possessing any surplus capital or reserve fund. *Oswego Starch Factory v. Dolloway*, *supra*. Where they have been assessed upon valuation of his shares they are not entitled to a reduction on account of indebtedness. *People v. Dolan*, 36 N. Y. 42. See *Bank of Utica v. Utica*, 4 Paige, 399, 3 L. ed. 437."

The Revenue Act does not make a corporation liable for taxes assessed on its capital stock when such capital is represented by shares of stock which are not the property of the corporation. *People v. National Gold Bank*, 51 Cal. 508.

So a tax upon the capital stock and franchise of a corporation is not a tax on the shares of the shareholders; where the personal property which a corporation was required to list for taxation embraced the capital stock, an owner of shares of the stock of such company is not required to list his shares for taxation. *Jones v. Davis*, 35 Ohio St. 474.

Capital and shares of stock are distinct property, and the exemption of the one will not necessarily 12 L. R. A.

Three other cases followed the two upon which I have commented in which the Statute was referred to,—*People v. Dolan*, 36 N. Y. 59; *People v. Ferguson*, 38 N. Y. 89; *People v. Board of Assessors*, 89 N. Y. 81. They related to the permitted deductions and exemptions, and can scarcely be said to bear upon our present inquiry, except inferentially, and the inferences which they suggest are certainly not in the direction of a right to value the share stock instead of the capital. We come now to the decision in *People v. Tax Comrs.*, 95 N. Y. 554. It would be quite sufficient to say of that case that it involved in no degree the question here at issue. The sole conflict between the contending parties assumed that capital and surplus aggregated had been fairly and justly valued, and that the property to be taxed was such capital and surplus. The opinion aggregates them under the one name of "capital," which was not strictly correct, and yet was sufficiently so for the purposes of an inquiry, which did not depend upon any special discrimination between them. That discrimination was so carefully made by the same pen in *Williams v. Western U. Teleg. Co.*, 93 N. Y. 188, as to leave no doubt that it was perfectly understood. The point of the case was to determine whether the real estate was to be deducted from the nominal capital stock or from the actual value of the "capital," using that word as including surplus, and whether at the value paid for it or at the value for which it was assessed on the assessment rolls. Those questions, and those only, were decided, and if in the process surplus was treated as part of capital, instead of an accretion beyond it, the aggregation was at the moment convenient and immaterial to any necessity of the case. It did no harm, then, but must not be allowed to prevent upon a different inquiry the discrimination which in fact

exempt the other; so the taxation of one is not an imposition of a tax on the other. *Memphis v. Farrington*, 3 Baxt. 559. See *New York v. New York Tax Comrs.* 71 U. S. 4 Wall. 259, 18 L. ed. 350; *Van Allen v. Assessors*, 70 U. S. 3 Wall. 573, 18 L. ed. 229.

Even if the shares of stock are erroneously assessed, it affords no reason why the capital stock should not be taxed. It is the fault of the shareholders if they pay an erroneous tax on their shares. *Republic L. Ins. Co. v. Pollak*, 75 Ill. 238.

An exemption of the capital stock, without other words of limitation, may operate to exempt all the property of the corporation (*Bank of Commerce v. Tennessee*, 104 U. S. 495, 26 L. ed. 811; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *Jones v. Davis*, 35 Ohio St. 477; *Bank Tax Case*, 69 U. S. 3 Wall. 206, 17 L. ed. 735; *Farrington v. Tennessee*, 95 U. S. 683, 24 L. ed. 590); and where the purpose for which a corporation may hold property is specified in connection with the exemption, the limitation of taxation designated must be held to apply only to property. *Burrall v. Bushwick R. Co.* 75 N. Y. 211; *San Francisco v. Spring Valley Water Works*, 54 Cal. 575.

Under the Tax Revenue Laws the capital of a domestic corporation must be taxed, and the shares of stock are exempted; but when a resident owns stock in a corporation created in another State, it is taxable against him. *Porter v. Rockford, R. I. & St. L. R. Co.* 75 Ill. 551. When the capital stock is taxable, the shares of stock are exempt from taxation in the hands of stockholders. *Republic L. Ins. Co. v. Pollak*, *supra*.



this court had already made. If beyond that words were used which indicate that our judgments had been affected by the opinion in the *Oswego Starch Case*, the result was natural, so long as attention was not drawn to an inquiry which would have developed the existing ambiguity and its cause.

The next case relied upon by the respondents is *People v. Astor*, 100 N. Y. 597, 1 Cent. Rep. 770. That again was a question, and a question only, of the mode of deducting the real estate. No dispute existed over the valuation of the company's capital stock. It was deemed worth exactly the par of its nominal capital, and both sides assented to that as its actual value. It was of no consequence to the decision how the assessors arrived at that value, since no question arose over it; and what was said in the opinion as to the right of the assessors to consider the market value of the shares and the dividend-earning power of the corporation was *obiter*, and needless to the sole questions at issue, which were whether the real estate should be deducted at the price paid for it, or at its assessed value on the rolls, and whether an incumbrance upon it in the form of a mortgage for \$80,000 should or should not be deducted. Indeed, the remarks which I have characterized as *obiter* may, as we shall presently see, have been justified in their application to the action of the assessors by the existing circumstances which surrounded their actions, but which do not appear in the report of the case.

The next authority relied on by the respondents is *People v. Tax Commrs.*, 104 N. Y. 240, 6 Cent. Rep. 881. There, again, the point involved respected solely the deduction of real estate, and the manner of ascertaining the value to be deducted. Not one word was said in the opinion as to what was meant by the actual value of capital stock and surplus, or what was the thing to be valued; for no question whatever was raised over that. The real estate of the company was a railroad situated in a foreign country. Not being assessed upon the rolls in this State or elsewhere, its assessed value could not be deducted, and resort was necessarily had to its actual value. The relator sought to estimate the value of the real estate by fixing, first, the aggregate value of the whole railroad, and then deducting the value of the equipment. This court combated that method on the ground that it imported into the value of the real estate the additional value of the franchise. When the opinion declared that "the value of the franchise of the corporation is an important element in determining the value of a railroad as a whole or the value of its capital stock," it meant exactly what it said, using the last phrase in the sense which is entirely apparent, viz., that of the share stock which represents the railroad as a whole, or the entire property of the company as a railroad company.

The final case to be examined is *People v. Coleman*, 107 N. Y. 541, 10 Cent. Rep. 266. It appeared that the relator's stock at par amounted to \$210,000, while its share stock was selling below par, and for 90 cents on the dollar. But the assessors did not assess the share stock, nor take its value as the test of capital, and so showing no surplus but a defi-

ciency. On the contrary, they went to the company's own books for information, and there found, not a deficiency, but a surplus; and, deducting from the aggregate of capital and surplus the assessed value of the real estate, United States stock, and the exempted 10 per cent, they found a taxable balance of about \$25,000. The company resisted. Their counsel argued that "the assessment should not exceed the market value of the capital stock, less statutory exemptions." 107 N. Y. 542, 10 Cent. Rep. 267. By "capital stock" he plainly meant the share stock which was selling at 90. The counsel for the assessors insisted that "the market value of shares of stock of the corporation is not the proper and sole test of the value of the corporate capital." On that issue we sustained the assessment. In so doing, we necessarily decided that capital, swollen by surplus or diminished by losses, was the subject to be valued and taxed, and not the share stock; and that when the actual value of capital and surplus was known and established, in this case by the party's own books, no reference to the value of the shares could be permitted to lessen the valuation. The case, therefore, was correctly decided, and in entire accord with the doctrine which I have herein advocated. But the opinion contained a statement which has been cited as conclusive by the general term, and also on the argument at our bar, and to which I now refer, because it opens the way to the final point of the discussion, and to a fact which accounts for and explains most of the references to the value of share stock which are seemingly of a doubtful character. The language was this: "The law does not prescribe how the actual value of the capital stock of a corporation shall be ascertained. That is left to the judgment of the assessors, and in appraising the actual value they have a right to resort to all the tests and measures of value which men ordinarily adopt for business purposes in estimating and measuring values of property. They may take into account the business of the corporation, its property, the value of its actual assets, the amount and nature of its present and contingent liabilities, the amount of its dividends, and the market value of its shares of stock in the hands of individuals." Now, I do not desire to withdraw in any degree the concurrence which I yielded to this statement when the case was decided, but it must not be wrested from its application to the facts then before the court, and be made to do duty on a different and broader field. The corporation was a fire insurance company, with a wide range of contingent liabilities. It had made no statement to the assessors, and had left them to their own resources. Where that is so, what are the officers to do? Necessarily they must resort to such means of information as remain and are accessible, and in that emergency they may "look at," "take into account," consider, the market value of the shares. That is something very different from assessing the share stock, or making its value the conclusive measure of capital and surplus. Such reference is simply the result of necessity, a resort to the poorest means of information, and to the most deceptive and treacherous test, because the better means or truer test cannot be obtained.

How unreliable the test of share value may be, through the effect of gambling, false rumors, scarce money and panics, *Judge Comstock* describes in his opinion to which I have already referred; and yet there are cases in which it furnishes some aid to the judgment in the absence of accurate knowledge. It is such cases that the courts have had in mind when justifying a reference to the stock market, and not those in which the amount and value of capital and surplus were fully and faithfully disclosed; and so I think the authorities either fairly permit or fully justify the conclusions which I have reached, and which may be stated with reasonable accuracy thus: *first*, the subject of valuation and assessment is never the share stock, but always the company's capital and surplus; *second*, such capital and surplus must be assessed at its own value, and, when that is correctly known and ascertained, no other value can be substituted for it; *third*, where its amount and value are undisclosed and unknown, the assessors may consider the market value of the share stock, and the general condition of the company, as indicative of surplus or deficiency, and of the probable amount of either; *fourth*, they may further resort to such means of information when the amount of capital and surplus is disclosed, but the assessors have sufficient reason to disbelieve the statement, and such reason is founded upon facts established by competent proof.

If these conclusions are correct, it will follow that the assessment complained of should be canceled. The corporation presented to the assessors a sworn statement of its assets and liabilities. If it be true, there was nothing subject to assessment. But its truth is not questioned, and there is not the least reason to doubt it. The assessors did not doubt it. They merely deemed it immaterial, and so testified when examined. In other words, knowing with certainty the value of one thing, they claimed the right to affix to it the larger value of a different thing. Authorized only to tax against the company its capital and surplus, they assumed the right, practically, to tax it

for the share stock held by individuals. They have not in terms claimed that the share stock is the subject of taxation, nor has the counsel who represented them on the argument, but both have maintained and defended what is the exact and complete equivalent. The right asserted is a discretion in the assessors, at their free will, to assess corporations upon and at the value of their capital and surplus, or upon and at the value of the share stock, independently of established facts, and whenever they please. The law gives them no such discretion. How it has been exercised, and how destructively to the rights of taxpayers, may be seen by comparing the action in this case with that in one of the cases which we have reviewed. Where the share stock was selling at 90, and so below par, the assessors refused to take that value, and went to the Company's books in search of a larger one, which they found and adopted. Here, where the actual value of capital and surplus is established so that they frankly admit the fact, they calmly disregard it, and fly to the larger value of the share stock. The Statute has given them no such right. They are not lawless rovers, wandering among corporations at will, but regular officers, bound by discipline and controlled by the law, and whose discretion exists within fixed and definite limits. It is said, and it is true, that large masses of personal property escape taxation, and the owners are persistent and artful, and not over-nice, in their efforts to avoid a just share of the public burdens, and so we should uphold faithful assessors in every attempt to do their full duty. I think this court will not be unmindful of the situation, but, before all, we must first ascertain, and then obey, the law. If in that process evils result or are disclosed, the remedy must be sought elsewhere.

It follows that the judgment and order of the General and of the Special Term should be reversed, and the assessment against the relator vacated and canceled without costs.

All concur, except *Peckham, J.*, not voting, and *Gray, J.*, absent.

## FLORIDA SUPREME COURT.

GUARANTY TRUST & SAFE DEPOSIT CO., *et al.*, *Appts.*,

v.

O. A. BUDDINGTON *et al.*

(....Fla.....)

\*1. The term "months," when used in a statute of this State, means calendar months.

\*Head notes by RANNEY, Ch. J.

NOTE.—The term "month" not technical.

The term "month" is not technical. When parties have not given it a definition, and there is no legislative provision on the subject, it will be construed in its ordinary sense of calendar month. *Sheets v. Selden*, 69 U. S. 2 Wall. 190, 17 L. ed. 826. See also *Brudenell v. Vaux*, 2 U. S. 2 Dall. 302, 1 L. ed. 590; *Com. v. Chambre*, 4 U. S. 4 Dall. 143, 1 L. ed. 776; *Union Bank of Georgetown v. Forrest*, 8 Cranch, 0 12 L. R. A.

See also 30 L. R. A. 450.

and not lunar months, unless there is something in the Statute which indicates that a contrary meaning was intended.

2. The term "months," as used in the Act of November 7, 1888 (§ 8, p. 154, *McClell. Dig.*), providing for the publication of orders in chancery causes for absent defendants to appear and plead, and for decrees *pro confesso* in default thereof, means calendar months.

3. Jurisdiction is not acquired of a non-resident defendant by publishing for a

*C. 218; Hunt v. Holden*, 3 Mass. 170; *Avery v. Pixley*, 4 Mass. 460; *Churhill v. Merchants Bank*, 19 Pick. 532; *Parsons v. Chamberlin*, 4 Wend. 512; *People v. New York*, 10 Wend. 393; *Jackson v. Van Valkenburgh*, 8 Cow. 280; *Leffingwell v. White*, 1 Johns. Cas. 99; *Holsey v. Black*, 28 N. Y. 444.

In general, when a statute speaks of a month, without adding "calendar," or other words showing a clear intention, it shall be intended a lunar

period of four lunar months, but of less than four calendar months, where the Statute (§ 8, p. 154, McClell. Dig.) requires the publication to be made for four months, and there is nothing in it showing that lunar months were intended; and decrees rendered upon such publication of an order to appear and plead are of no effect as to such defendant.

(April 12, 1891.)

**A**PPEAL by defendants from decrees of the Circuit Court for Clay County directing bills filed against them to be taken as confessed for want of appearance after publication of notice to them as nonresidents. *Reversed.*

The facts are stated in the opinion.

*Mr. H. Bisbee* for appellants.

*Messrs. Fleming & Daniel, C. P. & J. C. Cooper, and A. W. Cockrell & Son,* for appellees:

In England, before the 18th day of November, 1847, when the word "month" was used in a statute, without the addition of "calendar," or any other words to show the Parliament meant "calendar," it was understood to mean a lunar month.

*Lacon v. Hooper*, 6 T. R. 224, 1 Esp. 246.

In legal matters, a month means a lunar month.

*Hart v. Middleton*, 2 Car. & K. 9; *Atty-Gen. v. Newbury Corp.* 1 Coop. 883.

This was changed by 18 and 14 Vict., chap. 21.

Since the passage of the Florida Act, the common-law meaning of the word "month," importing a "lunar" month, has been changed,

not by judicial action, but by statute law, in the following States as noted:

N. H. Gen. Laws 1878, chap. 1, § 8; Mass. Pub. Stat. 1882, chap. 8, § 3; Me. Rev. Stat. 1883, chap. 1, § 6; Vt. Rev. Laws 1880, § 12; R. I. Pub. Stat. 1882, chap. 24, § 11; Conn. Rev. Laws 1875, title 22, chap. 9; Banks & Bro. Rev. Stat. (N. Y.) chap. 19, title 1, §§ 3, 4; N. J. Rev. Stat. 1877, § 10; Ind. Rev. Stat. 1881, § 240; Ill. Stat. 1883, Cothran's ed. chap. 131, § 1; How. Ann. Stat. (Mich.) 1882, § 2; Wis. Rev. Stat. 1878, § 2578; Miller's Rev. Code (Iowa) 1880, § 45; Minn. Gen. Stat. 1878, chap. 4, § 1; Dassel's Com. Laws (Kan.) 1879, chap. 80, § 720, applies only to construction of the Code; Del. Rev. Code 1874, chap. 5, § 1; Va. Code 1873, chap. 15, § 9; W. Va. Bien. Law 1882, art. 143, § 14; N. C. Code 1883, § 3765; Ky. Gen. Stat. 1873, chap. 21, § 7, and § 732; Bullitt's Civ. Code; Mill & Vetre's Code (Tenn.) 1884, § 50; Mo. Rev. Stat. 1879, § 3126; Mansf. Dig. (Ark.) 1884, § 6354; Tex. Rev. Stat. 1879, § 3188; Hittell's Civ. Code (Cal.) § 5014; Colo. Civ. Code 1877, § 406; Code 1881 (Wash. Terr.) § 759; Leviess's Codes 1883 (Dak.) § 2123; Idaho Civ. Code 1881, § 11; Mont. Gen. Laws, § 149; Ga. Code 1882, § 5; Ala. Code 1876, § 8; Miss. Code 1880, § 12; Utah Civ. Code Proc. 1884, § 11; Arizona Comp. Laws 1877, § 8.

In *Loring v. Halling*, 15 Johns. 119, 120, the word "month" in a statute was held to mean lunar month.

See also *Stackhouse v. Halsey*, 3 Johns. Ch. 74, 1 L. ed. 547; *Jackson v. Van Valkenburgh*, 8 Cow. 260.

The legislative power of Florida, by which

month. Comyns, Dig. Anno. (B); *Parsons v. Chamberlin*, *supra*; *Snyder v. Warren*, 3 Cow. 513, 505; *Loring v. Halling*, 15 Johns. 119.

In all legal proceedings, as in commitments, pleadings, etc., a month means four weeks. *Tullett v. Linfield*, 3 Burr. 1455; *Talbot v. Linfield*, 1 W. Bl. 450; *Bex v. Adderley*, Dougl. 463; *Stackhouse v. Halsey*, 3 Johns. Ch. 74, 1 L. ed. 547; *Lacon v. Hooper*, 6 T. R. 224.

#### Rule of the common law.

In all statutes a month signifies a lunar month, unless it appears to be clearly intended to be a calendar month; and in all legal documents and proceedings the legal month is a lunar month, except in bills of exchange and promissory notes, cases of lapse, and *quare impedit*, in which four cases months are deemed calendar months. Wood, Land. and T. § 57.

By the common law of England, a month is, in temporal matters, a lunar month (1 Steph. Com. 265; 2 Bl. Com. 141), the reason of which rule is explained to be, "not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks." Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for "a twelve-month," in the singular number, it is good for the whole year. *Ibid.* In statutes and deeds, "month" means a lunar month, unless expressly declared as calendar, or so appearing from the context (Comyns, Dig. Anno. B; *Lang v. Gale*, 1 Maule & S. 118; so in all contracts, unless a contrary intention appear, or unless a general understanding of trade to the contrary be proved (*Dyke v. Sweeting*, Wills, 595; *Barksdale v. Morgan*, 4 Mod. 185); so, in all legal proceedings, unless the month be expressly described as calendar. *Tullett v. Linfield*, 3 Burr. 1455; *Talbot v. Linfield*, 1 W. Bl. 12 L. R. A.

450; *Bex v. Adderley*, Dougl. 463; 3 Chitty, Bl. Com. 140, note.

In ecclesiastical matters, on the other hand, "month" means a calendar month. *Catesby's Case*, 6 Coke, 61b; 2 Rolle, Abr. 581; *Copley v. Collins*, 4 Hob. 179; *Talbot v. Linfield*, 1 W. Bl. 450; 1 Steph. Com. 265; *Tullett v. Linfield*, 3 Burr. 1455; *Lang v. Gale*, 1 Maule & S. 111; *Bouvier, Law Dict. Month*. So, by the custom of trade as in case of bills of exchange and promissory notes, a month is deemed a calendar month. *Cockell v. Gray*, 3 Brod. & B. 187.

This indeed is the universal rule of the commercial world, in regard, not only to negotiable instruments, but all commercial contracts. *Story, Bills*, § 330.

In Pennsylvania and Massachusetts, and perhaps some other States (1 Hill, Abr. 113, note), a month mentioned generally in a statute has been construed to mean a calendar month. *Avery v. Pixley*, 4 Mass. 461; *Brudenell v. Vaux*, 3 U. S. 2 Dall. 302, 1 L. ed. 390; *Com. v. Chambre*, 4 U. S. 4 Dall. 143, 1 L. ed. 776.

Computation of time must be by; calendar months. *Com. v. Chambre*, *supra*.

So where a lease provided that rents should be paid semi-annually on the first days of May and November, and that, if any installment should remain unpaid for one month the lessee's rights should cease, the time expired on the first day of June. The day on which the rent became due was to be excluded. *Sheets v. Selden*, 60 U. S. 3 Wall. 177, 17 L. ed. 822.

#### Early rule relaxed.

In the United States the old English rule is considerably relaxed, and the term "month" usually computed, and especially in statutes and judicial proceedings, as calendar. 4 Kent, Com. 94, 95, note.

alone the rule of the common law can be changed, has never been exerted in the direction of declaring that the word "month," when used in a statute, shall mean calendar month. Nor have the courts of Florida, in any instance, held that the word "month," as used in the statute bringing nonresidents into court by publication, means anything but "a common-law" month, a "lunar month."

*Bacon v. State*, 23 Fla. 47, interpreted in the light of *Sheets v. Selden*, 69 U. S. 2 Wall. 177, 17 L. ed. 822, does not conflict with this view.

Raney, Ch. J., delivered the opinion of the court:

The causes in which the orders of publication were made were consolidated subsequently by an order of the court. Buddington, Wilson & Co. were complainants in one, and Philip J. Canova was the complainant in the other of them.

The order in the case in which Buddington, Wilson & Co. were complainants was made July 29, 1884, and directs that the Chester Construction Company and the Guaranty Trust & Safe-Deposit Company, bodies corporate organized under the laws of States of the United States other than Florida, and residing and having their principal places of business at stated places in such other States, appear and answer the bill on or before the first Monday of December, 1884, or that the bill shall be taken as confessed, and directs that the order be published once a week for four months in some paper published in Clay County. On

the 15th day of January, 1885, an order was made reciting that it appeared to the satisfaction of the court, from the affidavit of H. E. Bemis, business manager, that the above order of publication (designating it) had been published in the named paper once each week for four consecutive months, and "one month having expired of the time thereby limited for appearance and answer," and that the defendants had failed to appear, adjudges that the bill be taken for confessed, and that the cause be proceeded in *ex parte* as against the two defendants.

The law under which the order of publication was made is the thirteenth section of the Act of November 7, 1828 (§ 8, p. 452, Thomp. Dig.; § 8, p. 154, McClell. Dig.), which provides that the order shall be published in any newspaper published in the circuit in which the bill is filed, as follows: "If the defendant resides in this State, but not in the circuit in which the bill is filed, for two months; if in any other part of the United States, for four months;" and, after stating "six months" and "nine months" as the periods of publication where the defendant resides in the West India Islands or in Europe, as the case may be, it reads: "Which publication shall be, when the defendant resides in the United States, once a week; and when he or she resides out of the United States, once a month, during the periods above described."

The first question to be decided is whether the word "month," as used in this Statute, means a lunar or a calendar month. Black-

In Georgia, however, the English rule is followed. *Redmond v. Glover*, Dudley (Ga.) 107.

In New York, it has been expressly reversed, it being declared by statute that whenever the term "month" or "months" is or shall be used in any statute, Act, deed, verbal or written contract, or any public or private instrument whatever, it shall be construed to mean a calendar and not a lunar month, unless otherwise expressed. 1 Rev. Stat. (1806) 615, § 4; 2 Burrill, Law Dict. title *Month*.

The word "month," when used in a statute or Constitution, means a calendar month, unless words are added showing that a lunar month was intended. *Baltimore & D. P. R. Co. v. Pumphrey* (Md.) March 25, 1891.

The word was held to import a calendar month as early as 1794, in the circuit court for the District of Pennsylvania, in construing an Act of the Legislature (*Brudenell v. Vaux*, 2 U. S. 2 Dall. 302, 1 L. ed. 390), and in 1808, in the Supreme Judicial Court of Massachusetts, it was said that "in this State, as well before as since the Revolution, a month mentioned generally in any Act had immemorially been considered as a calendar month." *Avery v. Pixley*, 4 Mass. 460, 461; *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 197, 85 L. ed. 116.

A statute which requires publication as against nonresident defendants to be made once a week for four months is not satisfied by a publication for sixteen weeks or four lunar months; the word "month" in contracts or statutes means calendar month. *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.* *supra*.

#### *Statutory provisions on the subject.*

The law takes no account of the fractions of a day, unless it be to prevent injustice. *Blydenburgh v. Cotheal*, 4 N. Y. 418; *Duffy v. Ogden*, 64 Pa. 240; *Clute v. Clute*, 3 Denio, 263. 12 L. R. A.

The term "month" is regulated by Statute in California, and section 17 of the Code of Civil Procedure enacts that the word "month" means a calendar month, unless otherwise expressed.

Where a statute directs the publication of notices a certain number of times a week for a specified number of months, it is requisite, not only that the number of weekly publications be observed, but that the prescribed length of time, calculated according to the calendar month, be followed. *Sav. & Loan Soc. v. Thompson*, 32 Cal. 347; *Sprague v. Norway*, 31 Cal. 173; 1 Wood, Land, and T. § 57.

From the cases, *Parker v. Constable*, 3 Wils. 25, and *Right v. Darby*, 1 T. R. 159, it appears that a notice to a tenant from year to year to quit the premises must be half a year, and not six calendar months, though the computation by the latter would be more simple and convenient; and that is understood to be the proper notice by the court of common pleas in *Doe v. Snowden*, 2 W. Bl. 1224; *Catesby's Case*, 6 Coke, 61b.

#### *The term in its relation to promissory notes.*

In computing the time when a note, payable at a certain number of months after date, will become due, the rule is to exclude the day of the date from the calculation and include the day of payment, when no days of grace are allowed. *Bellasis v. Hester*, 1 Ld. Raym. 280; *Campbell v. French*, 5 T. R. 212.

When a promissory note is dated on a day of any month, and made payable at a specified number of months after that date, without days of grace, it becomes due and payable on the same day of the date of the note (*Hartford Bank v. Barry*, 17 Mass. 94; *Ripley v. Greenleaf*, 2 Vt. 120); the months after date are then fully complete. *Roehner v. Knickerbocker Life Ins. Co.* 63 N. Y. 160.

stone, after stating that a year is a determinate and well-known period, consisting commonly of 365 days, and in leap-years of 366, says that a "month" is more ambiguous, there being in common use two ways of calculating months, either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year; or as calendar months of unequal length, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A "month," he says, is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is one of uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease is only for forty-eight weeks; but if it be for "a twelvemonth," in the singular number, it is good for the whole year. For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases, it being generally understood that by the space of time called thus, in the singular number, "a twelvemonth," is meant the whole year, consisting of the solar revolution. 2 Bl. Com. pp. 140-142.

A "month," in temporal matters, except in *quare impedit*, and at least some commercial matters, meant, unless a different meaning was shown to be intended, a lunar month; but in ecclesiastical matters it meant a solar month. *Talbot v. Linfield*, 1 W. Bl. 450; *Lang v. Gale*, 1 Maule & S. 111; *Titus v. Preston*, 1 Strange, 652; *Cockell v. Gray*, 3 Brod. & B. 186; Bayley, Bills, 288.

In *Barkdale v. Morgan*, 4 Mod. 185 (A. D. 1694), where, on a contract to pay "within one month next following," the decision was that the time should be reckoned a lunar month, the court said: "In common parlance, the month is taken to be twenty-eight days in all cases except in a *quare impedit*, and therefore it must be so many days, according to the common and known acceptation of the word."

In *Lacon v. Hooper*, 6 T. R. 224 (decided in 1795), where it was held that the word "month," infused in a statute without the addition of the word "calendar," or anything to show that the Legislature meant a calendar month, meant a lunar month, Lord Kenyon said that the rule had been so long established that it should not be shaken, but confessed that he wished that the rule as first established by the decisions had been otherwise.

That the rule in England was as stated above, until changed by Act of Parliament during the present reign, cannot be denied; and it is true that in New York the same rule of construction was followed. *Leffingwell v. White*, 1 Johns. Cas. 99 (decided in 1791), held that calendar months were meant in matters of bills of exchange (*Stackhouse v. Halsey*, 3 Johns. Ch. 73, 1 L. ed. 547); that a statute as to the advertisement of mortgaged property for sale "once a week, for six successive months," meant lunar months. *Jackson v. Clark*, 7 Johns. 217; *Loring v. Halling*, 15 Johns. 119.

In *People v. New York*, 10 Wend. 895, where a statute allowed the owners of land two years from the time of the sale for taxes within which to redeem, and required the municipal authorities to give public notice at least six months before the expiration of that period, 12 L. R. A.

for four weeks, it was held that "months" meant calendar months. "Now," says the opinion, "as calendar time is used by the Legislature in fixing the period for redemption, it is a just and reasonable inference that they intended to use it in fixing upon the division or point of time specifying the notice to be given to the owners to redeem. As the one period, in express terms, is calendar time, and the six months immediately succeed it, and were intended to include a part of it, it should be construed to mean the same; otherwise we must believe the Legislature intended to fix the different periods by different calculations of time, in the same breath and on the same subject, and without any conceivable purpose." See also *Snyder v. Warren*, 2 Cow. 518; *Parsons v. Chamberlin*, 4 Wend. 512.

In the last case a Statute authorized any justice of the peace who should be removed from office before the collection of the money due on any judgment rendered by him, to issue execution "at any time within six months after such removal." No calendar time was mentioned in the Statute, "but," it was said, "the days mentioned in the execution correspond merely to calendar time. Executions are to be issued within thirty or ninety days, and they are returnable within similar periods. There is reason, therefore, to believe that calendar time was intended."

The supreme courts of North Carolina and Delaware have, we find, adopted the English view (*Rives v. Guthrie*, 1 Jones, L. 84; *State v. Jacobs*, 2 Harr. (Del.) 548); and there is in Georgia a superior court decision to the same effect. *Redmond v. Glover*, Dudley (Ga.) 107.

If the supreme courts of any other of the States have adopted or approved the English view, neither our own investigation nor those of counsel have discovered the fact. It has, on the contrary, been repudiated by many of the courts, for reasons that must commend themselves. Taking, in somewhat alphabetical order, the States in which there have been decisions on the subject, we find that in Alabama, in *Bartol v. Calvert*, 21 Ala. 42, where the term "months" was used in a Statute in 1848, in prescribing the time for filing claims against insolvent estates, they were held to mean calendar and not lunar months. Says the opinion, after recognizing the English rule to be as stated above: "In the United States there is some conflict of decisions, but the current of authority is to the reverse of the English rule. The general rule established by the American cases commends itself strongly by its superior convenience, its correspondence with our business transactions, as well as the received understanding in the community of the meaning of the term; and for these reasons we adopt it in preference to the English rule."

In *Gross v. Fowler*, 21 Cal. 398, where the term was used in a statute fixing the period for the redemption of property from judicial sales, it was held to mean calendar months. We must construe it, says the court, as we would any other term which the Legislature has used, and to which it has not affixed a special definition. It is not a technical term, and therefore it must be taken in its ordinary and general sense. In the general and popular use of the term, calendar months are always intended.

In *Strong v. Birchard*, 5 Conn. 357 (A. D. 1824), where the question was whether the time of an execution levied on land had expired by not being recorded within "four months" from the rendition of the judgment, it was held that the calendar months was its meaning. Having stated the law of the mother country as above, in its application to different subjects, the supreme court of that State said: "This fluctuation in the construction of a word cannot fail to produce more uncertainty and inconvenience than is counteracted by any imaginary benefit when considering it as generally possessing one signification, but occasionally admitting of another. Of this opinion was undoubtedly Lord Kenyon in *Lacon v. Hooper*.

... Uniformity in the construction of a word not used technically, nor governed by the subject matter, is not only desirable but unquestionably proper, and the proper meaning of a term used in a statute, made to be understood and practiced upon the people, is the only intendment that ought to be adopted. Upon this sound and obvious principle, in this State, as well as in the sister State of Massachusetts, the word 'month' has invariably been expounded to mean calendar month; that is, to mean what everyone not a lawyer by profession believes the word to mean." The chief justice remarked also that the point was solemnly decided thus more than thirty years before by the superior court. The decision in *Avery v. Pixley*, 4 Mass. 459 (A. D. 1808), on a statute requiring appeal from the probate court to be claimed within "one month," was that it meant a calendar month; and it was said that in that State, as well before as since the Revolution, a month mentioned generally in a statute had immemorially been considered a calendar month. See also *Churchill v. Merchants Bank*, 19 Pick. 532, 535.

The Supreme Court of Pennsylvania held in 1794, in *Com. v. Chambers*, 4 U. S. 4 Dall. 143, 1 L. ed. 778, that the computation of time under the Act of 1780, for the gradual abolition of domestic slaves attending upon persons passing through or sojourning in the State, provided they be not retained in the State "longer than six months," must be by calendar months, the court remarking that the same expression in other statutes of the State had uniformly received the same construction.

In *Shopley v. Garey*, 6 Serg. & R. 539 (A. D. 1821), after referring to the fact that in the mother country a "month" was in common parlance formerly understood to mean twenty-eight days, and hence the English rule of the common-law courts, the court says that however wise this rule may have been in its origin, the reason of it has long ceased, at least in this country, where the popular understanding on the subject is so entirely changed that in all the transactions and business of life the month is universally estimated by the calendar, and the lunar month never enters into the contemplation of anyone. In South Carolina, in the case of *Alston v. Alston*, 3 Brev. 469, 2 Tread. L. 604 (decided in 1814), the term "months," in an Act of 1785 relating to the recording of marriage contracts, was decided to mean calendar months. The reasoning of the court was that in common parlance "month" means calendar month; that in some of the law books

it was laid down that it meant lunar month, but the universal method of computing time in that State was by calendar months, and the members of the Legislature must be presumed to have used the word in the Act in the same manner as they would have used it on any other occasion.

In *Williamson v. Farrow*, 1 Bailey, L. 611 (A. D. 1830), the decision was that the word, when employed in that State in statutes or in judicial proceedings, meant calendar month, and that it was to be understood in the same sense in all matters of contract, unless the parties have obviously intended it to mean a lunar month. The Supreme Court of Virginia held in *Brewer v. Harris*, 5 Gratt. 285, the meaning of a Statute requiring that indentures of apprenticeship should be filed within "six months" from the date of the order authorizing them to be executed, to be calendar months, and said: "We know perfectly well that with us, by general usage and popular acceptance, whenever the word 'months' is used, without qualification or explanation, in common parlance or business transactions, it is understood to mean calendar, and not lunar, months. Now, in the use of language not technical, the Legislature must be supposed to express their meaning according to the sense in which it will be understood by the persons for whom they legislate. And that, in point of fact, this word has uniformly been so employed, we also know, from the whole course of our legislation and judicial proceedings. It is impossible, therefore, that the legislative will, thus indicated, can be controlled and perverted, and extensive mischiefs introduced into our jurisprudence, by the application to the subject of English adjudications. Whatever may be the meaning in this respect of the English statutes (founded originally upon a different usage and habit), such is not the meaning of our Virginia statutes; and that is all upon such a question which it is our province to adjudicate."

The Circuit Court of the United States, sitting at its April Term, 1794, in the district of Pennsylvania, held in the case of *Brudenell v. Vaux*, 2 U. S. 2 Dall. 302, 1 L. ed. 390, that the term in question, as used in the Mortgage Recording Act of that State, meant calendar months; and the Supreme Court, in a case from Indiana (*Sheets v. Selden*, 60 U. S. 2 Wall. 177, 17 L. ed. 823), held that the term "months," when used in contracts or deeds, must be construed, where the parties have not given it a definition, and there is no legislative provision on the subject, to mean calendar, and not lunar, month. The term, said the court, is not technical, and when the parties have not themselves given it a definition, it must be construed in its ordinary and general sense, and there can be no doubt that in this sense calendar months are always understood, and that the reasons upon which a different rule rests in England, with reference to other than mercantile contracts, do not outweigh this consideration. That court in *Hunt v. Wickliffe*, 27 U. S. 2 Pet. 201, 7 L. ed. 397 (A. D. 1829), following what it understood to be the decision of the Supreme Court of Kentucky, held a requirement of a statute of that State for the publication of an order of the kind now under

consideration for two months, was not answered by a publication of eight weeks.

It is evident from these authorities that the English rule has not been followed generally in this country, but, on the contrary, it has oftener been repudiated. There the features of uniformity of period and of the divisibility into equal quarterly periods so commended the lunar month that, by common acceptance, the word "month" became and was understood to mean, in its ordinary use, a lunar month, and this meaning was held by the courts to be the one intended by the law-making power when using it. Neither the reasons which commended the lunar period to the people of England, nor any other considerations, have caused its general adoption by the people of our own country. The rule which had become the source of judicial regret there, as early as 1795, has never been generally established here. Common usage has adopted the calendar periods, and the courts hold that the law-making power should be understood to have used the term in the same sense as the people use it, and should give that effect to it which by common acceptance it has, and is in common parlance intended to convey, when used by the people. There is no inconsistency in the reasons controlling the English courts and the majority of those of this country. Each has given to a word, not technical, the meaning and effect which it has by common understanding in the territorial jurisdiction spoken for. The meaning of the word "month," as commonly used and understood in Florida, is a calendar month. Nobody uses it, or understands it to be used, as meaning anything else, where a contrary meaning is not expressed. There is nothing to suggest that it ever had any other commonly accepted meaning in this State. If it ever had, the present acceptance would doubtless be based upon Statute. There is no statute. Should we hold that this Statute means lunar months, we would not only disregard the weight of authority, and what we deem the sounder reasons, but we would defeat the intention of the law-makers. That the Legislatures of thirty-five States and Territories may have defined the term "month" to mean a calendar month cannot be regarded as satisfactory evidence that its meaning was otherwise in the respective jurisdictions of any of them other than New York, North Carolina and Delaware, and perhaps Georgia, when we consider that it has been adjudicated in at least six or seven of the thirty-five to mean a calendar month.

This question was considered in the case of *Bacon v. State*, 22 Fla. 46, in connection with the use of the word in a judicial order allowing time for settling a bill of exceptions, and the conclusion reached was consistent with the views expressed above. See also *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 187, 35 L. ed. 116.

The "four months" for which the Statute requires an order of this kind published are calendar months, and this term of publication is a continuous period equal to four calendar months preceding the day fixed by the order for the nonresident defendants to appear and plead (*Smith v. Thompson*, 8 Ga. 28), which day, in the case in which Buddington, Wilson

& Co. were complainants, was the 1st day in December, 1894. This first Monday fell on the first day of that month. If the record does not show that the order was published once a week for the four months preceding the appearance day, the decree *pro confesso* was erroneously made. The only proof of publication appearing in the record is the affidavit of Bemis, referred to in the decree, with which proof the decree is to be considered in connection. *Hartley v. Bloodgood*, 16 Ala. 233; *Hansom v. Patterson*, 17 Ala. 788; *Oillum v. Branch Bank of Mobile*, 28 Ala. 797; *Keifer v. Barney*, 81 Ala. 192; *Randall v. Songer*, 16 Ill. 27; *Settlemyer v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110; *Allen v. Blunt*, 1 Blatchf. 490; *Cissell v. Pulaski County*, 10 Fed. Rep. 891.

This affidavit was made on the 15th day of December, 1894, and states that the order was "duly published for nineteen consecutive weeks prior to this date, to the best of his knowledge and belief," having previously stated that the newspaper was published weekly in the Town of Green Cove Springs, in Clay County, in this State. It does not state what was the first day of its publication, unless we can consider a date appearing in the printed copy of the advertisement of the order attached to and mentioned in the affidavit. This date is below the order, and is as follows: "Aug. 9th, 4 s. 4 mo." and our understanding of it is that it is the usual printers' mark, denoting the day of the first insertion, and that it occupies four squares, and is to be published four months. In *Langdon v. Poor*, 20 Vt. 18, the date appearing on a tax collector's advertisement was held to be at least prima facie evidence of the time of making it. It is, however, unnecessary for us to invoke this rule or consider this date in reaching the conclusion to be announced, and we do not do so, though it would be fatal to the sufficiency of the publication or validity of the decree. So, neither the initial nor the final publication being shown, we cannot tell on what day the period of nineteen consecutive weeks mentioned in the affidavit began or ended. It may have ended with the 14th or 18th day of December, and, if it did, the first publication was on either the 8d or 2d day of August; and, if such was the fact, there was not a publication of four months prior to the return day, or December 1. The order was made in Madison County, in an adjoining circuit to that in which Clay County is, on the 29th day of July; and consequently the first publication must have been either on the 29th, 30th, or 31st of that month, or on the 1st day of August, to admit of four months' time prior to the return day; and, if the first publication was not on one of these four days, there could not have been the required notice. It is impossible for this court, upon the proofs before it, to say that such publication was on either of these four days, or, on the other hand, that it was not on the 2d or 8d days of August; and the same may be accurately said of the circuit judge who granted the order, he having the same and no other evidence before him. The record, then, does not show that the requisite notice was given, and it is certainly not for us to presume jurisdiction. Jurisdiction must be affirmatively shown by the record, where the parties are

shown to be nonresidents, and constructive service is depended upon for jurisdiction. This is the rule, even where the jurisdiction is attacked collaterally. *Freem. Judgm. § 127; Allen v. Blunt, supra; Galpin v. Page*, 85 U. S. 18 Wall. 350, 21 L. ed. 959.

The order of publication in the case wherein Philip J. Canova was complainant was made May 2, 1884, and requires the Chester Construction Company to appear and answer on the first Monday in September following. The affidavit of publication made by Bemis is dated September 1, of the same year, and states, *inter alia*, that the order was published for "seventeen consecutive weeks prior to this date, to the best of his knowledge and belief." The fact, however, is that the first Monday in September was the first day of that month, and it is hence apparent that there were not four months from the date of the order to the appearance day, counting either of such days and omitting the other, and hence there could not have been four months' publication prior to appearance day. The error of the order is apparent upon its face.

It is perhaps well for us to say that proofs of publication should be positive, and the sufficiency of the affidavits made simply to the

best of the deponent's information and belief, as those above were made, is at least questionable.

No jurisdiction was obtained of the trust company, nor of the construction company, in the former of the two cases, nor of the latter company in the other case.

The appeal taken in the name of the Green Cove Springs & Melrose Railroad Company has been dismissed, thus leaving the two companies named above as the sole appellants. No relief was asked or adjudged in favor of the railroad company against either of these appellants; and neither that company, nor anyone else, can complain that it is not now before this court.

It is not necessary, nor do we deem it proper, to discuss any of the other questions raised by the petition of appeal. The decision of all of them was made in the lower court without appellants having a legal opportunity to be heard, and upon a record by which they are not bound.

*The decrees appealed from, in so far as they affect the two appellants, or either of them, should be reversed for the reasons indicated above; and it will be so ordered.*

## WEST VIRGINIA SUPREME COURT OF APPEALS.

H. E. BUMGARDNER *et al.*

v.

Charles P. LEAVITT, Impleaded, etc., *Appt.*

(...W. Va....)

### \*1. As a general rule, equity will not enforce specific performance of con-

\*Head notes by LUCAS, P.

NOTE.—Sales of corporate stock; specific performance of contract.

Equity will in a proper case compel the specific performance of a contract for the transfer of corporate stock. *Cowles v. Whitman*, 10 Conn. 121; *Draper v. Stone*, 37 Me. 175; *Leach v. Forbes*, 11 Gray, 506; *Bissell v. Michigan F. & M. Bank*, 5 McLean, 495; *Taylor, Corp. § 790*, cited in 2 Beach, Corp. § 624.

Where money damages can afford no adequate compensation, equity will enforce the performance of the contract. *Chater v. San Francisco Sugar Ref. Co.* 19 Cal. 219, cited in *Treasurer v. Commercial Coal Min. Co.* 23 Cal. 352; *Baldwin v. Com.* 11 Bush, 417; *Todd v. Taft*, 89 Mass. 371; *Johnson v. Brooks*, 93 N. Y. 337; *Cushman v. Thayer Mfg. J. Co.* 76 N. Y. 368; *White v. Schuyler*, 31 How. Pr. 38; *Ashe v. Johnson*, 2 Jones, Eq. 145; *Cheale v. Kenward*, 3 De G. & J. 27; *Duncuft v. Albrecht*, 12 Sim. 158.

Either party may be entitled to specifically enforce the contract on the principle of mutuality of rights and remedies. *Walker v. Bartlett*, 2 Jur. N. S. 643; *Paine v. Hutchinson*, L. R. 3 Eq. 257.

#### Option contracts, when not illegal.

Where the only option the seller has is as to the precise time of delivery, and the delivery must be made within a limited period, the contract is not thereby illegal. *Pixley v. Boynton*, 79 Ill. 351; *Lo-13 L. R. A.*

tracts for the delivery of shares of stock; but when a purchaser has bargained for or taken an option upon such shares, because they have to him a unique and special value, the loss of which could not be adequately compensated by damages at law, the chancellor, in the exercise of a sound discretion, may decree specific execution.

2. Where such relief would be granted to the purchaser, were he to apply, the seller who has given to the purchaser such preference or option is entitled to like relief, by reason of

*gan v. Musick*, 51 Ill. 415; *Harris v. Tumbidge*, 33 N. Y. 99, 38 Am. Rep. 398.

A contract by which stock is sold at a certain price, with option to the purchaser to resell it at a future time for an increased price, to the amount of interest which would to that time accrue, is not a gambling contract. *Richter v. Frank*, 41 Fed. Rep. 859.

So a contract for the sale of stock without delivery is not necessarily void, even if time for delivery is not fixed and either party may enforce its performance within a reasonable time. *Bruce v. Smith*, 44 Ind. 1; *Kelchner v. Gettys*, 18 S. C. 531; *Stewart v. Canty*, 5 Mees. & W. 160.

But where in the transaction neither party contemplated delivery or accepting the shares, the contract was a gambling transaction and void. *Rountree v. Smith*, 103 U. S. 269, 27 L. ed. 722; *Re Hunt*, 25 Fed. Rep. 739; *James v. Sheppard*, 6 Ry. & Corp. L. J. 478; *Greenhood*, Pub. Pol. 230; 2 Beach, Corp. 1044.

The mere fact that at the time of the fulfillment one of the parties makes default, and the parties settle upon the basis of the difference between the contract price and the market value at the time of the breach, does not render the contract void as a gambling contract. *Bruce's App.* 55 Pa. 294; *Smith v. Bouvier*, 70 Pa. 325; *Fairfax v. Gabel*, 69 Pa. 30; *Clarke v. Foss*, 8 Biss. 540; *Sawyer v. Taggart*, 14 Bush, 737.



the operation of the principle of mutuality of right and remedy.

3. Where the remedy at law would be incomplete and inadequate, because the court of law could not give a conditional or modified judgment, and would be unable to preserve the benefit of the agreement to all the parties interested, equity has jurisdiction to enforce the agreement.

(March 21, 1891.)

**A**PPEAL by defendant Leavitt from a decree of the Circuit Court for Wood County in favor of plaintiffs in an action brought to enforce specific performance of a contract for the purchase of certain shares of stock. *Affirmed.*

The facts are stated in the opinion.

**Mr. L. N. Tavenner**, for appellant:

While in the case of realty there is a conclusive presumption that the purchaser cannot be adequately compensated by the recovery of damages at law, in the case of personalty there is no such presumption.

3 Parsons, Cont. p. 866, note X. and authorities cited.

The general rule is that contracts as to personalty will not be specifically enforced.

3 Parsons, Cont. pp. 863, 864.

The question in all cases is this: Will damages at law afford an adequate compensation for breach of the agreement? If they will, there is no occasion for the interference of equity; the remedy at law is complete.

2 Benjamin, Sales, pp. 1143, 1144; 1 White & T. Lead. Cas. in Eq. Am. ed. 1876, p. 1096; 1 Morawetz, Priv. Corp. § 218; Mitford & Tyler, Pl. & Fr. Eq. p. 214, citing *Ord v. Butler*, 1 P. Wms. 570, cited in 10 Ves. Jr. 161; *Mason v. Armistage*, 13 Ves. Jr. 87; *Noyes v. Marsh*, 123 Mass. 286.

Shares of stock constitute personalty, although the corporation own realty.

*Edwards v. Hall*, 35 Eng. L. & Eq. 433; *Typpets v. Walker*, 4 Mass. 595; *Johns v. Johns*, 1 Ohio St. 350.

In no case will it be found that a court of equity, at the suit of the vendor, has compelled the vendee to specifically execute a contract for the purchase of shares of stock.

See *Ross v. Union Pac. R. Co.* 1 Woolw. 26. See also Pom. Spec. Perf. § 19; *Orange & A. R. Co. v. Fulvey*, 17 Gratt. 366; *Laidley v. Laidley*, 25 W. Va. 525; *Peyton v. Cabell*, Id. 540.

It is the manifest right of the purchaser to have a clear, marketable title, and a specific performance will not be decreed unless this requirement is fulfilled, nor when the title, as finally tendered, is subject to even reasonable doubt.

2 White & T. Lead. Cas. in Eq. p. 1118; 1 Morawetz, Priv. Corp. § 218, note 1; 8 Pom. Eq. Jur. p. 449, §§ 1405-1407, and authorities cited in note.

The certificate of stock in this case had been delivered to L. N. Tavenner, attorney for Arnolds, with assignment indorsed by the plaintiffs. This amounted to a transfer of the stock itself.

*Ross v. South Western R. Co.* 58 Ga. 514; *Bank of America v. McNeil*, 10 Bush, 54; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Leitch* 12 L. R. A.

*v. Wells*, 48 N. Y. 585; *Johnson v. Underhill*, 52 N. Y. 208; *Cushman v. Thayer Mfg. J. Co.* 76 N. Y. 865.

Having thus parted with the stock, the plaintiffs were unable themselves to perform a substantial part of the contract, as shown by the bill itself. Consequently, the defendant had the right to rescind, and the plaintiffs no right to enforce.

1 Wharton, Cont. § 282, p. 418, citing *Perkins v. Bailey*, 99 Mass. 61; *Coggs v. Bernard*, Ld. Raym. 909, 1 Smith, Lead. Cas. 7th Am. ed. p. 299, and numerous other authorities; *New Brunswick M. B. & L. Assn. v. Conover*, 14 N. J. Eq. 219. See also Cook, Stock and Stockholders, § 388; 8 Pom. Eq. Jur. § 1402, note; *Cors v. Wigner*, 32 W. Va. 278.

**Mr. Okey Johnson**, with **Mr. Barna Powell**, for appellees:

It is not sufficient to deny specific performance that there is a lien on the property agreed to be sold.

*Richards v. Mercer*, 1 Leigh, 125; *Legrand v. Hampden Sidney College*, 5 Munf. 324; *Edwards v. Van Bibber*, 1 Leigh, 183.

It is sufficient if title can be made at the time of the decree.

*Townshend v. Goodfellow*, 3 L. R. A. 740, 40 Minn. 312, and the following cited cases: *Oakey v. Cook*, 41 N. J. Eq. 364; *Watts v. Waddle*, 31 U. S. 6 Pet. 889, 8 L. ed. 437; *Hepburn v. Dunlop*, 14 U. S. 1 Wheat. 179, 4 L. ed. 65; *Hepburn v. Auld*, 9 U. S. 5 Cranch, 262, 3 L. ed. 96; *Langford v. Pitt*, 3 P. Wms. 629; *Mortlock v. Buller*, 10 Ves. Jr. 292; *Coffin v. Cooper*, 14 Ves. Jr. 205; *Seymour v. De Lancy*, 3 Cow. 445; *Pieros v. Nichols*, 1 Paige, 244, 2 L. ed. 638; *Baldwin v. Salter*, 8 Paige, 473, 4 L. ed. 508; *Steenerson v. Maxwell*, 2 N. Y. 408; *Jenkins v. Fahey*, 73 N. Y. 355.

Equity had jurisdiction of this case, the remedy at law not being complete.

*Burke v. Parke*, 5 W. Va. 122; *Laidley v. Laidley*, 25 W. Va. 525; *Hodges v. Kowing*, 7 L. R. A. 87, 58 Conn. 12; *Stuyvesant v. New York*, 11 Paige, 414, 5 L. ed. 182; *Somerby v. Buntin*, 118 Mass. 279; *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 537; *Cornwall & L. R. Co's App.* 125 Pa. 232; *Story, Eq. Jur.* § 723; *Furnival v. Owen*, 3 Atk. 87; 2 *Story, Eq. Jur.* 41; *Cowles v. Whitman*, 10 Conn. 121; *Clark v. Flint*, 23 Pick. 231; *Pooley v. Budd*, 14 Beav. 34, 7 Eng. L. & Eq. 229; *Alexandria M. Bank v. Seton*, 26 U. S. 1 Pet. 299, 7 L. ed. 152.

While it has been held that a bill in equity will not lie for the specific performance of an agreement to sell stock, yet if the stock is in railroads, and such like stock, equity will enforce a specific performance of a contract to sell the same.

*Fry, Spec. Perf.* 53, § 27; *Duncuft v. Albrecht*, 12 Sim. 189; *Cole v. Netherhill*, 2 P. Wms. 304; *Shaw v. Fisher*, 2 De G. & S. 11, 5 De G. M. & G. 596; *Bissell v. Michigan F. & M. Bank*, 5 McLean, 495; *Sullivan v. Tuck*, 1 Md. Ch. 59.

**Lucas, P.**, delivered the opinion of the court:

This suit originated by the filing of a bill in chancery, by H. E. Bumgardner, a married woman, and H. F. Bumgardner, her husband, against C. P. Leavitt, and others, in the Cir-

cuit Court of Wood County. The female plaintiff alleges that the defendant Leavitt induced her to invest \$1,000 in the Steamboat General Dawes, the proposed cost of which was \$7,600. It was understood that the boat was to be put in a joint-stock company, in which the plaintiff H. E. Bumgardner was to have shares in proportion to the money she had advanced, as aforesaid. The plaintiff exhibits with her bill an agreement as follows:

"This article of agreement, made and entered into this the 14th day of July, 1884, between C. P. Leavitt, County of Wood, and State of West Virginia, and H. E. Bumgardner of Hockingport, Athens Co., Ohio, witnesseth, that the said C. P. Leavitt, in case of misunderstanding, or not being able to agree, or in case of death of Herman Bumgardner, agent, said Leavitt agrees to take the said stock of Mrs. Bumgardner at not exceeding cost, or, if boat depreciates in value, at fair cash valuation. The said Mrs. H. E. Bumgardner agrees to give said C. P. Leavitt the refusal over any other purchaser. The said stock referred to above is stock in the steamer General Dawes. [Signed] C. P. Leavitt."

And there is further exhibited the following notice:

"To Chas. P. Leavitt—

"Sir: I propose to sell you my stock in the Farmer's Trans. Co. in accordance with your contract of July, 14, 1884, at cost, or, if the boat has depreciated in value, at its fair cash valuation. Your early attention is called to this matter, the contingency having arisen under which you bound yourself to take said stock. [Signed] H. E. Bumgardner, by H. F. Bumgardner, Ag't. March 31, 1887."

The bill supplements the above written agreement, signed by C. P. Leavitt, by stating that it was a part of the consideration that the husband, H. F. Bumgardner was to have regular employment on said steamboat, of which C. P. Leavitt was to be master. It is further alleged that all of the interests, including the stock owned by Leavitt (which was a large majority of it), as well as that owned by H. E. Bumgardner, was capitalized into a corporation known as the Farmer's Transportation Company, or conveyed to said company. The steamer was valued at \$7,600 at that time, and 760 shares of capital stock of the par value of \$10 per share were issued, of which 100 shares were given to said H. E. Bumgardner, and 1½ shares to her husband, in order that he might be represented in the company. It is further alleged that C. P. Leavitt took charge as master, and pursuant to the agreement gave H. F. Bumgardner employment, but that they soon disagreed, and said H. F. Bumgardner was discharged. Plaintiffs proceed to aver that since such disagreement they have at all times been ready to give said Leavitt the preference of purchasing said stock, and have urged him to buy said stock according to his agreement, but he has steadily and persistently refused to do so, until the 31st day of March, 1887, when the above notice was written and served. They charge that there has been no depreciation in the value of the boat, but that it has been increased in size and capacity at a large expense, and its value enhanced in consequence. It is further alleged that one E. W. Petty, who

is made a defendant, had attached the 101½ shares of stock in the Circuit Court of Wood County, in an action at law against H. F. Bumgardner. It is further alleged that the plaintiffs were largely indebted to J. W. Arnold and L. H. Arnold, both of whom were made defendants, and that the female plaintiff executed a lien upon the said 100 shares of stock to secure said indebtedness. By an agreement and compromise between the plaintiffs and said E. W. Petty his debt is reduced to \$422, which it is agreed shall be paid him out of the proceeds arising from the sale of of said 101½ shares of stock; and by like agreement with J. W. and L. H. Arnold, they are to receive the residue of the proceeds of said sale as a compromise, and in full settlement of the indebtedness due them from the plaintiffs. Plaintiff H. E. Bumgardner, it is alleged, has always been ready, and has offered, and now offers, to specifically perform the said agreement on her part, by assigning and transferring said 101½ shares of the stock free and unincumbered, as of the 31st day of March, 1887. The prayer of the bill is that the court will declare the plaintiff to be entitled to a specific performance and execution of the said agreement, with interest on the said amount from March 31st, 1887; *second*, that the court will decree that the amount ascertained to be due said H. E. Bumgardner from said C. P. Leavitt may be paid over to said E. W. Petty and said J. W. and L. H. Arnold, as above set out; and, *thirdly*, for all proper accounts and general relief. The bill was demurred to by Leavitt, but the demurrer was overruled, whereupon C. P. Leavitt filed his answer, in which he admits the agreement as set out in the bill, so far as it goes, but he denies it was ever understood or contemplated that the said H. F. Bumgardner should have the right, at any time he might thereafter see fit, to require respondent to buy the stock of said H. E. Bumgardner, and to require respondent to pay therefor the original cost, but in truth it was intended to give respondent refusal and right to buy said stock at any time, provided he paid therefor as much as any other bidder, and provided, furthermore, that respondent so desired. He alleges that the boat is not worth more than \$2,500, about one third of what she cost at the time said stock was issued; and that the present value of said 101½ shares in the bill mentioned is not worth more than \$333.33½ at the outside. He denies that the stock has ever been tendered him, or that either of the plaintiffs have ever proffered the same at anything like a fair cash valuation. He admits that on or about the — day of July, 1887, he offered them \$850 for the stock, although he knew that they had immediately before that offered it to another party at \$800. He alleges that it had been assigned by H. E. Bumgardner to Mrs. J. W. Arnold, to secure payment of a debt, and the certificate was then held by one L. N. Tavenner, as attorney of said Arnold, who had notified the secretary of the corporation, and requested a transfer on the books. Respondent sets out also that the certificate was incumbered by a lien of said E. W. Petty, and he pleads that the plaintiffs had not title to said stock, and so could not carry out the agreement. Respondent further alleges that his

said offer of \$850 was made in good faith, and he was ever ready from the time he offered in 1887 to buy said stock to take the same, but his offer was not accepted, nor was there ever tendered to respondent the said stock at any time, nor could it be, since they had parted with the title. He denies that he ought in equity to be compelled to pay for the stock, which cannot be delivered, and is incumbered to the full amount of its value. J. W. Arnold and L. H. Arnold filed their joint and separate answer, in which they admit all that is said in the bill about the mortgage or the pledge of the stock to them, and admit that they have agreed that out of the proceeds arising from the sale E. W. Petty should be first paid, and that they would accept the residue of the proceeds in full satisfaction of their lien, and that they have accordingly authorized L. N. Tavenner, Esq., their attorney, to execute their release, in order that said H. E. Bumgardner may execute to said defendant C. P. Leavitt an unincumbered transfer of said 100 shares of stock in fulfillment of said H. E. Bumgardner's contract on her part, as set out in Exhibit No. 1 of the bill. E. W. Petty likewise answers, and admits all the averments of the bill as to his lien upon the stock by attachment, and also the agreement with reference to his payment out of the proceeds of sale.

A vast amount of testimony was taken, very little of which had anything to do with the case, the bulk of it seeming to be predicated upon some extraneous controversies, as to the earnings of the boat, and Leavitt's settlement with the corporation and stockholders. On the 10th of December, 1888, the case came on to be finally heard, and the court decreed that H. E. Bumgardner was entitled to specific execution of the contract; that demand was made by her on the 31st day of March, 1887; and that the 101½ shares of stock were then worth \$866.60; and the said C. P. Leavitt is decreed to pay that amount, with interest from 31st day of March, 1887, aggregating the sum of \$954.76, which he is to pay, with interest thereon from the date of decree. The money is to be distributed to the Arnolds and Petty in accordance with their respective liens, and agreements with reference to the same. The decree then proceeds to direct "that L. N. Tavenner, who is authorized in a writing filed in the papers in this cause to release the lien of said J. W. Arnold and L. H. Arnold upon one hundred shares of the stock aforesaid, to execute said release of said lien, and, in case said L. N. Tavenner shall fail or refuse to execute said release within ten days from this date, then Barna Powell, who is hereby appointed a special commissioner for the purpose, is authorized and directed to execute a release of the lien of said J. W. Arnold and L. H. Arnold, as aforesaid, upon the 100 shares of stock held in the name of H. E. Bumgardner and filed with the papers in this cause, which certificate of 100 shares, as well as the certificate of 101½ shares, now also in the file in this cause, are to be delivered to said C. P. Leavitt upon payment by him, or someone for him, to the defendants Petty and Arnolds and plaintiffs, the sum hereinbefore decreed by him to be paid." Leave was given the plaintiffs to sue out execution.

12 L. R. A.

From this decree the defendant Leavitt has appealed to this court.

The first and pivotal question to be decided in this case is whether the court of chancery had jurisdiction to decree specific performance. If not, the bill should have been dismissed on demurrer. In the first place, regarding the defendant Leavitt as having for a consideration obtained the refusal of, or, as we may call it, the option on, this stock, could he have maintained a bill for specific performance against Mrs. H. E. Bumgardner in case she had refused to let him have the stock, and had insisted on selling it to someone else? This is an important question, because, if such relief could be granted to the purchaser were he to apply, the seller, who has given the purchaser such preference or option, is entitled to like relief by reason of the operation of the principle of mutuality of right and remedy. The general doctrine upon this subject is thus stated by Mr. Pomeroy: "It is not then sufficient in general that a valid and binding agreement exists, and that an action at law for damages will lie in favor of either party for a breach by the other; the peculiarly distinctive feature of the equitable doctrine is that the remedial right to a specific performance must be mutual." See *Moore v. Fitz Randolph*, 6 Leigh, 175.

This is a general rule, namely, that the right to a specific execution of a contract, so far as the question of mutuality is concerned, depends upon whether the agreement itself is obligatory on both parties, so that upon the application of either against the other the court would grant a specific performance. *Duwall v. Myers*, 2 Md. Ch. 401. Says Mr. Pomeroy: "It is a familiar doctrine that if the right to the specific performance of a contract exists at all it must be mutual. The remedy must be alike attainable by both parties to the agreement." Pom. Spec. Perf. § 165.

In the present case it appears that the defendant Leavitt, being the owner of about three fourths of the stock in a steamboat, entered into an agreement with a married woman with reference to \$1,000 of the same stock. It is true that the contract was signed by him alone. The circumstance that it was signed by him alone is not material, since it is admitted by both parties that she entered into the contract, and was to be bound by it. Wat. Spec. Perf. §§ 268, 270. Neither is the fact that she was a married woman material in this State, since, by our Married Woman's Act, which went into operation in 1869 (see Code, chap. 66), a married woman may not only take and hold personal property, such as stocks, but, being such a stockholder, she may vote the same in any organized company; consequently she had the right of disposition and the power to sell or contract to sell. It is also true that, according to her statement, personal services entered into a part of the consideration of the contract, and it is a rule almost universal that a contract for personal services cannot be enforced against the party promising such services, and hence for the want of the requisite mutuality specific execution will not be enforced against the opposite party, unless the services have been actually performed, and the contract to that extent been executed,

as was the case here. Pom. Spec. Perf. § 310.

These obstacles being disposed of, we may inquire, Had Mrs. Bumgardner persisted in selling this stock to a third party, contrary to her agreement, could Leavitt have asked the court of chancery to interfere by injunction, and to compel her to transfer the stock to him upon payment of the price stipulated in the agreement? The question of specific performance of contracts for the delivery of stock is frequently treated by the text-writers in an empirical and unsatisfactory manner, as if there were something peculiar in this character of personal property, which rendered it impossible to classify it under any general rule. Mr. Fry, for example, does not hesitate to say positively that a contract for the sale of stock will not be specifically enforced, although he afterwards admits that railway shares form an exception. Fry, Spec. Perf. §§ 24, 27. Mr. Pomeroy's treatment of the subject is equally unsatisfactory. See Pom. Spec. Perf. §§ 17-19. The true principle would seem to be that, as a general rule, courts of equity will not enforce specific performance of contracts for the delivery of shares of stock, but when a purchaser has bargained for such shares, or taken an option upon them, because they have for him a unique and special value, the loss of which could not be adequately compensated by damages at law, the chancellor, in the exercise of a sound discretion, may decree specific execution. This principle we find laid down and insisted upon in the more recent work of Mr. Waterman (1881). "The same principles," he says, "govern in contracts for the sale of stock as in the sale of other property,—that is, if a breach can be fully compensated in damages, equity will not interfere; while it will do so when, notwithstanding the payment of the money value of the stock, the plaintiff will still lose a substantial benefit, and thereby remain uncompensated. If a contract to convey stock is clear and definite, and the uncertain value of the stock renders it difficult to do justice by an award of damages, specific performance will be decreed." Waterman, Spec. Perf. § 19. Among the many other cases cited in support of this proposition is the leading case of *Doloret v. Rothschild*, decided by Sir John Leach, Vice-Chancellor, in 1824, 1 Sim. & Stu. 590, in which it is said that a bill will lie for the specific performance of a contract for the purchase of government stock, where it prays for the delivery of certificates which give the legal title to the stock. There are many other cases, however, both in England and America, which sustain the correct principle as laid down above, but which it is unnecessary to cite. In the present case the purchaser of the refusal of or option upon the stock in the steamboat was dealing for an article which he could not go upon the market and buy, and which no one could deliver to him but the holder, with whom he bargained. The shares of stock evidently had for him a peculiar value, which could not be compensated by mere damages, such as would be recovered at law. Their possession would enable him to control the company, and to retain his position as master of the vessel. For the same reason, therefore, that a contract for railway shares will frequently be specifical-

ly performed, viz., whenever such shares are being purchased for the purposes of organization and control, I think a court of equity would have interfered in this case in favor of C. P. Leavitt, had he filed a bill praying for its intervention. It follows, therefore, upon the ground of mutuality of remedy and reciprocity of obligation, that such a bill could be maintained by Mrs. Bumgardner. There is another ground quite as apparent as that stated above, and that is that the legal title to this stock had passed into the hands of a third party, who is properly made a co-defendant. In the case cited above of *Doloret v. Rothschild*, 1 Sim. & Stu. 590, the vice-chancellor remarks: "I consider also that the plaintiff, not being the original holder of the scrip, but merely the bearer, may not be able to maintain any action at law upon the contract, and that, if he has any title, it must be in equity." So in the present case the plaintiffs are in a situation in which a court of equity sees its way clearly to administer complete and adequate remedial justice to all parties interested, whereas, if they were remitted to a court of law, if relief could be afforded at all, it could only be done by resorting to several actions, perhaps no less than three. Upon the general principle, therefore, of avoiding circuity of action, and affording relief where the remedy at law is inadequate, it was proper for the court of equity to exercise its jurisdiction. Whenever the remedy at law would be incomplete and inadequate because the court of law cannot give a conditional or modified judgment, and would be unable to preserve the benefit of the agreement to all the parties interested, equity has jurisdiction to enforce the agreement. In the case of *Summers v. Bean*, the general principle is thus declared by Judge Moncre (18 Gratt. 412): "Generally an adequate remedy may be had at law for the breach of a contract concerning any other personality than slaves, and therefore, as a general rule, a court of equity will not enforce the execution of such a contract. But sometimes an adequate remedy at law cannot be had for the breach of such a contract, and then its specific execution will be enforced in equity." As it was said in *May v. Le Claire*, 78 U. S. 11 Wall. 218, 20 L. ed. 50, in order to oust the equity jurisdiction, the remedy at law must be "as effectual and complete as the chancellor can make it." The same principle is recognized by all the text-writers. See Fry, Spec. Perf. § 18; Pom. Spec. Perf. § 29. Mr. Waterman says tersely: "If, however, the remedy at law would be wholly inadequate or impracticable, specific performance will be decreed." Waterman, Spec. Perf. § 17. For these reasons, therefore, we think there was no error in overruling the demurrer to the plaintiffs' bill. Upon the merits, although there was, as we have said, a great deal of unnecessary testimony taken, the plaintiffs' case might have rested, and no doubt did rest, upon the testimony of the defendant C. P. Leavitt himself. Out of the 168 questions propounded to him, of which some were frivolous, and nearly all impertinent, he is asked on the 108d question whether he did not offer Mrs. Bumgardner \$850 for her stock, in order to get rid of Bumgardner, to which he replies: "Yes: I wanted to get rid of him. Here is one of the

clerks right here who asked him what he would take for it at different times." 104th question: "Did you not make a proposition to buy the stock on account of your obligation under that contract?" Answer: "Oh, yes; several times. I guess the clerk here knows that I made offers at different times through Mr. Ritchie, and Mr. Baringer can testify to the same thing." The defendant further testifies that these offers were made in March, 1887, or a little after that time, and that the negotiations would have been con-

cluded, except for some trivial and inconsequential dispute about matters foreign to the subject matter.

To take the defendant, therefore, at his own word, and fix the value of the stock at a price only differing by a few dollars from what he himself offered, with interest from the time of his offer, was a judgment of the circuit court of which he has no right to complain, and we think, therefore, that *the decree complained of should be in all respects affirmed.*

## NORTH DAKOTA SUPREME COURT.

### Re Election of Directors of the ARGUS PRINTING CO.

Edwin O. FAULKNER, *Appt.*,

v.

A. W. EDWARDS *et al.*, *Respts.*

(....N. Dak....)

- \*1. The pledgee of stock in whose name it stands on the corporate records has a right to vote the stock at a meeting to elect directors.
2. The pledgor has no right to vote such stock, but a court of equity will, in a proper case, compel the pledgee to give the pledgor a proxy.
3. One not appearing to be a stockholder upon the corporate records is not eligible to the office of director, under the Statute

\*Head notes by CORLESS, CL. J.

providing that only stockholders are eligible to that office; one who still so appears is eligible, and may vote, notwithstanding he has assigned the stock.

4. A vote of stockholders representing a majority of the subscribed capital stock is necessary to the choice of a director. There being no such vote, the election is declared illegal, and a new election ordered.

5. A stockholder holding a majority of the subscribed capital stock having acquiesced in the organization of a stockholders' meeting, and having participated in the business of the meeting as so organized, among other things having nominated persons for the office of director, cannot afterwards withdraw from the meeting, and organize another meeting, at the same time and in the same place, and by voting at that meeting elect the persons voted for by him the directors of the corporation. It is his duty to

#### NOTE.—Of stock certificates in general.

The certificates of stock are not negotiable instruments so as to come within the rule governing bills of exchange and promissory notes. *New York & N. H. R. Co. v. Schuyler*, 84 N. Y. 72; *Stebbins v. Phoenix Ins. Co.* 3 Paige, 360, 3 L. ed. 184; *Wilson v. Little*, 2 N. Y. 447; *Mechanics Bank v. New York & N. H. R. Co.* 13 N. Y. 635; *Dows v. Perrin*, 16 N. Y. 325; *McCready v. Rumsay*, 6 Duer, 574; *Weaver v. Barden*, 49 N. Y. 238; *Denton v. Livingston*, 9 Johns. 96; *Howe v. Starkweather*, 17 Mass. 244; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 336; *Arnold v. Ruggles*, 1 B. L. 165.

The transfer book is not the only evidence of the ownership of stock. The certificate, which has always been deemed *prima facie* evidence of ownership is the only evidence in possession of the owner, and, where there has been no transfer, is the only recognised evidence of title. *Broadway Bank v. McElrath*, 18 N. J. Eq. 24.

The holder of a certificate of shares of stock, accompanied by an irrevocable power of attorney to transfer them, is the apparent owner, and when he is the holder for value without notice his title cannot be impeached. *Leavitt v. Fisher*, 4 Duer, 1.

#### Holder of certificate may assign it as a pledge.

It has also been settled, by repeated adjudications, that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with

his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc. *Ang. & A. Corp.* 8th ed. § 354; *Bank of Utica v. Smalley*, 2 Cow. 770; *Gilbert v. Manchester J. Mfg. Co.* 11 Wend. 637; *Commercial Bank of Buffalo v. Kortright*, 23 Wend. 323; *New York & N. H. R. Co. v. Schuyler*, 84 N. Y. 80.

It is well settled that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the register of the corporation as the owner of the stock, is, in the event of insolvency of the corporation, chargeable as a stockholder for the benefit of creditors. *Adlerly v. Storm*, 6 Hill, 624; *Rosevelt v. Brown*, 11 N. Y. 143; *Re Empire City Bank*, 18 N. Y. 190; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Magruder v. Colston*, 44 Md. 349; *Crease v. Babcock*, 10 Met. 525; *Wheelock v. Kost*, 77 Ill. 290; *Pullman v. Upton*, 96 U. S. 323, 24 L. ed. 818. See *Thompson, Liability of Stockholders*, § 233.

#### Effects of pledgee's failure to transfer shares on company's books.

In cases where a pledgee for value, of stock certificates, has neglected to obtain, in compliance with statutory or charter provisions, a transfer of shares upon the books of the company and the issue of new certificates, he receives an equitable title only and is subject to the equities of third parties. *Naglee v. Pacific Wharf Co.* 80 Cal. 529; *Weston v. Bear River & A. W. & M. Co.* 5 Cal. 186; *Fisher v. Essex Bank*, 5 Gray, 373; *Rock v. Nichols*, 3 Allen, 343; *Union Bank of Georgetown v. Laird*, 15 U. S. 3 Wheat. 390, 4 L. ed. 269; *Oxford Turnp. v. Bunnell*, 6 Conn. 553; *Dutton v. Connecticut Bank*, 13 Conn. 498; *Shipman v. Aetna Ins. Co.* 39 Conn. 245; *Strout v. Natoma Water & Min. Co.* 9 Cal. 73; *Winter v.*

remain in the meeting first organized, and vote his stock there, and no one can prevent his voting his stock at that meeting, although his ballot may be rejected. Notwithstanding such rejection, had he voted his stock at the original meeting the persons voted for by him would have been elected directors, and under the Statute declared by the court elected.

6. A transferee of stock upon the corporate records is qualified to vote the stock, and to become a director, although the transfer was made for the express and sole purpose of so qualifying him, provided that it was not made in furtherance of a fraudulent scheme.

(February 25, 1891.)

**A**PPEAL by petitioner from a judgment of the District Court for Cass County, dismissing his petition filed to compel recognition of certain persons as directors of the Argus Printing Company. *Reversed.*

The facts are stated in the opinion.

**Messrs. Benton & Amidon, B. F. Spaulding and A. C. Davis,** for appellant: The register of shareholders was the only evidence by which the right to vote could be ascertained.

*Pender v. Lushington*, L. R. 6 Ch. Div. 70; *Re St. Lawrence Steamboat Co.* 44 N. J. L. 529-539; *Burgess v. Seligman*, 107 U. S. 20, 29, 27 L. ed. 359, 363; *Comp. Laws*, § 2933; *Hoppin v. Buffum*, 9 R. I. 518, 518.

**Mr. S. G. Roberts,** for respondents:

The power and duties of a pledge-holder do not include the right to use the pledge in any

manner whatever without the consent of the pledgor.

*Comp. Laws*, §§ 3871, 3880, 4401-4404.

Appellant was not the holder of said pledge on said 8d day of June, 1890, having assigned by indorsement and delivered the same to one of the pledgors, he could not lawfully repossess it without the consent of both pledgors.

*Comp. Laws*, §§ 2934, 3880, 4404; *Story*, *Ballm.* § 114.

In case of a dispute as to a right to vote, the books of the corporation are only *prima facie* evidence.

*Hoppin v. Buffum*, 9 R. I. 518, 11 Am. Rep. 293; *McDaniels v. Flower Brook Mfg. Co.* 22 Vt. 271.

The pledgee of stock is not, for the purpose of notice of meetings, to be regarded as the owner of the stock.

*McDaniels v. Flower Brook Mfg. Co. supra.*

**Corliss, Ch. J.**, delivered the opinion of the court:

On this appeal we are asked to review the judgment of the District Court in summary proceedings instituted under section 2932 of the Compiled Laws to determine the rights of certain persons to the offices of directors of the Argus Printing Company, a corporation. This Statute provides that upon the application of any person or body corporate aggrieved by any election held by any corporate body, or any proceedings thereof, the district judge of the district in which the election is held must proceed forthwith summarily to hear the allegations and proofs of

*Belmont Min. Co.* 53 Cal. 431; *People's Bank v. Gridley*, 91 Ill. 487; *Flake v. Carr*, 30 Me. 301; *Skowhegan Bank v. Cutler*, 49 Me. 315; *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 424; *Bank of Commerce's App.* 73 Pa. 59; *Sabin v. Woodstock Bank*, 21 Vt. 363; *Re Murphy*, 51 Wis. 519. See *Colebrooke*, *Collateral Security*, § 273.

#### *Sale accompanied with power of attorney.*

A sale of the stock, with a transfer of the certificate indorsed with a power of attorney to the purchaser to make the necessary transfer on the books of the corporation, transfers to the purchaser the equitable interest and legal right of the vendor in the property evidenced by the certificate assigned. It completes the transaction between the vendor and the purchaser. But as regards the corporation and those who have a right to look to its records for the owners of the stock, the transaction is incomplete. The purchaser does not become vested with the absolute title of the stock—does not become a shareholder in the corporation—until the purchased stock is transferred to him on the books of the corporation. *Cheever v. Meyer*, 53 Vt. 66.

#### *Mode in which stock is transferred.*

The capital stock of a corporate company is not capable of manual delivery. The scrip or certificate may be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. Nor does it necessarily put that interest under the control of the pledgee. The mode in which the capital stock of a corporation is transferred usually depends on its by-laws. *Wilson v. Little*, 2 N. Y. 443.

#### *Pledgee holds equitable title.*

The use of the stock certificates given as collateral security where made by the mere manual delivery 12 L. R. A.

of the certificate, without any accompanying power of transfer, invests the pledgee holding such collateral with the mere equitable title. He cannot upon default enforce his rights by the ordinary processes of sale, and is remanded for relief to a court of equity. *Wilson v. Little*, 2 N. Y. 443; *Newton v. Fay*, 10 Allen, 606; *Nisbit v. Macon Bank & T. Co.* 12 Fed. Rep. 698; *Ex parte Boulton*, 1 DeG. & J. 163; *Allen v. Dykera*, 3 Hill, 593, 7 Hill, 497; *Johnston v. Dexter*, 2 McArthur, 530.

A person holding stock of a corporation, not as a shareholder, but merely as a pledgee, may bring an action on his own account, and in his own name, to protect his rights and interests as a pledgee, and is not required in such matter to act through the association. *Baldwin v. Canfield*, 20 Minn. 43.

Where stock was bought for a customer, which can be identified in the hands of any pledgee of the firm who has sold it, the customer may affirm the sale and claim the price at which it was sold. If the proceeds of stock thus identified have come into receiver's hands, the customers may reach them. If the stock has come to the receiver's hands unincumbered by any pledge, and the receiver still has it, the customer may reach and have a delivery of it by paying to the receiver the amount owing to the firm in respect to it. *Chamberlain v. Greenleaf*, 4 Abb. N. C. 173.

A pledgee can sell the pledge after an adjudication in bankruptcy against the pledgor. *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 138.

Bankruptcy or insolvency will not revoke or affect in any way stock in the hands of the pledgee as security for a debt, when such security is accompanied with a proper power of attorney. *Hunt v. Roumanian*, 21 U. S. 8. Wheat. 174, 5 L. ed. 589; *Story*, Ag. § 477-482; *Dickinson v. Central Nat. Bank*, 129 Mass. 279.

A Vermont case holds that the pledgee of stock

the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice. This appeal must be decided as we determine which of two persons had the right to vote 546 shares of stock. The total amount of stock which had been issued at the time of the meeting to elect directors was 570 shares. At this meeting A. W. Edwards voted these 546 shares of stock for the following directors: A. W. Edwards, H. C. Plumley, N. R. Flint, Alexander Griggs, and William A. Stevens. At the same time and place one E. O. Faulkner voted these same shares for Alexander Griggs, W. A. Stevens, B. F. Spaulding, H. C. Plumley, and E. O. Faulkner as directors. In whom was the right to vote this stock? The stock at one time was the property of A. W. Edwards. For the purpose of securing a debt which he owed to J. J. Hill, this stock, with ten other shares, was transferred upon the corporate books to E. O. Faulkner, confidential clerk of Mr. Hill. Certificates representing the total number of shares, 556, were issued directly to Mr. Faulkner, the same being signed by Mr. Edwards as president of the Company, the old certificates held by Edwards being canceled. The stock, therefore, stood on the books of the corporation in the name of E. O. Faulkner. Where there has been no transfer of the stock on the books of the corporation a pledgee of such stock may not vote it. The beneficial ownership is still in the pledgor, and the records

of the corporation still show him to be a stockholder. In none of the cases cited in which the right to vote was adjudged to be in the pledgor, instead of the pledgee, had there been a record of the transfer made. See *McDaniels v. Flower Brooks Mfg. Co.* 23 Vt. 274; *Re Barker*, 6 Wend. 509; *Ex parte Willcocks*, 7 Cow. 410; *Strong v. Smith*, 15 Hun, 222.

We have discovered an Oregon case in which stock stood upon the books in the name of the pledgee, but the court ruled that he could not vote it because he had no authority from the pledgor to make the transfer. This case we will refer to hereafter. In the case at bar the stock stood in the name of the representative of the pledgee upon the corporate records. Was he a bona fide stockholder within the meaning of our Statute which restricts the right to vote stock to those who are bona fide holders thereof? Comp. Laws, 2931. It may be stated, in this connection, that Edwards could not vote the stock, as the stock had not stood in his name on the books of the corporation for ten days prior to the election. *Ibid.* If, then, the representative of the pledgee could not vote the shares, no election of directors could be held, for no one else had a right to vote it, and without its being represented at the election no election of directors could be had, for the reason that these shares constituted more than half of the capital stock. At all elections or votes had for any purpose, there must be a majority of the subscribed capital stock represented, etc. *Ibid.* No person can be

is not regarded as the owner, to the extent, at least, of entitling him to notice of a stockholders' meeting. *McDaniels v. Flower Brook Mfg. Co.* 23 Vt. 274.

#### *Pledgee's right to dividends.*

It has been decided that dividends declared during the continuance of a pledge belonged to the pledgee; and this even, although the latter has failed to procure registration of the books of the corporation. *Herrman v. Maxwell*, 15 Jones & S. 247.

The person to whom scrip for stock has been delivered, with a transfer thereof, and power of attorney to perfect the transfer, is the legal owner of the stock, although the same has not been actually transferred on the books of the corporation. *Hill v. Newichawanick Co.* 48 How. Pr. 427.

While the pledgee under the authorities is entitled to the dividends on the stock pledge, on its redemption by the pledgor, who must account for the amount received (Edwards, *Bailm.* p. 300; *Isaak v. Clark*, 2 Bulst. 306), the pledgee is not required to retain in his possession the identical shares of stock originally received from the pledgor, if the transaction is a mere loan of securities; a return of other stocks of like nature, kind and amount is sufficient. *Taylor v. Ketchum*, 35 How. Pr. 239.

#### *Who are entitled to vote the stock.*

As to the pledgee's rights to vote certain shares held by him as collateral security, the general rule is said to be based upon the names disclosed by the stock register of the corporation. Any private agreement between the parties holding legal title to the stock and others is a matter between themselves with which the corporation has no concern. *Re Long Island R. Co.* 19 Wend. 37.

The Supreme Court of Nevada has held that the right to vote at stockholders' meetings is not gov-

erned by the fact that the party in whose name the stock is registered is merely the nominal owner. *State v. Leete*, 16 Nev. 242.

By statutory enactment in New York, stockholders in moneyed and railway corporations are entitled to vote after duly registering as stockholders for at least thirty days prior to the election. 1 Rev. Stat. chap. 18, title 2, art. 2, §§ 78-85.

These provisions have been substantially reenacted in many of the other States.

A transfer of stock until entered upon the books of the company confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done, or demanded to be done, the person in whose name the stock is entered on the books of the company is, as between himself and the company, the owner to all intents and purposes, and particularly for the purposes of an election. *People v. Robinson*, 64 Cal. 373.

It is a rule of extended application that a person holding stock as trustee, not only where he is duly registered as a stockholder in that capacity, but also where the trust relationship is not declared upon the books of the corporation, is entitled to vote upon shares held by him.

In *Wilson v. Central Bridge Props.*, 9 R. I. 590, an equally well-settled principle allows a person who pledges stock as collateral security to vote upon it at all corporate meetings so long as it is not transferred on the stock ledger in the name of the pledgee. *McDaniels v. Flower Brook Mfg. Co.* 23 Vt. 274; *Hopkin v. Buffum*, 9 R. I. 513.

The principle is crystallized in statutory form in New York, and is thus expressed: "Every person who shall pledge his stock as aforesaid may nevertheless represent the same at all such meetings, and may vote accordingly as a stockholder." New York Laws 1848, chap. 40, § 17.

chosen director without a majority vote. § 2925, Id.

At the time the Legislature employed the word "stockholders" in the section prescribing the qualification of a voter at corporate meetings, that word had acquired a definite and fixed meaning, so far as a pledgee of stock was concerned. It had been repeatedly adjudged that a pledgee of stock whose transfer was upon the corporate records was a "stockholder," within the meaning of the Statute providing for the liability of stockholders for the debts of corporations. The general reasoning upon which these decisions were based was that the pledgee with a recorded transfer was a stockholder for the purpose of receiving dividends and voting at stockholders' meetings; and that he could not enjoy all of the benefits enjoyed by a stockholder without being subjected to a stockholder's liability. Said the court in *Bank of New Orleans v. Case*, 99 U. S. 628, 25 L. ed. 448: "It is thoroughly established that one to whom stock had been transferred in pledge, or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman v. Upton*, 96 U. S. 828, 24 L. ed.

818, and like decisions abound in the English courts, and in numerous American cases, to some of which we refer. *Adderly v. Storm*, 6 Hill, 624; *Rosevelt v. Brown*, 11 N. Y. 148; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Magruder v. Colston*, 44 Md. 849; *Crease v. Babcock*, 10 Met. 585; *Wheelock v. Kost*, 77 Ill. 296; *Re Empire City Bank*, 18 N. Y. 199; *Hale v. Walker*, 31 Iowa, 344. For this several reasons are given. One is that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representation he has made; another is that by taking the legal title he has released the former owner; and a third is that, after having taken the apparent ownership, and thus become entitled to receive dividends, vote at elections and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder."

In *Pullman v. Upton*, 96 U. S. 828, 24 L. ed. 818, the court said: "So in *Holyoke Bank v. Burnham*, 11 Cush. 183, it was decided that a transfer of stock on the books of the bank, intended merely to be held as collateral security makes the holder liable for

It is important to observe that the legal right to vote, belonging to the legal holder of shares, may often be restricted by his equitable obligations to third persons. Thus, a shareholder who has made a complete sale or assignment of his interest in shares, has no right, as against assignee, to vote upon them without the consent of the assignee, although a regular transfer may not have been executed on the company's books. *McHenry v. Jewett*, 20 Hun, 453.

The right of a trustee to vote upon shares held in trust for other parties depends upon the terms of the trust. A shareholder may transfer his shares to nominees having no real ownership, for the purpose of enabling them to vote at the company's meetings, unless the charter or articles of association of the company restrict the right to vote to such persons as are the beneficial owners of their shares. *Morawetz, Priv. Corp.* § 483.

In *State v. Hunton*, 28 Vt. 595, it was held that a nonresident shareholder could not parcel out his shares among his friends so as to enable them to vote, as this would be in violation of a statute providing that no stockholder residing out of the State should be entitled to vote.

Where a certain amount of corporate stock is held jointly by two of its stockholders, subject to certain equities, the company is required by its officers to issue scrip for said stock to such stockholders; and in an election for trustees of the company, such stockholders, notwithstanding an appeal from such judgment by one of them is pending and undetermined as to the manner of voting, may properly be rejected at the election. *Re Pioneer Paper Co.* 86 How. Pr. 111.

#### *Directors, how chosen.*

The general rule of corporations having a capital stock requires that the directors be chosen from the body of the stockholders. Eligibility to office is governed by the amount of stock held. The majority of the board must be citizens; and the qualifications of the directors, in many respects, is usually determined by statutory enactment or charter recitals. In the absence of these the corporation may prescribe the conditions by resolution or 12 L. R. A.

formal by-law. The election of an unqualified person to a corporate office is merely voidable and not void. *People v. Albany & S. R. Co.* 55 Barb. 344. See also *Cook, Stock and Stockholders*, § 680.

Surprise and fraud on the part of the electors is ground for avoiding an election. This principle is asserted in many cases. *Rex v. Gaborian*, 11 East, 77; *Grant, Corp.* 204; *People v. Peck*, 11 Wend. 611; *Re Pioneer Paper Co.* 86 How. Pr. 103.

It is a law of joint-stock corporations that a majority of the stockholders in interest shall control any election of officers of the company, and in its management.

A court of equity has no power to restrain a public officer, or an officer duly elected or appointed by a corporation, from performing the general, ordinary and proper duties of his office. *People v. Albany & S. R. Co. supra*.

*Directors de facto* in contemplation of law, are regarded *directors de jure*, and their official acts, within the scope of the authority apparently conferred, bind the corporation. *Rockville W. Turnp. R. Co. v. Van Ness*, 2 Cranch, C. C. 449; *Bills v. North Carolina D. & D. Inst.* 68 N. C. 423.

A Vermont case holds that the pledgee of stock is not regarded as the owner, to the extent, at least, of entitling him to notice of a stockholders' meeting. *McDaniels v. Flower Brook Mfg. Co.* 23 Vt. 274.

In corporations aggregate, the principle of an election is a majority, unless otherwise specified. *Horton v. Baptist Church Soc.* 34 Vt. 316; *State v. Wilmington City Council*, 3 Harr. (Del.) 294. But after an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although the majority of the entire assembly wholly abstain from voting. *Oldknow v. Wainwright*, 3 Burr. 1017. And see *Rex v. Miller*, 6 T. R. 288; *Booker v. Young*, 13 Gratt. 303; *Buell v. Buckingham*, 18 Iowa, 234; *Everett v. Smith*, 22 Minn. 53. But see *Com. v. Wickensham*, 66 Pa. 184.

An adjournment during the process of balloting will not invalidate the election of a board of directors. *Penobscot & K. R. Co. v. Dunn*, 20 Me. 567. And see *Re Chenango County Mut. Ins. Co.* 19 Wend. 535; *Boone, Corp.* § 69.



the bank debts. It was said that the creditor was to be considered the absolute owner, and that his arrangement with his debtor cannot change the character of the ownership."

In *Magruder v. Colston*, 44 Md. 849, where it was held that the pledgee whose transfer was recorded was liable as a stockholder, the court said: "Stockholders are those who appear on the books of the bank as owners of shares, and who are entitled to manage its affairs, and they can only throw off the liabilities incident to that relation by transferring the stock."

That the word "stockholder," as used by the Legislature, was, in the absence of any qualification of its meaning, understood by the Legislature to be sufficient to embrace a pledgee with a legal title to the stock because of a transfer on the books, is clear from the provisions of section 2988, Comp. Laws, expressly declaring that the holding of stock by a pledgee shall not render the holder a stockholder, within the meaning of that section rendering stockholders liable for debts of the corporation. It is significant that in section 2981, prescribing the qualification of a voter, and declaring that he must be a bona fide stockholder, no such limitation of the meaning of the word "stockholder" is to be found. There are numerous cases in which it is said that a pledgee is a stockholder, and entitled to vote when he appears to be a stockholder on the books of the corporation.

In *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, plaintiff loaned to one Foote, the president of defendant, a sum of money, and received as security a pledge of the capital stock of defendant owned by such president. Defendant having refused to transfer the shares on its books, plaintiff sued for the conversion of the stock. The court held that he could not recover, on the principle that one corporation will not be allowed to own stock in another corporation in the absence of statutory authority. Said the court: "Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing such shares was created to carry on. . . . Nor would this result follow any the less certainly, if the shares of stock were received in pledge only to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee. A person in whose name the stock of the corporation stands on the books of the corporation is as to the corporation a stockholder, and has the right to vote upon the stock. . . . Hence if the plaintiff appeared upon the books of the defendant as the transferee or owner of the two hundred shares of stock represented by the certificate to Foote, it would have the right to vote upon the stock at all meetings of the stockholders of the defendant; and it would be only necessary for it to procure in pledge, as security for money loaned, a majority of the shares of the capital stock of the Commercial Bank [defendant in the case] in order to obtain full control of its affairs

and take charge of its banking operations. . . . It therefore follows that the refusal of the defendant to permit the transfer upon its books to the plaintiff of the two hundred shares of its stock violated no right of the plaintiff, and consequently created no liability on the part of the defendant. Such refusal did not amount to a conversion of the stock. Its action in refusing to transfer was but the denial of any right by the plaintiff to be placed in a position to interfere and participate in the control and management of its internal affairs."

In *Pool v. West Point B. & O. Assn.*, 30 Fed. Rep. 518, Judge Brewer says: "The stock was assigned as collateral for moneys advanced by B. D. Brown. It was duly transferred on the books of the company, so that they unquestionably have all the rights of stockholders."

In *State v. Ferris*, 42 Conn. 560, a bankrupt in whose name stock stood on the books of the company was adjudged entitled to the right to vote the stock after the title to the stock had passed to the assignee in bankruptcy under the provisions of the Bankrupt Act. The court observed: "It has been repeatedly held by this court that the books and records of a corporation determine who are its stockholders for the time being, and who have the right to vote on the stock, although the same may have been sold or pledged as collateral security. In such cases the party who appears to be the owner by the books of the corporation has the right to be treated as a stockholder, and to vote whatever stock stands in his name." See also *People v. Robinson*, 64 Cal. 378; *State v. Pettineli*, 10 Nev. 141.

Mr. Colebrooke, in his work on Collateral Securities, says: "In the absence of restrictive statutes, the pledgee of certificates of stock indorsed and transferred on the books of the company has a right to vote at its meetings. His name appearing as stockholder on the records, he becomes for all purposes a stockholder. The right to vote is an incident of the pledge, and according to the presumed intention of the parties." Section 288.

In *Vail v. Hamilton*, 85 N. Y. 458, the action was brought to set aside a mortgage on corporate property, on the ground that it was void because two thirds of the stockholders had not assented to it. Certain of the stock stood in the name of the pledgee on the books of the corporation. The assent of such stock was essential to the validity of the mortgage. The pledgee did not give such assent, and the court adjudged the mortgage void on the ground, among others, that the pledgee was, as to that particular stock, a stockholder, and his assent was necessary because without it there was not the assent of the requisite two thirds. The court said: "It is true that the shares were transferred to Conklin as collateral security, but the certificate was absolute in its terms, and he was described therein as owner. He so appeared upon the proper books of the corporation. Under such a title, he had power to render the security available by sale to satisfy the debt on default of payment, and until the debt was satisfied he was the one interested

in protecting the property represented by the shares from diversion by liens or preferences improperly created. The company had a right of redemption, and so had an equitable interest in the stock; but upon defendant's theory they could, without redemption, overreach the legal title by creating a mortgage which, when enforced, would extinguish it, and until that event deprive it of value. Conklin had a clear interest in that matter. Except as limited by statute, no stockholder by any title could have more or greater rights, or be subjected to other liabilities. He is relieved by statute from personal liability."

This, as we have already seen, is the case in this State. "He would be otherwise bound for the debts of the corporation, for a creditor need in general look only for the legal title. For the same reason he had a right to vote; his character upon the books of the bank would be conclusive upon the inspectors; and whether section 17 of the Act of 1848, *supra*, could, under any circumstances, be so construed as to deprive one with such a title from voting, it is not necessary to inquire, for the question does not arise; but it is clear that, except for the permission given in that section, even a pledgor could not vote. It has no application to an assent required to be given in writing to a specific act of the corporation, and which, without qualification, the Statute requires to be given by a stockholder. Such we have no doubt was the character of Conklin as to the 500 shares in question at the time of the execution of the mortgage. Including these shares as part of the stock to be represented, the assent required by statute was not given and the mortgage is of no validity."

In *Hopkin v. Buffum*, 9 R. I. 518, the court said: "The object of the stock-book, and of requiring transfers of stock to be recorded by the corporation, is for the protection of the corporation, to enable it to know who are its members, who are entitled to dividends, and for no purpose is it more important than to enable it to know who are entitled to vote in case of an election." The language of the court in *Re St. Lawrence Steamboat Co.*, 44 N. J. L. 529, is equally emphatic on the proposition that the record determines the question who are stockholders in their dealings with the corporation, which embrace the payment and receipt of dividends, and the voting at stockholders' meeting for directors and for other purposes; although on application to a court of equity the stockholders might be compelled to give a proxy to another or to vote as such other should direct. Said the court: "The general rule is that the books of the corporation are the evidence of the persons who are entitled to the rights and privileges of stockholders in the management of the affairs of the corporation. With the single exception that stock really belonging to the corporation cannot, at any election for its directors, be voted upon, directly or indirectly [citing cases], the books of the corporation are the only evidence of who are the stockholders, and as such are entitled to vote at elections. *Downing v. Potts*, 28 N. J. L. 66. Neither the inspectors nor stockholders can dispute the 12 L. R. A.

right to vote of anyone who appears by the company's books to be the holder of stock legally issued.

In *Pender v. Lushington*, L. R. 6 Ch. Div. 70, the articles of association provided that every member should be entitled to one vote for every ten shares, but should not be entitled to more than one hundred votes in all, and that no member should vote at any general meeting unless he had been possessed of his shares for three months previously thereto. It was held that the register of stockholders was the only evidence by which the right to vote could be ascertained, and that no vote of shareholders appearing on the register, and properly qualified, should be rejected on the ground that their shares had been transferred to them by other shareholders, for the purpose of increasing their own voting power, or with an object alleged to be adverse to the interests of the company, or on the ground that the holders were not beneficial owners of the stock. So, also, it is held that a person has a right to vote on stock standing in his own name as trustee for another, or on stock which he has pledged or hypothecated, if it be in his own name on the company's books; and that inspectors of the election, in determining the qualifications of voters, have no authority to inquire whether the stockholder who appears by the books to be a stockholder is or not the real owner of the stock standing in his name. They must take the company's books as conclusive evidence of the qualification to vote. To same effect are *Colebrooke*, *Collateral Securities*, § 282; 1 *Morawetz*, *Priv. Corp.* §§ 170, 488; *Burgess v. Seligman*, 107 U. S. 20, 29, 27 L. ed. 359, 368.

In *State v. Smith*, 15 Or. 98 (on rehearing, Id. 122), it was held that the pledgee, who had secured a transfer to himself of the stock on the books of the corporation under the authority of the express language of the assignment of the stock, empowering the pledgee to transfer the stock to his own name on the books, was, nevertheless, not entitled to vote the stock. But the reason for the decision has no application in this jurisdiction. The court held that the power to make the transfer on the books, although unlimited, although without condition as to the time when it might be exercised, could not lawfully be exerted until the pledgee had destroyed the equity of the pledgor by foreclosure. This decision is clearly opposed to that of the court in *Nicolet Nat. Bank v. City Bank*, 38 Minn. 85, where the court affirmed a judgment against the defendant for conversion of stock, because it had refused to transfer the same upon its corporate books to the name of a pledgee thereof before foreclosure of the pledge, and while still a mere pledgee. This case recognizes the absolute right of the pledgee to such a transfer. Said the court: "Although the assignment to the plaintiff was for the purpose of collateral security, the plaintiff was entitled to have the same entered on the books of the bank." To same effect, *Dayton Nat. Bank v. Merchants Nat. Bank*, 37 Ohio St. 215.

The right of the pledgee to insist upon a transfer upon the books at once is recognized

by numerous cases. *Rich v. Boyce*, 89 Md. 814; *Hubbell v. Drexel*, 11 Fed. Rep. 115-118; *Colebrooke, Collateral Securities*, § 272; and dissenting opinion of Lord, *Ch. J.*, in *State v. Smith*, 15 Or. 122, which accords with our views.

But our Statute settles the question. It in express terms declares that a transfer of stock shall not be valid except between the parties, unless the transfer is entered upon the corporate books. Section 2915, Comp. Laws. Under such a Statute, the condition of a pledgee with an unrecorded transfer would be similar to that of a mortgagee whose real or chattel mortgage should not be recorded or filed. Nay, his situation would be worse. A mortgagee's lien in such a case cannot be defeated by the levy of an attachment without notice. But a creditor of a pledgor of stock, who attaches the same in ignorance of a transfer thereof, no transfer on the books having been made, secures a lien which is superior to the interest of the pledgee, and his paramount lien cannot be defeated by subsequent notice of the transfer. *Re Murphy*, 51 Wis. 519; *Flake v. Carr*, 20 Me. 801; *Skooshogan v. Outler*, 49 Me. 815; *Nagle v. Pacific Wharf Co.* 20 Cal. 529; *Weston v. Bear River & A. W. Min. Co.* 5 Cal. 186; *Strout v. Natima Water & Min. Co.* 9 Cal. 78; *Fisher v. Essex Bank*, 5 Gray, 878; *Sabin v. Woodstock Bank*, 21 Vt. 353; *Cheever v. Meyer*, 52 Vt. 66; *People's Bank v. Gridley* 9 Ill. 457; *Northrop v. Newton & B. Turnp. Co.* 8 Conn. 549; *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 463; *Ft. Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270; *Colt v. Ives*, 31 Conn. 25; *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515; *Second Nat. Bank v. Williston*, 138 Mass. 244; *People v. Robinson*, 64 Cal. 878.

To say, in the light of this Statute and its construction, that a power vested in the pledgee to record the transfer was intended by the pledgor not for the purpose of conferring on the pledgee power to protect himself while a pledgee by making such record, is downright nonsense. Said the court in *Rich v. Boyce*, 89 Md. 814: "So far from the transfer of stock to the appellee's own name being a wrongful conversion, it was the exercise of an undoubted right conferred upon them by the appellant. Without such right, the pledge would have been doubtful security, as the stock would have been liable to execution or attachment by any creditor of the appellant." To same effect, *Colebrooke, Collateral Securities*, § 288.

But where the pledgor not only authorizes a record of the transfer to be made by the pledgee, such record being essential to the latter's protection, but makes the transfer on the books himself, as in the case at bar, by surrendering his old certificates and issuing directly to the pledgee new certificates, signed by the pledgor himself as president of the corporation, no room is left for the inquiry whether the pledgee had authority to make the transfer upon the corporate books, as in the Oregon case. In *Day v. Holmes*, 103 Mass. 310, the court held that a pledgee was justified in procuring new certificates to be issued to himself in place of stock assigned

to him in blank, and that this act did not constitute a conversion of the stock. See also *Colebrooke, Collateral Securities*, §§ 288, 323.

The provision of the Statute that a stockholder, to be entitled to vote, must be a bona fide stockholder, and have stock in his own name on the books, at least ten days prior to the election, must be read and interpreted in the light, not only of the decisions holding that a pledgee is a stockholder, but also in connection with the legislation which, under the decisions and by its terms, makes it necessary for a pledgee to secure a transfer on the books to protect himself against the creditors of his pledgor. Knowing that stock is frequently pledged, and that the pledgee would secure a transfer on the books to protect himself, it must be assumed that the Legislature intended he should be regarded as a stockholder with power to vote, for it has disqualified his pledgor to vote the stock after transfer; and it would be unjustifiable to impute to the law-making power a deliberate design frequently to leave a majority of the stock of a corporation without power to act, and thus render it impossible to hold a stockholders' meeting for any purpose. Unlike the doctrine of the common law, which allows any minority of the stockholders, however small, to constitute a quorum (1 Morawetz, *Priv. Corp.* § 476), our Statute requires a vote of stockholders representing a majority of the subscribed capital stock (§ 2925, Comp. Laws) to elect directors. Moreover, the provision that the pledgor, and not the pledgee, should be liable for the debts of the corporation, to the extent of a stockholder's liability clearly indicates that it was intended that the latter should have the right to make a transfer on the books, for without such transfer he is never liable. *Anderson v. Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478.

There is a class of cases in which the books are not conclusive of the right of the person to vote who appears upon the books to be a stockholder. The law will not allow the transfer upon corporate books to cover up the incapacity of the real owner to vote upon the stock. No corporation, in the absence of statutory permission, has any right to vote its own stock. Such stock having no vote, the colorable transfer of it upon the books will not give the person in whose name it stands authority to vote it. See *Ex parte Holmes*, 5 Cow. 426; *American E. Frog Co. v. Haven*, 101 Mass. 398. But there is a marked difference between such a case and the case of a pledgee who in good faith holds the legal title to the stock. The rights of the pledgor are in equity. He may, in a proper case, compel the pledgee to give him a proxy by a bill in equity. *Schofield v. Union Bank*, 2 Cranch. C. C. 115; *Vouell v. Thompson*, 3 Cranch. C. C. 428; *McHenry v. Jewett*, 90 N. Y. 58; *Hoppin v. Buffum*, 9 R. I. 513.

The fact that such suits have been instituted indicates the necessity for them. A pledgor who has a legal right to vote stock, notwithstanding it has been transferred on the corporate books, need not resort to equity for a proxy. Said the court, in the last case cited: "If the real owner wishes to have

his name, or the true state of facts, appear on the books, he has his remedy in equity to compel a proper transfer, or to compel the pledgee to give a proxy, as was done in the case of *Vowell v. Thompson*, 8 Cranch, U. S. 428." The pledgee sustains a relation to the corporation. This is determined by the record. In dealings with the corporation, his status as a stockholder is fixed by the books. "As between a corporator and the corporation, the records of the corporation, or its stock-book, as it is called, is the evidence of their relation. Meetings of the stockholders, elections and dividends, etc., are regulated by this record." *Bank of Commerce's App.* 78 Pa. 59.

If the equities and contract relations between different persons claiming the right to vote the same stock are to be considered in determining the question of the right to vote, few elections would be certain, and the courts would often be called upon to investigate a multitude of collateral issues in determining who had been elected directors, or whether any other business transacted at a stockholders' meeting had the support of the requisite amount of stock. Said the court, in *Hoppin v. Buffum*, 9 R. I. 518: "Upon any other rule, it could never be known who were entitled to vote until the courts had decided the dispute. The corporation or its officers would have to decide it for the time, and it would leave the election in uncertainty."

The record fixes the status of a person as a stockholder; and another having an equitable right to wield the power of a stockholder, as between himself and the one who has the legal right, must enforce that equitable right by the decree of a court, before he can be recognized as a stockholder in his relations with the corporation. The legal title to the stock determines the right to vote, and the courts, on quo warranto or on summary proceedings under the Statute, cannot regard and enforce a merely equitable right. It is true that under the Statute the court is authorized to award broader relief than on quo warranto. It may declare a different set of directors elected, but the proceeding in its essential nature is a proceeding at law to determine who had the legal right to vote as stockholders at a stockholders' meeting for directors or for other purposes. That the legal title to stock hypothecated and transferred to the creditor on the books is in the creditor so far as dealings with the corporation are concerned is elementary. *Cecil Nat. Bank v. Watontown Bank*, 105 U. S. 317, 26 L. ed. 1089; *Wilson v. Little*, 2 N. Y. 448; *Ang. & A. Corp.* § 580; *Pullman v. Upton*, 96 U. S. 328, 24 L. ed. 818; *Germania Nat. Bank of New Orleans v. Case*, 99 U. S. 628, 25 L. ed. 448; *Colebrooke, Collateral Securities*, § 282. It is not strictly accurate to speak of the creditor holding hypothecated stock transferred on the corporate books as a mere pledgee. His relation to the debtor and to the corporation may be more accurately described. He is a holder of the legal title to stock as collateral security. The debtor has a general right to the return of his property and its title, on payment of his obligation. By his own voluntary act, the debtor has conferred upon the creditor all the rights

of a stockholder by authorizing him to transfer the stock on the corporate books. In this case the debtor himself made the transfer by canceling his certificates, and issuing in their place others directly to the creditors' agent, signed by himself as president of the corporation. We are clearly of the opinion that Faulkner, and not Edwards, was entitled to vote the 546 shares of stock in question. The agreement between Hill and Edwards that the stock should be placed in the name of such person as Hill should designate, for the purpose of giving Hill control of the corporation, adds nothing to his legal rights, but it would be an important element in the case were Edwards here invoking equity to compel Hill to give him a proxy. The latter could use it as a defense to an application for such relief. If however, as is contended by Mr. Edwards, Hill agreed to leave him in control of the corporation, a resort to equity to compel the giving of a proxy would be his proper remedy. Such issues cannot be tried at every election, nor is it the policy of the law that they should be. It would, indeed, be a startling doctrine that the legality of business transacted at stockholders' meetings should be subject to the ultimate decision of complicated questions arising between different claimants of the same stock. If Faulkner voted this stock at the meeting, it is our duty, under the Statute, to declare the other set of directors elected. *Ex parte Deadloft*, 1 Wend. 98; *Re Barker*, 6 Wend. 509. *Re St. Lawrence Steamboat Co.* 44 N. J. L. 529; *Re Cape May & D. B. N. Co.* 51 N. J. L. 78.

Before discussing this, however, we should dispose of a further question relating to the qualification of Faulkner to vote this stock. The Statute declares that a stockholder must be a bona fide stockholder to entitle him to vote. This phrase, "bona fide," in this connection is used in contradistinction to "bad faith." In *Re St. Lawrence Steamboat Co.*, *supra*, the Statute required a person to be a bona fide stockholder to be eligible to the office of director. The court said, in construing this Statute: "A stockholder may have purchased stock with a view of becoming a director, or have obtained it by gift, or he may hold it upon a trust, and be qualified to be a director. If the stock was legally issued, and was not the property of the corporation, and the legal title is in him, he is prima facie capable of being a director, and his right to be a director, in virtue of his legal title to such stock, can be impeached only by showing that title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company, or to carry into effect some fraudulent arrangement with the company." But we do not think that Faulkner voted this stock for the persons who claim to be elected as directors. It is undisputed that he did not vote the stock at the meeting over which Mr. Edwards presided. At the hour named for the meeting Edwards assumed to act as chairman, and directed a Mr. Flint to act as secretary. This was without objection. The call was then read. Next Ed-

wards stated that the object of the meeting was to elect directors for the ensuing year. Ballot-boxes were then prepared, and nominations for directors were made by Edwards and by Mr. Faulkner. After that, some other routine business was transacted, and then an adjournment was taken, on motion of Mr. Faulkner, until afternoon. When the meeting was reopened, after the adjournment, Faulkner moved to reconsider all that had been done, on the ground that the president of the corporation had no right to act as chairman of the stockholders' meeting without election, and that he had not been elected or chosen chairman. In a word, Faulkner claimed that the meeting had not been properly organized. We think his claim came too late. He had acquiesced in the organization and had participated in the business of the meeting. He had even recognized, by making nominations for directors, that at that meeting as so organized, the candidates for directors should be voted for. Failing in his efforts to reorganize the meeting, he withdrew from it without voting, or offering to vote, his stock for directors. It is true that Edwards had notified him that he would not be permitted to vote his stock for directors. But this would not dispense with affirmative action on his part. His secret intention to vote for certain persons for directors, without expressing that intention in a legal way, would not elect anyone to office. It is true that Edwards might, and probably would, have refused to receive the ballot which he might have offered. But it was not in the power of Edwards, or of anyone else, to prevent his voting at that meeting. There was therefore no reason for his withdrawing. It was his duty to remain at the stockholders' meeting as organized, and vote his stock at that meeting. This he did not do, and we are of opinion that voting the stock at another meeting, which he held with others in the same room, at the same time, was of no effect. A minority must have a right to insist that, after a meeting is organized, the majority shall not withdraw from it, and organize another meeting, at which the minority must appear or lose their rights. Once concede the right, and there is no limit to the number of wrecked meetings which may, at the caprice of a majority, precede the transaction of any business. Suppose the vote of two thirds of the stock voted is required to carry a measure under the law or the by-laws of the corporation. Stockholders having more than one third of the stock present can vote it down. Can a majority, constituting less than two thirds, withdraw from an organized meeting, and thus compel the minority to follow them, or lose their right to defeat the measure? We believe it would be unwise, and unjust as well, to sanction such a rule. It is not essential to the protection of the majority who have the right to vote at the meeting as organized. On the other hand, the contrary rule is necessary for the protection of the minority. It is true that mere irregularities in conducting a meeting will not vitiate an election, but when a meeting is once organized it is not a mere irregularity to withdraw from it, and start a new one. The persons voted for at the second meeting cannot

12 L. R. A.

be adjudged to have been elected directors, without deciding both that the second meeting was valid and that the first was illegal. "The acts of a majority are not binding upon the company, unless the proceedings are conducted regularly, and in accordance with general usage, or in the manner prescribed by the charter and by-laws of the company." 1 Morawetz, Priv. Corp. § 487 and cases. See *Re Long Island R. Co.* 19 Wend. 87. To elect directors, they must receive the vote of a majority of the subscribed capital stock. Comp. Laws, § 2925. This is fatal to the election of the persons voted for at the legal meeting. Only 12 shares were lawfully voted at that meeting. It was therefore error to dismiss the petition. It was the duty of the court, under the Statute, to set aside the old, and order a new, election. *Re Long Island R. Co.* 19 Wend. 87; Comp. Laws, § 2932.

There remains to be considered the qualification of one of the directors voted for at the pretended meeting by Faulkner. To be a director one must be a holder of stock. § 2926, Id. Shortly before the election Faulkner transferred to B. F. Spaulding 10 of the 556 shares held by him, and on the day of election Spaulding demanded a transfer on the books. This request was refused. We do not think that he was eligible to the office of director. He did not appear to be a stockholder upon the books of the corporation. If he was entitled to have his transfer recorded, the corporation would be liable for its refusal, and he could recover the full value of his stock. 1 Morawetz, Priv. Corp. § 217, and cases cited. Or he might compel a transfer by an application to a court of equity. Id. § 220, and cases cited. But until such transfer is made he is not, under our Statute, a stockholder in his relations with the corporation. Our Statute in express terms declares, as we have already seen, that a transfer of stock, not entered upon the corporate books, shall not be valid for any purpose, except as between the parties. Comp. Laws, § 2915. If it is effectual to qualify the transferee for the office of director, it is valid for a very important purpose. We may not disregard the imperative provision of this law, nor can we shut our eyes to its very obvious policy. It would be as unfortunate, and as fruitful of confusion and litigation, to have the eligibility of a person for the office of director left in doubt at a stockholders' meeting to elect directors, as to have left in uncertainty the qualification of a person to vote as a stockholder for a director at that meeting. Under a statute couched in the same language, it has been held that the assignor of stock not transferred on the corporate books, and not the assignee thereof, has the right to vote the stock at a meeting to elect directors. *People v. Robinson*, 64 Cal. 878; *State v. Pettineli*, 10 Nev. 141. See also 1 Morawetz, Priv. Corp. § 488; *State v. Ferris*, 42 Conn. 560.

The decisions in New Jersey and Oregon, in *Re St. Lawrence Steamboat Co.*, 44 N. J. L. 529, and *State v. Smith*, 15 Or. 98, are not of controlling force here, because our Statute, by both its terms and its manifest spirit, compels the adoption of a

different doctrine. A person who desires to be recognized as a stockholder, for the purpose of voting, of being a director, of suing for dividends, must secure such a standing by recording his transfer on the corporate books. Nor will the assignee be without remedy. The law affords him the two remedies referred to against the corporation for an unwarranted refusal to make the transfer; and he may, by a resort to a court of equity, compel his transferor to give him a proxy after he has been unjustifiably deprived of his right to have his name entered upon the books of the corporation as a stockholder. Moreover, he can always insist on a transfer as a condition precedent to his purchase or loan on the security of the stock. Business prudence would prompt this caution. In cases where the corporation has a lien on the shares of its stockholders, the purchaser, without a transfer on the books, takes subject to the lien, and the corporation may refuse to record the transfer until the lien is discharged. 1 Morawetz, Priv. Corp. § 208. By insisting on a transfer upon the books before he pays his money, the purchaser will secure his stock free from such lien, as the act of the corporation in making such transfer would be a waiver of the lien. Id. § 208; *Cecil Nat. Bank v. Watontown Bank*, 105 U. S. 217, 26 L. ed. 1039.

In *Helm v. Swiggett*, 12 Ind. 194, it was held that a corporation, whose charter gave it a lien upon the stock of a stockholder for a debt owing to the corporation, had no lien for a debt of the assignee of stock on stock assigned, but not transferred on the books, the court saying: "Ownership simply of a certificate of stock in the bank did not constitute the owner of it a stockholder. It required a transfer of the stock to him upon the books of the bank." Referring to the provision requiring a transfer upon the books, Mr. Morawetz says: "It follows, therefore, that a transfer upon the books is essential to a novation of the contract of membership, where there is a provision of this description. An assignment of shares, although valid as between assignor and assignee, would not affect their legal relationship to the company until after a transfer was entered upon the books," etc. Vol. 1, § 170.

Under our Statute, no person can claim to be a stockholder, in his dealings with the corporation, until his name appears in some way as stockholder on the corporate books; and as the Statute requires a person to be a stockholder, not stock-owner, to entitle him to be a director, we are clear that Spaulding was not eligible to that office. "The directors of a corporation are generally required to be shareholders by express provisions of the company's charter or articles of association. A person is a shareholder, within the meaning of a provision of this description, if he holds shares on the books of the company, but not if he is merely the holder of the certificate. It has been held that the transferee on the books is eligible, although he is not the real owner of the shares, and the transfer was executed for the sole purpose of making him a director. A different rule might apply where the Statute expressly

requires the directors to be the owners of shares." Id. § 506. Had Spaulding appeared as a stockholder on the corporate books, he would have been qualified to hold the office of director, although the transfer had been made to him for the sole purpose of so qualifying him. As he did not so appear, he was not eligible to that office.

It was urged that as Faulkner subsequently to the issue of the stock had indorsed it in blank, and left it in the possession of Hill, that he (Faulkner) had ceased to be a stockholder, and therefore had no right to vote the stock or be a director. Under our Statute providing that an unrecorded transfer of stock shall not be valid for any purpose except between the parties, we are clearly of the opinion, as we have already stated in another connection, that until a transfer should be made on the books Faulkner would continue to be a stockholder, for the purpose of voting the stock or of being eligible to the office of director. *People v. Robinson*, 64 Cal. 373; *State v. Pettineli*, 10 Nev. 141; 1 Morawetz, Priv. Corp. § 488; *State v. Ferris*, 42 Conn. 580.

There are certain findings of fact which we are unable to discover any evidence in the record to sustain. The view the trial court took of the law may, however, explain why they are embodied in the case. The court finds that Hill, in electing directors, was not to put in men unsatisfactory to Edwards. Mr. Faulkner, on cross-examination by Mr. Edwards himself, stated that Edwards said to Hill that Hill was to have a majority of the directors. Mr. Edwards then remarked: "Satisfactory to me, of course?" To this the answer was: "He was to pick his own men." This is all the evidence on the point. Mr. Edwards did not testify in the case. It is true that the record seems to show that Hill was not to put in men who were enemies of Edwards, but this will not justify a finding that the majority of the directors were to be satisfactory to Edwards. Many persons who were not his enemies might nevertheless be unsatisfactory to him. The most that it can be claimed that the evidence discloses is that the question as to what men the majority of the board should be composed of was to depend upon a fact not to be determined by Hill or Edwards finally, but by the courts; whereas, the finding would make Edwards the sole and final arbiter of the question. This would be repugnant to the spirit of the arrangement which was to prevent Edwards from dealing with the corporation and its assets to the prejudice of Hill. Prior to this time Hill had held, as collateral for this same debt, stock in another corporation controlled by Edwards. Hill discovered that the organization of this corporation had been suffered to lapse; that his stock had therefore become worthless; and that Edwards had formed a new corporation. This stock had not been transferred on the books of the corporation, and Edwards, therefore, had full control of it, and by means of it had had complete control over the corporation. When Edwards proposed to give Hill stock in the new company as security, Hill said: "What good would that be if you form a third com-

pany?" To this Edwards replied that, to prevent this, Hill could have the stock put in his own name, and have absolute control, and then he would be safe, and a third company could not be started. Certainly, Mr. Hill would have no control whatever if Mr. Edwards were allowed arbitrarily to pronounce unsatisfactory every director for whom Mr. Hill or his representative should vote this stock. The effect would be that Mr. Hill would have control only on condition that he suffered Mr. Edwards to control him in exercising that control. Other findings it is not important to refer to, as a new election must be had.

The third conclusion of law is unwarranted. It states that Faulkner held this stock subject to the joint order of Hill and Edwards. Having made a transfer of the stock upon the records by issuing new shares directly to Faulkner, Edwards, as pledgor, had no control over the stock without paying

his debt. He could not control Faulkner in voting it without appealing to a court of equity under peculiar circumstances creating an equity in his behalf. Such circumstances are not shown by this record to exist in this case. This he did not do, and it was error to hold that he could, at a stockholders' meeting, exercise any control over the stock or over Faulkner, who held it.

*The judgment of the District Court is reversed, and that court is directed to render judgment setting aside as illegal the election of A. W. Edwards, H. O. Plumley, M. R. Flint, Alexander Griggs and William A. Stevens, as directors, and ordering a new election to be had as required by the Statute. The old directors will hold their office until their successors are elected and qualified. § 2924, Comp. Laws. It will be so ordered.*

All concur.

Petition for rehearing overruled, March 18, 1891.

## NEW YORK COURT OF APPEALS.

William D. SHIPMAN *et al.*, *Respts.*,

*v.*

BANK OF THE STATE OF NEW YORK,  
*Appt.*

(....N. Y....)

1. Payment of checks stolen from the depositor, without negligence on his part, by

his clerk, who forged the indorsements of the payees' names, constitutes no defense to the bank against an action by the depositor for his deposit, especially where the bank made no inquiry as to the genuineness of the indorsements but relied upon the responsibility of the persons presenting the checks for payment.

2. A depositor has the right to assume when checks are returned to him by the bank

*NOTE.—Relation between bank and depositor.*

The relations and relative obligations arising between a bank and its depositing customers are in general simply those of debtor and creditor. This position is well recognized. *Foley v. Hill*, 2 H. L. Cas. 28; *Ettna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 62, 7 Am. Rep. 614; *Boydén v. Bank of Cape Fear*, 65 N. C. 18; *Allen v. Fourth Nat. Bank*, 5 Jones & S. 187, 59 N. Y. 12; *Buchanan Farm Oil Co. v. Woodman*, 1 Hun, 639, 4 Thomp. & C. 193.

The understanding between the parties is, that the money shall remain with the banker and under his control until the customer, by his check, or in some other way, calls for its repayment; and the banker is not in default, and no action will lie, until payment has been demanded. *Downes v. Charlestown Phoenix Bank*, 6 Hill, 297; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 152, 19 L. ed. 397.

It is not the case of a bailment unless the deposit is special. *Wray v. Tuskegee Ins. Co.*, 34 Ala. 53; *Egerton v. Fulton Nat. Bank*, 43 How. Pr. 216; *Bank of Northern Liberties v. Jones*, 43 Pa. 583.

In the case of a general depositor, if the money, checks or bills deposited are stolen, lost or destroyed, or become of no value, the bank sustains the loss, and the depositor is still a creditor of the bank (*Re Franklin Bank*, 1 Paige, 249, 2 L. ed. 635), and has no valid claim to a priority of payment over bill-holders or other creditors. *Re Franklin Bank*, *supra*. And see *Ellis v. Linck*, 3 Ohio St. 66.

It is elementary law that a bank is bound to exhibit its books to a depositor, on proper occasions, and the officers having charge of them are *quo ad hoc*, the agents of both parties. *Union Bank v. Knapp*, 3 Pick. 93.

13 L. R. A.

The theory that a party who makes and issues commercial paper, properly and carefully drawn, to express the liability which he intends to assume, is chargeable with negligence on account of the criminal act of another in altering it after its issue, would render him a warrantor against such acts, and is repugnant to justice and reason. *Crawford v. West Side Bank*, 1 Cent. Rep. 253, 100 N. Y. 50.

*Pass-book no evidence of right to draw money.*

A savings bank seeks to justify the payment by it of a depositor's money to a stranger upon the ground that such payment was made to a person having possession of the depositor's pass-book. Such a pass-book is not negotiable paper, and its possession constitutes in itself no evidence of a right to draw money thereon. It merely imports a liability of the bank to the depositor for the moneys deposited, and an agreement to repay them at such time and in such manner as he shall direct. This contract is implied from the nature and objects of the transaction occurring between the parties. *Crawford v. West Side Bank*, 1 Cent. Rep. 253, 100 N. Y. 51.

The depositor may by special contract authorize payments to be made in some other manner than by his direction, but, in order to make such payments a protection to the bank, it is necessary for it to show some special agreement with the customer, authorizing such a mode of payment. *Smith v. Brooklyn Sav. Bank*, 1 Cent. Rep. 301, 101 N. Y. 53.

The contract between a bank and its depositor is the plain one of debtor and creditor. It has no element of trust; its character is in no way fiduciary. Consequently, the transactions of a bank with its depositors are governed exactly by the same rules as control ordinary contract relations. *Thompson*

that it has ascertained the genuineness of indorsements thereon.

3. A clerk's knowledge of his own wrong in forging checks and fabricating false papers to conceal his crime cannot be imputed to his principal.

4. A negotiable note made payable to a fictitious person and negotiated by the maker, which is given the same validity as against the maker and all persons having knowledge of the facts as if payable to bearer, by Rev. Stat., 765, § 5, includes only paper made with knowledge that the payee is fictitious, and does not include paper made by one who supposes the payee to be a real person and which is fraudulently negotiated by a third person without the maker's fault.

5. The fact that the forger of indorsements on checks has made good the amount to the payees constitutes no defense to the bank which has paid out money on the checks in an action by the depositor for his deposit money which is not founded upon the checks where plaintiff has not profited by such payment.

(April 22, 1891.)

v. Riggs, 72 U. S. 5 Wall. 663, 18 L. ed. 704; National Bank of the Republic v. Millard, 77 U. S. 10 Wall. 152, 19 L. ed. 897; Phoenix Bank of New York City v. Risley, 111 U. S. 125, 28 L. ed. 374.

The bank is bound to know at its peril the signature of its depositor. As to the filling in or body of the check, it owes no such duty, and it is only called upon to exercise ordinary care. 3 Dan. Neg. Inst. 3d ed. § 1654a; Espy v. First Nat. Bank of Cincinnati, 85 U. S. 18 Wall. 604, 21 L. ed. 947.

While it is true that the relation of a bank and its depositor is one simply of debtor and creditor (Phoenix Bank of New York City v. Risley, 111 U. S. 125, 127, 28 L. ed. 374, 375), and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a pass-book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank, and operates to protect him against the carelessness or fraud of the bank. Leather Manufacturers Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811.

When forged checks have been paid by a bank, charged in the depositor's account, and returned to him, he owes no duty to the bank to so conduct an examination of these vouchers that it will necessarily lead to a discovery of the fraud. At most, all that is required of the depositor is ordinary care, and if this is exercised by him or his agent, the bank cannot justly complain although the forgeries are not discovered until too late to enable it to retrieve its position or make reclamation from the forger. Frank v. Chemical Nat. Bank, 84 N. Y. 209.

#### Bank deposits.

In National Bank of Commerce v. National Mechanics Bkg. Assn. 55 N. Y. 211, 14 Am. Rep. 222, it was held that a bank is not bound to know the handwriting or genuineness of the filling up of a check drawn upon it, but only the signature of the drawer. So, where a bank had certified a check, which afterward was fraudulently raised, and the bank by mistake paid the raised amount to a bona fide holder, it was held that it could recover back the sum so paid, unless the holder had suffered loss in consequence of the mistake. The court here said: "If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff, as for instance, if in consequence of the recognition of the check in question, the

**A**PPPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment entered in the New York county clerk's office, upon the report of a referee in favor of plaintiffs in an action brought to recover money alleged to have been deposited by plaintiffs with defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. William Allen Butler and Adrian H. Joline, for appellant:

It was incumbent upon the plaintiffs to examine the pass-book and vouchers when the same were written up and balanced and returned to them from time to time. This was a duty they owed the defendant.

Morse, Banks and Banking, 8d ed. § 291, and see §§ 472, 473; Dana v. National Bank of the Republic, 183 Mass. 156; Leather Mfrs. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811.

The plaintiffs' negligence in the examination of the pass-book and vouchers is a bar to their right of recovery.

When one of two innocent parties must suffer from the fraud of a third, the loss should fall

defendant had paid out money to its fraudulent depositor, then, clearly, to the extent of the loss thus sustained, the plaintiff should be responsible." Louisiana Nat. Bank of New Orleans v. Citizens Bank of Louisiana, 28 La. Ann. 189, 28 Am. Rep. 92, and note.

The bank owes no duty to the holder of a check drawn against it until it has, by its own voluntary act, created one; i. e., by certifying the same, or by charging the drawer with the amount thereof. Bank of the Republic v. Millard, 77 U. S. 10 Wall. 152, 19 L. ed. 899.

In Morse on Banking, p. 243, it is said: "The bank has no right to defer the payment with the intention of making or refusing it at a later hour, according as it shall be influenced by subsequent occurrences. If payment is demanded at noon upon a check which the depositor's unincumbered balance at that hour is sufficient to pay in full, it is at once mature and perfect." First Nat. Bank of Northumberland v. McMichael, 106 Pa. 460.

There is abundant authority for the statement that the drawer of a check, made payable to the order of the payee, is not bound by a payment thereof by the bank, upon a forged indorsement of the name of the payee; it is bound before payment to ascertain the genuineness of the indorsement.

A depositor owes no duty to a bank requiring him to examine his pass-book or return checks with a view to the detection of forgeries in the indorsements; he has a right to assume that the bank before paying his checks will ascertain the genuineness of the indorsements. Welsh v. German American Bank, 78 N. Y. 424.

The relation existing between a bank and its depositor is, in a strict sense, that of debtor and creditor; but in discharging its obligation as a debtor, the bank must do so subject to the rules obtaining between principal and agent.

*Funds must be paid out in due course of business.*

In disbursing the customer's funds, it can pay them only in the usual course of business, and in conformity to his directions. In debiting his account it is not entitled to charge any payments except those made at the time when, to the person whom, and for the amount, authorized by him. Wheeler v. Guild, 20 Pick. 545; Dan. Neg. Inst. § 1813.

It receives the depositor's funds upon the implied condition of disbursing them according to his



on him who enabled such third party to commit the fraud.

*Root v. French*, 18 Wend. 570; *Horn v. Nichols*, 1 Salk. 289.

The rule has been applied to transactions by a duly authorized agent, acting in behalf of his principal, and therefore representing him, and by his act and dealings occasioning loss to innocent third parties.

*Grinbold v. Haven*, 25 N. Y. 595; *Story*, Partn. § 108.

Plaintiffs having been merely careless in their dealings, they are estopped.

*Smith v. Mechanics & T. Bank*, 6 La. Ann. 610.

The knowledge of Bedell was plaintiffs' knowledge.

*Allen v. Coit*, 6 Hill, 818.

This case falls directly within the principle applied in *New York & N. H. R. Co. v. Schuyler*, 84 N. Y. 30, where the doctrine of implied agency arising out of negligence and based on estoppel *in pais* was enforced.

*Cheung Canal Bank v. Bradner*, 44 N. Y. 680; *Durst v. Burton*, 47 N. Y. 167.

Plaintiffs took the risk of intrusting the

checks to Bedell, and, having done so, are estopped to question the indorsements.

*Cooper v. Meyer*, 10 Barn. & C. 468; *Coggill v. American Ech. Bank*, 1 N. Y. 118.

The several checks which were made payable to the order of persons having no existence were, in legal effect and under the statute of this State, payable to bearer; and the plaintiffs put the checks into circulation under circumstances which render them chargeable with knowledge that the payees were fictitious.

Rev. Stat. pt. 2, chap. 4, title 2, § 5; 1 Rev. Stat. 768, § 5; *Plets v. Johnson*, 8 Hill, 112; *Gibson v. Minet*, 1 H. Bl. 569, 8 T. R. 481; *Tatlock v. Harris*, 8 T. R. 174; *Vere v. Lewis*, 8 T. R. 152; *Collis v. Emmet*, 1 H. Bl. 819; *Gibson v. Hunter*, 3 H. Bl. 187; *Bennett v. Farnell*, 1 Campb. 180; *Phillips v. Thurn*, L. R. 1 C. P. 468.

The plaintiffs here are chargeable with knowledge that the payees named therein were non-existent.

See *Barnes v. Ontario Bank*, 19 N. Y. 159; *Jersey City First Nat. Bank v. Leach*, 53 N. Y. 350.

If the defendant not only accepted (certified)

order, and upon an accounting is liable for all such sums deposited, as it has paid away without receiving valid direction therefor. The bank is from necessity responsible for any omission to discover the original terms and conditions of a check, once properly drawn upon it, because at the time of payment it is the only party interested in protecting its integrity, who has the opportunity of inspection; and it therefore owes the duty to its depositors of guarding the fund intrusted to it from spoliation. This liability arises although an alteration of a material part of his order has been effected, even though it be done so skillfully as to defy detection by examination. Dan. Neg. Inst. § 1600.

*Banker must sustain loss when he pays on a forged signature.*

The liability of the banker, however, for a loss occasioned by neglect to exercise such vigilance is confined to the maker alone. So far as other parties, through whose hands an altered check passes, are concerned, they have the same opportunity for detecting fraudulent alterations in the body of the check that the banker has, and as to them, after payment, he is responsible only for the genuineness of the maker's signature. Bank of Commerce v. Union Bank, 3 N. Y. 230.

The principle stated in *White v. Continental Nat. Bank*, 64 N. Y. 318; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, and kindred cases, that the drawees of a check or bill are held to a knowledge of the signature only of their correspondents, the drawers, and not for a want of knowledge of the genuineness of the body of the instrument, applies only as between them and such other parties as have equal opportunity of inspection, and equal means for determining the existence of an alteration. Such parties take the paper relying solely upon the reputed responsibility of their transferrers, and the other parties to it, and its apparent genuineness, and they therefore deal in it at their peril. They have no duty to perform in respect to it except that of guarding their own interests, and in buying and transferring it to others they take the risk of loss occurring from fraudulent alterations.

The questions arising on such paper between drawee and drawer, however, always relate to what the one has authorized the other to do. They are 12 L. R. A.

not questions of negligence or of liability of parties upon commercial paper, but are those of authority solely. In this view it has been held when the check of a depositor was fraudulently altered from three pounds to two hundred pounds after issue, and was paid by the bank at the latter amount, that the bank was entitled to charge only three pounds to the depositor. *Hall v. Fuller*, 5 Barn. & C. 760. *Bailey, J.*, said: If the banker unfortunately pays money belonging to the customer upon an order not genuine, he must suffer, and to justify the payment he must show that the order was genuine, not in the signature only, but in every respect."

The question of negligence cannot arise unless the depositor has, in drawing his check, left blanks unfilled, or by some affirmative act of negligence has facilitated the commission of a fraud by those into whose hands the check may come. *Young v. Grote*, 4 Bing. 268; Dan. Neg. Inst. § 1600.

"It has been said: Whatever loss the bank has sustained it has suffered from its own negligence or want of skill in a matter as to which, in the first instance, it and it only was bound to exercise skill and diligence. To this loss no act of Weisser has contributed. He was guilty of no bad faith. He has violated no duty which he owed to the bank and is in no way responsible (*Manhattan Co. v. Lydig*, 4 Johns. 377; *Smith v. Mercer*, 6 Taunt. 78; *Young v. Grote*, 4 Bing. 253; *Johnson v. Windle*, 3 Bing. N. C. 226; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Canal Bank v. Bank of Albany*, 1 Hill, 287). He had a right to assume that the bank had discharged its own duty to itself (if indeed he was bound to make any assumption upon the subject), and was not bound to conceive it possible that the bank had charged him with money which had not been paid upon his order." *Weisser v. Denison*, 10 N. Y. 68.

Where checks forged by the confidential clerk of the depositor were paid by the bank, charged to the depositor in his pass-book, the book balanced, and, with the forged vouchers among others, returned to the clerk, who examined the account at the request of the principal, and reported it correct, and the principal did not discover the forgeries until several months afterwards, when he immediately made them known to the bank, it was held, in an action to recover the balance of the deposit, that the bank could not retain the amount of the forged checks. *Weisser v. Denison*, *supra*. See *Atlanta Nat. Bank v. Burke*, 2 L. R. A. 36, 81 Ga. 597.

but paid in ignorance of the fiction, the plaintiffs are estopped from asserting their want of knowledge against defendant on the same principle which would have estopped them from asserting it against bona fide holders of the checks.

1 Dan. Neg. Inst. § 139; *Lane v. Krekle*, 23 Iowa, 404.

As between plaintiffs and the Bank, Bedell's apparent authority was equivalent to the actual scope of his agency.

*Griswold v. Haven*, 25 N. Y. 595.

As to ten of the eleven checks payable to the order of existing persons, the evidence shows that the plaintiffs sustained no loss, the amounts having been made good by Bedell to the payees. The defense in regard to these checks set up in the answer was established, and the referee erred in refusing to find accordingly.

Under the present system of pleading and procedure a defendant in an action to enforce a strictly legal right may interpose a defense purely equitable.

Code Civ. Proc. § 507; *Webster v. Bond*, 9 Hun, 437; *Sheehan v. Hamilton*, 2 Keyes, 304, and cases cited; Baylies, Code Pleadings and Forms (1890) p. 239, and cases cited; *Dobson v. Pearce*, 13 N. Y. 156; *Savage v. Allen*, 54 N. Y. 458.

Where it can be shown that plaintiff sustained no actual loss his damages will be merely nominal.

*Sedgw. Damages*, 6th ed. pp. 614, 615.

*Vagliano v. Bank of England*, L. R. 22 Q. B. Div. 108, L. R. 23 Q. B. Div. 243, relied upon in the court below, as a controlling authority in favor of the plaintiffs, has been reversed by the House of Lords.

*Messrs. Elihu Root and Samuel B. Clarke*, for respondent:

The Bank's debt to plaintiffs was not diminished by its payment of the forged checks, and its obligation to pay the debt when required continued in all respects as if no payment had been made.

*Crawford v. West Side Bank*, 1 Cent. Rep. 253, 100 N. Y. 53; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 80; *Bank of British North America v. Merchants Nat. Bank*, 91 N. Y. 106; *Washington First Nat. Bank v. Whitman*, 94 U. S. 847, 24 L. ed. 231.

The plaintiffs are not estopped to deny defendant's performance of its contract by the statements of accounts involved in the balancing of the pass book and the return of vouchers.

*August v. Fourth Nat. Bank*, 15 N. Y. S. R. 956.

The law imposes upon depositors no duty to examine the indorsements upon checks returned to them by the bank.

*Weisser v. Denton*, 10 N. Y. 68; *Welsh v. German American Bank*, 73 N. Y. 424; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; *Washington First Nat. Bank v. Whitman*, *supra*; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 107, 29 L. ed. 816; *Vagliano v. Bank of England*, L. R. 22 Q. B. Div. 108, L. R. 23 Q. B. Div. 263.

We are not estopped by any negligence in the general conduct of our business or in supervising Bedell.

*Bigelow, Estoppel*, p. 612; *People v. Bank of North America*, 75 N. Y. 561; *Swan v. North* 13 L. R. A.

*British A. Co. 2 Hurlst. & C. 175*; *Mayor v. Bank of England*, L. R. 21 Q. B. Div. 160; *Vagliano v. Bank of England*, *Weisser v. Denton*, *Welsh v. German American Bank* and *Frank v. Chemical Nat. Bank*, *supra*; *Crawford v. West Side Bank*, 1 Cent. Rep. 253, 100 N. Y. 55.

It is only when the maker knows the payee to be fictitious, and intends to make the paper payable to a fictitious person, that it is equivalent to paper payable to bearer.

*Turnbull v. Bowyer*, 40 N. Y. 456; *Gibson v. Minet*, 1 H. Bl. 569; *Armstrong v. Pomeroy Nat. Bank*, 6 L. R. A. 625, 46 Ohio St. 512.

Bedell's knowledge that the payees were fictitious cannot be imputed to us.

*Frank v. Chemical Nat. Bank*, 84 N. Y. 214; *Weisser v. Denton*, *supra*; *Atlantic Cotton Mills v. Indian Orchard Mills*, 6 New Eng. Rep. 587, 147 Mass. 263; *Cass v. Cass*, L. R. 15 Ch. Div. 643.

O'Brien, J., delivered the opinion of the court:

This appeal brings here for review a judgment of over \$223,000, recovered by the plaintiffs against the defendant, upon a state of facts fully found and stated by the referee in his report, and in regard to which there is little, if any, serious dispute between the parties. The form of the action is for the recovery of a sum of money which it is claimed the defendant undertook, when accepting the plaintiffs' deposits, to pay to them, or upon their order and direction. It has been found, and is admitted on both sides, that on the 7th of April, 1884, the plaintiffs had upon deposit to their credit with the defendant the sum of \$14,499.08. That from this date to the close of business on the 3d day of October, 1888, the defendant had and received to and for the use of the plaintiffs various other sums of money, deposited from time to time, between these dates, by the plaintiffs with the defendant, amounting in the aggregate to \$6,218,566.71. That between the 7th day of April, 1884, and the close of business on the 3d day of October, 1888, the defendant paid to the order of the plaintiffs, on their checks drawn against the balance above stated and the deposits subsequently made, various sums of money, amounting in the aggregate to \$6,080,040.59. This would leave a balance due to the plaintiffs by the defendant of \$198,045.50, which, with interest, is the sum that constitutes the subject of this controversy. The defendant alleged in its answer that all moneys deposited with it by the plaintiffs were fully paid upon their order, and by checks drawn upon it by them; and, in order to meet and disprove the plaintiff's claim that there was due to them by the defendant, at the close of business on the 3d day of October, 1888, the sum of \$198,045.50, the defendant produced twenty-seven checks, all signed by the plaintiffs and drawn upon the defendant, directing the payment of sums respectively aggregating the total balance above mentioned, and to recover which the plaintiffs brought the action. That the defendant actually paid these checks is not disputed, and the case is thus made to turn upon the question whether they are available to the defendant as lawful vouchers, establishing the fact that the moneys

claimed by the plaintiffs were paid out by the defendant upon these checks according to the order and direction of the plaintiffs.

A clear understanding of the question involved requires a brief statement of the facts and circumstances under which these twenty-seven checks were signed by the plaintiffs and presented to and paid by the defendant. The plaintiffs are a well-known law firm in the City of New York, engaged in an extensive business, which, in its organization, had a department known as the "Real Estate Department." In this branch of their business they examined titles for clients who were lenders of money on bond and mortgage, carried out and completed such loans, and occasionally examined titles for clients who were purchasers of real estate. One of the members of the firm had general charge of this department, but the details of the business and the execution of the work were intrusted to subordinates. One James E. Bedell, a lawyer who had been admitted to the bar in the year 1868, and had been in the employ of the plaintiffs since 1873, assisting in the real-estate department, was, in the year 1881, practically put in charge of the work of this department, under the direction of the member of plaintiffs' firm who had the general charge. Bedell was an experienced and capable lawyer. The plaintiffs believed that he was honest and trustworthy, and, prior to the discovery of the very extraordinary crime in connection with these checks, they had no reason whatever to suspect or distrust him. During the period covered by the transactions in question the plaintiffs employed one Dodge, a competent expert book-keeper, who took charge of the plaintiffs' books, and acted as cashier. He kept the account between the plaintiffs and defendant. He filled out all the checks and made all the entries in the check-books, and the checks, when paid by defendant, came to him with the pass-book, which was balanced by the defendant, and the vouchers, including the checks in question, returned with the book, from time to time, at frequent intervals. The course of the business in which the checks in question were issued was substantially as follows: The plaintiff's client, who wished to make a loan through them, furnished the money, which went directly into the plaintiffs' general bank account with the defendant. Against the sum to be loaned, and thus put to the plaintiffs' credit, checks were filled up by Dodge, the cashier, from a written statement made by Bedell, showing the amount required to pay liens or charges on the property to be mortgaged, the amount of the plaintiffs' charges, and any other items entering into the transaction, and the balance to be paid the borrower. After filling up the checks, Dodge would take the check-book, with the filled-up checks, to a member of the firm for signature, showing him the entries in the check-book of the deposit of the client's money, and the statement of Bedell as to the payments to be made; and thereupon the checks would be signed by the plaintiffs, in the name of the individual partner to whom it was presented by Dodge, the firm name being engraved on each check and the individual signature underwritten. Dodge would then take away the check-book, and deliver the several checks to Bedell. In

this manner the twenty-seven checks in question were intrusted by the plaintiff to Bedell, their clerk, for delivery to the payees, respectively, therein named, who were in good faith believed by the plaintiffs to be real persons entitled to receive the amount of said checks, respectively, from them or their clients. The defendant paid the checks to a third person, upon an indorsement thereon of the payees named, forged by Bedell, who converted the proceeds to his own use. The names of the payees written in sixteen of the twenty seven checks, drawn for sums aggregating \$112,818.72, were not the names of real, but fictitious, persons. The remaining eleven checks, drawn for sums aggregating \$85,227.08, were made payable to the order of real persons, whose indorsements were in every case forged by Bedell. Only three of the checks, drawn for less than \$2,400, were paid to Bedell by defendant. All the others were deposited, from time to time, in various other banks in the City of New York, and the money thereon received by Bedell from these banks, and the checks all ultimately paid by defendant through the exchanges in the clearing house, in the due and regular course of business. As to the sixteen checks payable to the order of fictitious persons, the plaintiffs were led by fraudulent contrivances and representations on the part of Bedell, the details of which appear in the record, to believe, and they did in fact believe, until the discovery of the forgeries, that such payees were real persons; and as to all the checks the plaintiffs did not intend that any of them should go into circulation, or should be paid by the defendant, otherwise than through a delivery to and indorsement by the payee named therein. The checks were paid in every case by the defendant without any inquiry as to the genuineness of the indorsements, and in reliance upon the responsibility of the parties presenting the same, and not in reliance upon anything done or forborne by the plaintiffs, except that they were signed by them. There is no claim that, at the time the defendant paid the checks, it had any knowledge or suspicion or reason to suspect that any of the indorsements were forged, or that any of the names were fictitious, or that there was any fraud or irregularity in respect to any of the checks, or any indorsement or writing thereon. The plaintiffs' confidence in Bedell, and his representation to them in all their dealings with clients, concerning loans on real estate, continued without interruption until one of these clients, upon examining a fabricated mortgage sent to him by Bedell, had his attention arrested by the faintness of the impression of the seal of the register on the certificate of record, so that he sent the mortgage to the register's office for a better sealing. This led to the discovery of all the frauds, forgeries, fabrications of documents, attestations and official certificates carried on by him in the plaintiffs' office for more than four years. The plaintiffs did not discover that the indorsements on the checks had been forged, or that the amount thereof had not been paid to them or their order, until nearly four months after May 22, 1888, which was the date of the last check so forged. On the discovery of the facts, and before the com-

commencement of this action, the plaintiffs tendered the checks to the defendant, and demanded that the amount of the same should be paid to them or credited in their account by the defendant, which tender and demand were refused.

The various deposits of money, made from time to time by the plaintiffs with the defendant, created the relation of debtor and creditor, and the law implies a contract on the part of the defendant to disburse the money standing to the plaintiffs' credit only upon their order and in conformity with their directions. The defendant is not entitled to charge against the plaintiffs' account any sums as payments, unless they have been made to such persons as the plaintiffs directed. Such payments as were made without the order of the plaintiffs of their funds by the defendant afforded to it no protection, when called upon by the plaintiffs to account for the money deposited. Payments made upon forged indorsements are at the peril of the Bank, unless it can claim protection upon some principle of estoppel or some negligence chargeable to the depositor. These rules are so familiar and so well established and illustrated by the adjudged cases that a bare reference to them is all that is needful here. *Crawford v. West Side Bank*, 100 N. Y. 53, 1 Cent. Rep. 253; *Albion Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 86; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 80; *Phœnix Bank of New York City v. Risley*, 111 U. S. 125, 28 L. ed. 874; *Bank of British North America v. Merchants Nat. Bank*, 91 N. Y. 106; *Chicago Marine Bank v. Fulton County Bank*, 69 U. S. 2 Wall. 256, 17 L. ed. 787; *Washington First Nat. Bank v. Whitman*, 94 U. S. 847, 24 L. ed. 281; *Citizens Nat. Bank v. Importers & T. Bank*, 119 N. Y. 195.

The statement of the account made by the defendant to the plaintiffs, from time to time, the balancing of the bank pass-book, and the return of the same to the plaintiffs with the vouchers, including, as they did, the checks in controversy, with the forged indorsements thereon, constitute no obstacle to the maintenance of this action by the plaintiffs, as they were ignorant of the facts and circumstances under which the checks were issued and put in circulation. An account thus stated can always be opened upon proof of mistake or fraud; and the only effect of the plaintiffs' silence as to the correctness of the account rendered by the defendant is to put upon them, in this action, the burden of showing that the account, as stated, was the result of fraud or mistake,—a burden which they have fully assumed and met, as the referee has found.

It is urged that the plaintiffs owed the duty to the defendant of examining the vouchers returned to them with the balanced pass-book, from time to time, and that a careful examination of the same would have disclosed the fact that the money was received upon the checks by Bedell, and his forgeries thus detected. The duty of examining the returned vouchers was delegated by the plaintiffs to their cashier and book-keeper who was a faithful and competent person for many years in plaintiffs' employ. The referee found as a fact, from all the circumstances of the case, that the failure to discover the forgeries sooner than they were

was not, in any case, caused by any neglect on the part of the plaintiffs, or their cashier, of any duty that the plaintiffs owed to the defendant. The examination of the checks would of course enable the plaintiffs to ascertain whether their own signature was genuine, and whether the amount, date, or name of the payee had been changed, but would not necessarily enable them to detect the forgery of the payee's name. The law imposed no duty upon the plaintiffs to do more than they did to ascertain whether the indorsements on the checks were genuine. The defendant's contract was to pay the checks only upon a genuine indorsement. The drawer is not presumed to know, and in fact seldom does know, the signature of the payee. The Bank must, at its own peril, determine that question. It has the opportunity, by requiring identification when the check is presented, or a responsible guaranty from the party presenting it, of ascertaining whether the indorsement is genuine or not. When it returns the check to the depositor, as evidence of a payment made by his direction, the latter has the right to assume that the bank has ascertained the fact to be that the indorsement is genuine. *Weisser v. Denison*, 10 N. Y. 68; *Welsh v. German American Bank*, 78 N. Y. 424; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; *Washington First Nat. Bank v. Whitman*, 94 U. S. 847, 24 L. ed. 281; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 107, 29 L. ed. 816.

The plaintiffs committed the examination of the vouchers when returned from the bank to a faithful and competent cashier, who failed to discover the forged indorsements. There is not the slightest reason to believe that, if the checks had been examined by one of the plaintiffs themselves, the result would have been any different. We are unable to see that anything was done or omitted by the plaintiffs, with respect to the examination of the indorsements upon the vouchers, that excuses the defendant from its obligation to pay only upon a genuine order. Nor can we perceive anything done or omitted by the plaintiffs in the general conduct and management of their business, or in the employment of and confidence reposed in Bedell, that estops them from alleging that the twenty-seven checks were paid without their authority. Whether the plaintiffs were guilty of any negligence in that regard was a question of fact, and the finding is that they were, in so far as the defendant was concerned, reasonably prudent and careful, and that the payment of the checks was not caused by any negligence on their part, and we do not think it can be said that this finding is without evidence. Moreover it is found that the defendant paid the twenty-seven checks, in each case, without any inquiry as to the genuineness of the indorsements, and in reliance upon the responsibility of the persons presenting the same for payment, and not in reliance upon anything done or forborne by the plaintiffs, except the fact that the checks had been drawn by them; and, further, that all the checks, except the three paid directly to Bedell, and amounting to less than \$2,400, were presented to the defendant by and paid to banks perfectly solvent, and liable to respond to the defendant for all moneys paid upon the forged indorsements.

These findings, supported as they are, by the evidence, dispose of much of the argument upon which it is sought to establish the proposition that the plaintiffs are, by reason of their own acts and omissions, estopped from claiming that the checks were paid by the defendant without their authority. The facts upon which an estoppel must always be based are found against the defendant. Bedell, in issuing the forged checks and fabricating the false papers to conceal his crimes, did not act as the plaintiffs' agent, and his acts in this regard are not binding upon them, nor are they in any manner affected by his knowledge of the facts. The questions that arise in this case, and are so ably and elaborately discussed in the briefs of counsel, with respect to the examination of the returned checks and pass-book, the manner in which the plaintiffs' business was conducted, and the degree of care and supervision that was exercised over their subordinates, how far the plaintiffs are bound by the criminal acts and knowledge of their clerk, as well as the general rule of estoppel, when applied to this class of cases, are not new. They have been frequently and fully discussed in the numerous cases in this court, involving the rights and duties of banks and depositors, and it would extend this opinion beyond reasonable limits, and serve no useful purpose, to go over the ground again. *Frank v. Chemical Nat. Bank, Welsh v. German American Bank and Weisser v. Denison, supra; People v. Bank of North America*, 75 N. Y. 547; *Leather Mfrs. Nat. Bank v. Morgan, supra; Mayor v. Bank of England*, L. R. 21 Q. B. Div. 160. It is enough to state our general conclusion, that with respect to all these points, the defendant has failed to establish any defense to the action.

It is claimed by the defendant that the sixteen checks made payable to the order of persons having no existence were, in legal effect, payable to bearer. It is provided by statute that paper made payable to the order of a fictitious person, and negotiated by the maker, has the same validity, "as against the maker and all persons having knowledge of the facts, as if payable to bearer." 1 Rev. Stat. p. 768, § 5. We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer, unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person. *Irving Nat. Bank v. Alley*, 79 N. Y. 586; *Turnbull v. Bouyer*, 40 N. Y. 456; *Vagliano v. Bank of England*, L. R. 22 Q. B. Div. 108, on appeal L. R. 23 Q. B. Div. 248; *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 6 L. R. A. 625; *Gibson v. Minst*, 1 H. Bl. 569.

The findings of the referee that the plaintiffs in good faith believed that the names of the payees represented real persons, entitled to receive from them the amount of the check in each case, having been led to believe this by the fraudulent contrivances of Bedell, and that they intended that Bedell should deliver the

check to a real payee therein named, and that they did not intend that they should go into circulation or be paid by defendant otherwise than through a delivery to and indorsement by the payee named, and that plaintiffs gave no authority to Bedell to indorse the name of the payee, or to put the checks into circulation, and that no one in fact relied on any appearance of authority, derived from the plaintiffs, in Bedell to indorse the payee's name upon the checks, or to put them in circulation, disposes of this question. The indorsement of the names of the fictitious payees upon the checks, with intent to deceive and to put the checks in circulation, constituted the crime of forgery, by means of which, and without any fault of the plaintiffs, payment was obtained thereon. The defendant does not occupy any different position with reference to the checks payable to fictitious payees than it does with reference to those payable to real parties whose indorsements were forged. Bedell, of course knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals. *Frank v. Chemical Nat. Bank, Weisser v. Denison and Welsh v. German American Bank, supra; Case v. Case*, L. R. 15 Ch. Div. 643, 644.

The case presents another and peculiar question. It seems that ten of the eleven checks, which were made payable to the order of real persons, were made good by Bedell to the several payees, and the defendant has set up these facts in its answer as a partial equitable defense. The referee made no finding on the subject, but Bedell so testified, and was not contradicted, and the question arises upon a request by the defendant to find, in substance, that, the amount of these ten checks having been made good by Bedell to the several payees, the plaintiffs, having sustained no loss by reason of the payment thereof, are not entitled to recover in this action, against the defendant, any sum on account of or by reason of the payment by defendant of the same. The request was refused, and the defendant excepted. Keeping in view the theory of this action, and regarding the evidence before the referee, we cannot perceive that there was any error in refusing the requests. Bedell testified, in substance, that at the time of the commencement of the action the plaintiffs were liable to clients to the extent of \$264,000 on account of his frauds. There were \$200,000 in fabricated mortgages which had been delivered by Bedell to clients on account of an equal sum of money paid by the clients to plaintiffs for investment, and which Bedell had converted to his own use. The \$64,000 was obtained through other frauds upon clients which the plaintiffs were liable to be called upon to make good. One of the plaintiffs testified that his firm had actually paid to clients on account of Bedell's frauds over \$242,000. It was not shown by what funds or in what manner Bedell made good to the payees the amount of the checks intended for them. None of the money paid by him was traced to the defendant. The plaintiffs' action was not upon the checks, nor for damages by reason of their payment, but on defendant's implied promise to pay the

money deposited to the plaintiffs or upon their order. The plaintiffs' case was made out without the checks at all, except so far as they were necessary as proof to open the account stated. In substance, the referee was asked to hold that by reason of the payment by Bedell of the amount of the checks to the persons named therein, without any reference to the source from which the money came, they were to be charged to the plaintiffs the same as if paid by their authority. The proof given did not justify this conclusion. As it was not shown that such payment was made at the expense or to the injury of the defendant, or that the plaintiffs profited by it, the cause of action stated in the complaint was not affected by the fact. It is no doubt true that indemnity to the payees of checks diverted as these were, made by the wrong-doer, might, under certain circumstances, constitute a basis for equitable relief in an action of this kind, but the proof did not go far enough to warrant it in this case.

The very recent case of *Vagliano v. Bank of England* occupied such a prominent place in the discussions of the questions involved in this appeal by the courts below, and it is now so earnestly pressed upon our attention by the learned counsel for the defendant as a controlling authority in support of his views, that we consider it necessary to refer to it, and point out, so far as we can, the rule or principle which it decides. In the magnitude of the sum involved, the boldness and ingenuity with which a clerk perpetrated a stupendous fraud upon his employer, and in many other respects, that case doubtless bears a very strong resemblance to this. The question there was whether the defendant was entitled to debit the plaintiff, one of its depositors, with forty-three forged bills of exchange, amounting in the aggregate to £71,500, which it had paid, upon genuine acceptance by the plaintiff, but procured by fraud under substantially the following circumstances: Vagliano, the plaintiff, was a merchant and foreign banker in London, with correspondents in various parts of the world, and transacting an enormous business with the defendant, his general banker. He employed in his office a considerable number of clerks, and among them one Glyka, who had charge of the foreign correspondence. One Vucina, a merchant and banker at Odessa, was, and for thirty years had been, one of Vagliano's correspondents, transacting with him a large business, and having practically unlimited credit. For many years he had drawn drafts for large amounts, when necessary, upon the plaintiff, payable sometimes to his own order, but more frequently to the order of a payee named therein. The course of business in the office was well known to Glyka, who procured specimens of Vucina's letters of advice, which always preceded the drafts, and specimens of the drafts themselves. Having done so, he had paper prepared identical in general appearance and texture with that upon which Vucina's genuine letters and bills were written. This enabled him to forge letters of advice and drafts with Vucina's name as drawer, which he executed with extraordinary skill, and in each case he wrote upon the face of the bill, as payees, the name of C. Petrida

& Co., a firm who carried on business at Constantinople, and had business relations with Vucina, but had no connection whatever with the fabricated drafts. Glyka caused these forged letters of advice and drafts to be laid before Vagliano, his principal, who, being deceived by the skillful manner in which the papers were prepared, and the confidence he reposed in his clerks, wrote a genuine acceptance on the face of each bill, as it was put before him from time to time, during a period of some four months, payable in every case at the Bank of England. These fabricated bills, having been thus accepted, were placed with the other and genuine bills in a box in the office, to be delivered according to the usual course of business to the proper party, when called for. Glyka stole the bills from the box, forged the indorsement of the payees thereon, presented them at the counter of the bank, and received the money thereon. By the English Bills of Exchange Act of 1882 (45 & 46 Vict. chap. 61, § 7, subd. 8), it was enacted, with reference to bills of exchange, that, "where the payee is a fictitious or nonexisting person, the bill may be treated as payable to bearer." The bank defended upon two grounds: *first*, that they were protected by this Statute; and, *secondly*, that the plaintiff was guilty of such negligence as precluded him from claiming that the payments made upon these bills were without authority. On the trial of the action, before *Mr. Justice Charles*, the plaintiff recovered. L. R. 22 Q. B. Div. 103. On appeal the judgment was affirmed, the master of the rolls alone dissenting, on the ground that the bank was protected by the Bills of Exchange Act. L. R. 23 Q. B. Div. 243. Thus far the views of the court, on both hearings, were in harmony with the contention of the plaintiffs in the case at bar, both as to the construction of the Statute and the facts bearing on the question of negligence. The judgment, however, has recently been reversed by the House of Lords, and we have been furnished with copies of the opinions given upon the final decision of the appeal, and have given to them the careful consideration which the high authority of the tribunal from which they emanate and the importance of the case seem to demand. The main point upon which the case turned in the review by the House of Lords, as we understand the opinions, was the construction to be given the Bills of Exchange Act. It was held, contrary to the opinions below, that, whenever the name inserted as payee is without any intention that payment shall only be made in conformity therewith, the payee then becomes a fictitious person, within the meaning of the Act, and therefore the forty-three bills were within the Statute, though Petrida & Co. were in fact existing and real persons. When this conclusion was reached, the plaintiffs' case necessarily failed, as it was but another way of stating that the bank paid the fabricated bills according to their legal tenor and effect, and according to the plaintiffs' directions, that is, to bearer. It is hardly necessary to add that, if we could follow that case in giving construction to our Statute, the same result would follow in this case. But it is quite obvious that we cannot. The language is different. Our Statute is a codification of the com-

mon law, while the English Statute is, and was intended to be, a departure from it. In so far as the opinions deal with the facts of the case, upon the question of negligence, it is difficult to deduce from them any abstract rule or principle. Moreover, there is, as it seems to us, a material difference, in some respects, between the facts in that case and the one at bar. Vagliano, through the contrivances of his clerk, had put before him a fabricated bill, the spurious character of which he failed to detect, and he affixed to it a genuine acceptance, thereby accrediting it to the bank as a genuine instrument. He left the bill thus accepted, in a place where the dishonest clerk could easily purloin it. The manner in which the business was conducted was such as to enable the clerk to possess himself of the means whereby the fraud

was successfully carried out without check or detection. The view of the case taken in the opinions delivered in the House of Lords, aside from the question of the construction of the Statute, may very well be attributed to a different shading in the facts, and to the further consideration which can be inferred from the record, that that tribunal is not confined, as we are, to a review of the courts below upon questions of law only. For these reasons the *Vagliano Case* cannot be regarded as authority adverse to the conclusion at which we have arrived in this. We have examined the other exceptions appearing in the record, to which our attention has been directed, and we are of the opinion that none of them can be sustained.

*The judgment should be affirmed.*

All concur, *Gray, J.*, in result.

### KANSAS SUPREME COURT.

PACIFIC EXPRESS CO., *Plff. in Err.*,  
v.

Peter T. FOLEY.

(...Kan....)

\*1. Where the receipt or contract of a common carrier contains a stipulation that the company is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package or thing for over \$50, unless the just and true value thereof is stated in such receipt, and where the receipt fails to show any value of the box or goods shipped, the receipt or contract, if fairly and voluntarily entered into, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, when the loss or injury to the box or goods carried results only from slight, common,

\*Head notes by HORTON, Ch. J.

or ordinary negligence on the part of the carrier, its agents or servants.

2. The case of *Kallman v. United States Exp. Co.*, 3 Kan. 245, referred to and commented on.

3. *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, distinguished as the carrier in that case arbitrarily and unfairly fixed in the bill of lading or receipt a limitation on the value of the property shipped.

(*Valentine, J., dissents.*)

(May 9, 1891.)

**E**RROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover damages for injury to certain property while in defendant's possession for transportation. *Reversed.*

**NOTE.—Carrier; Limitation of Liability by contract.**

A carrier cannot limit his liability by any act of his own (*Wallace v. Sanders*, 42 Ga. 436; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 343, 12 L. ed. 465), but if the act have the consent of the shipper, the stipulation becomes a contract. *Sager v. Portsmouth, S. P. & E. R. Co.* 51 Me. 223; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462; *Judson v. Western R. Corp.* 88 Mass. 486; *Mann v. Brohard*, 40 Vt. 823.

The document he receives is a muniment of title quasi negotiable, and on the faith of which he may borrow money; it is a contract and not merely a receipt. *Logan v. Mobile Trade Co.* 46 Ala. 514; *Snider v. Adams Exp. Co.* 68 Mo. 870; *Huntingdon v. Dinsmore*, 4 Hun. 66; *Long v. New York Cent. R. Co.* 50 N. Y. 76; *McMahon v. Macy*, 51 N. Y. 155; *Farnham v. Camden & A. R. Co.* 55 Pa. 63; *American Exp. Co. v. Titusville Second Nat. Bank*, 69 Pa. 364.

An express receipt delivered at the time of shipment is a contract. *Collender v. Dinsmore*, 55 N. Y. 200.

So, a "domestic bill of lading" delivered to a shipper is a contract, whose terms are binding on both parties. *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Westcott v. Fargo*, 6 Lans. 12 L. R. A.

319; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288. See also *Magnin v. Dinsmore*, 56 N. Y. 168; *Steinweg v. Erie R. Co.* 43 N. Y. 123; *Dorr v. New Jersey S. N. Co.* 11 N. Y. 435; *Breece v. United States Teleg. Co.* 48 N. Y. 182; *Young v. Western U. Teleg. Co.* 65 N. Y. 163, cited in *Wheeler, Carr.* 227.

A limitation of liability as to amount in case of loss of the goods shipped is valid if agreed to by the shipper. *Fay v. The New World*, 1 Cal. 343; *Lawrence v. New York, P. & B. R. Co.* 38 Conn. 63; *Chicago, R. I. & P. R. Co. v. Harmon*, 17 Ill. App. 640; *Brown v. Wabash, St. L. & P. R. Co.* 18 Mo. App. 568; *Newstadt v. Adams*, 5 Duer, 43; *Moriarty v. Harnden's Express*, 1 Daly, 227; *Belger v. Dinsmore*, 51 N. Y. 166; *Elkins v. Empire Transp. Co.* 81\* Pa. 315.

And a stipulation that the value of the goods shall be estimated at the place of shipment is valid. *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 314, 29 L. ed. 873.

**Rule as to valuation fixed in bill of lading.**

As a general rule, and in the absence of fraud or imposition a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents and though its contents are ever so valuable, if he does not make a special acceptance. But if the shipper is guilty of fraud or imposition,

Statement by **Horton, C. J.:**

On the 4th day of November, 1887, Peter T. Foley brought his action against the Pacific Express Company before a justice of the peace of Douglas County to recover \$175, for damages alleged to have been sustained by him in the transportation of a box containing type and electrotypes plates from Kansas City, Mo., to Lawrence, in this State, on October 15, 1887, from the A. N. Kellogg Newspaper Company at Kansas City, Mo., by the Pacific Express Company. The following is a copy of the receipt given by the Express Company for the box in controversy:

"Read this receipt.

The Pacific Express Company.

"Not negotiable.

"Received from — the following articles, which we undertake to forward, to the point nearest to destination reached by this Company only, perils of navigation excepted. And it is hereby expressly agreed that the said Pacific Express Company are not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package, or thing for over \$50, unless the just and true value thereof is herein stated, nor for any loss or damage by fire, the acts of God, or of the enemies of the government, the restraint of governments, mobs, riots, insurrections, or pirates, or from any of the dangers incident to a time of war; nor upon any property or thing, unless properly packed and secured for transportation; nor for any fragile fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass. If any sum of money, besides the charge for transportation, is to be collected from consignee on delivery of the property described herein, and the same is not paid within thirty days from date hereof, the shipper agrees that this company may return said property to him, at their option, at the ex-

piration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this Company for such property, while in its possession, for the purpose of making such collection, shall be that of warehouse men only. And it is further agreed that the said Pacific Express Company shall not be held liable for any claim, of whatsoever nature, arising from this contract, unless such claim shall be presented in writing sixty days from date hereof, in a statement to which his receipt shall be annexed; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Pacific Express Company may intrust or deliver the above-described property for transportation (which the said Pacific Express Company is hereby authorized to do), and shall define and limit the liability therefor of such other company or person:

Date.	Ar-	Value.	Con-	Destina-	Receipt
1887.	ticles.		signee.	tion.	by.
Oct. 15.	1 box.		P. T. Foley.	Lawrence, Kansas.	Glam."

On the first page of the receipt book, after the printed words, "Received from," there was written, "A. N. Kellogg N'paper Co.;" and on the following pages nothing was written in the blank after the words, "Received from."

Before the commencement of this action, J. K. Johnston, superintendent of the Pacific Express Company, tendered to Mr. Foley for that company \$50, in payment for the damage to the box, but Mr. Foley refused to accept that amount. Trial had before the justice of the peace on November 8, 1887, and the plaintiff recovered judgment for \$144.55 and interest and costs. The action was appealed to the

he destroys his claim to indemnity. *Hart v. Pennsylvania R. Co.* 112 U. S. 351, 38 L. ed. 731, citing 3 Kent, Com. 603; *Belf v. Rapp*, 3 Watts & S. 21; *Dunlap v. International S. R. Co.* 98 Mass. 371; *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531; *Gibbon v. Paynton*, 4 Burr. 2293; *Batson v. Donovan*, 4 Barn. & Ald. 31.

Where the contract of carriage signed by the shipper is fairly made, agreeing on a valuation with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Musser v. Holland*, 17 Blatchf. 412; *Barnest v. Express Co.* 1 Woods, C. C. 573; *Hopkins v. Westcott*, 6 Blatchf. 64; *Oppenheim v. United States Exp. Co.* 69 Ill. 62; *South & North Ala. R. Co. v. Henlein*, 63 Ala. 606, 56 Ala. 368; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 538.

The decisions, however, are not harmonious, as the contrary rule is sustained in *Southern Exp. Co. v. Moon*, 39 Miss. 822; *The City of Norwich*, 4 Ben. 271; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transp. Co.* 55 Wis. 319; 12 L. R. A.

*Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017; *Kansas City, St. J. & C. R. Co. v. Simpson*, 30 Kan. 645; *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85; *Unnevehr v. The Hindoo*, 1 Fed. Rep. 627; *Grogan v. Adams Exp. Co.* 5 Cent. Rep. 203, 114 Pa. 523.

A special contract stamped upon a bill of lading is not so certain and specific as is required to free the carrier from liability. *Merriman v. The May Queen*, Newb. 424; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 58 U. S. 15, Wall. 330, 21 L. ed. 303; *McMillan v. Michigan S. & N. I. R. Co.* 16 Mich. 83.

The words in a bill of lading "not accountable for contents," do not constitute an agreement for exemption from liability. *The Pacific, Deady*, 17.

Common-law liability. See *note to Hartwell v. Northern Pac. Exp. Co. (Dak.)* 3 L. R. A. 343. Restriction of, see *note to North America Ins. Co. v. Easton (Tex.)* 3 L. R. A. 423.

Restriction in bill of lading. See *notes to Richmond & D. R. Co. v. Payne (Va.)* 6 L. R. A. 342; *Browning v. Goodrich Transp. Co. (Wis.)* 10 L. R. A. 418.

Contracts limiting liability. See *note to Gulf, C. & S. F. R. Co. v. Gatewood (Tex.)* 10 L. R. A. 419.

Restriction by valuation of property. See *notes to International & G. N. R. Co. v. Tisdale (Tex.)* 4 L. R. A. 545; *Richmond & D. R. Co. v. Payne*, *supra*.



district court. Trial had before the court with a jury at the February Term, 1888. The jury returned a general verdict for the plaintiff for \$144.55, with interest, and also made special findings. Subsequently judgment was rendered upon the general verdict. The defendant excepted, and brings the case here.

**Messrs. A. L. Williams and Charles Monroe** for plaintiff in error.

**Mr. John Hutchings** for defendant in error.

**Horton, Ch. J.**, delivered the opinion of the court:

The principal question in this case is, What effect is to be given to the following language of the receipt executed by the Express Company? "It is hereby expressly agreed that the said Pacific Express Company is not to be held liable for any loss or damage, except as forwarders only; nor for any loss or damage of any box, package or thing for over \$50, unless the just and true value thereof is herein stated." It appears that the type and electrotype plates were shipped from Kansas City to Lawrence by the A. N. Kellogg Newspaper Company, who, in making the shipment, acted for Peter T. Foley. It also appears that the newspaper company had a receipt-book furnished by the express company, and in the heading to each page were printed conditions, and, among others, the one quoted. The newspaper company, having this book in their possession and control and using it from day to day must be presumed to have known of its conditions, and to have shipped with reference to it. In this they acted for the plaintiff, and he must be presumed to have assented to the terms and conditions of the receipt. The jury made the following special findings in answer to questions submitted to them: "Q. Was not the box containing the type and electrotypes in controversy broken while it was still in the car in which it was brought from Kansas City? A. It was found broken in the car. 2. If you should find that said box was broken open by any negligence of the Company, state what act or thing caused said box to be broken. A. We do not know. Q. Do the jury know where on the journey the box was broken open? If so, state where. A. We do not know. Q. Were not the agents of defendant negligent in taking the box out of the car? A. Yes. Q. Could they not have saved the contents of the box by handling the box carefully when it was taken out of the car? A. Yes, to the best of our knowledge and belief."

The district court, among other things, instructed the jury that "while a common carrier is generally, in the absence of any such limitation, liable absolutely, as an insurer, against all loss except that caused by the act of God and the public enemy, it may limit such liability by special conditions such as contained in this receipt, but such special contract cannot relieve the Company from its own negligence. It follows that in this case the Company is liable, if at all, not as an insurer, but solely for negligence in the transportation of the property. 'Negligence,' is a

negative term, implying the want or absence of ordinary care; that is, that care and caution that men of ordinary prudence usually exercise under like circumstances. Whether the defendant Company was so negligent, and, if so, whether such negligence caused the injuries complained of, are questions of fact for the jury, to be determined from all the evidence. You should consider the condition of the material when delivered to them; the manner in which it was boxed; the nature of the articles, so far as they could be seen and known by the shipper; the manner in which such property is handled; the condition and circumstances in which it was found at the place of destination; and taking into consideration all the surrounding circumstances and facts proven, and using that ordinary knowledge, observation, and experience in life that men generally possess, you must say whether the loss and injury were attributable to the want of ordinary care and diligence on the part of the Express Company. If they were, the plaintiff may recover his actual loss; otherwise, he cannot recover beyond the sum of \$50." The Express Company asked the court to instruct the jury as follows: "(1) The jury are instructed to return a verdict in favor of the plaintiff for the sum of \$50. (2) The agreement in the receipt that defendant will not be liable for more than \$50, for any shipment, unless the true value of such shipment is stated in the receipt, is a valid agreement, and relieves the defendant of liability as insurer for all amounts over \$50, leaving it liable in excess of \$50 only for gross negligence, and the burden of proving gross negligence is upon the plaintiff."

1. It is settled by the decisions of this court, and by the great weight of authority, that a common carrier cannot stipulate for exemption from responsibility for the negligence of himself or his servants, on grounds of public policy, even by express contract. *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 80 Kan. 645; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, and the cases therein cited; 2 Am. & Eng. Encyclop. Law, 822. But this is not the question presented by the record in this case. The receipt executed by the Express Company, and knowingly and voluntarily accepted by the shipper through his agent, expressly provided "that the Express Company was not to be liable for any loss or damage to the box, for over \$50, if the just and true value thereof was not stated." The true and just value of the box was not stated in the receipt or to the Company by the shipper. The trial court very properly instructed the jury "that the shipper must be presumed to have assented to the terms and conditions of the receipt." Two questions are therefore presented for our determination: *First*. May a common carrier limit his liability to an amount stated in a written receipt or special contract, in the event of loss or injury to the goods or property through ordinary negligence, if such special contract is freely, voluntarily, and fairly entered into by the parties, and such contract is just and reasonable in its terms? *Second*. Did the written

receipt or special contract between the shipper and Express Company in this case limit the liability of the Company for loss or injury to the amount of \$50?

The better authorities declare the law to be that the value of the property transported may be agreed upon, and the damage or loss to the property occasioned by the negligence of the Company or its servants will be limited to the agreed valuation. *The Hart Case*, 112 U. S. 381, 28 L. ed. 717, may now be called the leading case in America. *Mr. Justice Blatchford*, delivering the opinion of the court in that case, said, among other things, that "it is the law of this court that a common carrier may, by special contract, limit his common-law liability, but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. . . . There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made as to value, even where the loss or injury has occurred through the negligence of the carrier. . . . The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based upon that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purpose of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." See also *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 539; *Brehme v. Dinmore* 25 Md. 329; *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178; *Duntley v. Boston & M. R. (N. H.)* 9 L. R. A. 449; *Magnin v. Dinmore*, 63 N. Y. 85; *Squire v. New York Cent. R. Co.* 98 Mass. 239-245; *Graves v. Lake Shore & M. S. R. Co.* 187 Mass. 38; *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 384, 8 New Eng. Rep. 916; *Falkenau v. Fargo*, 8 Jones & S. 332, 55 N. Y. 642; *Ghormley v. Dinmore*, 21 Jones & S. 36; *Westcott v. Fargo*, 6 Lans. 328; *Grace v. Adams*, 100 Mass. 505; *Pemberton Co. v. New York Cent. R. Co.* 104 Mass. 144. See also *Breese v. United States Teleg. Co.* 48 N. Y. 132, 139, 141, 142; *Richmond & D. R. Co. v. Payne*, 86 Va. 481, 6 L. R. A. 849.

As to the second question proposed, we think that the limitation in the written re-  
12 L. R. A.

ceipt or special contract not to be liable for any loss or damage over \$50, in this case, stands as if the carrier had asked the value of the box and its contents, and had been told by the shipper "that the value was \$50 only," or, which is the same thing, had been told by the shipper "that, if loss or damage occurred to the box or its contents, he would not demand over \$50." In *Kallman v. United States Exp. Co.*, 8 Kan. 205, it was said that "no value was given in the bill of lading which was delivered to the shipper by the Express Company, and received by him without objection, thus consenting and agreeing that the plaintiffs should be bound by its terms. If he had desired to make the Company responsible for the full value of the goods, he had only to furnish them with the amount, and have it inserted in the bill. But it may be said that the Company was bound to make inquiry as to the value of the goods, if they desired to obtain the benefit of this limitation upon their liability. We confess that we are not able to see any good reason for making such a requirement a condition precedent in such case. The Company exhibits to the employer the exact condition upon which it will receive his property for carriage, to which he may assent or not, as he may choose. If he assent, we think he should be bound thereby. As in this case, if the real value of the property was \$592.63, the employer, in case of loss, would be as much, nay more, interested in having such value truly stated in the bill of lading or receipt as the Company could possibly be in having the value understated. He ought, then, to have made known to the Company the true value of the goods, and more especially as the limitation upon the liability of the Company was so plainly stated in the receipt." We do not quote this part of the opinion in the above case because it is necessarily conclusive or binding as a prior decision of this court, as, in that case, the trial court granted a new trial. This court affirmed the action of the court below. Much said in the former opinion, outside of affirming the action of the court in granting a new trial, we consider *obiter dictum*. The trial court in that case, in granting the new trial, did not pass upon a pure, simple and unmixed question of law. This court has decided time and again that "the granting of a new trial is largely in the discretion of the trial court; and where a new trial is given, and the record does not show upon what grounds the court granted such new trial, but the record does show errors upon which the trial court might have granted a new trial, the order granting such trial will not be disturbed." *Barney v. Dudley*, 40 Kan. 247; *Howell v. Pugh*, 25 Kan. 96; *Sedan v. Church*, 29 Kan. 190. See *Betz v. Williams & W. Land & L. Co.* (recently decided).

"It is a maxim, not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is

obvious." *Cohens v. Virginia*, 19 U. S. 6 Wheat. 264, 399, 400, 5 L. ed. 257, 290. But we have referred to that part of the Kallman opinion because the court below charged the jury "that the Kellogg Newspaper Company, having this receipt-book in its possession and control, and using it from day to day, must be presumed to have known of such conditions, and to have shipped with reference to it. In this it acted for the plaintiff, and he must be presumed to have assented to the terms and conditions of the receipt;" and because this part of the charge of the trial court and the part of the opinion quoted from the *Kallman Case* is in accordance with reason, fairness and justice. This part of the opinion also answers the objection "that the value of the property transported was not agreed upon."

As is forcibly argued by counsel, "the Express Company took the property, and signed a receipt presented to it by plaintiff's agent. It is true that it was one of a book of receipts furnished by the Express Company, but the receipts were all in blank, the printed part containing all the regulations that the Express Company required the shipper to comply with. The blanks were all left for the shipper to fill in any way he pleased; and in whatever way he filled the blanks the Express Company was bound to receipt for the property covered by the receipt. When the shipper had filled the blank and presented it to the Express Company for its signature, he was in the attitude of proposing an agreement to the Express Company for acceptance. The signature of the Express Company was the completion of the agreement, and the agreement as completed, so far as it related to the value of the property, was not a limitation of liability for negligence in any way, but a square agreement that the property presented for carriage and covered by the receipt was only worth \$50." In *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62, the facts were about as follows: May and Stern shipped by the United States Express Company a box weighing twenty-five pounds, from New York City to Oppenheimer & Co., at Chicago, Ill. It contained jewelry of the value of \$3,800. The receipt given by the Express Company was similar in that case to the receipt given by the Pacific Express Company in this case. The blank for the value of the box and contents was not filled in. But the limitation of \$50 was in the receipt in that case, as in this. The box and its contents were destroyed by fire in the office of the Express Company at Chicago. Oppenheimer & Co. brought an action to recover for the value of the contents of the box. Judgment was rendered in their favor for \$50 only. They appealed. The judgment of the lower court was affirmed by the Supreme Court of Illinois. In rendering its opinion that court said: "The terms and conditions on which the company received the property for transportation were clearly expressed in the body of the receipt, and in a way not calculated to escape attention. It must be supposed that these men paid some attention to the transaction of their business, and were reasonably well in-

formed in regard to the nature of their contracts. That they should have been so, doing business with this Company for years, handling, filling out, and procuring the execution of these shipping receipts without a knowledge of their general character and effect, it is difficult to believe. They must be held to have had such knowledge.

A distinction exists between the effect of those notices by a carrier which seek to discharge him from duties which the law has annexed to his employment, and those, like the one in question, designed simply to insure good faith and fair dealing on the part of his employer,—in the former case, notice alone not being effectual without an assent to the attempted restriction; while in the latter case, notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient." A part of the syllabus of that case reads. "An express company has the right to demand from a consignor such information as will enable it to decide on the proper compensation to charge for the risk, and the degree of care to bestow in discharging its trust; and a limitation of its liability not to exceed \$50, unless the value of the goods forwarded is truly stated, if brought to the knowledge of the consignor, is reasonable and consistent with public policy." The court finally disposed of the above case upon the ground that there was a "designed suppression of the value of the goods." It was said in the opinion, among other things, that "there was an actual attempt here by the agent of the shippers to fill in this blank space, but, instead of inserting '3,800' (the value), a mark or character was inserted inexpressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shipper of the goods. The effect of such conduct to relieve the carrier from his liability as insurer is asserted in many cases [here decisions are given]. Had the true value of the goods been disclosed, there would have been an extra charge of \$9.50, increased precautions would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved."

It may be said, in every case, that where a shipper fixes an agreed valuation upon his goods to be transported, or enters into a special contract with the carrier that if his goods are lost or injured he will not demand over \$50, and thereby obtains cheaper rates, he is guilty of fraud, or attempted fraud, if his goods are lost or injured, and he demands for his damages an amount above the valuation or limitation agreed to. If it be true, as the trial court charged the jury, that "the plaintiff must be presumed, under the facts of this case, to have assented to the terms and conditions of the receipt," then, within the better authorities, the limitation of the carrier's liability, not to exceed \$50, was the same as fixing the value of the property transported at \$50 only, and the limitation of the Express Company's liability, not to exceed the \$50 stated in the receipt, was reasonable and just. *Boorman v. American*

*Exp. Co.*, 21 Wis. 154, is a case like this. A limitation of \$50 was contained in the receipt. Chief Justice Dixon, writing the opinion, held that an "express company may exempt itself by special contract from liability as insurer; or for the default or negligence of any person to whom the property may be delivered by it, for the performance of any act or duty in respect thereto, off its own routes; or for loss or damage of any package for over \$50, unless the just and true value thereof is stated in the receipt." In *Duntley v. Boston & M. R.*, *supra*, it was decided that "a regulation of a carrier with respect to the transportation of live animals, which fixes the ordinary value of horses, for which it will hold itself responsible in case of loss, at \$200 each, and requires extra compensation for transporting animals of greater value, is reasonable and valid."

In *Durbin v. American Exp. Co.* (N. H. 1860), 20 Atl. Rep. 828, the receipt was like the one in this case, and limited the liability to \$50. It was held that "a shipper of goods who fills out one of the blank receipts contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto, upon delivering to him a package for transportation, will be presumed to know the contents of the receipt; and, if he receives such receipt without objection, his assent as to its conditions will, in the absence of fraud, be conclusively presumed." Clark, J., in delivering the opinion in that case, said: "The receipt signed by the defendant's agent and servant at the time of the delivery of the package was taken by the plaintiff as evidence of the fact and purpose of its delivery, and of the terms and conditions on which the defendants received it. The receipt was contained in a book of blank receipts previously furnished by the defendants for the use of the plaintiff, and the written portions were in his handwriting, and the law presumes that the contents were known to him. The plaintiff understood it to be the shipping contract, and, in the absence of fraud, by receiving it without objection, he was conclusively presumed to assent to its conditions." *Merrill v. American Exp. Co.* 62 N. H. 514; *Grace v. Adams*, 100 Mass. 505.

"It is now generally held that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, where such stipulation is just and reasonable; and a stipulation that the carrier shall be informed as to the value of the goods delivered to him for carriage, as affecting the risk, and the degree of care required, is clearly reasonable. . . . The plaintiff understood that he was securing transportation of the box to New York at a reduced rate (in fact, at one fifth of the regular rate), by calling the value \$50, and assuming a portion of the risk of carriage himself; and, having agreed upon a valuation for the purpose of fixing the express charges, he cannot insist that the goods are of greater value, for the purpose of increasing his claim for damages for the loss. Nor is it material whether the loss arose  
12 L. R. A.

from the negligence of the defendants or some other cause. The defendants agreed to respond in a sum not exceeding \$50 in case of loss, and, for the purpose of the contract of transportation between the parties to the contract, the goods had no greater value." See also, to the same effect, *Squire v. New York Cent. R. Co.* 98 Mass. 389; *South & North Ala. R. Co. v. Henlein*, 52 Ala. 615; *Magnin v. Dinsmore*, 56 N. Y. 168; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397.

In *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 820, special contracts for a limitation of the liability of a carrier are not sustained. It is said in that case, among other things, that "to our minds it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so,—the same considerations of public policy operating in each case." In our opinion, the reasons stated are wholly untenable. They proceed upon false premises. That court overlooks the power of the shipper to freely and fairly fix a valuation upon his own property. The carrier has the right to make reasonable rates for carriage. A total exemption from the liability on the part of a carrier would not be just or reasonable, and no person, having reason, would willingly and freely contract with a carrier that the property which he wished to have transported was absolutely worthless. The carrier is bound to receive and transport the property of the shipper. The shipper can place his own valuation upon the property delivered by him to the carrier to be transported. The carrier cannot arbitrarily fix any valuation on the property received from the shipper, but may reasonably insist on proper information as to the value of the property which he receives. He ought to have a right to know what it is that he undertakes to carry, and the amount and extent of his risk. Upon the value of the property, the risk incurred, and the distance the property is to be transported, the charges for carriage are fixed. Therefore it would seem to us that a contract fixing the value of the goods delivered to the carrier, or fixing a limitation for damage in case of loss or injury, is clearly reasonable, as affecting the risk and the degree of care required concerning the property to be transported. With the above and foregoing limitations, we cannot conceive how the carrier can evade his duty or nullify the law. Upon the authorities cited, the instructions of the trial court were erroneous, and the instruction prayed for by the Express Company for limitation as to damages should have been given.

There is nothing appearing in the evidence or the findings of the jury that show, or tend to show, gross negligence, fraud or intentional wrong upon the part of the Express Company. In the case of *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 80 Kan. 645, the limitation was arbitrarily fixed by the carrier without the consent of the shipper. That

contract was not just or reasonable, or freely or fairly entered into. It was in violation of public policy. It is unlike this case, because, when the box in controversy was shipped, the shipping clerk of the Kellogg Newspaper Company filled out a receipt, and a man by the name of Glass, a driver for the Pacific Express Company, signed it. No deceit or unfairness was practiced by the Express Company. In the case of *Western U. Teleg. Co. v. Orall*, 88 Kan. 679, gross negligence was involved. Whether a telegraph company could exempt itself by contract from ordinary negligence was not passed upon. That question was reserved. We do not think it is necessary to follow all that was stated in *Kallman v. United States Exp. Co.*, *supra*, because, although that decision was made nearly 25 years ago, the question now at issue was not necessarily embraced in that decision, for the reasons heretofore named. The case of *Kansas City, St. J. & C. B. R. Co. v. Simpson*, *supra*, followed *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 637. This case is referred to and clearly distinguished in the latter case of *Hart v. Pennsylvania R. Co.*, *supra*. Again, the box containing the type and plates was shipped from Kansas City Mo. The receipt executed by the express company was executed and delivered at Kansas City, Mo., to the Kellogg Newspaper Company for P. T. Foley, the plaintiff below. In that State the law declared by the supreme court is that "a contract fairly entered into between carrier and shipper, specifying a fixed sum as the value of the property and limiting the recovery in case of loss to that sum, is binding on the shipper." *Harvey v. Terre Haute & I. R. Co.*, 74 Mo. 588. We must assume, so far as this case is concerned, that the parties, including the shipper and the Express Company, contracted with reference to the law of Missouri. The receipt was signed there, the box was delivered there, and was shipped from Missouri to Kansas. It seems to us that the shipper ought not to complain. If he had desired to insert in the receipt, which the Express Company was asked to sign, \$144.55 as the full value of the box, or if he had desired to insert any larger amount, he had the option so to do, and if he had inserted the full value of the box and its contents he could have recovered the value. But as the shipper voluntarily limited his loss or damage to the sum of \$50 only, why should he refuse to receive the sum of \$50, which was tendered him by the superintendent of the Express Company when he presented his claim for damages? The receipt, as executed, was just as he desired and wished it. The damage in case of loss or injury to the box or its contents was liquidated in advance by the voluntary action of the parties. "The limitation as to the damages or value has no tendency, in such a case as this, to exempt from liability for negligence." *Hart v. Pennsylvania R. Co.* *supra*. Generally, the charges for transporting a box or package valued at \$144.50, \$500, or \$1,000, are more than when the value is \$50 only, and if the shipper wishes to pay full charges and re-

cover full value, in case of loss or injury from negligence, why should he not state to the carrier, or write in the receipt to be signed by the carrier, the full value? We now repeat what was said upon this point in the *Kallman Express Co's Case*, 8 Kan. 205, where the receipt was left blank as to the value, as in this case, but where a limitation was inserted in the receipt in case of loss or damage: "The company exhibits to the employer the exact conditions upon which it will receive his property for carriage, to which he may assent or not, as he may choose. If he assent, we think he should be bound thereby. As in this case, if the real value of the property was \$592.58, the employer, in case of loss, would be as much, nay more, interested in having such value truly stated in the bill of lading or receipt as the company could possibly be in having the value understated. He ought, then, to have made known to the company the true value of the goods, and more especially as the limitation upon the liability of the company was so plainly stated in the receipt."

*The judgment of the district court will be reversed, and the cause remanded for a new trial.*

**Johnston, J.**, concurs.

**Valentine, J.**, dissenting:

I think we should follow the decision made in the case of *Kallman v. United States Exp. Co.*, 8 Kan. 205: *first*, because it is right; and, *second*, for the following reasons: It was made on February 17, 1865, more than twenty-six years ago; the courts have been open ever since, and twenty or more sessions of the Legislature have intervened, and yet no modification of any of the rules therein enunciated have been made, but all seem to have been acquiesced in; and for these reasons it must be presumed that the parties to this action, and especially the Express Company, contracted with reference to such rules; and now, to overturn them, and to declare different rules for this case, would virtually be to make a new contract for the parties; and construing the present contract as the contract in that case was construed would render the contract valid, while to construe it as the Express Company now desires to have it construed would render it void. To construe the contract so as to limit the Express Company's common-law liability only as an insurer, and only for losses and injuries brought about by other causes than the Company's own negligence, fraud or willful wrongs, would render the contract valid; while if it be construed in such a manner as to reach to the domain of negligence, fraud and willful wrongs on the part of the Express Company itself, and to limit the Company's liability so that the Company would not be liable for losses occasioned by its own negligence, fraud, or willful wrongs, would render the contract to that extent invalid and worthless. It must be remembered that in this case the value of the property transported was not agreed upon. Whether it was worth one cent, \$1, \$100, \$1,000, or any other sum, greater or less, is left wholly blank. There seems to have been no thought of fixing, by

contract or otherwise, the actual value of the property, or any value, but it was actually worth \$144.55. In this failure to fix the value of the property by contract, this case differs essentially from the case of *Hart v. Pennsylvania R. Co.*, 112 U. S. 832, 28 L. ed. 718. There are other distinctions between the present case and those relied on by the Express Company. For instance, the shippers themselves, in some of the cases relied on by the Express Company, were guilty of fraud or unfair dealing, as in the case of *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62, 68. In that case the shippers delivered to the Express Company for transportation a certain box containing watches and jewelry of the value of \$3,800, without disclosing its contents or their great value, and paid only \$1.40 for its transportation; while, if they had disclosed its contents and their value, they would have had to pay \$10.90 for its transportation. The receipt which they took from the Express Company did not state the contents or the value of the goods, but stated, "Contents unknown." The court, in commenting upon these matters, used the following, among other, language: "There was an actual attempt here by the agent of the shippers to fill in this blank space, but, instead of inserting '\$3,800' (the value), a mark or character was inserted inexpressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shippers of the goods. The effect of such conduct to relieve the carrier from his liability as insurer is asserted in the cases of—[here certain cases are given.] Had the true value of the goods been disclosed, there would have been an extra charge of \$9.50, increased precautions would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved." In this case of *Oppenheimer v. United States Exp. Co.* no pretense of fault or negligence on the part of the Express Company was imputed, but, on the contrary, it was admitted by the parties that the company was not guilty of any fault or negligence; and in the later case of *Chicago & N. W. R. Co. v. Chapman*, 183 Ill. 96 (decided by the Supreme Court of Illinois on May 14, 1890), it is stated as follows: "In *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62, the court held that the contract exempting carriers from liabilities is not to be construed as providing against loss or injury occasioned by actual negligence on their part." Indeed, the case of *Oppenheimer v. United States Exp. Co.* has no application to this present case.

In the present case the shipper was not guilty of fraud or unfair dealing, and the Express Company was unquestionably guilty of culpable negligence. In the case of *Orange County Bank v. Brown*, 9 Wend. 85, 114 *et seq.*, an intended passenger on a steamboat, without paying extra fare, took with him on the steamboat as baggage an ordinary traveling trunk containing \$11,250. In a few minutes afterwards the trunk and its contents were removed, and the owner never recovered them. The owners of the steamboat had no knowledge of the contents of

the trunk, nor of their great value, and it was held that they were not liable for their loss.

Other distinctions might be shown between this case and the cases relied on by the Express Company, if it were thought necessary. The stipulation contained in the receipt given by the Express Company in the present case, limiting its liability for loss or damage, does not limit its liability, except with respect to an amount in excess of \$50. Up to that amount the Express Company's liability remains precisely the same as it would be at common law, or as it would be if no contract limiting its liability had ever been made. But for the excess above \$50 the Express Company claims that it has obtained a boundless immunity from liability; that it has not only obtained an absolute exemption from all liability for all loss or damage above that amount, where the loss or damage has occurred without fault or negligence on its part, but that it has also obtained such an exemption where the loss or damage has been occasioned by its own negligence, or by its own fraud or willful wrongs, including the willful destruction of the property, or the greater wrong of feloniously stealing it. This cannot be correct. The stipulation in such receipt ought to be so construed as to exempt the Company from liability for only such loss or damage in excess of \$50 as might be occasioned by the fault or negligence of others, or as might result from some accident, casualty or misfortune over which the Company could have no control. I think the weight of authority sustains this view. While a common carrier may make a valid contract exempting himself from his common-law liability as an insurer and for losses occasioned by the acts of others without his fault, or occasioned by such of his own acts only as do not involve any kind of wrong, or occasioned by circumstances over which he has no control, yet he cannot make a valid contract exempting himself from liability for losses occasioned by his own carelessness or negligence or improper acts. Such a contract would be against public policy and void. I think the contract in the present case should be construed precisely as though it did not attempt to limit the Express Company's liability at all for losses occasioned by its own negligence or improper conduct, and I would refer to the following authorities in support of this view: *Kallman v. United States Exp. Co.* 3 Kan. 205; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 80 Kan. 345; *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169; *Western U. Tel. Co. v. Crall*, 38 Kan. 679; *Farnham v. Camden & A. R. Co.* 55 Pa. 53; *American Exp. Co. v. Sands*, 55 Pa. 140; *Grogan v. Adams Exp. Co.* 114 Pa. 523, 5 Cent. Rep. 298; *Weiller v. Pennsylvania R. Co.* 184 Pa. 310; *Southern Exp. Co. v. Moon*, 89 Miss. 823; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017; *Southern Exp. Co. v. Seide*, 67 Miss. 609; *Kirby v. Adams Exp. Co.* 2 Mo. App. 870; *McFadden v. Missouri Pac. R. Co.* 92 Mo. 343, 10 West. Rep. 372; *Moulton v. St. Paul, M. & M. R. Co.* 81 Minn. 85; *The City of Norwich*, 4 Ben. 271; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall.

357, 21 L. ed. 627; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 897, 83 L. ed. 788; *Rosenfeld v. Peoria, D. & E. R. Co.* 103 Ind. 121, 1 West. Rep. 150; *Adams Exp. Co. v. Harris*, 120 Ind. 78; *Missouri & P. R. Co. v. Harris*, 67 Tex. 166; *Southern Pac. R. Co. v. Macdon*, 75 Tex. 800; *Erie Dispatch v. Johnson*, 87 Tenn. 490; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 820; *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 490, 7 L. R. A. 162; *Black v. Goodrich Transp. Co.* 55 Wis. 819; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486; *Adams Exp. Co. v. Stettin*, 61 Ill. 184; *Chicago & N. W. R. Co. v. Chapman*, 183 Ill. 96, 8 L. R. A. 508; *Judson v. Western R. Corp.* 6 Allen, 486; *Orndorff v. Adams Exp. Co.* 8 Bush, 194; *United States Exp. Co. v. Backman*, 38 Ohio St. 144; *Lamb v. Camden & A. R. Co.* 46 N. Y. 271.

In my opinion, notwithstanding the stipulation in the aforesaid receipt, limiting, to some extent, the liability of the Express Company, the Company was still bound, at its peril, to act in good faith, as towards its employer, and to exercise reasonable care and diligence with respect to its employer's goods. There was ample evidence to show negligence on the part of the Express Company, if not gross negligence. The goods were shipped from Kansas City in good order. When they arrived at their destination, at Lawrence, the box containing them was found broken. With due care, however, they might still have been saved, as is fairly inferable from the evidence, and as was the opinion of the jury according to their findings. The box, however, was turned over by one of the Express Company's agents, and a piece came out. Afterwards the Company's agents attempted to take the box and contents from the express-car in which they were transported, and to put the same on a truck, and in doing so some of the type and some of the electrotyping plates fell down between the car and the platform. Afterwards they gathered them up, and put them into a coal scuttle, and took them to a house belonging to the Express Company, where they remained for some time, and were afterwards removed to the Express Company's office, where they still remain, so far as is shown. This seems like gross negligence. It was not necessary, however, that gross negligence should have been shown. Ordinary negligence only, or, in other words, a want of ordinary care, was all that was necessary.

In the case of *Kallman v. United States Exp. Co.*, *supra*, the following, among other, language, with reference to express companies limiting their common-law liability, is used: "An examination of the authorities bearing upon this point will, we think, show that they may do so, provided, however, that due care and diligence be used in the discharge of their trust. But carriers cannot in this way shield themselves from the consequences of fraud, gross negligence, and want of care."

It is only when such carriers act in good faith, and use due care and diligence in and about their business, that the law permits them to have the benefit of limitations like that under consideration."

In the case of *Louisville & N. R. Co. v.* 12 L. R. A.

*Wynn, supra*, the following, among other, language is used by the court: "The author of American and English Encyclopædia of Law says: 'By the clear weight of authority in England, Canada, the United States, and almost without exception in the States of the Union, the rule has been adopted that the common carrier can make no contract the effect of which will be to exempt him from liability for negligence.' 2 Am. & Eng. Encyclop. Law, 822. Is the limitation in the contract before us within the prohibition of this eminently just and generally accepted principle? Manifestly the stipulation does not contemplate total exemption from liability; it only provides for partial or limited exemption. Upon that distinction the nice and important question arises, Can a stipulation of the latter character stand before the law when one of the former kind cannot? Or, to state the same question differently, and so as to apply it more directly to the facts of this case, the rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it would in no event be liable for any part of the value of the mare, if lost or destroyed, Can the limitation of its liability to \$100 be upheld in the courts, if it should appear that her death resulted from the negligence of the company, and that she was in fact worth eight times that amount, as the jury found her to be? We unhesitatingly answer, 'No.' The carrier cannot by contract excuse itself from liability for the whole or any part of a loss brought about by its negligence. To our minds, it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so,—the same considerations of public policy operating in each case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one half, three fourths, seven eighths, nine tenths, or ninety hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the former. If allowed to do the latter, it may thereby substantially evade and nullify the law, which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation by stipulation for exemption in whole or in part from the consequences of its negligent acts."

In the case of *Southern Exp. Co. v. Seide, supra*, the Supreme Court of Mississippi decided as follows: "A stipulation in a receipt given by an express company that, if

the value of the goods shipped is not stated by the shipper and specified in the receipt, the holder will not demand more than \$50, for loss or damage, exempts the carrier from greater liability only when the loss did not result from negligence on its part. This is true, although a greater charge is made for carrying packages over \$50 in value, and the shipper fails to state the value, and pays the minimum charge." Part of syllabus.

In the case of *Kirby v. Adams Exp. Co.*, *supra*, the Court of Appeals of St. Louis, Mo., decided as follows: "A clause in a contract between an express company and a shipper stated that goods shipped are of the value of \$50, unless their value should be inserted in the contract, and that the company, in case of loss, would not be liable for more than \$50, unless the value was so in-

serted, and the value of the goods was not inserted. Held, that this did not relieve the company from liability for the full value of the goods if lost through its fault and that a presumption of negligence arose from the mere fact of loss." Part of syllabus.

In the case of *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 848, 10 West. Rep. 372, the Supreme Court of Missouri decided as follows: "While a shipper may release a common carrier from its obligation as an insurer of his property, yet the carrier cannot, by any kind of stipulation, exempt itself from liability for its own negligence." Part of syllabus. See also the other cases above cited, and especially the Pennsylvania cases.

I think the judgment of the court below should be affirmed.

Petition for rehearing overruled.

## NEW YORK COURT OF APPEALS (2d Div.).

Paul M. BERGER *et al.*, *Respts.*,

v.

George E. VARRELMANN, Impleaded, etc.,  
*Appt.*

(....N. Y. ....)

1. Findings that a judgment was confessed in contemplation of an assignment for creditors and in fraud of the statute governing such assignments, though classified among conclusions of law, will be given the same effect to uphold the judgment as if they were designated as findings of fact.

2. Lack of knowledge by a creditor on receiving a confession of judgment that his debtor intends immediately to make a general assignment does not exempt the judgment from the provisions of the statute in respect to preferences in such assignments.

3. A confession of judgment made in contemplation of a general assignment for creditors, which immediately follows, must be treated as part of the assignment in respect to prohibited preferences.

(Bradley, Haight and Brown, JJ., dissent.)

(June 2, 1891.)

### NOTE.—Preferences in assignments sanctioned.

A formidable array of authority is cited in support of the proposition that a failing debtor may honestly prefer one creditor above another and apply all of his assets to the payment of one individual creditor, providing the indebtedness is genuine, and the property out of which it is paid no more than sufficient to satisfy. *Hill v. Northrop*, 9 How. Pr. 524; *Hall v. Arnold*, 15 Barb. 599; *Archer v. O'Brien*, 7 Hun. 145; *Jewett v. Noteware*, 30 Hun. 124; *Woodworth v. Sweet*, 51 N. Y. 8; *Carpenter v. Muren*, 42 Barb. 300; *Leavitt v. Blotchford*, 17 N. Y. 521; *Williams v. Brown*, 4 Johns. Ch. 682, 1 L. ed. 979; *Waterbury v. Sturtevant*, 18 Wend. 358; *Spaulding v. Strang*, 37 N. Y. 125; *Auburn Exch. Bank v. Fitch*, 48 Barb. 344.

A man confessedly in embarrassed circumstances, and, as the result shows, insolvent, seeing that a firm of which he is a member must probably fail, may lawfully appropriate such private property to the payment primarily of his private debts, in preference to the partnership debts, by conveying and transferring his property to his private creditors in payment of their just demands; and such conveyances and transfers will be valid, where there is nothing to impeach the good faith of the grantees, or tending to show that they were privy to any concealment or fraudulent intent or purpose on the part of the grantor, in disposing of his property. *Auburn Exch. Bank v. Fitch*, *supra*.

When a debtor is insolvent and knows it, any payment then made by him to a creditor in full must be made with intent to prefer. *Driggs v. Moore*, 3 Nat. Bankr. Reg. 608, 1 Abb. U. S. 440; *Rison v. Knapp*, 4 Nat. Bankr. Reg. 849, 1 Dill. 186; *Martin v. Toof*, 4 Nat. Bankr. Reg. 436; *Re Gregg*, 1d. 456.

12 L. R. A.

See also 14 L. R. A. 198.

The intentions of parties are to be judged by the legal effect of their acts. *Sampson v. Burton*, 4 Nat. Bankr. Reg. 1; *Campbell v. Traders Nat. Bank of Chicago*, 3 Nat. Bankr. Reg. 493.

It is not necessary that there should be an actual intent in the mind of the debtor. The intent may be inferred from circumstances. *Linkman v. Wilcox*, 1 Dill. 151; *Giddings v. Dodd*, 1 Dill. 115.

It was well said that the law tolerates assignments giving preferences; it does not favor them. And one inflexible condition of that toleration is, that the debtor shall not reserve by the assignment any benefit or advantage to himself out of the assigned property, either pecuniary, or by coercion of his creditors, or by a control over the disposition of the fund. Even a discretion in the assignees as to the distribution of the fund will vitiate the assignment. *Boardman v. Halliday*, 10 Paige, 223, 4 L. ed. 963.

This right is unrestrained by statute in New York, except in special instances, and the cases in which it has been decided that a debtor in failing circumstances has a right to prefer one of his creditors to another in the distribution of his estate are very numerous. *McMenomy v. Roosevelt*, 3 Johns. Ch. 446, 1 L. ed. 679; *Murray v. Riggs*, 15 Johns. 571; *Wilkes v. Ferris*, 5 Johns. 385; *Macfie v. Cairns*, 3 Cow. 547, affirming *Hopk. Ch. 373*, 3 L. ed. 455; *Wilder v. Winne*, 6 Cow. 284; *Winteringham v. Lafay*, 7 Cow. 736; *Handricks v. Walden*, 17 Johns. 426; *Hyslop v. Clarke*, 14 Johns. 453; *Grover v. Wakeman*, 11 Wend. 187; *Webb v. Daggett*, 2 Barb. 9; *Brigham v. Tillinghast*, 15 Barb. 618; *Grant v. Chapman*, 33 N. Y. 203; *O'Neil v. Salmon*, 25 How. Pr. 246; *Cram v. Mitchell*, 1 Sandf. Ch. 251, 7 L. ed. 318; *Jacobs v. Remsen*, 33 N. Y. 603; *Casey v. Jones*, 37 N. Y. 608; *Putnam v. Hul-*



**APPEAL** by defendant Varrelmann from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Special Term for New York County, which set aside a judgment confessed by W. and H. Erdtmann in favor of appellant. *Affirmed.*

Statement by *Follett, Ch. J.*:

From June, 1888, to April 29, 1889, Henry Erdtmann and Gustave Varrelmann were partners engaged in business at Nos. 253 and 254 Pearl Street, New York, under the firm name of "W. & H. Erdtmann." April 29, 1889, they confessed judgment in favor of George E. Varrelmann (the father of Gustave Varrelmann) for \$7,824.62, which was entered and docketed in the office of the clerk of the City and County of New York, at twenty-six minutes past twelve o'clock of that day, and on the same afternoon an execution thereon was delivered to the sheriff of that county, who on the same day "levied under such execution upon the entire stock and property of said defendants, Henry Erdtmann and Gustave Varrelmann, in their several places of business, 252 and 254 Pearl Street, and at the warehouse of W. A. Evis & Co., 63 Front Street, in the City of New York." Immediately after the levy of the execution, and on the same day, the defendants therein executed and delivered a general assignment for the benefit of creditors to Clemens J. Kracht, by which their individual property was devoted to the payment of their personal debts, and the surplus, if any, together with the firm property, to the payment of its debts, and the surplus of the

firm assets, if any, to the payment of their personal debts (if their individual assets were insufficient for that purpose), according to the interest of each partner. None of their individual creditors were preferred except employes, whose wages were to be first paid. The salaries and wages of the firm employes were directed to be first paid, after which the firm creditors were divided into six classes, which were to be paid in full in their order. April 30 and May 1, 1889, were legal holidays, and the assignment was not recorded until May 2, 1889, at five minutes past nine in the forenoon. At the time judgment was confessed and the assignment executed an action was pending in the supreme court, brought by the plaintiffs herein against the assignors for the recovery of the amount due on their promissory note for \$1,000, which fell due April 4, 1889, in which action a judgment was duly entered and docketed at ten o'clock and ten minutes in the forenoon of May 2, 1889, and ten minutes thereafter an execution thereon was duly issued and delivered to said sheriff. May 9, 1889, the sheriff sold, under Varrelmann's execution, all of the property upon which he had levied for \$5,877.79, nearly all of which was purchased by the plaintiff in the execution. On the 9th of May, 1889, this action was begun to set aside the judgment so confessed, the execution issued thereon, and for the recovery for the benefit of the assignee, from the defendant George E. Varrelmann, the amount realized upon the sale under the execution, on the ground that the assignors, in contemplation of their general assignment and as a part thereof, in

bell, 42 N. Y. 106; Jaycox v. Caldwell, 51 N. Y. 396; Dana v. Owen, 54 N. Y. 646; Rathbun v. Platner, 18 Barb. 272; Stern v. Fisher, 23 Barb. 196; Keteltas v. Wilson, 36 Barb. 208; Hauselt v. Vilmar, 76 N. Y. 630.

In many of the States preferential assignments are prohibited by statute, but in none has the rule at common law, as above stated, been denied. Burrill, Assignm. 4th ed. chap. 10; Bishop, Insolvent Debtors, § 159.

That preferences made in contemplation of and with a view to insolvency and an assignment are void, see Doggett v. Herman, 5 McCrary, 290; Burrows v. Lehnendorff, 3 Iowa, 96; Berry v. Cutts, 42 Me. 455; United States v. Griswold, 8 Fed. Rep. 496; Van Patten v. Burr, 52 Iowa, 518; Holt v. Bancroft, 30 Ala. 192; Livermore v. McNair, 34 N. J. Eq. 478; Kellogg v. Root, 23 Fed. Rep. 525; Hahn v. Salmon, 20 Fed. Rep. 801; Perry v. Holden, 33 Pick. 269.

In the State of New York it is provided by special legislative enactment that in all general assignments any preferences therein created shall not be valid except to the amount of one third in value of the assigned estate, etc. The fact of an excess of preference in no way affects the validity of the assignment. It only requires that the preferences shall be reduced *pro rata* until the same shall not exceed one third of the assigned estate. Stein v. Levy, 55 Hun, 381.

A debtor resident of Illinois, although insolvent or in failing circumstances, may prefer one creditor to the exclusion of others when done in good faith and for a valuable consideration. Tomlinson v. Matthews, 98 Ill. 178; Payne v. Miller, 108 Ill. 442; Eads v. Thompson, 109 Ill. 87; Bean v. Patterson, 122 U. S. 496, 30 L. ed. 1123.

12 L. R. A.

#### *When assignment is general or partial.*

The amount of property embraced in, or intended to be conveyed by, an assignment determines its character as being general or partial. A general assignment is understood to import, in its nature, a transfer of all the debtor's property for the benefit of his creditors. The nature of the relation created by insolvency usually requires that the transfer should be of this comprehensive character. "Creditors," observes Chief Justice Marshall in *Brashear v. West*, 32 U. S. 7 Pet. 608, 8 L. ed. 801, "have an equitable claim on all the property of their debtor, and it is his duty, as well as his right, to devote the whole of it to the satisfaction of their claims."

#### *Schedule must accompany the assignment.*

If the schedule was a loose, detached sheet of paper, and not annexed to or really a part of the instrument executed and acknowledged before the notary, and was not actually a part of the assignment when executed and acknowledged, but was annexed afterward, such act would make a new deed. *Kerobels v. Schloess*, 49 How. Pr. 284.

The schedules are to be deemed a part of the assignment, and the insertion of any fraudulent or fictitious indebtedness therein avoids the assignment. *Talcott v. Hess*, 31 Hun, 232; *Terry v. Butler*, 43 Barb. 395; *Shultz v. Hoagland*, 85 N. Y. 464; *American Exch. Bank v. Webb*, 36 Barb. 291; *Frazier v. Truax*, 27 Hun, 597; *Denton v. Morrel*, 43 Hun, 224, 36 N. Y. Week. Dig. 379.

Where judgments are confessed in contemplation of a general assignment for the purpose of evading the Statute restricting preferences, they are void

violation of section 80 of the General Assignment Act, as amended in 1887, created a preference for more than one third of the assets of the assignors. The assignee refused to bring the action in his own behalf, and was made a party defendant. The judgment reversed, and which is appealed from, set aside the judgment confessed, the execution issued thereon, the levy and sale made thereunder, and adjudged that George E. Varrelmann pay \$5,877.79 (the sum collected on the execution) to the assignee, to be by him distributed according to the terms of the general assignment.

**Mr. Rudolph Dulon**, for appellant:

The Statute is not intended to regulate the act of the creditor. He may, notwithstanding the Statute, if he does not know that his

debtor contemplates making an assignment, take a mortgage, power of attorney to confess judgments, or other security for his debt, in good faith, and enforce the same. And if he procure the preference over the assignment by his own diligence, and without collusion with the debtor, the subsequent assignment will not affect his security.

*Horns Nat. Bank of Chicago v. Sanchez*, 131 Ill. 835; *Preston v. Spaulding*, 130 Ill. 208.

*White v. Cotehausen*, 129 U. S. 848, 32 L. ed. 682, was not a case of a bona fide creditor. In this instance it is of no greater authority than that of the highest court of any State.

*Chicago Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 228, 34 L. ed. 841.

Had the judgment been taken by defendant as security for a firm debt without knowledge or notice of the insolvency of the partners and

and may be set aside. *Abegg v. Schwab*, 24 N. Y. S. R. 988.

In *Moir v. Brown*, 14 Barb. 39 (Hand, J.), it was held that the schedule containing a specification of the property concerned would have controlled and limited the general words of the assignment; that such schedule not being annexed, the assignment was inessential, and, as against creditors, did not convey the property to the assignees.

If the assignment contemplated that the schedule of creditors was to be annexed at some future time, it would be fraudulent upon its face, as it would, in effect, reserve to the debtor the right thereafter to designate the persons who should be preferred in the distribution of the assigned property and assets. *Kerchels v. Schloss*, 49 How. Pr. 284.

*Rights must be determined by the assignment.*

The assignment must itself fix and determine the rights of creditors in the assigned property, and not reserve to the assignors the power of substantially doing so. *Averill v. Loucks*, 6 Barb. 470; *Sheldon v. Dodge*, 4 Dento, 220.

The reason why the reservation of such power in the assignors is fraudulent is obvious. The debtor, in such an assignment, puts his property beyond the reach of his creditors, and yet reserves the right to control the manner of its distribution among them. This is a violation of the Statute, which declares assignments made with intent to hinder, delay and defraud creditors to be void. The intent of the debtor cannot be considered other than it appears in the instrument. The law pronounces such reservation of power in the debtor fraudulent. *Kerchels v. Schloss*, 49 How. Pr. 284.

Where an assignment directed the assignees to pay the debts specified in the schedules annexed thereto, according to the priority of several schedules, and provided that such schedules should be made within sixty days, and be annexed to, and form a part of the assignment, but did not prescribe what debts should be inserted in the respective schedules, or in what order they should be arranged therein, the preparation of such schedules being left entirely to the discretion of the assignors; and it appeared that such schedules had not been made out and annexed to the assignment previous to its execution, but that they were prepared by the assignors and annexed at some subsequent time,—it was held that the assignment was fraudulent and void. *Averill v. Loucks*, 6 Barb. 470.

Any act done in fraud of law is done in violation of it. *Re King*, 15 U. S. 2 Wheat. 153, 4 L. ed. 207; *Lee v. Lee*, 38 U. S. 8 Pet. 44, 8 L. ed. 900; *Kerr, Frauds*, 279, 288, 13 L. R. A.

*Of judgments by confession.*

Although a judgment by confession is to a certain extent founded on the agreement of the parties, instead of a direct adjudication by the court, it is none the less, on that account, a judicial act. And since their contract cannot create a jurisdiction in excess or contravention of that conferred by law, it is equally essential to the validity of a judgment of this character as to any other that it be entered in a court having jurisdiction of the subject matter. And it is to have all the incidents and consequences of any other judgment, and to have the sanction of the law and the authority of the court behind it, it will be invalid unless the court where it is entered might lawfully have rendered the same judgment in a contested action. *Lanning v. Carpenter*, 23 Barb. 402; 1 Black. Judgm. § 53.

A judgment by confession is not an absolute nullity, if it is valid as to any person. And as long as it remains unvacated, and in apparent force upon the records of the court, it cannot be impeached collaterally. *Sheldon v. Stryker*, 34 Barb. 116.

The Supreme Court of Iowa held that a judgment confessed under a power which does not comply with statutory requirements is a nullity. *Edgar v. Greer*, 10 Iowa, 379.

A judgment upon confession, founded on a statement of facts which is defective or insufficient to answer the requirements of the statute, will nevertheless be valid and effectual as between the parties to it, though voidable at the instance of other creditors. *Coolbaugh v. Roemer*, 30 Minn. 424; *Miller v. Earle*, 24 N. Y. 110; *Neusbaum v. Keim*, 24 N. Y. 336; *Kirby v. Fitzgerald*, 31 N. Y. 417; *Bryan v. Miller*, 28 Mo. 32, 75 Am. Dec. 107; *How v. Dorschheimer*, 31 Mo. 348; *Lee v. Figg*, 37 Cal. 223, 90 Am. Dec. 271; *Pond v. Davenport*, 44 Cal. 431; *Plummer v. Douglas*, 14 Iowa, 60, 51 Am. Dec. 436. See also *Shadrack v. Woolfolk*, 23 Gratt. 707; 1 Black. Judgm. § 68.

The statutes require a person confessing a judgment to file a written statement, signed and sworn to, designating the amount for which the judgment is to be entered, and "stating concisely the facts out of which the indebtedness arose." *Winnebrenner v. Edgerton*, 30 Barb. 185; *Lanning v. Carpenter*, 20 N. Y. 447.

The designation of the amount of the debt is a vital part of a valid confession; it must be set forth explicitly and not be left to inference, and the omission of it is a fatal defect. *Clements v. Gerow*, 30 Barb. 325.

The case last cited contains an admirable statement of the rules that should govern the judgments by confession. See opinion by Hogeboom, J.; notes to *Powell v. Kelly* (Ga.) 3 L. R. A. 139, and *Milliken v. Hathaway* (Mass.) 1 L. R. A. 510.

of their intent to make an assignment, it would have been valid in his hands.

*Heineman v. Hart*, 55 Mich. 64.

The New York Statute (Laws 1877, chap. 466), describes the instrument of assignment, and by chap. 508, Laws 1887, forbids any preference "created" in the general assignment beyond the limit therein mentioned.

To hold that under this Statute the preference forbidden need not be "in the assignment" requires a far more liberal construction than to hold under the Illinois Statute, which does not prescribe the form of the assignment, that such assignment may be divided into several parts, and that several contemporaneous parts or transfers may constitute one assignment.

See *Gwynne v. Burnell*, 7 Clark & F. 572; *Jones v. Smart*, 1 T. R. 44.

The Supreme Court of Pennsylvania holds a preference made by an independent act before the assignment, though in contemplation thereof, to be valid because not in the assignment.

*Lake Shore Bkg. Co. v. Fuller*, 1 Cent. Rep. 109, 110 Pa. 156; *Gallagher's App.* 5 Cent. Rep. 725, 114 Pa. 353.

The appellant is protected by the Statute which authorized him to obtain a judgment by confession.

*Trier v. Herman*, 115 N. Y. 163; 1 Black, Judgm. § 293.

*Mr. Frederic W. Hinrichs*, for respondent:

The facts of this case offer abundant ground for setting aside the judgment and for having the assets which were levied upon by the defendant George E. Varrelmann (or their proceeds) paid to the defendant Kracht for distribution under the terms of the assignment deed.

*Spelman v. Freeman*, 54 Hun, 409; *Wilcox v. Payne*, 28 N. Y. S. R. 712; *White v. Cotschhausen*, 129 U. S. 329, 33 L. ed. 677; *Manning v. Beck*, 54 Hun, 102; *Kessel v. Drucker*, 6 N. Y. Supp. 945; *Abegg v. Schwab*, 24 N. Y. S. R. 986; *Riesner v. Cohn*, 1 N. Y. Supp. 161; *Turnbull v. Cohen*, N. Y. Daily Reg. June 18, 1889; *Davis v. Harrington*, 55 Hun, 109; *Sweetser v. Smith*, 5 N. Y. Supp. 378; *Stein v. Levy*, 55 Hun, 331.

A finding, although in form classified as a finding of law, may, in effect, be a finding of fact, and for the purpose of upholding the judgment should be so regarded.

*Adams v. Fitzpatrick*, 125 N. Y. 124; *Murray v. Marshall*, 94 N. Y. 617.

The statute is remedial and was intended to supply a defect in the existing law and to suppress a mischief. It should therefore be construed liberally to accomplish the manifest intention of the Legislature.

*White v. Cotschhausen*, 129 U. S. 329, 33 L. ed. 677; *Preston v. Spaulding*, 120 Ill. 208; *Richardson v. Thurber*, 6 Cent. Rep. 799, 104 N. Y. 606.

Under the Missouri statute it was held that judgments confessed immediately before the execution of the general assignment, and alleged to be parts of the same transaction, constituted together one voluntary assignment for the benefit of creditors, under which all the creditors were entitled to share alike.

*Clapp v. Nordmeyer*, 25 Fed. Rep. 71.  
12 L. R. A.

A like ruling was made in Maine.

*Berry v. Cutsa*, 42 Me. 445.

The same is true of Alabama.

*Holt v. Bancroft*, 30 Ala. 195.

A like rule was enforced in Iowa.

*Van Patten v. Burr*, 53 Iowa, 518. See also *Kellogg v. Root*, 23 Fed. Rep. 525; *Fuller v. Hasbrouck*, 46 Mich. 81; *Perry v. Holden*, 32 Pick. 269; *Livermore v. McNair*, 34 N. J. Eq. 478; *Lake Shore Bkg. Co. v. Fuller*, 1 Cent. Rep. 109, 110 Pa. 156.

It is of no consequence what intention appellant had in accepting the preference. It is sufficient if the debtor unlawfully intended to violate the law in confessing the judgment.

*Illinois Watch Co. v. Poynes*, 33 N. Y. S. R. 967; *Starrin v. Kelly*, 38 N. Y. 419; *Loos v. Wilkinson*, 1 L. R. A. 250, 110 N. Y. 195; *Preston v. Spaulding*, 120 Ill. 220.

The fraudulent preference sought to be given to George E. Varrelmann falls with his judgment.

*Spelman v. Freedman*, 54 Hun, 414; *Wilcox v. Payne*, 28 N. Y. S. R. 712.

*Follett, Ch. J.*, delivered the opinion of the court:

The judgment which the appellant obtained by the confession of his debtors is sought to be set aside, and the money collected by virtue of it recovered for the benefit of the creditors of the judgment debtor, on the ground that, when confessed, the confessors intended to make a general assignment and prefer the claim of the appellant through a judgment and execution, and thereby evade the prohibition of the 30th section of the Assignment Act, which is as follows: "Sec. 30. In all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preference created therein (other than for the wages or salaries of employes under chapter 328 of the Laws of 1884, and chapter 283 of the Laws of 1886), shall not be valid except to the amount of one third in value of the assigned estate left after deducting such wages or salaries and the costs and expenses of executing such trust; and should said one third of the assets of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then said assets shall be applied to the payment of the same *pro rata* to the amount of each said preferred claims." Laws 1887, chap. 508.

The appellant insists that his judgment and execution by which he secured more than one third of the estate of the insolvent debtors are not brought within the prohibition of this section, because: (1) the trial court did not find as a fact that the debtors contemplated making a general assignment when the judgment was confessed: (2) the trial court did not find as a fact that the appellant knew, when he received the confession of judgment and seized the property by virtue of the execution issued thereon, that the debtors contemplated making a general assignment; (3) the preference was not created in the general assignment, but by a separate instrument.

Before this section was added, in 1887, to the General Assignment Act of this State, the

practice which had become so prevalent that it may be said to have become a custom for failing debtors to devote, by general assignment, the whole or a large part of their estates to the payment of a few preferred creditors, often near relatives, resulted in so much hardship and injustice that the section above quoted was adopted to mitigate the evils arising from the practice. The section being remedial, should be liberally construed so as to prevent the mischiefs at which it was aimed. *White v. Cotzhausen*, 120 U. S. 329, 83 L. ed. 677; *Hulder v. Golden*, 86 N. Y. 448; *Hart v. Cleis*, 8 Johns. 41.

The trial court found that the estate of the assignors was not worth three times the amount of the appellant's judgment, and that its collection consumed more than one third of it, and that when the judgment was confessed, execution issued and levied and the assignment executed, the assignors and George E. Varrelmann all knew that the sale under the execution to be issued would absorb more than one third of the debtors' assets. The decision signed by the trial judge contains seventeen findings of fact and seven conclusions of law. The first and second of the latter are as follows:

"1. The judgment confessed in favor of the defendant George E. Varrelmann, and the execution and levy which followed, were made by the defendants Henry Erdtmann and Gustave Varrelmann, in contemplation of their general assignment and as part thereof, and for the purpose of preferring said defendant, George E. Varrelmann, in whose favor the said judgment was confessed by them, out of their property, for more than one third of the net assets of the said defendants, Henry Erdtmann and Gustave Varrelmann, and to prevent the said assets from going into the hands of the defendant Kracht, as assignee, and being distributed to the plaintiffs and the other creditors of the said defendants Henry Erdtmann and Gustave Varrelmann, pursuant to the terms of their general assignment deed.

"2. Said confession of judgment and the execution and levy which followed were made in fraud of the said general assignment, and are void, and should be set aside and vacated, and the assets levied upon, or the entire proceeds thereof should be paid the defendant Kracht, as assignee, to be distributed pursuant to the terms of the deed of general assignment."

The learned counsel for the appellant insists that these conclusions cannot be given the effect of findings of fact, but must be held to be conclusions of law, and that the facts so found cannot be considered on this appeal. This contention is not well founded, for it is well settled that though a "finding of fact" be called a "conclusion of law" and improperly classified as such in the decision signed (Code Civ. Proc. § 1022), it will, for the purpose of upholding a judgment, be given the same effect as though embraced within and designated as one of the findings of fact. *Parker v. Baxter*, 86 N. Y. 586; *Murray v. Marshal*, 94 N. Y. 611; *Adams v. Fitzpatrick*, 125 N. Y. 124.

12 L. R. A.

The facts found in the conclusions of law above quoted—that the assignors confessed the judgment in contemplation of making a general assignment as a part thereof, and for the purpose of preferring George E. Varrelmann for more than one third of their estate, that the confession of judgment, the execution and levy were made in fraud of the general assignment—will be given the same force in support of this judgment as though they had been properly classified in the decision signed.

It would not be claimed, we think, that a preference for more than one third of the assigned estate, when created by an instrument known as a general assignment, would be valid, though executed without the knowledge of the preferred creditors. If such a position could be successfully maintained, the section would be wholly inoperative, as it would be quite easy, as, indeed, it is frequently the practice, to execute those instruments without consulting the favored creditors. If the absence of pre-knowledge on the part of the creditors that a preference is to be created by an assignment does not strengthen their position, it is not easy to see how the want of knowledge that an assignment is contemplated would avail them, though the preference be created by an independent instrument. This section is designed to limit the power of insolvents to create preferences beyond the extent named, and to regulate their conduct, but not to control the action of creditors, who are left free to collect or secure their claims by the usual remedies. It is the action of the insolvent debtors which the law seeks to control. *Home Nat. Bank of Chicago v. Sanchez*, 131 Ill. 830.

The only remaining question is whether a preference by insolvents not created in or by a general assignment, but by a separate instrument and in contemplation of making a general assignment, is prohibited by the Statute.

We are asked to construe the language: "In all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preferences made therein . . . shall not be valid, except," etc.—closely, and hold that preferences not created in instruments known as general assignments are not within the condemnation of the section. Such an interpretation would defeat the intent of the Legislature, and the Statute would be found to be no bar to the practices at which it was aimed. Insolvents would be left free to secure their friends by independent instruments, executed in contemplation of making general assignments, which, when executed, would carry to their assignees but a remnant of their estates, for the benefit of their unfavored creditors. The words of the section must be construed to embrace all of the instrumentalities which failing debtors, in contemplation of a general assignment, voluntarily employ to give preferences to particular creditors. As was said by Finch, J., in *Richardson v. Thurber*, 104 N. Y. 610, 6 Cent. Rep. 799: "The word 'assignment' may sometimes have reference to the instru-

ment which affects the transfer and some-times to the transfer itself, considered as a legal fact or result."

The section under consideration was intended to prevent the forbidden result whether accomplished within or without the general assignment. This question has been several times before the supreme court in this State, and conveyances which created preferences for more than one third of the insolvent's estate, when made in contemplation of a general assignment, have invariably been condemned as violations of the Statute. *Manning v. Beck*, 54 Hun, 102; *Spelman v. Freedman*, Id. 409; *Sweetser v. Smith*, 5 N. Y. Supp. 878; *Spelman v. Jaffray*, 6 N. Y. Supp. 570; *Kemp v. Drucker*, Id. 945; *Abegg v. Schwab*, 24 N. Y. S. R. 986; *Wilcox v. Payne*, 28 N. Y. 712.

The question has also been considered by the courts of other States under similar statutes, forbidding or regulating preferences in voluntary or general assignments for the benefit of creditors.

In Illinois the Act is entitled "An Act Concerning Voluntary Assignments, and Conferring Jurisdiction upon County Courts, Approved May 22, 1877," and contains fourteen sections. The first prescribes the mode in which assignments shall be executed and is, in part, as follows:

"Sec. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that in all cases of voluntary assignments hereafter made for the benefit of creditors, the debtor or debtors shall annex to such assignment an inventory," etc.

The succeeding eleven sections prescribe the power and duties of assignees and the procedure by which voluntary assignments are to be carried into effect. The 14th section confers jurisdiction upon the county courts to carry out the provisions of the Act. The thirteenth section provides: "Sec. 13. Every provision in any assignment hereafter made in this State providing for the payment of one debt or liability in preference to another shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof."

The question has several times arisen whether preferences created, not in a voluntary assignment, but by instruments executed at about the same time and in contemplation of making a general assignment, were within the Statute. In *Preston v. Spaulding*, 120 Ill. 208, the insolvents preferred certain of their creditors by confessing judgments, and on the same day that their general assignment for the benefit of creditors was made. The point was taken that the Statute made void only preferences in the general assignment, and not those otherwise given. In discussing this question it was said: "We hold that it is within the spirit and intent of the Statute that when a debtor has formed a determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken, the law will regard all his acts, having for their object and effect the disposition of his estate, as

parts of a single transaction, and on the execution of a formal assignment it will, under the Statute, draw to it, and the law will regard as embraced within its provisions all prior acts of the debtor having for their object and purpose the voluntary transfer or disposition of his estate to or for creditors, and if any preferences are shown to have been made or given by the debtor to one creditor over another in such disposition of his estate, full effect will be given to the assignment, and such preference will, in a court of equity, be declared void, and set aside as in fraud of the statute."

This doctrine has been approved in subsequent cases in that State, and also in the Supreme Court of the United States in *White v. Cotzhausen*, 129 U. S. 329, 32 L. ed. 637, which arose under the Illinois Statute. In that case an insolvent debtor, by deeds, bills of sale and warrants for the confession of judgments, disposed of all his property for the benefit of his brothers and sisters, who were creditors, but made no general assignment. In an action brought in the circuit court of the United States to set aside the conveyances as violations of the thirteenth section of the Voluntary Assignment Act, it was held that it was quite immaterial that no general assignment had been executed, but that any preference, however created, by an insolvent while engaged in making a complete disposition of his property, was forbidden and void under the Act. The judgment of the circuit court was placed in part upon the ground that the conveyances and confessions of judgment were "made without adequate consideration and with intent to hinder, delay and defraud the appellee Cotzhausen" (p. 388), the complaining creditor, but the judgment of the supreme court was not rested upon that ground. It was said: "We have already seen that the circuit court proceeded upon the ground that the conveyances, bill of sale, confessions of judgment and transfers by Alex. White, Jr., were made without adequate consideration and with intent to hinder, delay and defraud the appellee. Upon these grounds it gave him a prior right in the disposition of the property. We are not able to assent to this determination of the rights of the parties; for the mother, sisters and brother of Alex. White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over other creditors" (page 344).

The reference to *White v. Cotzhausen*, must not be taken as an indication of approval, nor this cautionary remark as an intimation that we disapprove of the doctrine that when an insolvent, without making a general assignment, transfers his entire estate to favored creditors by several instruments, it is a violation of the section, but the case is instructive in its reasoning, and shows the trend of courts when called upon to consider like statutes. In this State the supreme court (*Stein v. Levy*, 55 Hun, 881), one judge dissenting, has declined to follow the doctrine of the case cited to its logical conclusion. In Pennsylvania it has been held (*Lake Shore Bkq. Co. v. Fuller*, 110 Pa. 156, 1 Cent. Rep. 109), that a confession of judgment to

a bona fide creditor by an insolvent, on the eve of making a general assignment for the benefit of creditors, is not a violation of the Statute which forbids preferences in assignments; but in most of the States the construction which we have indicated prevails.

Thus far this case has been considered upon the theory that the appellant had no knowledge when he took his confession of judgment that his confessors contemplated making a general assignment, and we think it might well be decided upon that theory. But it is urged by some of our brethren that, there being no express finding of fact that the appellant knew that the judgment debtors intended to make an assignment when the confession was taken, his judgment should not be set aside, but allowed to stand as a valid preference to the extent of one third of the estate of the assignors. We think a sufficient answer to this suggestion is that the appellant makes no such claim, but from the first to the last he has planted himself upon the ground that in the absence of an explicit finding that he knew that a general assignment was intended he is entitled to sustain his judgment and retain the whole sum collected thereby. No such question was raised at special term, at the general term, nor is it suggested in his brief on this appeal.

There is a further answer to this position: as before stated, the record before us contains none of the evidence. "Where the evidence given on a trial is not contained in the case on appeal to this court, it must be assumed that the facts proved were sufficient to sustain the findings; and also to sustain any additional findings required to support the conclusions of law not in conflict with the affirmative facts found." *Gardner v. Schwab*, 110 N. Y. 650; *Murray v. Marshall*, 94 N. Y. 611, 617; *Reese v. Reese*, Id. 623; *Kellogg v. Thompson*, 66 N. Y. 88; *First Nat. Bank of Champlain v. Wood*, 45 Hun, 413; *Bond v. Bond*, 51 Hun, 507.

An assumption that George E. Varrelmann knew that the judgment debtors contemplated a general assignment is not in conflict with any of the affirmative facts found, nor is it in conflict with any facts which the court refused to find. As before stated, the court found as facts that "said confession of judgment and the execution and levy which followed were made in fraud of said general assignment." The judgment by confession was the joint act of the judgment debtors and of the judgment creditor, which is found to have been made in fraud of the assignment. Issuing the execution, causing a levy and sale to be made, were the individual acts of George E. Varrelmann, which the court found were in fraud of the assignment. These facts so expressly found, with the other significant facts found and admitted by the answers, to wit: the relationship existing between the parties, that the assignment, the confession of judgment and the issuing of the execution and levy thereunder, were concurrent acts performed on the same afternoon, taken in connection with the knowledge of Varrelmann that his judgment, execution and levy would absorb much more

than one third of the assets of the firm, seem to us to require this court, under the rule laid down, to infer, in support of this judgment, which is so apparently an equitable one, that George E. Varrelmann knew, when he took his judgment and made his levy, that his son and the partner of his son then contemplated making a general assignment. If he was not aware of their purpose, it is quite singular that the steps which he took were so timely and happily taken as to accomplish the absorption of the entire assets of the assignors. We think these various proceedings were not the result of accident, but of design. This judgment, confessed in fraud of the assignment, cannot be regarded as part of it, for both parties to the judgment say it was not so intended; but if it could be, it may be cut down by any act of the assignors which would invalidate a general assignment, and the fraud of the assignors, though not participated in by those benefited, avoids a general assignment. *Loos v. Wilkinson*, 110 N. Y. 195, 1 L. R. A. 250.

The judgment should be affirmed, with costs. All concur, except **Bradley, Haight and Brown, JJ.**, dissenting.

**Bradley, Haight and Brown, JJ.**, dissenting:

We are unable to concur with the majority of the court. The record does not contain the evidence. And the facts found do not warrant the conclusion that the appellant took the judgment by confession otherwise than in good faith for a valid debt, and without any knowledge or information that the debtors contemplated making an assignment for the benefit of their creditors.

In that view no reason appears to us for setting aside the judgment, and it is the right of the creditor to retain it, as it was to take it pursuant to the Statute providing for that method of taking judgments. But, inasmuch as the confession of it was made by the judgment debtors in contemplation on their part of the general assignment which was soon after made by them, and treating it as part of the scheme or transaction of their assignment; so far as they were concerned, the sale on the execution of the judgment was properly set aside and direction given for the payment of the proceeds of the sale to the assignee for distribution in execution of his trust. In that view the creditor taking the judgment should not be denied entirely the benefit of the preference which it and the levy of his execution apparently gave him, but he should at least be treated as a preferred creditor, and the amount of one third of the estate of the assignors left after making the deduction directed by the Statute, should, treating him as such, be applied *pro rata* amongst the preferred creditors as their rights in that respect may appear. Otherwise his means as such judgment creditor to realize anything upon his debt may be entirely defeated. And the rule adopted that the judgment in such case be set aside may well have the effect to discourage the taking of judgments by confession, as perchance it may be followed by

a general assignment of a debtor making such confession. It would seem to bring such case, more in accordance with principle to set aside the assignment as well as the judgment confessed rather than to set aside the latter and permit the former to stand; and such discrimination against the judgment creditor cannot properly be made unless he is chargeable with a fraudulent intent as

against the creditors of his judgment debtor in taking his judgment.

Our conclusion is that unless the plaintiffs stipulate to modify the judgment as above suggested the judgment should be reversed and a new trial granted, costs to abide the event, and in case they do so stipulate the judgment be modified accordingly without costs.

### NEVADA SUPREME COURT.

Thomas E. HALEY, *Appl.*,

v.

EUREKA COUNTY BANK *et al.*, *Respts.*

(....Nev.....)

1. Proof as to the value of the property may be required before the entry of judgment in favor of plaintiff after a default by defendant in an action to recover damages for the conversion of personal property.
2. No notice need be given of a motion by an *amicus curie* to dismiss an action as fictitious.
3. An action commenced by collusion without any real controversy will be dismissed.
4. A judgment by default and the assignment thereof to a stranger will not prevent dismissal of a collusive suit.
5. A conversation in the presence of an attorney is not a privileged communication in an action between the parties thereto.
6. Communications to an attorney acting as the agent of both parties to a controversy are not privileged in an action between such parties.
7. Failure to demand a jury is a waiver of the right to a jury trial.
8. An attorney as *amicus curie* may move to dismiss an action as collusive and it is his duty to do so if he knows or has reason to believe that the action is fictitious.

(Bigelow, J., *dissent.*)

#### NOTE.—What is collusion.

Collusion is where two persons, apparently in a hostile position, or having conflicting interests, by arrangement do some act in order to injure a third person or to deceive a court. Thus, where a person brought an action for penalties against a company by arrangement with them, for the purpose of protecting them against other actions by hostile persons for the same penalties, it was held that the judgment was obtained by collusion. *Girdlestone v. Brighton Aquarium Co.* L. R. 3 Exch. Div. 187, L. R. 4 Exch. Div. 107.

The effect of collusion is to vitiate the transaction in which it is employed. *Rapalje & Lawrence*, Law Dict. title *Collusion*.

Where the tendency of an agreement is to interest a husband in procuring a divorce or in foregoing resistance to an effort by his wife to that end, then it is contrary to public policy, and is void. *Everhart v. Puckett*, 73 Ind. 408; *Muckenburg v. Holler*, 29 Ind. 189; *Viser v. Bertrand*, 14 Ark. 287; *Adams v. Adams*, 25 Minn. 72; *Sayles v. Sayles*, 21 N. H. 512, 58 Am. Dec. 208.

Sound policy as well as established law forbids it, and any agreement made in fraud of the purposes of the law, and against its policy, is illegal and void. *Bishop, Mar. and Div.* § 635 *et seq.*; 1 *Bishop, Married Women*, § 760; *Speck v. Dausman*, 7 Mo. App. 165.

Courts will entertain jurisdiction of real contro-

(March 10, 1891.)

**A** PPEAL by plaintiff from a judgment of the District Court for Eureka County dismissing his action brought to recover damages for the alleged conversion of certain personal property. *Affirmed.*

The facts sufficiently appear in the opinion.

*Messrs. Wren & Cheney* for appellant.

*Messrs. Baker & Wines* for respondents.

**Murphy, J.**, delivered the opinion of the court:

This case came before this court on appeal from an order of the district court, setting aside the default of the defendants. The order was reversed, and the cause remanded. 20 Nev. 410. It is unnecessary to repeat the history of the case here. On the return of the case to the district court, the plaintiff, by his attorney, appeared in court, and asked for judgment on the pleadings for the full amount prayed for in the complaint, no answer having been filed; which motion was by the court denied, on the ground that the plaintiff was not entitled to a judgment without proof of the value of the property alleged to have been converted. In an action arising upon contract, for the recovery of money or damages only, a default and final judgment may be entered by the clerk. In all other cases the plaintiff must apply to the

verses only; and hence, a bringing of fictitious action involving fictitious issue has always been considered a contempt of court. *Smith v. Brown*, 3 Tex. 260.

And where it appears that the only object of the action was to determine the legality of a certain stock issue, in which the alleged controversy was purely fictitious, the institution of such a suit was held to be a contempt of court. *Haskett v. State*, 51 Ind. 178.

A familiar application of the rule occurs in cases where an action is brought for the recovery of property in *custodia legis*. It is well settled that in bringing such an action the party plaintiff incurs the penalties incident to contempt. *Huntington v. McMahon*, 48 Conn. 174.

A fictitious suit, or a feigned issue, or a suit instituted by persons to try the rights of third persons, not parties to the record, is a contempt of court, and will be dismissed on motion (*Hoskins v. Berkeley*, 4 T. R. 402; 3 Bl. Com. 452; *Re Elsom*, 8 Barn. & C. 597, 2 Inst. 215; *Brewster v. Kitchin*, Comb. 425; *Coxe v. Phillips*, Cas. t. Harw. 287; *Fletcher v. Peck*, 10 U. S. 6 *Cranch*, 147, 148, 3 L. ed. 181); and any person as *amicus curie* may make the motion. *Rex v. Vaux*, Comb. 13; *Dove v. Martin*, Id. 169; *Doe v. Walker*, 2 Show. 403; *Coxe v. Phillips*, *supra*.

A suit may be shown to be fictitious, either by inspection of the record or by evidence *alunde*, or by both. See cases *supra*.

court for the relief prayed for in his complaint, and when he does so the court may require additional proof, and it is not error for the court to refuse to enter judgment on the pleadings alone, and the proof must be made when demanded. *Parker v. Wardner* (Idaho) 13 Pac. Rep. 178.

G. W. Baker, as an officer of the court, and as *amicus curie*, submitted a written motion to the court "to dismiss the action as to all the defendants, except the Eureka County Bank, upon the ground and for the reason that the same was and is a sham action, colorably instituted between the plaintiff and the defendants Sadler, Torre, Barbieri, and the Nevada Stage & Transportation Company, without any intention of ever determining any dispute, or litigating any question, or ever having any adversary trial, but simply to obtain the judgment and decision of the court upon a feigned issue, which might affect other parties not impleaded; and that said action between the parties last above mentioned was amicably instituted, without any real dispute between them, and their interest in the question when the said suit was brought was one and the same, and not adverse. That in these proceedings the plaintiff and said defendants mentioned were seeking to secure such a judgment to be entered as might result to the advantage of the defendants, with reference to the title of the property mentioned in the complaint, and adversely to the interest of other parties not before the court, and who had no knowledge of the suit, and no opportunity to be heard, and have any interest they might have in the subject matter of the suit determined. That the attorney for the plaintiff, who brought the action for the defendants last above mentioned, was employed and paid by them, and such suit was simply a scheme to in some way obtain a judgment of the court upon a feigned issue, which it was conceived might be of advantage to the defendants, and for which purpose the plaintiff permitted his name to be used in instituting the same." In support of this motion, the *amicus curie* offered the affidavits of Sadler and Rives, and it was stipulated between the parties that the testimony taken on the hearing of the motion to open the default should be considered admitted as evidence on the hearing of this motion, in so far as the same was applicable. The plaintiff objected to the consideration of the motion, upon the ground that the same had not been noticed. The court permitted the motion and affidavits to be filed, and informed the plaintiff that he might have all the time he required to prepare counter-affidavits and argue said motion. The plaintiff denied the right of counsel to make the motion, and excepted to the ruling of the court.

The objection of the plaintiff to the filing and hearing of the motion to dismiss, on the ground that the same was not noticed, is without merit: (1) Because upon the reading and filing of the motion the court informed counsel for plaintiff that they should have all the time they desired to file counter-affidavits and argue the motion, which offer they declined to avail themselves of, but stip-

ulated that the affidavits, submitted to the court on the consideration of the motion to open up the default, on the former hearing of this case, should be admitted as the evidence on this motion, in so far as the same was pertinent to the question submitted for decision. And (2) a motion of this character is in the nature of a suggestion to the court that the action then pending is not a real, but a fictitious, one, to obtain a judgment of the court, not upon any issue then involved between the parties to the action, but that might be used by either the plaintiff or the defendants against strangers to the action who might thereafter come in and claim an interest in the property sued for. When actions are brought in a court of law, a duty devolves upon the judge, and that is scrupulously to guard its proceedings from being used by the parties collusively, and not suffer a judgment to be entered without being fully satisfied that a cause of action really exists as provided for by law. Whenever facts are placed before a court, which cause any suspicion that there is any collusion between the parties, no matter in what way or form the facts are brought to the knowledge of the court, it is the duty of the judge at once to institute such an examination as will satisfy him of the truth or falsity of the charge.

There are many circumstances connected with this case which certainly give a strange appearance to the mode in which this action was commenced and has been prosecuted, sufficient, in our opinion, to sustain the order of dismissal. It appears from the uncontradicted testimony that one Townshend had a contract from the government of the United States mail from Eureka, in Eureka County, to Pioche, in Lincoln County, all in this State. He was in possession of horses, wagons and harness sufficient to stock the route. R. Sadler and John Torre were his bondsmen. Townshend became indebted to the Eureka County Bank in the sum of "\$4,800, to Torre, Sadler, and Barbieri in the sum of \$2,000, and there was still due to the Utah, Nevada & California Stage Company the sum of \$2,000 balance of purchase money for the stock on the road,—making a total indebtedness of \$8,800." The Eureka County Bank insisting upon the payment of its claim, Townshend, on the 11th day of March, 1887, sold and delivered to the Bank all the property used in transporting said mail, and his interest in the said contract with the government. That the said Sadler, Torre and Barbieri, in order to protect themselves from loss, upon the failure of the parties to carry said mail in accordance with the contract for which they were bondsmen, with the knowledge and consent of Townshend, purchased the property and contract from the Eureka County Bank, paying therefor the sum of \$4,800. They also assumed the indebtedness due from Townshend to the Utah, Nevada & California Stage Company. That after the purchase of said property by Sadler, Torre, and Barbieri they organized the Nevada Stage & Transportation Company, and they subscribed for and owned all the stock. That in



order to qualify Thomas E. Haley, the parties above named gratuitously transferred to him twenty-five shares of the capital stock of said company, and made him secretary thereof. The Utah, Nevada & California Stage Company setting up its claim to the property, R. Sadler purchased all the right, title and interest of the said Utah, Nevada & California Stage Company, for himself, Torre, Barbieri and the Nevada Stage & Transportation Company, agreeing to give notes signed by himself, Torre and Barbieri for the sum of \$2,000. When the time came for the giving of said notes, Torre was absent from Eureka, and the notes of Sadler, Haley and Jackson were offered in lieu thereof; but the same were not accepted by the company, and they were returned to the makers thereof, and the notes of Sadler, Torre and Barbieri were made, and accepted by the company, and, through the advice of Henry Rives, the title of the Utah, Nevada & California Stage Company was taken in the name of Haley, for the purpose of commencing a suit and clearing the title to the property, which was to be done for the use and benefit of Sadler, Torre and Barbieri, and the Nevada Stage & Transportation Company, but that the said Haley never bargained for, purchased, or paid one dollar for said property, and only received the legal title to said property at the request of Sadler, and with the express understanding and agreement that he was in all things to be governed by the advice of the said Henry Rives, and that, if a suit was to be instituted, it was to be conducted in a friendly manner, and under the control of the defendants, and in their interests, and, when the title thereto was settled, to convey all of said property to the said Sadler, Torre and Barbieri, or to any person whom they might designate. This suit for conversion was commenced by the plaintiff while he was acting as secretary of a corporation, against the corporation and three of the stockholders. The defendants Sadler, Torre and Barbieri employed and paid the fees of the attorney for the plaintiff and all the costs of court. Haley testified, and denied that there was any agreement between himself, Sadler, Torre and Barbieri that a judgment should not be taken against the defendants Sadler, Torre, Barbieri and the Nevada Stage & Transportation Company; or that the suit should be a friendly one, and should inure to the use and benefit of the defendants above named. He admits that Sadler first spoke to him about purchasing the title of the Utah, Nevada & California Stage Company; admits the giving of the notes of Sadler, his own and Jackson's, and the return of them to him; admits that he never paid any money whatever for the property, but says he expected to pay his notes. But they were returned to him, and Sadler, Torre and Barbieri gave notes, and paid them as they became due. They had prior thereto paid the Eureka County Bank the sum of \$4,800, and had been in possession of all the property.

The evidence was sufficient to satisfy the court that there was collusion between the plaintiff and the three defendants named,

and that the action was not commenced for the purpose of settling any real controversy then existing between the parties. In the case of *Brewington v. Lowe*, 1 Ind. 28, the supreme court said: "We think these proceedings were instituted under a mistaken apprehension of the proper function of the judiciary. Courts of justice are established to try questions pertaining to the rights of individuals. An action is the form of a suit given by law for the recovery of that which is one's due, or a legal demand of one's rights. . . . Indeed, it is well settled that courts will not take cognizance of fictitious suits, instituted merely to obtain judicial opinions upon points of law." In the case of *Loughhead v. Bartholomew*, reported in Wright (Ohio), 91, Lane, J., said: "Courts are instituted to try questions pertaining to the real interests of individuals; to settle substantial controversies; to preserve the peace of society; and where questions submitted to their action are merely questions of speculation, and where their discussion is *contra bonos mores*, or against public policy, or where the inquiry tends to cast ridicule upon the court, or where the investigation is palpably injurious to the interests or feelings of third persons, without affecting the substantial rights of the litigants, some means will be found to arrest the inquiry."

In the case of *Lord v. Veazie*, 49 U. S. 8 How. 255, 13 L. ed. 1069, Taney, Ch. J., said: "It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves, and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as punishable contempt of court. . . . The objection in the case before us is not that the proceedings were amicable, but that there is no real conflict of interest between them; and that the plaintiff and defendant have the same interest, and that interest adverse, and in conflict with the interest of third persons. . . . A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible, and the learned district judge, who was then holding the court, undoubtedly suffered the judgment *pro forma* to be entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. A judgment in form, thus procured, in the eye of the law, is no judgment of the court. It is a nullity, and no writ of error will lie upon it. This writ is therefore dismissed."

In *Smith v. Junction R. Co.*, 29 Ind. 546, a fictitious name was used for plaintiff in the action. The testimony shows that the name

of Smith, instead of Reeder, was more by accident than intentional. But the court did not dismiss the appeal on that ground, but that the interests of Reeder and the railroad company were not antagonistic, and the decision was intended to affect third persons. See also *Hotchkiss v. Jones*, 4 Ind. 360. The case of *Cleveland v. Chamberlain*, 68 U. S. 1 Black, 425, 17 L. ed. 93, was a real action. The plaintiff had judgment. Thereafter defendant purchased the plaintiff's judgment, and perfected an appeal to the supreme court. These facts were called to the attention of the court. Mr. Justice Grier said: "This appeal must be dismissed. Selah Chamberlain is, in fact, both appellant and appellee. By the intervention of a friend, he has purchased the debt demanded by Cleveland in his bill and now carries on a pretended controversy by counsel, chosen and paid by himself, and on a record selected by them, for the evident purpose of obtaining a decision injurious to the rights and interest of third parties."

In the case of *Berks County v. Jones*, 21 Pa. 416, Black, *Oh. J.*, speaking for the court, said: "Without a doubt the object of the proceeding was not to settle a real dispute, but merely to ascertain the law; in other words, to make the court act as counsel for the commissioners. But they have no right to get advice in this way. Courts ought to encourage amicable submissions of real disputes, but people have no right to propound abstract questions to them. For this there is not only the clearest reason, but the highest authority. . . . The judge of the common pleas, over-indulgent to the parties, decided the law for them, when he might have stricken the case from the record. With an easy good nature, equally inexcusable, we have done the same thing. We have considered the subject with as much care as if it had been regularly before us, and we unanimously agree in pronouncing the opinion of the court below to be a perfectly sound exposition of the law. But, because there was nothing on which a judgment could be entered, the writ of error must be quashed." *Pittsburgh v. Allegheny*, 1 Pittsb. Rep. 99.

In the case of *Meeker v. Straat*, 38 Mo. App. 242, the supreme court said: "This decree cannot stand. Suits contemplate adversary parties, although amicable suits may be brought to determine the respective rights of the parties thereto. When a suit is brought with a view of affecting the rights of third parties, and it is apparent that that is its sole object, the suit ceases to be adversary, and becomes collusive. No court should lend its aid to such a proceeding. least of all a court of equity. . . . All these considerations lead to the inevitable conclusion that the decree in the present case was unwarranted by the law and the evidence, and that the trial court, instead of rendering a decree for plaintiff, should have dismissed her bill. Judgment reversed, and bill dismissed."

Courts of justice are established for the purpose of deciding really existing questions of rights between parties who in good faith submit a case to the court for a decision and

the court should not try an action upon a feigned issue, or an abstract question of law, or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest. An action is a legal prosecution by a party complainant against a party defendant, to obtain the judgment of the court in relation to some rights claimed to be secured, or some remedy claimed to be given by law to the party complaining. It is given by law, for the recovery of that which is one's due, or a legal demand of one's rights. From the evidence in this case we are satisfied that, at the time of commencing this action, the plaintiff had no legal demand against the defendants, and they did not infringe upon any of the plaintiff's rights in relation to the property in controversy; that the action was commenced by the plaintiff as the agent and trustee of the defendants, and his denial "that there was no agreement between himself and Sadler that no judgment should be taken against Sadler, Torre, Barbieri or the Nevada Stage & Transportation Company," need occupy but little attention, as all the circumstances connected with the purchase and possession of the property, as well as the affidavits of Rives, Sadler and Torre, in support of the motion to dismiss, clearly show that plaintiff had agreed to and was holding the bill of sale of the property in trust for the defendants named, and for their use and benefit, and for the purpose of protecting their title to the property, and, as they supposed, to prevent Townshend from asserting any claim to the property, under an agreement entered into by Townshend on the one part, and Sadler, Torre and Barbieri on the second part, wherein they covenanted and agreed "that immediately upon the receipt by us of all moneys which we have agreed to pay said Eureka County Bank, and all money now due us from W. J. Townshend, together with all which we may hereafter have to pay out in order to conduct said stage line, and upon our being secured from loss by reason of our being sureties upon the mail contract bonds of said W. J. Townshend, we will transfer and set over unto said Townshend, or his order, all of said property connected with said lines which we may acquire in connection with the conduct of said lines, and which we may charge as having been necessarily purchased in the conducting of said lines and business. It is also understood and agreed that, in case we have to pay interest, and any money, to the Utah, Nevada & California Stage Company, in order to carry on said stage lines, or to retain possession of the property hereinbefore mentioned as having been transferred to us, this agreement to reconvey shall become operative until such interest and payment to said Utah, Nevada & California Stage Company shall be repaid to us;" and, as was said in the case of *Lord v. Veasie*, *supra*, any judgment, entered under the above state of facts, would be a nullity; and a right of action must be complete before the suit is brought, and no subsequent occurrence of a material fact will avail the plaintiff in maintaining the suit. *Moore v. Maple*, 25 Ill. 343.

Therefore the assignment of the judgment by Haley to Ahern did not change the condition of things as to the fictitiousness of the action when commenced. There could be no rights, under such a judgment, to assign.

The plaintiff also objected to the reading of the affidavit of Rives, for the reason that the same was incompetent, irrelevant and immaterial, and discloses information which was obtained when he was acting as attorney for the plaintiff, and discloses privileged communications between attorney and client, and that it attempts to prove facts contrary to the admitted allegations of the complaint. It did not disclose privileged communications. Some of the statements made by him were in the nature of communications received while acting as the agent and attorney for the defendants in the purchase of the property from the Eureka County Bank, Townshend, and the Utah, Nevada & California Stage Company, and conversations had by Haley and Sadler, in the presence and hearing of Rives; and such statements are not privileged, when the action is between the parties to the conversation. *Michael v. Poll*, 100 N. C. 178. Where an attorney was acting for both plaintiff and defendant in drawing a contract for them to sign, communications of the parties to such attorney are not confidential. *Goodwin Gas-Stove & M. Co's App.* 117 Pa. 514, 10 Cent. Rep. 761; *Griffin v. Griffin*, 125 Ill. 480; *Hurlbut v. Hurlbut*, 49 Hun, 189.

In the case of *Bauer's Estate*, 79 Cal. 304, the Supreme Court of California said: "When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations." The appellant claims that the court erred in granting said motion to dismiss, and in entering said judgment, for the reason that no jury was ever waived in this action. An answer to that objection is that a jury was not demanded, and by the silence of the plaintiff he waived his right thereto, if any he had.

In the case of *Sheets v. Bray*, 125 Ind. 33, the Supreme Court of Indiana said: "We have been unable to find any bill of exceptions in the record showing a request on the part of appellants for a jury trial, and a refusal and exception thereto, nor is any such bill referred to by counsel in their brief. In the absence of such request, the right to a trial by jury, if such right existed in this case, must be regarded as waived." *Grant v. Hughes*, 96 N. C. 177.

The objection of the plaintiff to G. W. Baker, as *amicus curia*, making the motion to dismiss the action, is without merit. In the earlier English cases we find that any stranger, as *amicus curia*, may move the court of matters apparent in the writ, and the court *ex officio* is bound to abate the writ, if it be vicious for false Latin or default of form, or that the one plea goes to the whole, and the court will discharge all others; or may move to quash an indictment apparently vicious, be the crime what it will; and a

party was permitted to state in court that he was present at the making of the Statute and what was the intention of Parliament in enacting the law; and, if an action be abated, anyone may move to have the verdict set aside, even the defendant himself. 2 Vin. Abr. 175. If a judge be doubtful or mistaken in a matter of law, a stander-by may inform the court, as *amicus curia*. In some cases, a thing is to be made apparent by suggestion; on the roll, by motion; sometimes by pleadings; and sometimes as *amicus curia*. Taylor, Law Glossary, 43, and 29 Ind. *supra*. In the case of *Ex parte Randolph*, 2 Brock. 454, Mr. Nichols appeared as *amicus curia* at the request of the court, and argued the question therein pending. And in *Ex parte Yeager*, 11 Gratt. 656, where the petitioner had made application for a license to keep a public house, Fry, who was counsel in a similar action, was permitted to appear as *amicus curia*, and argue against granting the same. In the case of *People v. Gibbs*, 70 Mich. 426, Thompson asked permission of the court to assist in the prosecution of the case, he having theretofore had something to do with the prosecution, but his request was denied. Thompson then suggested to the court that the defendant be required to plead to the information. Counsel for the defendant objected to Thompson addressing the court, the objection was overruled, and the defendant required to plead. On appeal, the supreme court said: "The suggestion of Thompson was one which might very properly have been made, as *amicus curia*, by any member of the bar." The court may, and often does, of its own motion, ask of counsel information upon a point in doubt, or in relation to the merits of the case on trial. *State v. McCullough*, 20 Nev. 164.

It is not only the right, but the duty, of an attorney of the court, if he knows or has reason to believe that the time of the court is being taken up by the trial of a feigned issue, to so inform the judge thereof; and it is discretionary with the court to stay proceedings, make due inquiry, and, if the facts warrant the suggestion, then dismiss the case.

*The judgment of the dismissal is affirmed.*

**Bigelow, J.**, dissenting:

In the verified complaint filed in this action, the plaintiff alleges that he is the owner and entitled to the possession of certain personal property of the value of \$8,200, which the defendants have unlawfully taken from him, and converted to their own use. The defendants demurred; their demurrer was overruled; and, all but the bank failing to answer, their default was entered. Subsequently, upon their motion the default was set aside by the district court, but, upon appeal to this court, 20 Nev. 410, the order was reversed. Upon the return of the case to the district court, for further proceedings upon the default, on motion of the defendants' attorney, G. W. Baker, acting as *amicus curia*, the action was dismissed upon the ground that it was collusive and fictitious. It is agreed that the property originally belonged to the Utah, Nevada & California

Stage Company. One Townshend was in possession of it, under a contract of purchase, the company retaining title until it was paid for. The defendants were sureties upon a certain bond for Townshend, and he was also indebted to them. Becoming involved, he transferred the property to the Eureka Bank, to which he was also indebted. The defendants paid the bank the amount due it, and took possession of the property, under an agreement with Townshend that when they were indemnified upon the bond, and repaid the money advanced upon the property, and the amount then owing them, it was to revert to him. The defendants' evidence, upon the motion, tends further to prove that the stage company, demanding payment of the balance due it, was also paid by the defendants, but the legal title to the property was taken in the name of the plaintiff, under an agreement that he was to hold it in trust for them; that it was further agreed that the plaintiff should bring this action, obtain judgment against the defendants, and sell the property out in their interest. This, of course, vested the legal title in him, but as a trustee for the defendants, other than the Bank. On the other hand, the plaintiff denies this, and upon the hearing of the motion testified that he bought the property for his own purposes, paid for it with his notes, and that there was no agreement or understanding that he should hold it in trust or in any manner for the defendants. Under these circumstances, I shall not investigate the evidence, to determine whether the plaintiff's or the defendants' contention is the better supported by it. In my judgment, the principles asserted in *Lord v. Yeasie*, 49 U. S. 8 How. 251, 12 L. ed. 1067, and similar cases, concerning fictitious actions, have no application here. Taking the broadest and most charitable view of the defendants' case as presented upon the motion, it appeared that the plaintiff alleged by his verified complaint that he was the owner and entitled to the possession of the property. The defendants admit that he holds the legal title, but claim that it is only in trust for them, and consequently he is not, as against them, entitled to its possession, nor to recover its value. The burden of showing this is, of course, upon them. This is the ordinary situation in a contested lawsuit: The plaintiff asserts a right, which the defendant denies. Under such circumstances, it has heretofore been supposed that the parties are entitled to a regular trial, either with or without a jury, as they may elect, to determine whether this right exists or not. This is perhaps the first time where, in advance of the trial, against the protests of one of the parties, the case has been taken up, the evidence heard, and the merits of the action decided upon a simple motion,—decided, too, against a plaintiff whose evidence made at least a *prima facie* case, such a case as would have prevented a nonsuit upon a trial. Unquestionably, before it could be determined that the action was collusive, it was necessary to decide the very point in dispute between the parties; that is, that the plaintiff was holding the title to

19 L. R. A.

the property in trust for the defendants. If he was not, if, as he alleged and testified, it was absolutely his, and they were wrongfully detaining it from him, then there was no collusion in commencing the action, nor in maintaining it. In determining this point against him, the court decided in the defendants' favor the only defense they could possibly have made, had they been allowed to answer. Usually, after a claim legal upon its face is sufficiently stated in a complaint, and the defendant has lost the right to make any defense, judgment goes against him as a matter of course. But here, after this right had been lost, the defendants were allowed, upon a mere motion, to make their whole defense, and in a much more expeditious manner than they could had they been permitted to answer. I say the defendants were allowed, because the proposition that Mr. Baker, who had been their attorney through all these years of litigation, made this motion, not in their interest, but as an *amicus curia*,—a friend of the court,—is too transparent for sober consideration.

2. If the transaction was just what the defendants claim it to have been, if the plaintiff took the title to the property in trust for the defendants, and commenced the action in their interest, it also appears clearly enough that this was done for the purpose of obtaining some unfair advantage of Townshend or his creditors. It is hard to determine just what their ideas were, probably owing to the fact that they themselves did not have a clear perception of them, but it is safe to say that men do not resort to such crooked methods for honest purposes. The bill of sale, vesting the legal title to the property in the plaintiff, was, in my judgment, under the circumstances, equivalent to the deed in *Peterson v. Brown*, 17 Nev. 175, and brings the case directly within the principles there laid down. In the attempt to overreach someone else, through the treachery of their confederate, they have been caught in their own trap, and neither law nor justice calls upon the courts to interfere in their behalf. Why this should be the rule has been so clearly and fully stated in the last-mentioned case that I refrain from saying more concerning it.

A fictitious case is one where, without there being any real litigation between the parties, a pretended case is presented, in which it is sought to obtain an authoritative decision of some point of law that will, as a precedent, determine the rights of others, who may have a real controversy with the parties to this collusive proceeding. This constitutes a fraud upon the third person, as well as the court, because it is highly probable that only one side will be properly presented or argued, and that consequently a biased decision will be rendered, that will affect their rights without their being heard. This is not that kind of a case. There is no question of law to be decided here, nor, whatever may have been the purpose in the beginning, will the result affect any third person. This is a case of attempted fraud, where the parties to the attempt, after going a certain length, and after, perhaps, reaping

all the benefits they expected from their acts, have fallen out, the same as they did in *Peterson v. Brown*, and now the defendants are trying to relieve themselves from a position which they have voluntarily assumed, by showing that the bill of sale was not made, and the action based thereon was not brought, bona fide, but for the purpose of deceiving and overreaching others. To permit them to do this is to allow them to plead their own fraud in avoidance of the

consequences of their acts. Of course, the plaintiff did not demand a jury trial upon the hearing of the motion. He would not have been entitled to it, if he had; for juries are not called to decide motions. Upon this point the error of the court consists in hearing and deciding, upon a mere motion, the entire merits of the action, without a trial of any kind, either with or without a jury. I think the judgment should be reversed.

### MASSACHUSETTS SUPREME JUDICIAL COURT.

Albert LILIENTHAL *et al.*

v.

SUFFOLK BREWING CO.

(....Mass....)

1. An oral condition that an order shall "be no sale" if the market price is not as it is represented, is a condition subsequent and not precedent and cannot be proved to affect the terms of an unconditional written order.

2. False statements as to the market price of hops, made to the president of a brewing company to induce the purchase of a carload, do not justify its rescission where he said as to the statements first made that he did not believe them, and as to others that he had no means of information, and in addition made an oral condition on giving a written order for the hops that it should be no sale if the price was not as represented.

(June 27, 1891.)

**R**EPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court, after directing a verdict in favor of plaintiffs of an action brought to recover damages because of defendant's refusal to comply with his alleged contract to accept and pay for certain hops. *Judgment on the verdict.*

The facts sufficiently appear in the opinion. *Messrs. Warren & Brandeis*, for plaintiffs:

The evidence offered to prove the alleged condition was inadmissible.

It tended to show only, that the contract made contained a term not set out in the written memorandum, a condition subsequent, by

which the defendant's obligation might be discharged, and not that, owing to a condition precedent, the defendant had never assumed any obligation.

*Hunt v. Wyman*, 100 Mass. 198; *Gordon v. Nieman*, 118 N. Y. 152; *Reynolds v. Robinson*, 87 Hun, 561; *Foley v. Cowgill*, 5 Blackf. 18; *Brewster v. Potruff*, 55 Mich. 129; *Daley v. W. W. Kimball Co.* 67 Iowa, 183; *Dulaney v. Burke* (Idaho) March 5, 1890; *Davis v. Randall*, 115 Mass. 547; *Fits v. Comey*, 118 Mass. 100; *Squires v. Amherst*, 5 New Eng. Rep. 143, 145 Mass. 192; *Chemical Electric Light & Power Co. v. Howard*, 150 Mass. 495; *Gried v. Lomas*, 86 Ala. 183; *Masonic Temple Assn. v. Channell*, 48 Minn. 353; *Nicholson v. Reeves*, 94 N. C. 559; *Hubbard v. Marshall*, 50 Wis. 323.

The elements necessary to establish the defense of false representations are a misrepresentation, by the party charged, of a material fact, not within the observation of the other party, the person making the representation either knowing it not to be true, or having no knowledge on the subject, and making it with utter disregard to its truth or falsity."

*Cooper v. Lovering*, 106 Mass. 77, 79.

The statements made in this case were not representations of facts, but expressions of opinion and judgment. *Brown v. Castles*, 11 Cush. 348; *Hemmer v. Cooper*, 8 Allen, 384; *Manning v. Albee*, 11 Allen, 520, 522; *Richardson v. Noble*, 77 Me. 390; *Bourn v. Davis*, 76 Me. 223; *Foley v. Cowgill*, 5 Blackf. 18; *Oronk v. Cole*, 10 Ind. 485; *Grafenstein v. Epstein*, 23 Kan. 448.

Such statements are mere instances of "dealer's talk" and unaccompanied, as they were in the case at bar, by the affirmation of any specific facts to induce belief, afford no ground,

**NOTE.**—Sales not affected by oral conditions subsequent.

The misrepresentation which will vitiate a contract of sale must relate to a material matter constituting an inducement to the contract, respecting which the complaining party had no means of knowledge, and upon which he relied, and by which he was actually misled to his injury. *Slaughter v. Gerson*, 80 U. S. 18 Wall. 379, 20 L. ed. 637; *Smith v. Richards*, 38 U. S. 13 Pet. 28, 10 L. ed. 48; *Powell v. Adams*, 96 Mo. 568.

An executed contract will not be rescinded in equity for representations which are mere expressions of opinion, or for errors as to facts, which did not change the conduct of the parties. *Johanson v. Stephanson* (U. S.) 23 L. ed. 1009.

12 L. R. A.

If a purchaser does not avail himself of the means of knowledge within his reach, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations. *Slaughter v. Gerson*, *supra*.

Where there has been an innocent misrepresentation or misapprehension it does not authorize a rescission of the contract unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken so as to constitute a failure of consideration. *Kennedy v. Panama, N. Z. & A. R. Mail Co.* L. R. 2 Q. B. 560.

Conditional sales. See notes to *Daugherty v. Fowler* (Kan.) 10 L. R. A. 314; *Hineman v. Matthews* (Pa.) 10 L. R. A. 238; *Hays v. Jordan* (Ga.) 9 L. R. A. 373; *Dunn v. State* (Ga.) 3 L. R. A. 190.

even if willfully false, for avoiding a contract.

*Medbury v. Watson*, 6 Met. 246, 259; *Veasey v. Doton*, 8 Allen, 880; *Parker v. Moulton*, 114 Mass. 99; *Poland v. Brownell*, 181 Mass. 188; *Deming v. Darling*, 3 L. R. A. 743, 148 Mass. 504.

The facts were "within the observation" of the defendant.

Having had full means of informing himself, his reliance was not reasonably placed on the statements made, and even if those statements had been willfully false representations as to material facts, they would afford no defense.

*Salem India Rubber Co. v. Adams*, 28 Pick. 256, 265; *Brown v. Leach*, 107 Mass. 864, 868; *Savage v. Stevens*, 126 Mass. 207.

It is only when the knowledge is peculiarly in the possession of one party that his statement can be relied on by the other.

*Noulan v. Cain*, 8 Allen, 261; *Burns v. Lane*, 138 Mass. 350, 356.

The market value of a commodity has repeatedly been held not to be a fact peculiarly within the knowledge of one party, at least where the other has means of information.

*Foley v. Cowgill*, *Orank v. Cole*, *Grafenstein v. Epstein* and *Poland v. Brownell*, *supra*.

*Messrs. Alfred Hemenway and H. F. Naphen*, for defendant:

False representations for the purpose of avoiding a contract must be material, inducing the contract.

*Reese River Mining Co. v. Smith*, L. R. 4 H. L. 64; *Newbigging v. Adam*, L. R. 84 Ch. Div. 583.

It is enough that the statement is untrue and relied upon. It is no defense that one had means of discovering the truth.

*Redgrave v. Hurd*, L. R. 20 Ch. Div. 1.

The principal is responsible for his agent's misstatement.

*White v. Sawyer*, 16 Gray, 586; *Bennett v. Judson*, 21 N. Y. 288; *Locke v. Stearns*, 1 Met. 560; *Jeffrey v. Bigelow*, 18 Wend. 518; *Udell v. Atherton*, 7 Hurlst. & N. 172; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Blackburn v. Vigors*, L. R. 17 Q. B. Div. 553-559; *Fuller v. Wilson*, 8 Q. B. 68; *Dobell v. Stevens*, 8 Barn. & C. 623; *Rogers v. Hadley*, 3 Hurlst. & C. 227.

The market value of a staple like hops is a fact, not an opinion.

*Whitney v. Thacher*, 117 Mass. 523.

It is not needful that the defendant be fraudulently induced to forbear inquiry if he really relied on statement of plaintiffs' agent.

*Hogan v. Wirted*, 188 Mass. 270; *Litchfield v. Hutchinson*, 117 Mass. 195; *Lewis v. Jewell*, 151 Mass. 345; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, and cases there cited; *Pedrick v. Porter*, 5 Allen, 824; *Jewett v. Carter*, 132 Mass. 835.

The condition precedent to this paper becoming a contract was that the market price September 10 should be found by the defendant's treasurer to be thirty cents.

The paper was delivered in a way analogous to a deed delivered as an escrow.

*Pym v. Campbell*, 6 El. & Bl. 570; *Bannerman v. White*, 10 C. B. N. S. 844, 31 L. J. C. P. 28-31; *Wallis v. Littell*, 11 C. B. N. S. 369-375; *Murray v. Stair* 2 Barn. & C. 82; *Wilson* 19 L. R. A.

*v. Powers*, 181 Mass. 539; *Bell v. Ingestre*, 13 Q. B. 817; *Lloyd v. Howard*, 15 Q. B. 995-1000; *Gorgerly v. Outhbert*, 2 Bos. & P. (N. R.) 170.

*Holmes, J.*, delivered the opinion of the court:

This is an action of contract for refusing to accept and pay for seventy bales of hops bought of the plaintiffs by the defendant. The defenses are that the defendant was induced to make the contract by the fraudulent representations of the plaintiff's agent, one Horst, as to the market price of hops, and that the agreement was made subject to a condition on the same matters, which was not satisfied. According to the testimony of Smith, the defendant's president, who made the bargain with Horst, Horst called on him several times trying to sell hops. On a Saturday, Horst said hops were worth twenty-five cents and Smith told him he didn't care, he didn't believe hops were worth twenty-five cents. On the next Monday, September 10, 1888, Horst called again and said that hops had advanced very much since last week, that they were now thirty cents a pound. Smith said he didn't care, he wasn't in want of hops. But being urged said, "If hops are going as you say very high, I will buy ten bales and run the risk, at thirty cents a pound." Horst refused and pulled out some telegrams, written in hieroglyphics, stating that hops before a week would be thirty-five cents. Smith told him he had no means of information; at all events he was not in the market for hops; but after a good deal of urging told him he would sign a memorandum for a carload of seventy bales on the condition that "when I return from Canada and find out that it was not the market price it will be no sale." At the same time Smith signed and delivered a memorandum for the defendant: "We have this day bought of Lillenthal Bros. seventy bales," etc., stating the terms of the bargain and mentioning no condition. On the 13th the plaintiffs wrote confirming the sale and thanking the defendant. Smith further testified that on his return from Canada on September 24 he found that the best hops in Boston were offered for twenty-five cents on September 10, and we will assume there was other evidence that that or about that was the market price. On September 25, Smith wrote the plaintiffs acknowledging their letters and saying nothing of the alleged condition, but complaining that "although of course I had no business to be ignorant of the state of the market," Horst had misrepresented it, and that unless there was some concession he should not accept the hops. Later the hops were refused.

So far as the alleged condition goes, it seems to us impossible to construe it as a condition precedent to the existence of the contract, as in *Wilson v. Powers*, 181 Mass. 539. The language testified to imports that a contract has been made or is about to be made, which is to be off in a certain event thereafter, not that the defendant will make a contract with the plaintiffs at some time in the future in case Smith finds Horst's statement to be true. The common sense of

the thing and the correspondence of the parties, if consistent with the existence of any condition at all, leads to the same result. The plaintiffs assume in their letter that a sale has taken place. The defendant in his answer does the same thing. He says he gave Horst an order for seventy bales, and his suggestion that Horst misrepresented the market price as a ground for a concession is quite inconsistent with the notion that the moment only then had arrived for making a contract and that its existence depended on what he should then have discovered for himself touching the market price.

It is admitted that if the alleged condition was a condition subsequent the defendant was not entitled to prove or to rely upon it. There could be no argument that it was a subsequent modification of the written memorandum. It was strictly contemporaneous talk. *Clark v. Houghton*, 13 Gray, 38, 40, 41. This being so, of course the defendant could not modify by spoken words the effect of a writing signed by it, which purported to set forth all the terms of the bargain and to bind the defendant unconditionally to accept the hops. *Davis v. Randall*, 115 Mass. 547; *Batchelder v. Queen Ins. Co.* 185 Mass. 449; *Gordon v. Nieman*, 118 N. Y. 153; *Daly v. W. W. Kimball Co.* 67 Iowa, 182.

As the foregoing considerations justify the ruling of the court below that the alleged condition was no defense, we need go no further.

Next, as to fraud. Prima facie a statement

to an experienced dealer in hops as to the market value of the article he is asked to buy is dealer's talk on a subject about which the seller has a right to assume that the buyer will make up his mind for himself, the means of information being equally open to both. *Manning v. Albee*, 11 Allen, 520, 523; *Poland v. Brownell*, 181 Mass. 188; *Deming v. Darling*, 148 Mass. 504, 2 L. R. A. 743; *Foley v. Cowgill*, 5 Blackf. 18; *Cronk v. Cole*, 10 Ind. 485; *Graffenstein v. Epstein*, 23 Kan. 443. Assuming, for the sake of argument, that a case might be supposed in which a jury would be warranted in finding from other facts beside the mere making of the representation that the buyer reasonably surrendered his judgment to the seller (*Whiteside v. Brouley*, 153 Mass. 183), this is not such a case. There were no such other facts. Moreover Smith's answer to Horst on Saturday was direct that he did not believe Horst's statement. So on Monday Smith's answer to Horst, that he had no means of information, imported in polite terms that he did not rely upon Horst, and if, as he says, Smith made a condition that if he found the price given was not the market price the sale was to be off, he told Horst in effect that he did not rely upon him but meant to find out for himself. The only fair inference from the evidence for the defendant is that its agent relied, not upon Horst's statements, but upon an oral condition, which fails for the reasons which we have given.

*Judgment on the verdict.*

## OREGON SUPREME COURT.

William PEABODY, *Resp't.*,

OREGON RAILWAY & NAVIGATION  
CO., *App't.*

(Ort. Or.....)

\*1. It is the duty of a passenger, if he has not the required ticket or token evi-

\* Head notes by LORD, J.

**NOTE.**—Ejection of passenger for refusal to pay fare.

Many lines of strict analogy in a case recently decided by the New York Court of Appeals necessitate its production in this immediate connection. That case is authority for the proposition that a regulation of a railroad company requiring passengers either to present evidence to the conductor of a right to a seat, when reasonably required so to do, or to pay fare, is reasonable; and for noncompliance therewith a passenger may lawfully be put off the train. And the wrongful taking of the passenger's ticket by the conductor of a previous train, in which the former had performed part of his journey, does not exonerate him from compliance with this regulation. *Townsend v. New York C. & H. R. R. Co.* 56 N. Y. 286.

In *Cheney v. Boston & M. R. Co.* 11 Met. 121, the plaintiff purchased a ticket for a passage from Dunham to Boston. It was a rule of the defendant that a passenger should go through in the same train of cars. The plaintiff, after taking his seat,

denying his right to travel on that train, to pay his fare or quietly leave the train when requested, and resort to his appropriate remedy for the damages he has sustained; and if he attempts to retain his seat without paying his fare, and is expelled by the conductor, using no more force than is necessary, he can recover no damages for the injury incurred by such expulsion.

2. When it is admitted that a railroad company is the owner of a railroad then being operated, a presumption arises that

was so informed, and remonstrated. He stopped at an intermediate place, and went aboard of the next train and was required to pay fare again. The action was for money had and received and for breach of contract. The court held that the plaintiff could not recover. This case is, in principle, in point. See also *Pierce*, Am. Railway Law, 421.

A regulation made by a railroad corporation requiring passengers to exhibit their tickets whenever requested by the conductor, and directing the ejection from the cars of those who should refuse to do so, is a reasonable and proper one. The passenger is bound to conform to such regulation, and forfeits his right to be carried further by his refusal to comply with it. *Hibbard v. New York & E. R. Co.* 15 N. Y. 455.

If the plaintiff had forfeited his right to be carried as a passenger by refusing to show his ticket when requested to do by the conductor, and if the right was not restored by subsequently complying, then his expulsion was lawful and he has nothing to complain of, unless greater force and violence

the same is operated by the company owning it, and the burden of proof is upon such company to show to the satisfaction of the jury that such is not the fact.

(June 24, 1891.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Wasco County in favor of plaintiff in an action brought to recover damages for plaintiff's alleged wrongful expulsion from defendant's train. *Reversed.*

The facts are stated in the opinion.

*Messrs. W. W. Cotton and Gilbert & Snow*, for appellant:

The right of a passenger by virtue of his payment of fare is a right to a continuous ride, though the railway company, through its authorized agents, may by express agreement provide otherwise.

*Drew v. Central Pac. R. Co.* 51 Cal. 425; *Wyman v. Northern Pac. R. Co.* 84 Minn. 210, 23 Am. & Eng. R. R. Cas. 402; *Townsend v. New York Cent. & H. R. Co.* 56 N. Y. 295.

As between passenger and conductor, and the expulsion of the former by the latter, the passenger must have what has been required by the regulations of the company as conclusive evidence of a right to ride.

*Hubbard v. New York & E. R. Co.* 15 N. Y. 455; *Townsend v. New York Cent. & H. R. Co.* 56 N. Y. 299; *Mosher v. St. Louis, I. M. & S. R. Co.* 28 Fed. Rep. 326, 127 U. S. 890, 32 L. ed. 249; *Hall v. Memphis & O. R. Co.* 15 Fed. Rep. 57; *Bradshaw v. South Boston R. Co.* 185 Mass. 407, 16 Am. & Eng. R. R. Cas. 886; *Petrie v. Pennsylvania R. Co.* 43 N. J. L. 449;

were used than his own resistance rendered necessary. *Ibid.*

The Wisconsin Court of Appeals, in a unanimous opinion delivered by Chief Justice Cole, referring to the case of *Townsend v. New York Cent. & H. R. Co.*, *supra*, says: "The court held that he was lawfully put off the train, notwithstanding the wrongful act of the previous conductor in taking his ticket. The case is well considered, and the opinion by Judge Grover is very instructive. Substantially the same doctrine as to the rights and duties of passengers is laid down in *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Downs v. New York & N. H. R. Co.* 38 Conn. 287; and *McClure v. Philadelphia & W. B. R. Co.* 34 Md. 532." See *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 239, 6 Am. & Eng. R. R. Cas. 322.

In the case last above cited it was held: A regulation by a railway company by which one who has paid his fare between two points on the road, who desires to stop over at an intermediate point, is required to procure a stop-over ticket from the conductor and present it to the conductor of the train on which he seeks to complete his journey, as evidence of his right to do so without further payment, is a reasonable regulation.

A passenger holding a ticket, the limitation of which has expired, cannot insist that the conductor shall take it in violation of a regulation of the company requiring the conductor to demand train fare of persons without tickets, although he may have an understanding or contract with the station agent of whom the ticket was purchased that it would be received after the time limited on the face of it; and on the refusal to pay the fare, ejection from the train would not be wrongful. The measure of damages in a suit for a breach of the alleged contract is, in the absence of proof of any special

*Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 618; *Pullman Palace Car. Co. v. Reed*, 75 Ill. 125; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Prince v. International & G. N. R. Co.* 64 Tex. 146; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174; *Frederick v. Marquette, H. & O. R. Co.* 87 Mich. 342; *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich. 277; *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 118; *Willets v. Buffalo & R. R. Co.* 14 Barb. 590; *Hill v. Syracuse, B. & N. Y. R. Co.* 63 N. Y. 101; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 239; *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276; *Louisville & N. R. Co. v. Fleming*, 14 Lea. 128, 18 Am. & Eng. R. R. Cas. 347; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; *Downs v. New York & N. H. R. Co.* 38 Conn. 287; *Jerome v. Smith*, 48 Vt. 280.

The action in this case was grounded upon a supposed lawfulness on the train, arising from what plaintiff contended was a right, growing out of mere contract, and without any evidence of his right to exhibit to the officers in charge of the train. For the damage recovered in this action, this character of action was improperly brought.

*Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Mosher v. St. Louis, I. M. & S. R. Co.* 28 Fed. Rep. 326, 127 U. S. 890, 32 L. ed. 249; *St. Louis & K. O. R. Co. v. Marshall*, 78 Mo. 610, 18 Am. & Eng. R. R. Cas. 248.

Where a party has no evidence of his right to ride, but has in fact some contract which might give him a right if specifically enforced, he cannot undertake its specific performance, invite force for his expulsion, and then, having

damage by delay, only the price of the extra fare demanded and paid for transportation to the place of destination. *Hall v. Memphis & C. B. Co.* 15 Fed. Rep. 57, 9 Am. & Eng. R. R. Cas. 348.

In another case the conductor, when the ticket was presented, saw no stamp upon it. The plaintiff had not been identified, and the rules of the company, binding upon him as a conductor, required him to remove the party unless he paid his fare. *Mosher v. St. Louis, I. M. & S. R. Co.* 28 Fed. Rep. 326.

A rule directing conductors to remove from the cars those who refuse to comply with the requirement is reasonable. The fact that a ticket has been purchased by a passenger, which was afterwards wrongfully taken up by a conductor of one of the defendant's trains, will not relieve the passenger from the duty of providing himself with a ticket or paying fare on another train of the defendant in which he may be a passenger. In such case, the right of action of the passenger would be for the wrongful taking up of the ticket, and not for having been removed from a train by another conductor for refusing to pay fare. *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214.

A passenger who is without a ticket and declines to pay full fare may ordinarily be ejected from a train at a station, as one may who absolute refuses to pay his fare. *State v. Gould*, 58 Me. 279; *Stephen v. Smith*, 39 Vt. 160; *Hilliard v. Gould*, 34 N. H. 230. See also *Swan v. Manchester & L. R. Co.* 122 Mass. 116.

For rules and regulations respecting passengers and their ejection for non-payment of fare, see notes to *McGowan v. Morgan's L. & T. R. & S. Co.* (La.) 5 L. R. A. 817; *McKay v. Ohio River R. Co.* (W. Va.) 9 L. R. A. 128; *South Florida R. Co. v. Rhoads* (Fla.) 3 L. R. A. 783.



aggravated his damage, recover for that which he himself has brought about.

*Townsend v. New York Cent. & H. R. R. Co.* 56 N. Y. 298; *Hall v. Memphis R. Co.* 9 Fed. Rep. 585; *Ha'l v. Memphis & O. R. Co.* 15 Fed. Rep. 57, 9 Am. & Eng. R. R. Cas. 848; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 18 Am. & Eng. R. R. Cas. 389; *Atchison, T. & S. F. R. Co. v. Gants*, 88 Kan. 618; *Bradshaw v. South Boston R. Co.* 185 Mass. 407; *Houston & T. C. R. Co. v. Ford*, 53 Tex. 364; *Lake Shore & M. S. R. Co. v. Piers*, 47 Mich. 263; *Fredrick v. Marquette, H. & O. R. Co.* 87 Mich. 342; *Louisville & N. R. Co. v. Fleming*, 14 Lea. 123, 18 Am. & Eng. R. R. Cas. 847; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125.

**Mr. Alfred S. Bennett**, for respondent:

Where a railroad company is shown to be the owner of a line of road, and that line is being operated, and trains of cars run upon it, a presumption arises that the same is being run and operated by the company owning it, and the burden of proof is upon the company to show to the satisfaction of the jury that this is not the case.

*Ferguson v. Wisconsin Cent. R. Co.* 63 Wis. 145; *Patterson, Railway Accident Law*, § 379.

A railway is liable where it permitted tickets to be issued in its name for transportation.

*Patterson, Railway Accident Law*, § 182; *Lockhart v. Little Rock & M. R. Co.* 40 Fed. Rep. 631; *Washington, A. & G. R. Co. v. Brown*, 84 U. S. 17 Wall. 445, 21 L. ed. 675; *Bower v. B. & S. W. R. Co.* 42 Iowa, 546.

The plaintiff had a right to rely upon the receipt given to him by the conductor of the first train, and upon his representations and promise that upon that receipt he could stop over at The Dalles and ride up on the next train; and having gone upon the second train with that receipt, and pursuant to the representations and agreement of the first conductor, he was lawfully upon the defendant's train, and his expulsion therefrom was unlawful, and he could recover damages for such ejection.

*Toledo, W. & W. R. Co. v. McDonough*, 58 Ind. 289; *Burnham v. Grand Trunk R. Co.* 63 Me. 298; *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63; *Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 631; *Murdock v. Boston & A. R. Co.* 137 Mass. 298; *Wightman v. Chicago & N. W. R. Co.* 2 L. R. A. 185, 78 Wis. 169; *St. Louis, A. & T. R. Co. v. Mackie*, 1 L. R. A. 667, 71 Tex. 491; *Baltimore & O. R. Co. v. Bambrey* (Pa.) Nov. 5, 1888; *Georgia R. & Bkg. Co. v. Murden*, 83 Ga. 753; *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381; *Godfrey v. Ohio & M. R. Co.* 116 Ind. 30; *Pittsburg, O. & St. L. R. Co. v. Hennigh*, 39 Ind. 509; *Pennsylvania R. Co. v. Bray*, 125 Ind. 229; *Hamilton v. Third Ave. R. Co.* 53 N. Y. 25; *English v. Delaware & H. C. Co.* 66 N. Y. 454; *Maples v. New York & N. H. R. Co.* 58 Conn. 557; *Tarbell v. Northern Cent. R. Co.* 24 Hun. 51; *Palmer v. Charlotte, O. & A. R. Co.* 3 S. C. 580, 16 Am. Rep. 750; *Head v. Georgia Pac. R. Co.* 79 Ga. 358.

The regulations of a railroad company and its instructions to its conductors are not in any way binding upon the plaintiff, unless they were brought to the knowledge of the plaintiff at the time he made his contract, and before he went upon its train.

12 T. R. A.

*McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124; *Sullivan v. Philadelphia & R. R. Co.* 30 Pa. 238; *Hufford v. Grand Rapids & I. R. Co.*, *Head v. Georgia Pac. R. Co.* and *St. Louis, A. & T. R. Co. v. Mackie*, *supra*; *Chicago, St. L. & P. R. Co. v. Holdridge*, 118 Ind. 281; *Georgia R. & Bkg. Co. v. Murden*, *Burnham v. Grand Trunk R. Co.*, *Toledo, W. & W. R. Co. v. McDonough* and *Hamilton v. Third Ave. R. Co. supra*; *English v. Delaware & H. Canal Co.* 66 N. Y. 454.

Plaintiff, having paid his fare from Portland to Grant's, and having gone upon the train in accordance with the provisions of the contract made with the defendant Company by its agent, and not having any notice of any contrary regulation until after he had commenced his journey, was not compelled to pay extra fare or leave the train; but he might stand upon his rights, and if defendant's servants forcibly and wrongfully ejected him, recover damages for any injury which he suffered by reason of such ejection.

*English v. Delaware & H. Canal Co. supra*; *Toledo, W. & W. R. Co. v. McDonough*, 58 Ind. 289; *Pittsburg, O. & St. L. R. Co. v. Hennigh*, 39 Ind. 509; *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381; *Godfrey v. Ohio & M. R. Co.* 116 Ind. 30; *Pennsylvania R. Co. v. Bray*, 125 Ind. 229; *Burnham v. Grand Trunk R. Co.* 63 Me. 298, 18 Am. Rep. 220; *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63; *Head v. Georgia Pac. R. Co.* 79 Ga. 358; *Clendenin v. Memphis R. Co.* 15 Fed. Rep. 69, *note*; *Wightman v. Chicago & N. W. R. Co.* 2 L. R. A. 185, 78 Wis. 169; *St. Louis, A. & T. R. Co. v. Mackie*, 1 L. R. A. 667, 71 Tex. 491; *Baltimore & O. R. Co. v. Bambrey* (Pa.) Nov. 5, 1888; *Poole v. Northern Pac. R. Co.* 16 Or. 261; *Nelson v. Oregon R. & Nav. Co.* 18 Or. 141.

**Lord, J.**, delivered the opinion of the court:

This is an action in tort to recover damages for the wrongful acts of the defendant's agents or servants in ejecting the plaintiff from one of its cars. There are mainly two questions presented by this record, but the controlling one arose substantially out of this state of facts: The plaintiff, who is a stockdealer, had shipped stock from Grant's Station to Portland, and had received from the Railroad Company a shipping contract which entitled him, upon the performance of certain conditions, to a passage from Grant's to Portland and return. Going to the office of the Company earlier than its business hours, he was unable to get the ticket stamped, and otherwise perform its conditions so as to ride upon it, without taking a later train, so he went on the train then ready, and seated himself in the car. When the conductor came around for tickets, he presented to him his shipping contract, but it not being stamped, etc., as required, the conductor refused to receive it, and informed him that he must pay his fare, which the plaintiff did, giving the conductor a \$20 gold piece, from which the amount of his fare from Portland to Grant's was to be taken. At this time, according to his testimony, he asked the conductor if he would be allowed to stop over at The Dalles, and go to Grant's on the next train, to which the conductor replied that he could do so, and that it would be all right.

The conductor, not being able to make the necessary change for the fare, after an absence of about twenty minutes, during which time he was engaged in taking up tickets, etc., returned with the change and a drawback check, which he delivered to the plaintiff. Upon the back of the drawback check was a receipt for the fare, but the check itself had printed upon it in large and legible words, "Good for this day and train only." The plaintiff does not seem to have given any attention to the check, or what was written or printed upon it, but, acting upon the assurance of the conductor that he would be permitted to stop over at The Dalles, he did so, and, after remaining some hours, he took another train for the completion of his journey to Grant's. A short time after he entered upon this train, the conductor called upon him for his ticket, and he presented the drawback check and the receipt, which the conductor refused to accept, stating that it did not entitle him to ride upon that train, when he then explained to him the circumstances under which it was delivered to him by the other conductor, and claimed the right to continue his ride to Grant's Station. The conductor told him that he was required by the rules and regulations of the Company to collect fare, or a ticket entitling the passenger to ride, and that none of the papers which he had presented entitled him to ride on that train, and that, unless he paid his fare, his duty would require him to expel him from the cars. After waiting until the train had proceeded several miles and arrived at a station, the conductor informed him that, unless he paid his fare, he would be under the necessity of requiring him to leave the train. The plaintiff pointedly refused to leave or to pay his fare, when the conductor finding he would do neither one nor the other, with the aid of the brakeman undertook to expel him from the car, which the plaintiff resisted with all his force, and manifested a disposition to fight, but when finally expelled from the train he tendered his fare, was received again on the train, and carried to his destination. His own evidence concedes that the duty of expelling was an unpleasant task to the conductor, and performed under the circumstances indicated. From this statement of the facts it is apparent that the plaintiff was without any proper evidence or token of his right to transportation on that train, other than his statements to the second conductor of the oral representations of the other conductor of such permission. Although a disputed fact at the trial, the conductor denying he ever made such representations or gave such permission, we shall assume its verity after verdict. Under such circumstances, was it the duty of the plaintiff, when notified by the conductor that he could not receive the drawback check, to pay his fare under protest, or leave the train without rendering it necessary for the conductor to resort to force to secure his removal. The drift of the defendant's contention is that it is a recognized right of every railroad company to make such reasonable rules and regulations for the conduct of its business as may be necessary, and that it is a reasonable exercise of this right to require that every passenger shall, when called upon by the conductor, present a ticket conforming to its reasonable

rules and regulations, or, if he is unable so to do, that he shall pay his fare, but if he cannot produce the required ticket, and refuses to pay his fare, that he may be lawfully ejected from the train. In this view, as between the plaintiff and the conductor of the train from which he was expelled, unless he could produce the required ticket as evidence of his right to ride on that train, or in default thereof to pay his fare, the conductor would not be authorized to allow him to proceed to his destination on such train on his statement of the oral representations of the other conductor, inconsistent with the face of his ticket, and contrary to the rules and regulations of the Company. To that conductor the ticket which the plaintiff produced was to be taken as conclusive evidence of his right to travel on that train, and, it failing, the conductor could not receive the statements of the plaintiff contradicting its plain terms, and allow him to retain his seat. Upon this assumption, when the plaintiff was unable to produce the required ticket evidencing his right to travel on that train, and refused to pay his fare or to leave the train when requested, stopped at a proper place, the conductor was authorized lawfully to expel him from the train, and the defendant is not responsible in damages for injuries incurred in resistance to such expulsion. Summed up, then, the considerations in support of the principle invoked are: That as between the conductor and passenger, the right of the latter to ride must be evidenced by some proper token or ticket; that neither the time nor the occasion is suitable for an investigation, whether of explanation, or representations of another conductor in conflict with the terms of the ticket, and contrary to the rules of the Company; that it is better, under such circumstances, that the passenger comply if he is unable to produce the required ticket, and pay his fare, or leave the train quietly, and suffer the temporary inconvenience which results, than that the business of the road be interrupted to the annoyance of the traveling public; that such a course would avoid all liability to unseemly struggles, often occurring in the presence of women and children, and prevent breaches of the peace, and at the same time secure the passenger ample redress in the remedies which the law provides. The application of this principle includes a variety of cases, as where the passenger is unable to produce any token or ticket as evidence of his right to ride, or the ticket which he does produce is irregular or defective, due to the fault or negligence of the agents of the company.

In *Frederick v. Marquette, H. & O. R. Co.*, 37 Mich. 342, the plaintiff held an insufficient ticket, caused by the fault of the company's agent in delivering to him a ticket to the wrong station. He asked and paid for a ticket to a given station, and received what he supposed was such ticket, but which on its face was only good to a point short of his destination. In passing upon this question the court observed: "How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company, where a ticket is purchased and presented to him? Practically there are but two ways,—one, the evidence offered him by the ticket; the other,

the statements of the passenger contradicted by his ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind, and the benefit of a cross-examination. At common law, parties interested were not competent witnesses, and even under our Statutes the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and cannot be procured. Yet here would be an investigation as to the terms of the contract where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the statement of the interested party. I doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. As between conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as evidence of his right to the seat he claims. Where a passenger has purchased a ticket, and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him a wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case."

In *Townsend v. New York Cent. & H. R. R. Co.*, 56 N. Y. 295, the court says: "The question in this case is whether a wrongful taking of a ticket of a passenger by the conductor of one train exonerates him from compliance with the regulations on another on which he wishes to proceed upon his journey. I am unable to see how the wrongful act of the previous conductor can at all justify the passenger in violating the lawful regulations upon another train. . . . The conductor of the train upon which he was not bound to take his word that he had had a ticket showing his right to a passage to Rhinebeck, which had been taken up by the conductor on the other train. His statement to that effect was wholly immaterial, and it was the duty of the conductor to the company to enforce the regulation, as was repeatedly held by the trial judge, by putting the plaintiff off in case he persistently refused to pay fare. The question is whether, under the facts found by the jury, his resistance in the performance of this duty was lawful on the part of the plaintiff. If so, the singular case is presented where the regulation of the company was lawful, where the conductor owed a duty to the company to execute it, and at the same time the plaintiff had a right to repel force by force, and to use all that was necessary to retain his seat in the car. Thus a desperate struggle might ensue, attended by very serious consequences, when both sides were entirely in the right, so far as either could ascertain. All this is claimed to result from the wrongful act of the conductor of another train in taking a ticket from the plaintiff, for which wrong the 12 L. R. A.

plaintiff had a perfect remedy without inviting the commission of an assault and battery by persisting in retaining a seat upon another train, in violation of the lawful regulations by which those in charge were bound to govern themselves.

In *Yorton v. Milwaukee, L. S. & W. R. R. Co.*, 54 Wis. 284, the plaintiff had purchased a ticket to the place of his destination, and asked the conductor for a stop-over ticket, and, through the fault or mistake of the conductor, he received a trip or train check instead of a stop-over ticket for which he asked, and which the conductor undertook to give him. The conductor of the second train refused to recognize it for fare, and demanded passage money or a ticket, which being refused, the plaintiff was ejected from the train. The court says: "Then the question arises, Was the plaintiff entitled to ride on a subsequent train, not having the proper stop-over check, or was the second conductor justified, under the circumstances, in putting him off the train when he refused to pay his fare? . . . He was perfectly justified in ejecting plaintiff from his train when plaintiff had no proper voucher, produced no sufficient evidence of his right to ride thereon, and refused to pay fare, and he himself was ignorant of the transaction between plaintiff and Conductor Sherman [the first conductor]. It seems to us there was no other course for him to pursue under the rules of the company, for he was certainly not bound to take the plaintiff's word that he had paid his fare, and that Sherman had made a mistake in not giving him a stop-over check. It is apparent that the right of plaintiff to ride on the train without a proper voucher, and the right of the second conductor to eject him for want of said voucher, were inconsistent rights. Each could not co-exist at the same time. Mistake or fault of the conductor in not giving him, on request, such a check, would not give him a lawful right to ride on the second train, though he might require damages against the company for the wrongful act of the first conductor."

In *Bradshaw v. South Boston R. Co.*, 185 Mass. 407, the court says: "It is no hardship upon the passenger to put upon him the duty of seeing to it in the first instance that he receives and presents to the conductor a proper ticket or check, or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise the conductor must investigate and determine the question as best he can while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case." See also *Mosher v. St. Louis, I. M. & S. R. Co.* 23 Fed. Rep. 326; *Hall v. Memphis & C. R. Co.* 15 Fed. Rep. 67; *Petrie v. Pennsylvania R. Co.* 42 N. J. L. 449; *Atchison, T. & S. P. R. Co. v. Gants*, 38 Kan. 618; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Louisville & N. A. R. Co. v. Fleming*, 14 Lea, 128; *Pennsylvania R. Co. v. Connell*, 113 Ill. 295; *Prince v. International & G. N. R. Co.* 64 Tex. 146; *Hufford v. Grand Rapids & I. R. Co.* 58 Mich. 118; *Downs v. New York & N. H. R. Co.* 36 Conn. 287; *Jerome v. Smith*, 48 Vt. 230.

On the other hand, the contention for the plaintiff is that when he paid his fare from Portland to Grant's, upon the representation and promise of the conductor that he could stop over at The Dalles and ride upon the next train, and the conductor delivered to him a drawback check with a receipt for the money indorsed on the back thereof, and that, in pursuance of such agreement and promise, he, having stopped over, and then gone upon the second train without notice of any contrary regulation until after he commenced his journey, was not compelled to pay fare or leave the train, but that he was lawfully there, and might stand upon his rights, and, if wrongfully ejected by the conductor, he could recover damages for any injuries which he suffered in consequence of such ejection. Upon the facts there is no doubt but that the plaintiff had no knowledge of the rules or regulations of the Company, and, as the agreement for a ticket with the right to stop over was made before the ticket was delivered, the plaintiff cannot be deemed to have assented to any part of the contract expressed by the ticket different from that made with the conductor. As he wished to make his journey over the road on different trains to accommodate his business engagements, the conductor must be supposed to have known what the rules and regulations required in respect to the matter upon which he desired information. He was the person appointed by the Company to impart the information asked, and to sell and deliver to him a ticket as evidence of his right to ride. This agent assures him that he can pay his fare to Grant's Station, and that he can stop over at the place designated, and the plaintiff, relying upon his representations, pays his fare. His ticket is not delivered to him immediately for want of change, and not until some twenty minutes after his contract or understanding of permission to stop over was made, showing that he parted with his money in reliance upon the contract made or permission given, and not upon a ticket which he had not seen, expressing different terms, or terms inconsistent with his right to pursue his journey upon the next train. When the ticket was delivered to him, supposing that it is sufficient, or that the conductor whose duty it was to furnish it would deliver one conforming to their engagement, and relying upon his contract as made, he puts the ticket into his pocket without observing its terms, or that it expressly limits his right to ride on that day and train only, and stops over at The Dalles; and when he commences his journey on the next train, and his ticket is demanded of him, he is informed by the conductor that it is insufficient, when he explains to him the contract he made with the other conductor, and that he is on that train in pursuance of his assurances and contract, but the second conductor refuses to receive his explanations, and demands of him the payment of his fare, or the alternative of leaving the train, both of which he refuses to do, claiming that he is lawfully upon the train, and resisting with force his expulsion from it. Under such circumstances, the plaintiff contends that the contract established the relation of passenger and carrier, and, if the ticket furnished by its agent was insufficient to notify the second con-

ductor of his right to travel on that train, that it was the negligence of the other conductor, and that he, being without fault, had a lawful right to travel on that train, and might resist his ejection, and, if ejected, he could recover damages for any injury which he suffered by reason of such ejection.

In support of this contention numerous authorities are cited, to which it is not possible to make full reference. Perhaps as strong a case as any is *Head v. Georgia Pac. R. Co.*, 79 Ga. 338, which, like the case at bar, was an action in tort for the expulsion of the plaintiff from the cars of the defendant. By some negligence of the company's agent the plaintiff's ticket was not stamped or signed as required by the conditions of the ticket and the regulations of the company. He presented the ticket for his fare, but it was refused by the conductor, and for his expulsion the court held that he could recover "his proper damages of all sort," and among other things saying: "The company could no more be heard to say that an error was committed by its agent, resulting in a breach of duty on its part to the plaintiff, than it can be heard to say that an error was committed by its own action. . . . He [the plaintiff] had a right to assume that all these agents understood their duties and would perform them; and, if he performed his, he could stand upon his contract, and upon his relation as a passenger which the contract generated."

In *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 68, the plaintiff had gone upon one of the trains of the company with a proper ticket, and the conductor canceled it by mistake, but afterwards attempted to correct it, and assured the plaintiff that it would be all right, and that he could ride upon it on the next train in that condition. It was not properly corrected, and when the plaintiff went upon the returning train and presented the ticket the conductor refused to take it, and the plaintiff, refusing to pay his fare or leave the train, was expelled therefrom. The court says: "The return coupon was canceled through the mistake of the conductor. This error he attempted to correct, and informed plaintiff that it was all right. The latter had a right to rely on this assurance, and that the ticket for which he had paid his money entitled him to return to Wilmington. If the servants of the appellant, under such circumstances, laid their hands forcibly upon the plaintiff, and compelled him to leave the car, there was not merely a breach of contract on the part of the company, but an unlawful interference with the person of the plaintiff and an indignity to his feelings for which an action will lie, and for which he is entitled to be compensated in damages. Such is the well-settled law of this State and of this country. The mistake by which plaintiff's ticket was canceled was the mistake of the appellant's servants, and it must abide the consequences."

In *Hufford v. Grand Rapids & I. R. Co.*, 64 Mich. 681, the plaintiff purchased in good faith of the ticket agent a genuine ticket, issued by the company, which the agent had a right to sell, covering the distance between two stations, and was informed by the agent that it "was good, and entitled him to ride between

said stations." The court says: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out that it was not true, no matter what the ticket contained in words, figures or other marks." See also *Toledo, W. & W. R. Co. v. McDonough*, 58 Ind. 289; *Burnham v. Grand Trunk R. Co.* 23 Me. 298; *Hamilton v. Third Ave. R. Co.* 53 N. Y. 25; *Palmer v. Charlotte, O. & A. R. Co.* 3 S. C. 580; *Lake Erie & W. R. Co. v. Fia*, 88 Ind. 381; *English v. Delaware & H. Canal Co.* 66 N. Y. 454; *Tarbell v. Northern Cent. R. Co.* 24 Hun, 53.

In the case at bar, the plaintiff never had any valid ticket or evidence of his right to ride or travel on the train from which he was expelled. His ticket was not even apparently valid on its face when offered, and is not within the principle or reason of some of the cases cited in support of his contention. That he had paid his fare to his destination, and that the conductor represented that he might stop over at The Dalles, may be admitted, but the ticket he received furnished no evidence of that permission, was inconsistent with it, and when offered it was after the right, according to its terms, had expired to travel upon it. It is not the case of a passenger with a valid ticket entitling him to a ride on the train from which he was ejected, or with such a ticket as he was required to have, and by some mistake or fault of the conductor wrongly canceled, as in *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 68; or surrendered to the proper agent of the Company on demand, and receiving back what the agent believed to be the proper evidence of a right to ride on it, and when presented to the other conductor refused, despite the explanations offered, as in *Lake Erie & W. R. Co. v. Fia*, 88 Ind. 384; or as in *Toledo, W. & W. R. Co. v. McDonough*, 58 Ind. 288; or where the ticket appears upon its face to be good, although not a regular ticket, but which the ticket agent assures the passenger is sufficient, after his attention has been recalled to it, and is afterwards refused by the conductor on the train, as in *Huford v. Grand Rapids & I. R. Co.*, 53 Mich. 118, 64 Mich. 631, or where the plaintiff has paid his fare, and the same conductor to whom he paid it asks for it again, and insists, unless it is paid, that he would put the plaintiff off, and the latter, refusing to pay, is forcibly ejected from the train, as in *English v. Delaware & H. Canal Co.*, 66 N. Y. 454; or where the plaintiff was not guilty of any negligence in accepting his ticket, but carefully examined it, saw everything there was on it, and received explanation of the meaning of the punched holes, and assurances that the ticket in the condition in which it was would be good for the trip, and the conductor refused to receive it, as in *Murdock v. Boston & A. R. Co.*, 137 Mass. 298, and in some other cases cited which might be distinguished. It is true that the principle announced in some of the authorities cited is in conflict with the contention for the defendant, and, while I own some reluctance, it seems to me that the weight of authority and reason, as

applicable to the facts as disclosed by this record, is that it is the duty of the passenger to pay his fare or quietly to leave the train when requested, if he has not the proper ticket, and resort to his appropriate remedy for the damages he has sustained; but that if he attempts to retain his seat without paying his fare, and is expelled by the conductor, he can recover no damages for the injuries incurred by the expulsion. This result will tend to avoid unseemly struggles occurring on railroad trains, usually filled with passengers, including women and children, and thereby prevent breaches of the peace, and at the same time will fully protect the passenger by making the Company responsible for all damages resulting from any breach of its contract. It is not disputed that the business of ejecting the plaintiff was extremely disagreeable to the conductor, and that he made considerable effort to induce the plaintiff to pay his fare or peaceably to leave the train, but that the plaintiff not only insisted on being put off by force, but resisted with all the force he could command. It is hardly necessary to say that no reference is intended to apply to agents of the company who act wantonly or willfully or maliciously, or that a trespasser upon a train can be treated in a willful, wanton or malicious manner.

2. The motion for nonsuit was based principally upon the idea that the evidence for the defendant was the only evidence in the case, and that this so conclusively showed that the defendant had leased its road and ceased to operate it at the time of the injury that the court erred in submitting the case to the jury. The stipulation and pleadings admit that the defendant was the owner of the road. When it is admitted that a railroad company is the owner of a railroad then being operated, a presumption arises that the same is operated by the company owning it, and the burden of proof is upon such company to show to the satisfaction of the jury that such is not the fact. Thus in *Ferguson v. Wisconsin Cent. R. Co.*, 63 Wis. 145, the court says: "When a railroad company owns a railroad in operation, bearing the name of the company, the presumption is that such company operates it, and in order to relieve itself from liabilities for injuries to persons upon such road, caused by the negligence of the employes operating the same, the burden of proof is upon it to show that it does not operate the same." Nor, is it disputed but that at common law the general rule was, where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted their testimony was to be credited, and to have the effect of overcoming a mere presumption. "But this rule," as Rapallo, J., observed, "is subject to many qualifications." *Elwood v. Western U. Telog. Co.* 45 N. Y. 558. Our Code provides that the jury "are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption, or other evidence satisfying their minds." Hill's Code, § 845, subd. 2. This seems to indicate, as was contended, that where a presumption arises in any case the jury are not bound to believe the declarations of a witness, or a number of them, contradicting the presumption, but that the

credibility of such witness or witnesses then becomes a question for them, and, if they are not satisfied of the truthfulness of the evidence of such witnesses, they are not bound to believe it, but may find in accordance with the presumption. The execution of the lease is admitted, but the transfer and possession under it are disputed, and the establishment of that fact is dependent upon the testimony of Mr. Cookingham, and certain telegrams and circulars offered through him for that purpose. The lease itself purports to have been executed in April, 1887, and before the statute for its authorization had gone into effect; but, waiving this, the truth of the transfer and possession, which ought to have been clear and decisive, was vague and unsatisfactory. From the nature of the circumstances, and as Mr. Cookingham stood related to them, it was not possible for him to testify positively or distinctly as to this transaction. Nor do the telegram and circular relied upon to establish the transfer and possession, aided by the testimony of Mr. Cookingham, render the proof in that regard much more definite and satisfactory. Owing to their vagueness as applied to the subject matter in dispute, without his testimony they are of little value as evidence. Much that he testifies to is but hearsay, much mere conclusions, and as to what may be regarded as relevant, it was for the jury to pass upon the weight to be given to his statements in respect thereto, and his credibility. Taking, then,

into consideration the presumption of operation of the road from its ownership, and in addition thereto that the stock contract upon which plaintiff shipped his cattle and rode to Portland was drawn in the name of the defendant Company, and signed by the agent, as the agent of the defendant, for that Company; that the lettering upon its cars and tickets, drawback checks, and other writings, etc., were likewise in the name of the defendant Company; together with the testimony of the plaintiff, keeping in mind that the jury are the judges of the credibility of the witnesses,—it would be difficult on this record to assign any just or legal reason to withdraw the case from the jury. Leaving out of view the question of credibility, before a withdrawal of a case from a jury can be justified, the facts of the case should not only be undisputed, but the conclusion to be drawn from them indisputable. But, whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them the case should be properly left to the jury. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745.

Upon this point we think there was no error in refusing the motion for nonsuit. But in view of the considerations already expressed *the judgment is reversed*, and the plaintiff remitted to his remedy in accordance therewith.

Petition for rehearing denied.

## ALABAMA SUPREME COURT.

BIRMINGHAM MINERAL R. CO., *Appt.*,

*v.*  
Hannah JACOBS, Admx., etc., of Peter Jacobs, Deceased.

(....Ala.....)

1. A dummy railroad operated by steam and running beyond the lines of a municipality, organized under Acts Feb. 26, 1887, which authorize corporations to construct such roads in a city or town and also "upon any of the public roads of any county," upon such terms and in such manner as may be authorized by the city and county authorities respectively, is a "railroad" within the meaning of Code, § 1146, requiring trains to be stopped within 100 feet of a place where it crosses the track of another railroad.
2. It is no excuse for failure to stop a railroad train within 100 feet of a place where the track crosses another railroad, as required by statute, that the rear of the train would thus be left standing across another track.
3. Proof that an act was negligently done will not sustain a charge that it was fully done.

(Stone, Ch. J., and Clopton, J., dissent from proposition 1.)

(May 22, 1891.)

NOTE.—*Railroads, crossing lines; regulations by statutes.*

Statutes in relation to penalties for failure of a railroad company to stop its trains before crossing another railroad, are constitutional. *Mix v. Illinois Cent. R. Co.* 8 West. Rep. 493, 116 Ill. 502.

12 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's wrong-doing. *Reversed.*

The deceased was an engineer of the Ensley Railway Company. His death was caused by a collision between defendant's train and the engine upon which deceased was at work, at a point where the tracks of the two companies crossed each other.

The other facts sufficiently appear in the opinion.

*Messrs. Hewitt, Walker & Porter* for appellant.

*Messrs. Bowman & Harsh* for appellee.

Coleman, J., delivered the opinion of the court:

The important question involved in this case is whether the Ensley Railway Company is a railroad within the meaning of section 1145 of the Code of 1896, which reads as follows: "When the tracks of two railroads cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop within 100 feet

Railroads, duty at crossings. See notes to *Fletcher v. Fitchburg R. Co.* (Mass.) 3 L. R. A. 743; *Becke v. Missouri Pac. R. Co.* (Mo.) 9 L. R. A. 157.

Warning on approach to crossing, slackening speed. See notes to *Rupard v. Chesapeake & O. R. Co.* (Ky.) 7 L. R. A. 316; *Becke v. Missouri Pac. R. Co.* *supra*.

of such crossing, and not proceed until they know the way to be clear." It is contended that this law does not apply to the Ensley Railway Company. The purpose of the Statute was to guard against collisions at these crossings. Prior to the adoption of the Code of 1886, the distance within which trains were required to stop was 50 feet, and the distance was extended to 100 feet on account of the difficulty of controlling the large engines and heavily loaded trains. The purpose of the Statute, as we have said, is to prevent collision, and the fact that some engines and trains, by reason of their structure and appliances are more easily managed than others, and may be stopped within a distance of 20, 30 or 50 feet, is no reason why the law should not apply to them. It may be conceded in argument that there are many sections in the Code applicable to railroads which do not and were not intended to apply to street railways. We hold that the Ensley Railway Company is not a street railway, within the meaning of the Constitution and the statutes which provide for the incorporation, organization and government of street railways, but that it is a "railroad company," within the meaning of section 1178 of the Code of 1886. The constitutional provision is as follows: "No street passenger railway shall be constructed within the limits of any city or town without the consent of its civil authorities." Code, p. 49, § 24.

The statute laws pertaining to street railways are found in chapter 7, title 1, of the Code of 1886, beginning with section 1608 and ending with section 1612, and, so far as respects the question under consideration, are substantially the same as section 1917 to 1929, inclusive, of the Code of 1876. Section 1608 of the Code of 1886 reads as follows: "Corporations for constructing, maintaining and operating street railways in a town or city may be formed in the mode prescribed, and have the capacity and powers in this chapter expressed." It is evident from the Constitution, and from this section and those which follow, that street railways here intended are only those to be formed, maintained, and operated in a town or city. The phraseology of the law, the location, uses and purposes contemplated of street railways, and their subjection to municipal ordinance lead to this conclusion.

The Ensley Railway Company is not included within this class of corporations, or within the meaning of "street railways," as defined by Elliott, in his excellent work on Roads and Streets. See pages 557-560. Its lines extend beyond municipal corporation control, and its corporate existence, authority and powers are not derived from or subject to municipal regulations. It was incorporated and organized by virtue of an Act of the Legislature adopted February 25, 1887, page 144.\* Until the adoption of this Act, there was no law which authorized the formation of a corporation like that of the Ensley Railway Company. The second section of the

Act reads as follows: "Sec. 2. Be it further enacted that section 1921 of the Code of Alabama be amended so as to read as follows, namely: 'Sec. 1921. Road located by authorities of cities or towns and counties; power to make and alter contracts: Such corporation shall have power to construct, maintain and use a street railroad upon the streets and upon the lines and between the termini named in the certificate in any city or town, upon such terms and in such manner as may be authorized by the ordinance or other lawful act of the proper authorities of such city or town, and upon any of the public roads of any county, upon such terms and in such manner as may be so authorized by the proper authorities of such county; and such railroad company may contract with such counties, cities, or towns therefor, and the contract may be altered when both parties agree to the change.'" Before the adoption of this Act, it must be admitted there were no street railways in the State outside of the corporate limits of a city or town, and none were contemplated by the then existing laws.

A railroad organized under this Act of the Legislature, running beyond the corporate limits of any city or town and through counties, is not, and necessarily cannot be, a street railway, within the meaning of the Constitution and the provisions of the Code in regard to street railways. Except as to its termini, it is entirely independent of municipal control. It derives its corporate powers and existence under the Act of the Legislature, after leaving the city boundaries, by contract with the counties through which it runs. There is no limitation to the extent of such a road. Under its provisions a road could be constructed from Huntsville to Mobile, traversing the entire length of the State. There is no limitation upon the power and character of the propelling force or the business to be conducted. It is common knowledge that railroads incorporated under this Act, having in use heavy dummy engines, run from Birmingham to Bessemer City, and to other parts of the State, traversing wide scopes of country with regular stations, soliciting patronage, and competing with other railroads in carrying both freight and passengers. The very Act itself, in the second section, no longer designates railroads organized under its provisions, after they leave the corporate limits, as street railways, but as "railroad companies." They are engaged in the same business as other roads, and propelled by the same dangerous power of steam, and attended with the dangers incident to the operation of other railroads. Is there any reason why such roads should not provide comfortable depots for passengers, in the country, and have their freight rates regulated, where they carry freight, and be taxed as other railroads engaged in like business? Is there any reason why they should not be required to put up signboards, and ring signal bells, and stop their trains at public road crossings and at railroad crossings, and observe all the safeguards required of other railroads to prevent collisions and for the protection of human life? Is it reasonable to hold that, because of the structure of dummy engines, many of

\*This Act provides the manner in which "any number of natural persons, associating to form a corporation for the purpose of constructing and using a street railroad in, or in and near, or between, any of the cities or towns of this State" may be incorporated. [Rep.]

these regulations can be observed and complied with by those in control of them, more easily than by other engines, therefore they shall not obey them at all? After leaving the city limits, as we have shown, they are no longer street railways, subject to municipal regulations; and if not railroads, within the meaning of the general law, we may well inquire, What kind of railroads are they and by what laws are they governed? Can it be presumed that the Legislature intended to provide for the incorporation of a species of railroad companies "*sui generis*" not subject to any law except the common law for common carriers, while the duties and liabilities of all other railroad companies are regulated and controlled by statutory enactment? We are of the opinion that the Ensley Railway comes directly within "railroad companies" as defined by section 1178 of the Code of 1886, and which is as follows: "Sec. 1178. Meaning of 'railroad company.' Unless clearly otherwise apparent from the context, the term 'railroad company,' as used in this chapter includes any person or corporation owning or operating a railroad." This Statute is broad and comprehensive. There is nothing in this section to indicate that the number of incorporators, or the manner of the organization, enters into the definition. The only exception is, where it is "clearly otherwise apparent from the context." We should say a horse-car is not expected to carry a steam-whistle, and for obvious reasons would be clearly excepted. Section 1145, which requires engineers and conductors to stop their trains where two railroads cross each other is included in the chapter referred to in section 1178.

The Act of February 28, 1889, 1020, enlarging the charter, and conferring additional powers on the Ensley Railway Company, strengthens our position. That Act declares, among other things: "The Ensley Railway Company shall have and possess all rights, powers and privileges and immunities of the general laws of this State conferred on railroad companies." It must be admitted that this Act in no way changes the character of the engines used, the business of the company, or creates a necessity for having depots, or the ringing of bells, blowing of whistles, or stopping at public road crossings or railroad crossings, which did not exist before its passage. It cannot be contended that the effect of this Act was to change the relation of the road to the cities or towns in which are located its termini, or its relation to the country through which it passes, and the contract with the cities and county under which it was incorporated and organized. The number of incorporators and the mode of organization remain the same. The Act may have been passed out of abundant caution, or for some purpose not developed on this trial, but we can see no reason why the Act of the Legislature should bring the Ensley Railway within the definitions of "railroad companies," as given in section 1178 of Code 1886, *supra*, which did not exist prior to its passage. There was nothing in its incorporation, its motive power, its business and location, to exclude it from this section. Whether the Act of

February 25, 1887, is obnoxious to the constitutional provision of article 4, § 2, which declares that "each law shall contain but one subject, which shall be clearly expressed in its title," is not determined, because it is not deemed necessary to a decision of the question before us. See *Ex parte Reynolds*, 87 Ala. 188; *Ex parte Covert* (Ala.) 9 South. Rep. 225.

After a careful consideration of the question, the majority of the court is of the opinion that the trial court did not err in holding that section 1145 of the Code applied to the Ensley Railway Company. The court is unanimous in all other respects.

Since writing the foregoing opinion we have been furnished with a certified copy of an opinion recently delivered by the Supreme Court of Tennessee in the case of *Katsenburger v. Lano*, 16 S. W. Rep. 611, by Lurton, J. In that case the court holds that dummy engines, whether operated within or beyond the municipal limits, are subject to the general statutes regulating and prescribing duties for the government of railroads, to prevent accidents and injuries. The court uses the following language: "A train pulled by a small engine called a 'dummy,' although exclusively engaged in carrying passengers, is a railroad, within the meaning of the statute prescribing precautions to be observed by railroads. The evil intended to be remedied pertains as much to this sort of railways as to the ordinary railroads of commerce." We cite the case as an authority fully in accord with the conclusion reached by a majority of this court. It is unnecessary for us to go further than the principles declared in our opinion, *supra*; and consequently we express no opinion as to whether, under our statutes, dummy engines operated wholly within and under municipal control are subject to the general laws governing railroad companies as defined in section 1178, Code 1886.

*Reversed and remanded.*

**Stone, Ch. J.:**

The intestate of plaintiff in the court below, Peter Jacobs, was in charge, as engineer, of a dummy engine and train of two cars, which was making a trip over the dummy line between Birmingham and Ensley City. The track of that line crosses the track of the appellant corporation, and, at the crossing, intestate, while at his post of duty, was struck and killed by a train which was being pushed backward over the track of the Birmingham Mineral Railroad Company. The suit is against the railroad corporation, and charges that the collision and injury resulted from the negligence of the Birmingham Mineral Company. Possibly the most important charge of negligence consists in the alleged fact that the train of the Birmingham Mineral was not brought to a full stop within 100 feet of the crossing of the railroad and dummy tracks. Code 1886, § 1145. One defense to the action is contributory negligence. The trial court, in its rulings, treated the dummy line as a railroad, within the meaning of section 1145 aforesaid. There was a recovery in favor of the plaintiff.

It is contended for the appellant corporation



that a dummy line is not a railroad, within the meaning of the Statute, and that therefore it owed no duty to bring its train to a full stop before crossing the dummy track. If this point be well taken, there can be no question that the circuit court erred in several of its rulings. But, as we do not intend to consider this question until we shall have disposed of the other questions raised, we need say no more on this point at this place.

Moving in the direction the appellant's train was coming, it would first encounter, and must needs cross, the main track of the Kansas City, Memphis & Birmingham Railroad Company. Between that track and the track of the dummy line is a space of only 325 feet. The approaching train consisted of 14 cars besides the engine and tender,—much longer than the space between the two tracks. The uncontroverted testimony is that, if the train had stopped at any point within 100 feet of the dummy track, its rear section would have overlapped the track of the Kansas City, Memphis & Birmingham track by four or five car-lengths,—more than 100 feet. This, it is contended, must operate an exception to the statutory requirement, and relieve the Railroad Company from the duty of stopping before crossing the second track. The Statute in question is a very wise and humane exercise of the state's police power. It is of very easy observance; and, if faithfully and thoughtfully conformed to, no such thing as a collision of trains at a railroad crossing could occur. Each train must come to a full stop within 100 feet of the crossing before attempting to cross. It must not only be brought to a full stop, but it must "not proceed until they know the way to be clear." The Statute then declares which road shall have the preference in crossing,—the one having "the older right of way." So the duty of learning that the way is clear before proceeding is equally as binding as is the command to come to a full stop. The purpose of the required stop is that the situation may be taken in; and if the officer or agent having control of a train were merely to go through the perfunctory ceremony of coming to a stop, and were then to proceed without informing himself that the way is clear, he would be as derelict in duty as if he had not brought his train to a stop. We cannot adopt the interpretation contended for. It is not within our province to disregard so positive language of the Legislature, nor do we think policy points in that direction. To disregard the Statute is to make collisions possible, if not probable. To obey it is to render them impossible. If it were made a highly penal offense in all persons controlling trains who fail to observe this statutory enactment, such collisions would probably be much less frequent.

The first count of the complaint charges that the defendant, "by and through its conductor, engineer, servants and agents, negligently, wantonly, recklessly and willfully caused, permitted and suffered its said train to run into and against the said engine upon which plaintiff's intestate was as aforesaid,

knocking it off the track, and so scalding, bruising and wounding plaintiff's intestate that he died in consequence thereof." This count in terms charges that the defendant's train was willfully caused to be "run into and against the said engine" of the dummy line. There is no testimony tending to show that the collision was "willfully caused" by defendant's servants, but the trend of the whole testimony repels such inference. The defendant's sixth charge, which was refused, was confined to the first count of the complaint, and in effect asserts that the plaintiff failed to establish the truth of that count. This is the identical question which was raised and ruled on in *Johnston's Case*, 79 Ala. 486. While the point may be somewhat technical, we do not feel at liberty to depart from the ruling then made. The sixth charge asked ought to have been given. *Dickson's Case*, 88 Ill. 431; 1 Greenl. Ev. §§ 51, 63; *Coulton's Case*, 86 Ala. 129; *Guinan's Case*, 11 Lea, 98. The second count does not charge that the defendant willfully caused the collision. The charge is that the train was willfully run at a high rate of speed "towards and to said crossing." This is an entirely different question, which does not fall within the rule declared in *Johnston's Case*, *supra*.

We recur to the question first raised: Was the Ensley Railway a railroad, within the meaning of section 1145 of the Code of 1886? Was its track such a one as that, before crossing it, the train of the defendant railroad must be brought to a "full stop," with no authority to proceed until those having it in charge knew the way to be clear? This question, it would seem, does not necessarily depend on a partial resemblance of the Ensley Railway to railroads proper. It depends on the will and intention of the Legislature, to be gathered from its language. Much light will be shed on this subject by tracing our legislative history which bears upon it. The clause which now constitutes section 1145 of the Code of 1886 was enacted December 10, 1864. Sess. Acts 1865-66, p. 77. That clause has undergone no change since its enactment, with this exception. When first enacted, the train was required to be brought to a full stop within 50 feet of every railroad crossing. The Code of 1886, § 1145, fixes the maximum of the distance at 100 feet. There is much testimony tending to show that the train of the Birmingham Mineral Railroad Company which collided with the dummy engine, of which deceased was the engineer, was not brought to a full stop within 100 feet of the track of the Ensley Railway. So, if the Ensley Railway was at the time of the collision (February 22, 1889) a railroad, within the meaning of the Statute, the jury were not without testimony on which to find that that feature of plaintiff's case was made good. Our statutory provisions in reference to the government, regulation and supervision of railroads have been of steady growth, dating far beyond the introduction of dummy engines as tractors of street-cars. They are embodied in the Code of 1886, commencing with section 1120 and ending with section 1178. The whole of chapter 2, title 12, pt.

1 of the Code, is devoted to this subject. What is now section 1144 of the Code of 1886 was enacted February 6, 1868. Sess. Acts, 15. It constitutes section 1899 of the Code of 1867, and section 1699 of the Code of 1876. Section 1145, as we have seen, was approved December 10, 1864. In the Code of 1867 it is section 1408, and in the Code of 1876, § 1703. On December 29, 1868 (Sess. Acts, 462), the law was approved requiring railroad companies to erect at each crossing of a public road a sign, "with large and distinct letters," giving notice of the proximity of the railroad, etc. This Statute is embodied in section 1722 of the Code of 1876, and is section 1146 of the Code of 1886. One provision of the Act approved December 10, 1864, requires that "the chief superintendent of every railroad shall instruct the engineers and conductors thereof as to the provisions of" what now are §§ 1144, 1145, of the Code of 1886. Code 1867, § 1405; Code 1876, § 1703. So, in the Act approved December 29, 1868, it was provided "that every railroad company in this State shall cause all its trains of cars for passengers to stop upon each arrival at a station advertised by such company as a station for receiving passengers upon such trains at least one half of one minute." This is section 1721 of the Code of 1876; section 1157 of the Code of 1886. Railroads must have proper depot accommodations "at each of the passenger stations along the line of the railroad." Sess. Acts 1868-69, p. 154, 1868-69, p. 74; Code 1886, § 1154. The Act creating a railroad commission for the State of Alabama was approved February 26, 1881. Sess. Acts, 84. Its title is, "To Provide for the Regulation of All Railroad Companies and Persons Operating Railroads in This State." It was certainly intended to apply, and does apply, to all railroads in the State, as the Legislature understood that phrase. The powers it confers on the commissioners are comprehensive. They are embodied in the Code of 1886, §§ 1120 to 1143, inclusive.

To comment on all the statutory provisions relating to the railroad commissioners and their powers which apparently shed light on the question we are now considering, would swell this opinion unduly. To be fully comprehended the entire Statute must be read. Certain provisions of that Statute, as well as many statutory provisions noted above, seem not to be properly adapted to street railroads or dummy lines, which, as a rule, are constructed for the transportation of passengers for short and irregular distances. We will mention only some of the most striking provisions, in the enactment of which the Legislature, it would seem, could not have intended their application to street railways, whether drawn by a dummy engine or otherwise. Section 1145 of the Code requires trains to be brought to a full stop before crossing another track. There could be no question that the difficulty if not the impossibility of stopping an ordinary train of cars on an ordinary railroad within any short distance, and the consequent danger of a collision, supplied the motive of this enactment. That reason cannot apply to a dummy engine

and its train, which, under all the testimony, can be stopped in from 10 to 30 feet. Any one reading sections 1144, 1146, 1154, 1161, 1164, will readily perceive their inapplicability to street railways, even though drawn by a dummy engine; and it is not perceived how section 1148 can be made to apply to street railways. If street railways whose cars are drawn by dummy engines are there by constituted railroads under our general statutory system, then they must be brought under all the legislative enactments for the government of railroads. This will subject them not alone to the legislative provisions noted above. Its influence has a much wider sweep. They would cease to be taxable as the great bulk of property is taxed, but must be assessed under section 494 of the Code by the state board of assessment, with all the formality required in that section. Does the reason which caused that enactment apply to street railways and dummy lines?

Again, if they are railroads under our Statutes, they are under the power and jurisdiction of the railroad commission. Code, § 1129. They would be required to pay a license tax, and their share of the expenses of the railroad commission, to be ascertained by the auditor. Code, § 1128. It would subject their tracks to supervision by the railroad commissioners, and require them to transport the commissioners free of charge. Section 1129. Their tariff would be subject to revision by the commissioners. Section 1130. Can it be possible that dummy lines are subject to the provisions requiring railroads to have "at each of the passenger stations along the line of its railroad . . . sufficient sitting or waiting rooms . . . for passengers waiting for trains, having regard to sex and race, which shall be suitably heated in cold weather and supplied with sufficient fresh drinking water, when passengers waiting for trains are present, and with sufficient and comfortable seats?" Section 1154. Confining the legislation we are discussing to railroads proper, every clause in the 54 sections (1120-1173, inclusive) is germane and proper. Extending it so as to take in street railway service, no matter how propelled, we are forced to declare that many of the more important provisions of the Statute are wholly unsuited to the new service assigned them. We are on safe ground when we give to the Statutes such operation as the Legislature had, and could only have had in contemplation when the Statutes were enacted. We should hesitate before extending them to conditions essentially dissimilar. The difficulties of interpretation extend farther than is suggested above. If street railways which employ dummy engines as motors are railroads, what are similar roads whose coaches are propelled by electricity or by animal power? The tracks are alike, and the coaches, supported on flanged wheels, run only on the rails, as do the coaches of railroads proper. Are some street railways "railroads," under our statutory system, and others not? And, if so, what class or classes are included, and what excluded? But we are not left in doubt as to what the Legislature intended. The statutory provisions

in reference to the incorporation of railroads commence with section 1573 of the Code of 1886. There must be at least seven corporators, and the declaration must be filed with the secretary of state. Section 1574. The secretary of state issues the commission to open books of subscription (§ 1578), and keeps a record of it (§ 1579). Such corporations have very many and large powers peculiar to railroads proper, which are wholly unadapted to dummy lines. To state them in detail would swell this opinion to unreasonable dimensions.

We invite attention to the following sections of the Code: 1580-1583, 1586, 1588, and 1594. And we also invite attention to constitutional provisions. Street railway companies are treated as a separate subject, and a chapter of the Code is devoted to it, commencing with section 1603. Five or more persons constitute the requisite number of subscribers to obtain such incorporation. Section 1604. The judge of probate issues the commission for opening books of subscription (§ 1605), and the record of the proceedings is made and kept in his office (§ 1607). The powers of the corporation are set forth in section 1608, and are essentially unlike those conferred on railroad corporations proper. These statutory provisions are in several respects unlike those theretofore in force. Code 1876, § 1917 *et seq.* At the session of the Legislature of 1886-87 before the publication of the Code of 1886, several of the statutory provisions found in the Code of 1876 were changed. By Act approved December 10, 1886, p. 123, street railways were given the right to condemn private property to corporate purposes. By Act approved February 25, 1887, p. 144, sections 1918 and 1921 of the Code of 1876 were very materially changed. The language of these sections before the amendment authorized such incorporations only "in any of the cities or towns of this State." The amendment enlarged the privilege, and authorized the formation of such corporations "for the purpose of constructing and using a street railroad in, or in and near, or between any of the cities or towns of this State." This is, in point of time, the first legislative authority for constructing a street railroad outside of a city or town. It cannot operate on any railroads except street railroads, for its caption is, "To amend sections 1918 and 1921 of the Code" and those sections are in the article of the Code devoted exclusively to "street railroad companies." Any attempt, under that caption, to legislate on any subject other than that of sections amended,—street railroads,—would render the enactment unconstitutional and inoperative. *Ex parte Reynolds*, 87 Ala. 188; *Ex parte Covert* (Ala.) 9 So. Rep. 225.

There was a further amendment of sections 1917 and 1923 of the Code of 1876 by Act approved February 28, 1887. Sess. Acts, 149. The effect of this amendment was to reduce the requisite number of subscribers or promoters of a street railroad corporation from five to three. All of these enactments have special reference to street railroads, and cannot, by the most latitudinous construction,

be made applicable to railroads in the larger sense. It will be remembered that the collision which caused the death of plaintiff's intestate occurred February 22, 1889. Six days afterwards (February 28, 1889) the Act was approved. "To Amend and Enlarge the Character of the Ensley Railway, and to Confer Additional Powers on Said Corporation." Sess. Acts, 1020. That Act, among other things, declares that "the Ensley Railway shall have and possess all the rights, powers, privileges and immunities by the general laws of this State conferred on railroad companies." Why was that Act necessary, or considered necessary, if the Ensley Railway was already a "railroad" under the general laws of the State regulating railroads proper?

In the recent excellent work on Roads and Streets by Elliott (pp. 580, 587 *et seq.*), there will be found a very full, and in many respects an able, discussion of the proper classification of street railways which extend beyond the city limits, and in some cases connect one city with another. That work, however, had mainly two aims in handling the question: *first*, to ascertain whether the construction of a street railway along a public street is the imposition of a new servitude, for which the owner of the ultimate fee is entitled to additional compensation; and, *second*, to what extent the use of steam as a tractor enters into the inquiry. The conclusion is reached that the street railways which employ only animal power impose no additional servitude which justifies the demand of additional compensation, but, if steam be used, then the increase of annoyance and danger consequent upon it calls for further damages. It is further stated as a reason for a distinction that street railways whose cars are moved only by animals are not clothed with any powers of eminent domain, whereas those which employ steam may condemn private property for their use. Eminent domain is purely an attribute of the sovereignty, and can be exercised alone by it or by some person, natural or artificial, under legislative grant of the power. With the exception of a single provision for private roads in the Constitution of Alabama (art. 1, § 24), it is only in promotion of enterprises of a public nature that the sovereignty can exercise, or grant the power to another to exercise, the right of eminent domain. *Sadler v. Langham*, 34 Ala. 811. Can it be maintained that street railways, even those extending from city to city, if their cars be moved by steam-power, possess this element of public benefit which authorizes them to invoke and employ the sovereign power of eminent domain, while the less pretentious horse or mule car can aspire to no such eminence? No person, natural or artificial, can assert the power of eminent domain, unless that power is conferred by legislative grant, and in some matter which has in itself an element of acknowledged public benefit. Can it be affirmed that street railways which employ steam as a motor possess that element, and that those which employ horses or mules do not? Is not the true inquiry, at last, whether the service accommodates the public with a ready

and inexpensive means of transportation, within the area of customary business calls, and whether the Legislature has conferred upon it the power of eminent domain?

We have traced this legislative history for the purpose of showing that from the inception two systems have been declared,—one for the regulation of railroads proper, and the other for the regulation of street railways. That there is a natural, inherent, organic difference in the two systems, and their wants, we need scarcely assert. Is it not necessarily true that, if some of the provisions in reference to railroads apply to dummy lines, all must apply to them? By what statutory authority can we apply regulations to one which are designed for the other? And, if we do so apply them, to what extent shall the application be made? Who shall determine this question, and by what criterion shall it be determined? Is it not safer to leave this delicate duty to the law-making power? It may be that it would be wiser and safer to require railroad trains to be brought to a full stop before crossing a dummy track. Let the Legislature determine that grave question.

Whether, at the time of the injury complained of in this suit, the track of the Ensley Railway Company was a "railroad," within the meaning of section 1145 of the Code, is a question on which the members of this court are not agreed. It is contended by the majority of the court, as shown in *Judge Coleman's* opinion, that section 1178 of the Code tends to support their view. That section declares that, "unless clearly otherwise apparent from the context, the term 'railroad company,' as used in this chapter, includes any person or corporation owning or operating a railroad." I think that section has nothing to do with the question. My own opinion is that the only object of that section was to fasten responsibility on any person or corporation operating a railroad, whether such person or corporation owned the road or not. Under its provisions, any person having a cause of action traceable to the running of the road, or handling of its rolling stock, is not necessarily confined to the corporation as chartered or to the owner of the road for redress. He may proceed against any person or corporation

operating the road, if the grievance complained of was suffered at the hands of such person or corporation, although not the owner of the track. It is common knowledge that railroads are sometimes operated under lease, and that two or more railroad companies sometimes, under an arrangement between themselves, use the same track for a part of their respective lines. Under this section of the Statute, liability attaches to the particular person or corporation whose breach of conduct or tort is complained of. My own opinion is that section 1145 of the Code is a strong argument in favor of my position. Under its terms, it is shown that it was not intended to apply to the Ensley Railway Company. This is "clearly apparent from the context." That section is part and parcel of the system established for the government of railroads proper, as we have heretofore shown. It is both preceded and followed by statutory provisions which are palpably inapplicable to the Ensley Railway or any other dummy line. This is the context which makes it clearly apparent that the provisions of the chapter in which section 1145 is found do not and cannot apply to the Ensley Railway. On the other hand, the Ensley Railway was incorporated, not under the Statutes devoted to railroads and their regulation, but under an amendment of the Statutes devoted specially and separately to street railways and their regulation. How can the conclusion be resisted that the context clearly shows that none of the provisions found in the system devoted to railroads proper are applicable to street railways or dummy lines which are chartered under and governed by an entirely different statutory system, with entirely different objects, powers, regulations and methods of service?

If regulations enacted for railroads are applicable to street railways and dummy lines, why are not the regulations of street railways and dummy lines equally applicable to railroads proper? Should not the rule work both ways, to be consistent?

My own opinions are expressed above, and *Judge Clopton* concurs with me. The opinion of the majority of the court is expressed by *Judge Coleman*. According to that opinion, there is no error in the rulings of the circuit court, save the single one pointed out above.

## NEW YORK COURT OF APPEALS.

John Peter EISENLORD, *Appt.*,

v.

David H. CLUM *et al.*, *Respts.*

(.....N. Y.....)

**1. The mother of an alleged illegitimate son has no "interest in the event"**

which makes her incompetent under Code Civ. Proc. § 829, to testify to the fact of her marriage with his father in an action by the son to enforce his claim as an heir of his father.

**2. A judgment for the plaintiff in an action to recover damages for the seduction of his daughter is not competent evidence against her son in an action to enforce his claim to be the lawful heir of such judgment defendant.**

**NOTE.**—*Exclusion of testimony against decedent on ground of interest.*

No person is now disqualified as a witness because of interest, except in certain cases enumerated in the Code, and whoever asserts the existence of the 12 L. R. A.

disqualification must point out the way in which the exception lies. Code Civ. Proc. § 829; *Staples v. Fairchild*, 8 N. Y. 41; *Van Alstyne v. Erwine*, 11 N. Y. 381, 341; *Lobdell v. Lobdell*, 36 N. Y. 337.

At common law the agent was not incompetent

3. A man's declarations that he is married and that a certain child is his son and heir, although not admissible to prove marriage as part of the *res gestæ* when he never lived or cohabited with the alleged wife and never had anything to do with the son, are admissible as hearsay evidence concerning pedigree, on the question of the legitimacy of the son.

(June 3, 1891.)

**APPEAL** by plaintiff from a judgment of the General Term of the Supreme Court, Third department, affirming a judgment of the Montgomery County Circuit in favor of defendants in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. A. J. Abbott, for appellant:

The mother of the plaintiff was a competent witness for all purposes, under section 828 of the Code. Her testimony could not be excluded unless brought within the exceptions contained in said section 829. She had no such "interest" such as contemplated by that section.

*Jackson v. Bard*, 4 Johns. 280; *Jackson v. Van Dusen*, 5 Johns. 144; *Van Rensselaer v. Kearny*, 52 U. S. 11 How. 297, 18 L. ed. 708; *Jackson v. Brooks*, 8 Wend. 481; *Hobart v. Hobart*, 63 N. Y. 80; 1 Greenl. Ev. § 890; *Sanford v. Ellithrop*, 95 N. Y. 48.

The court erred upon the trial in excluding the testimony as to admissions and declarations of Dr. Eisenlod, in his lifetime, from time to time, emphatically going to prove that he had

been married in his lifetime to Margaret Lipe, the plaintiff's mother, and that the plaintiff was his son and heir.

Reynold's Stephen, Ev. pp. 42-54; Abbott, Tr. Ev. pp. 89-91, §§ 82-84, and cases cited; Cow. & Hill's notes, p. 623, note 469, and cases there cited; *Blackburn v. Crawford*, 70 U. S. 8 Wall. 175, 18 L. ed. 186; *Gaines v. New Orleans*, 78 U. S. 6 Wall. 642, 18 L. ed. 950.

The record of a judgment in the supreme court in an action between John A. Lipe, plaintiff, against Peter O. Eisenlod, defendant, brought by Lipe against the doctor for the seduction of Lipe's daughter, Margaret Lipe, mother of the plaintiff in this action, was not admissible.

6 Walt. Act. and Def. 680, § 8, citing *Lansing v. Montgomery*, 2 Johns. 882; Id. 681, § 6, 767, § 2, 770, § 4, 771, § 5, 784, §§ 25, 26, 785, §§ 27, 28; 787, 788, art. 2, § 1, 802, § 8.

Mr. George W. Smith, with Messrs. Morrell & Spraker, for respondent:

The judgment in the case of *Lipe v. Eisenlod* established the status of Margaret and Eisenlod, and that Margaret was the servant of John Lipe, and unmarried, and she so testified in that action.

*Clemens v. Clemens*, 37 N. Y. 59; 1 Greenl. Ev. § 525; *Eisenlod v. Eisenlod*, 49 Hun. 840; *Pray v. Hegeman*, 98 N. Y. 351.

The marital relation could not be established by declarations of Eisenlod. There was no cohabitation, no apparent marital relation, and therefore no basis for allowing the testimony to characterize it.

*Re Taylor*, 9 Paige, 617, 4 L. ed. 839; *Van*

as a witness because of interest in an action to which his principal was a party, where no question of exceeding his powers as agent was involved. *Bailey v. Ogden*, 3 Johns. 890, 420; 1 Greenl. Ev. 13th ed. § 418; *Lowber v. Shaw*, 5 Mason, 241; *Rice v. Gove*, 23 Pick. 158, 33 Am. Dec. 724; *Walwright v. Straw*, 15 Vt. 216; *Gilpin v. Howell*, 5 Pa. 41, 45 Am. Dec. 730; *Hoffman v. Delahanty*, 13 Abb. Fr. 368; *Lytle v. Bond*, 40 Vt. 618.

Since the change in the law in which the disqualification of interest was removed, no more stringent rule is applied now than when the common law existed in its rigor. *Hildebrand v. Crawford*, 65 N. Y. 107; *Hobart v. Hobart*, 63 N. Y. 80; *Sherman v. Scott*, 27 Hun. 381; *Parker v. McCunn*, 2 N. Y. Week. Dig. 502; *Wallace v. Strans*, 113 N. Y. 238.

The interest that will disqualify a witness under section 899 of the Code must be present, certain and vested, not uncertain, remote or contingent, and must be in the event of the action, not alone in the questions involved. It must be such that he will either gain or lose by the direct legal operation and effect of the judgment of the court disposing of the facts in dispute. *Moore v. Oviatt*, 35 Hun. 216; *Greenl. Ev. § 890*; *Steele v. Ward*, 30 Hun. 555; *Miller v. Montgomery*, 78 N. Y. 238; *Hobart v. Hobart*, 63 N. Y. 80; *Riddle v. Dixon*, 3 Pa. 372, 44 Am. Dec. 207, 210, note.

The provisions excluding personal transactions with a deceased person are only enforced where the case is brought strictly within the wording of the Statute; it is not enough that it is within its spirit. *Severn v. National State Bank of Troy*, 18 Hun. 223.

It is error to hold that personal communications between the witness and deceased cannot be proved for any purpose. Such evidence can only be excluded when it conflicts with the provisions of the Statute. *Hobart v. Hobart*, 63 N. Y. 80.

12 L. R. A.

The section does not render a party incompetent as a witness for all purposes, even in an action by an administrator, but only as to personal transactions or communications between the witness and the deceased. *Ham v. Van Orden*, 84 N. Y. 237.

The primary intent of the prohibition is very apparent, and is to prevent a surviving party from proving by his own testimony a personal transaction or communication between himself and the deceased person, which but for the prohibition he might do without fear or possibility of contradiction. *Pinney v. Orth*, 88 N. Y. 447-451.

#### *Extent of the prohibition.*

It has been repeatedly held that the prohibition does not extend to conversations had between the deceased and third persons which were overheard and listened to by the witnesses. *Hildebrand v. Crawford*, 65 N. Y. 111; *Simmons v. Simson*, 26 N. Y. 277; *Cary v. White*, 59 N. Y. 383.

#### *Fact must be proved directly.*

A fact that cannot be proved by a party or interested person directly cannot be established inferentially from his testimony. *Grey v. Grey*, 47 N. Y. 552; *McCotter v. Lawrence*, 4 Hun. 107; *Johnson v. Spies*, 5 Hun. 468; *Jacques v. Elmore*, 7 Hun. 675; *Burnett v. Noble*, 5 Bedf. 69; *Fisher v. Verplanck*, 17 Hun. 120.

#### *Strict construction usually given to section 899.*

A question has often arisen as to the strictness with which section 899 should be construed. In one class of cases it has often been held that if persons whose testimony is offered are clearly within the reason and spirit of the law, it is sufficient to exclude their testimony. *Dewey v. Goodenough*, 56 Barb. 54; *Mattoon v. Young*, 45 N. Y. 696; *Timon v. Claffy*, 45 Barb. 438; *Van Tuij v. Van Tuij*, 37 Barb. 336;

*Tuyl v. Van Tuyl*, 57 Barb. 235; *Bishop, Mar.* and Div. §§ 438, 439, 541.

The offer of the plaintiff to give the testimony of Mrs. Austin as to personal transactions with the deceased was properly rejected.

Code Civ. Proc. § 829; *Eisenlord v. Eisenlord*, *supra*; *Lyon v. Snyder*, 61 Barb. 172; *Morrill, Comp. Witnesses*, 28; *Re Wilson*, 4 Cent. Rep. 769, 103 N. Y. 374; *Loder v. Whelpley*, 111 N. Y. 239.

The evidence rejected as to the declarations only relates to "a wife" not named, and to the child, except that of Flanders. He is the only witness that mentions Margaret Lipe as the wife. He says the declaration was that Eisenlord said that he "had a wife; that he had Margaret Lipe"—even this does not assert the fact in question.

*Jaques v. Public Administrator*, 1 Bradf. 508; *Chamberlain v. Chamberlain*, 71 N. Y. 426; *Badger v. Badger*, 83 N. Y. 555; *Harbeck v. Harbeck*, 3 Cent. Rep. 430, 103 N. Y. 714; *Com. v. Stump*, 53 Pa. 183; *Davis v. Brown*, 1 Redf. 259; *Smith v. Smith*, 53 N. J. L. 207; *Sharon v. Sharon*, 79 Cal. 663; *Blair v. Howell*, 63 Iowa, 619.

**Peckham, J.**, delivered the opinion of the court:

The plaintiff brings this action of ejectment as the son and sole heir-at-law of one Peter O. Eisenlord, who died in Montgomery County on the 30th day of June, 1885, seised in fee-simple and possessed of the premises described in the complaint. The defendants other than Clum are, respectively, the brothers, sisters or nieces of the deceased, Eisenlord, and claim that they are his sole heirs-at-law, and the defendant Clum is in possession of the premises described in the complaint, and claims under the other defendants as tenant. The plaintiff is the son of one Margaret Lipe, and the question in issue depends upon whether she was

married to the deceased, Eisenlord, prior to this son's birth. He endeavored to prove an actual marriage between the deceased and his mother prior to his birth, on the 21st of October, 1857, and for that purpose called, among others, his mother, then married to one Austin. The plaintiff offered to prove by her various conversations between the witness and the deceased upon the subject of their getting married, and also offered to prove by her the performance of the marriage ceremony between them, by a justice of the peace in Montgomery County, at a time anterior to the plaintiff's birth. All the evidence was objected to by defendants' counsel, and was excluded by the court, upon the ground that the witness was interested, and came within the provisions of section 829 of the Code; because, if she established the fact that she was married to the deceased, she would then be entitled to dower in this real estate. The witness was not a party to the action, and hence could not be excluded as having any interest on that ground. Nor was she a person from, through, or under whom the plaintiff derived any title or interest by assignment or otherwise. His title or interest, if any, came through Eisenlord, and that, of course, depended upon the question whether the plaintiff was his legitimate son. The only other ground of exclusion contemplated by the Statute refers to a person "interested in the event" of the action. Prior to the adoption of the Code, the law excluded interested witnesses from testifying. What amounted to such an interest as would exclude a witness was a question which was frequently presented, and in every conceivable phase, and the courts had finally settled down to a general rule on the subject, which had long prevailed before the Legislature altered it. At common law, as the rule became developed by successive decisions, the interested witness was excluded

*Howell v. Taylor*, 11 Hun, 214; *Andrews v. New York Nat. Bank of North America*, 7 Hun, 20; *Schoonmaker v. Wolford*, 20 Hun, 166.

While in another class of cases it is held that it is not enough that a case be within the spirit, it must be within the letter, of the Statute. *Lobdell v. Lobdell*, 36 N. Y. 327; *Re Le Baron*, 67 How. Pr. 346; *Severn v. National State Bank of Troy*, 13 Hun, 223.

#### *Declarations as to marriage.*

In civil suits, the declarations and admissions of the husband and wife are generally admissible to prove their marriage (*Jones v. Reddick*, 79 N. C. 200. And see *Truman's Case*, 1 East, P. C. 470; *Woods v. Woods*, 2 Curt. Ecol. 518; *Reg. v. Creamer*, 10 L. C. Rep. 404; *Patterson v. Gaines*, 47 U. S. 6 How. 550, 12 L. ed. 553; *Gaines v. Reif*, 53 U. S. 13 How. 472, 13 L. ed. 1071; *Cameron v. State*, 14 Ala. 546; *Wilkins v. State*, 54 Ala. 181; *Fuller v. Fuller*, 17 Cal. 605; *Cook v. State*, 11 Ga. 53; *Murphy v. State*, 50 Ga. 150; *Squire v. State*, 46 Ind. 459; *State v. Seale*, 16 Ind. 362; *Com. v. Jackson*, 11 Bush, 679; *Barnum v. Barnum*, 48 Md. 251; *State v. Libby*, 44 Me. 460; *State v. McDonald*, 25 Mo. 176; *Ham's Case*, 11 Me. 391; *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Re Taylor*, 9 Paige, 611, 4 L. ed. 837; *Wolverton v. State*, 16 Ohio, 173; *Stanglein v. State*, 17 Ohio St. 453; *Kenyon v. Ashbridge*, 35 Pa. 157; *Hill v. Hill*, 38 Pa. 611; *State v. Medbury*, 8 R. I. 543; *State v. Hilton*, 3 Rich. L. 434; *Warner v. Com.* 2 Va. Cas. 96; *O'Neale v. Com.* 17 Gratt. 533, 537; in the case of the husband, 12 L. R. A.

being admissions against interest (see *Greenawalt v. McEnelley*, 85 Pa. 352); and in any case, being part of the *res gestae* of cohabitation and repute. See *Guardians v. Nathans*, 3 Brewst. 142, 172; *Stewart, Mar. and Div.* § 132.

#### *Hearsay evidence as to pedigree.*

But it is now settled, that the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest of the declarations in the person from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is therefore restricted to the declarations of deceased persons who were related by blood or marriage to the person, and therefore interested in the succession in question. *Yowles v. Young*, 13 Ves. Jr. 140; *Goodright v. Moss*, 2 Cowp. 591, as expounded by *Lord Edmonstone*, in *Whitelocke v. Baker*, 13 Ves. Jr. 514; *Johnson v. Lawson*, 2 Bing. 86; *Monkton v. Atty-Gen.* 2 Russ. & M. 147, 156; *Crease v. Barrett*, 1 Crompt. M. & R. 919, 928; *Casey v. O'Shaunessy*, 7 Jur. 1140; *Gregory v. Baugh*, 4 Rand. 611; *Jewell v. Jewell*, 48 U. S. 1 How. 231, 11 L. ed. 113; *Kaywood v. Barnett*, 3 Dev. & B. L. 91; *Jackson v. Browner*, 13 Johns. 37; *Chapman v. Chapman*, 3 Conn. 347; *Waldron v. Tuttle*, 4 N. H. 371. *Hargrave v. Hargrave*, 3 Car. & K. 701.

General repute in the family, proved by the testimony of a surviving member of it, has been considered as falling within the rule. *Doe v. Griffin*, 15 East, 293. See 1 Greenl. Ev. § 193.

only when he had what was termed a "legal interest" in the event of the action. A direct and certain interest in the event of the cause, or an interest in the record, for the purpose of evidence, became necessary in order to exclude. *Starkie, Ev.* (9th ed. 1849) marg. pp. 23, 24. The inclination of the courts was that the fact of interest should go to the credit, rather than the competency, of the witness, and hence they said that the party alleging incompetency must show it beyond doubt. The English legislation interfered with the rule as to the record, and provided that it should not be evidence in another action for or against the witness who testified. 3 & 4 Wm. IV. chap. 42, § 26. Then, under the suggestion of Lord Denman, another Act was passed limiting very greatly the cases in which a person should be excluded by reason of interest. 6 & 7 Vict. chap. 85.

In this State the question arose at an early date, and in one of the pioneer cases (*Van Nuy's v. Terkune*, 3 Johns. Cas. 82) the rule, as above stated, was declared as the law. It was therein explained that a witness was not interested in the event of the cause unless he would gain or lose by the event, and he was not interested by the record, unless the verdict could be given in evidence for or against him in some other proceeding. In a note to this case it is stated that the rule was formerly that an interest in the question put to the witness excluded him, but it was admitted that such rule had been explained away and limited, so that the one announced in the case was the true rule. This case was decided in 1802. In *Jackson v. Bard*, 4 Johns. 230, it was held that the widow of one Dickenson, who was the mediate grantor under whom the defendant claimed the land in question, was a competent witness, although it was argued she might claim dower in case the deed had not been executed. The supreme court held the decision correct, and said she was not an interested witness, because the verdict in the cause could never be given in evidence in an action of dower brought by her. Then in

*Jackson v. Van Dusen*, 5 Johns. 144, which was an action of ejectment, it was distinctly held that the widow of a person deceased was a competent witness in an action brought by the heir to recover the possession of lands claimed under her husband, though she would be entitled to dower in such land. Van Ness, J., delivered the opinion of the court, and said the witness had no other interest in the case than that which grew out of her right of dower in the premises, and as to that the verdict in the cause would be no evidence in a suit to be brought by her for the recovery of her dower. In *Jackson v. Nelson*, 6 Cow. 248, it was held that, in an action of ejectment against a devisee, a co-devisee and tenant in common with the defendant, not in actual possession, might be a witness for defendant, because the effect of a recovery by the plaintiff would not be to turn him out of any possession, nor could the verdict be evidence for or against him in any other suit. Again, in *Jackson v. Brooks*, 8 Wend. 426, 431, an action of ejectment, it was held that a tenant by the curtesy was a competent witness for the plaintiff, who was the heir-at-law. The court said the witness could not use the verdict, if the plaintiff recovered, as evidence in his favor in any suit he might bring to enforce his title as tenant by the curtesy, and hence he had but an interest in the question, and not in the event of the suit. See also Peake, *Ev.* (Norris' notes) p. 209, pt. 1, chap. 3, § 3; 1 Greenl. *Ev.* § 886 et seq. The interest must be certain, direct, not contingent or remote, or a mere possible benefit.

Under the rule of the common law on the subject of interest it is plain that the mother in this case would have been a competent witness. She had no "interest in the event of the suit," as that expression had been defined by the courts, and the judgment would not have been any evidence for or against her in any action she might bring. I think the expression "interest in the event," as used in our Statute, was never intended to enlarge the class to be ex-

Proof by one of the family that a younger brother of the person last seized had many years before gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, has been admitted as good prima facie evidence of such person's death without lawful issue. *Doe v. Griffin, supra*.

Evidence of hearsay may be given to prove a pedigree. The declarations of persons uninterested, and who are then dead, are admissible. *Strickland v. Poole*, 1 U. S. 1 Dall. 14, 1 L. ed. 17; *Stein v. Bowman*, 38 U. S. 13 Pet. 209, 10 L. ed. 129.

Declarations of servants and intimate acquaintances are not admissible in questions of pedigree, but only those of kindred. *Johnson v. Lawson*, 3 Bing. 86.

The facts of family history which may be proved by hearsay from proper sources are the following: Birth: *North Brookfield v. Warren*, 16 Gray, 174; *American L. Ins. & T. Co. v. Rosenagle*, 77 Pa. 507. Living or survival: *Doe v. Pembroke*, 11 East, 504.

Marriage: *Caujolle v. Ferrie*, 33 N. Y. 90; *Cunninghams v. Cunningham*, 3 Dow, 482, 511; *Com. v. Stump*, 33 Pa. 129; *Hill v. Burger*, 3 Bradf. 432; *Lyle v. Ellwood*, L. R. 19 Eq. 33, 11 Moak, Eng. Rep. 702.

Issue or want of issue: *People v. Fulton F. Ins. Co.* 25 Wend. 202; *King v. Fowler*, 11 Pick. 302.

12 L. R. A.

Death: *Mason v. Fuller*, 45 Vt. 29; 1 Taylor, *Ev.* §§ 570, 572.

The time, either definite or relative, of those facts: *Roe v. Rawlings*, 7 East, 290; *Webb v. Richardson*, 42 Vt. 465; *Bridger v. Huett*, 2 Fost. & F. 35.

Relative age or seniority: *Doe v. Pembroke*, 11 East, 504.

Name: *Monkton v. Atty-Gen.* 3 Russ. & M. 158.

Relationship generally, and its degree: *Doe v. Randall*, 2 Moore & P. 20, 26; *Vowles v. Young*, 13 Ves. 147; *Webb v. Richardson, supra*; *Chapman v. Chapman*, 2 Conn. 350.

#### *Evidence admitted from necessity.*

From necessity, in cases of pedigree, hearsay evidence is admissible. But this rule is limited to the members of the family who may be supposed to have known the relationship which existed in the different branches. The declaration of these individuals, they being dead, may be given in evidence to prove pedigree. And so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another as evidence. As evidence of this description must vary with the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject. *Stein v. Bowman*, 38 U. S. 13 Pet. 209, 10 L. ed. 129.

cluded under it beyond what the common law excluded in using the same language. All legislation on the subject has been in favor of greater liberality in the rules relating to the competency of witnesses. Upon referring to the cases which have been decided under the section of the Code already referred to, we find that the rule defining what is an interest in the event is laid down in about the same terms as those used by the common law. *Hobart v. Hobart*, 69 N. Y. 80; *Nearpass v. Gilman*, 104 N. Y. 506, 6 Cent. Rep. 667; *Wallace v. Straus*, 118 N. Y. 288; *Connelly v. O'Connor*, 117 N. Y. 91. But the learned general term, upon the appeal in this case, has held that the exclusion was proper on the ground that the judgment would furnish the witness with important evidence to establish her claim to dower in the premises described in the complaint. The cases I have cited show conclusively that such a judgment would not have been admissible in evidence at common law in any such action, either for or against the witness, and in this respect the Code has not changed the rule.

The case of *Miller v. Montgomery*, 78 N. Y. 282, is cited to show that the record would be legal evidence for or against her. A surety upon the bond of a nonresident executor was there held to be interested in the event of the accounting of his principal. This was so held because the surety is bound by the decree of the surrogate made upon a regular accounting, and such decree would be evidence against the surety in a suit upon the bond. Within all rules, such a witness is interested, and is incompetent to testify to a personal transaction with the deceased. The general term also thought the judgment would be evidence as a declaration or admission by the plaintiff of the facts, or some of them, which the witness would have to prove in her action against him for dower. Any declaration or admission made by the plaintiff as to any fact material for the witness to prove in her action is undoubtedly admissible as an admission. If found in a pleading, and it be shown that it was placed there with the knowledge and sanction of the plaintiff herein, such pleading would be admissible for the purpose of proving the admission. *Cook v. Barr*, 44 N. Y. 156. In order, however, to prove such admission, it is not necessary or proper to put in evidence the judgment in the action, for it is not the judgment which furnishes the proof, but the admission contained in the pleadings, and the judgment is not in that case the least evidence in favor of the witness in any action she might bring. The admission would exist without the judgment, and regardless of it.

That the witness has an interest in the question is very plain, but I am aware of no principle that would permit the introduction of this judgment as any proof for or against the witness in any other action. I see no foundation for any estoppel as against the plaintiff herein in an action brought by the witness to recover her dower. If, as I say, he has made admissions, they may be proved; but to say that he is estopped in the action for dower from denying any fact upon which the right of the plaintiff in such action depends, because in another action between himself and a third party it was necessary for him to prove the same fact, would

be a great extension of the doctrine of estoppel. If, in the course of such first trial, the plaintiff had proved by his own testimony any fact material to the dower action, it would be an admission which could be taken advantage of by proving that it was made; but if the fact had been proved by some third party, instead of by the plaintiff, it is not in that event an admission or declaration of the plaintiff therein which renders a judgment in that action proof against him in any future controversy with a third party. The cases cited from 1 Greenl. Ev. § 527a, are those where it was claimed the party had made an admission in a declaration or other pleading, or had suffered default; and it was held such express admission, or such constructive admission by suffering a default, was competent evidence against him. We do not doubt the correctness of this rule. It is not the judgment which is to form the evidence. It is the admission contained in the pleading or by the suffering of the default. Our conclusion is that the mother of the plaintiff was a competent witness to prove any or all facts of which she was cognizant, and which were material, and which were not inadmissible upon some ground other than the alleged interest of the witness in the event of the action.

2. Another question arises upon the reception in evidence, against the objection of the plaintiff, of the judgment in the action of *John A. Lipe v. Peter O. Eisenlord*. It was an action brought by Mr. Lipe (who was the father of Margaret Lipe, the mother of the plaintiff in this action) against the defendant on account of his alleged seduction of the plaintiff's daughter, Margaret, and in which action the plaintiff recovered a verdict, on which judgment was entered in his favor. I see no ground upon which to permit its introduction in this action. The plaintiff was no party to it, nor was his mother, Margaret Lipe. The judgment established no status of the plaintiff's mother. As a judgment, it simply established the fact which was conclusive on all parties and privies thereto that, in 1856, the defendant had seduced the plaintiff's daughter Margaret Lipe. Neither the plaintiff nor his mother was a party or privy to it. In that class of judgments, which touch the subject of marriage or divorce, and either establish a marriage or decree a divorce between the parties, it has been held that, under certain circumstances and within proper limitations of jurisdiction, such judgments are binding and of universal obligation. It is upon the same principle that the decree of a court *in rem* is conclusive upon the title to the *res* adjudicated upon. 1 Greenl. Ev. §§ 543, 544, and notes. But this is no such judgment. It adjudges no status, and is conclusive of the facts therein adjudged simply between the parties and privies thereto, and the plaintiff occupies neither position. If the witness had been sworn, and had testified to facts upon this trial which it was claimed were inconsistent with what she swore to on the trial of the seduction case, upon her attention being called thereto, and a proper foundation laid, such contrary and inconsistent declarations or evidence, if material, could have been proved with a view to impeach her evidence upon this trial. We think the judgment spoken of was not admissible in evidence against the plaintiff.



A third question arises upon the exclusion of declarations said to have been made by Eisenlord at times long subsequent to the time when this alleged marriage ceremony took place. One witness was called, and the plaintiff offered to prove by him that Eisenlord had said to him, in 1868 or 1864, that he was married, and had a wife, and that it was Margaret Lipe. The plaintiff offered to prove by another witness that Eisenlord had said he was married, and had an heir,—a son,—the one witness had teased him about, the plaintiff herein. This was in 1867 or 1868. Eisenlord died in 1885. The evidence was objected to as incompetent, and as not characterizing any act or thing which could render it admissible. The objection was sustained, and the plaintiff excepted. The fact is undisputed that the deceased, Eisenlord, and Margaret Lipe never lived together or cohabited as man and wife. No declarations of his could therefore characterize or explain the nature of a cohabitation which confessedly never existed. It is equally undisputed that Eisenlord never had anything to do with this alleged son. They never lived together, and, if they ever met, there is no proof of such fact aside from the possible inference arising from some of the alleged declarations, and they only went to the extent of an inference that Eisenlord had seen the plaintiff. These declarations, therefore, did not in any manner characterize or explain the footing upon which the plaintiff and Eisenlord had ever lived together or even met. Under such circumstances, the question arises as to the admissibility of the proposed evidence for the purpose of proving or as corroborative proof of a marriage in an action of this nature. They would be admissible upon the trial of an action to which the person making them was a party.

It has been held in England, and in some of the States of this Union, that evidence of declarations as to a former marriage was competent in the trial of an indictment for bigamy against the party making them. 1 Wharton, Ev. § 86, and *note*; *Miles v. United States*, 108 U. S. 804, 26 L. ed. 481. But in this State it has been held that such evidence was not sufficient in a prosecution for bigamy, to establish a marriage, even against the party making the admissions. *People v. Humphrey*, 7 Johns. 314; *Gahagan v. People*, 1 Park. Crim. Rep. 878. The court held them admissible to corroborate the proof of the actual marriage. In cases where a cohabitation between a man and woman was proved at the time when the declaration of the parties were made, they have been admitted in evidence, even in the lifetime of the parties making them, upon the principle that they were a part of the *res gesta*, accompanying, characterizing and explaining the nature of that cohabitation as being matrimonial, rather than meretricious. They were admitted as competent proof corroborative of the claim of a marriage between the parties so cohabiting. It was stated that proof of cohabitation, conduct, reputation, reception in family and in society, holding each other out as husband and wife, all tended to prove a marriage, and that in a perfect case they all combined, the lesser facts attending upon and explaining the material and important fact of cohabitation. These principles are illustrated

in the authorities herein cited. 1 Bishop, Mar. and Div. § 439; 1 Phil. Ev. (Cow. & H. & Edw. notes,) p. 252, *note* 91; *Read v. Passer*, 1 Esp. 218; *Leader v. Barry*, Id. 353; *Mathews*, Presumptive Ev. 288; *Fenton v. Reed*, 4 Johns. 53; *Re Taylor*, 9 Paige, 611, 4 L. ed. 887; *O'Gara v. Eisenlohr*, 88 N. Y. 296; *Chamberlain v. Chamberlain*, 71 N. Y. 428; *Badger v. Badger*, 88 N. Y. 546.

All these cases do not speak of the principle upon which the declarations were admitted, but it plainly appears that there was cohabitation, and the declarations, reputation, holding themselves out as married persons, etc., all came in as adjuncts to strengthen the inference and to corroborate the presumption of marriage resulting from such cohabitation, and as explanatory thereof, and therefore as part of the *res gesta*. How far the principle of *res gesta* extends was somewhat discussed in *Badger v. Badger*, *supra*, by Finch, J., but the point here was not decided. I do not see that these declarations, in the face of evidence that there never was any cohabitation between the parties, can be claimed to have been part of the *res gesta*, even under the most extended definition of that term, and some other ground must be sought for their admission, if they be competent at all.

It seems to me that they are competent as hearsay evidence in a case of pedigree. Such a case is a well-known and recognized exception to the general rule excluding hearsay evidence. This case involves without doubt a question of pedigree simply. It is what is termed in the books a purely genealogical controversy. Peter O. Eisenlord is, upon the plaintiff's claim, the common ancestor of all the parties, while the defendants only deny the plaintiff's relationship to him. The sole question involved is as to this relationship of the plaintiff, and that depends upon the fact of a marriage having taken place between Eisenlord and the plaintiff's mother before his birth. The exception regarding the admission of hearsay evidence in case of a pedigree is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired; and the hearsay as to deceased witnesses is admitted as to facts which have occurred in the presence of living witnesses. 1 Phil. Ev. (Cow. & H. & Edw. notes), p. 248; *Voules v. Young*, 13 Ves. Jr. 140. Matters of pedigree consist of descent and relationship, evidence of declarations of particular facts, such as births, marriages and deaths. 1 Phil. Ev. (Cow. & H. & Edw. notes) p. 251. In cases of pedigree, hearsay evidence of persons who from their situation were likely to know, is admissible when the person making them is dead. *Jackson v. Cooley*, 8 Johns. 123. It is not the question whether such evidence is sufficient to prove the marriage, but only whether it is competent. In many cases it will be readily seen such evidence may, under the circumstances, be the only evidence which can be obtained, and there might be no evidence of cohabitation. In those cases the declarations might be less open to criticism, and entitled to much greater credence, than where the facts were recent, and other evidence readily attainable, if the truth were in that direction. The weight to be given this kind of evidence

depends upon the facts surrounding each particular case. It is plain, however, that in cases of pedigree, the declarations, to be admissible, need not be a part of the *res gestæ*; for, if they were, they would be admissible on that ground, irrespective of any question of their admissibility as in a case of pedigree. The exception to the general rule in the latter case takes a wide range. Traditionary declarations become the best evidence sometimes, when those best acquainted with the fact are dead. When derived from those who are most likely to know the truth, and are under no bias to misrepresent the fact, such evidence affords a reasonable presumption of the truth. Starkie, *Ev. 9th Am. ed. 1879*, p. 47. Upon questions of pedigree, *i. e.*, in a controversy merely genealogical, hearsay evidence is allowed as to the time of birth of a certain party, as to a marriage, death, legitimacy or the reverse, consanguinity, generally, and particular degrees thereof, and of affinity. Per Knight-Bruce, *V. O.*, in *Shields v. Boucher*, 1 De G. & S. 40-52. The term "pedigree," says Greenleaf, embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened, and the rule permits hearsay evidence of the declarations of deceased members of the family upon these points in any case involving pedigree. 1 Greenl. *Ev. §§ 103, 104*. The declarations, to be admissible, need not be upon the knowledge of the declarant. If this were so, the main object of permitting hearsay evidence would be frustrated, as it seldom happens that the declarations of deceased relations embrace matters within their own personal knowledge. Thus, evidence that a deceased member of the family said that he heard from others of his family the facts which he states is admissible. 1 Whart. *Ev. § 205*; *Doe v. Griffin*, 15 East, 298; *Doe v. Randall*, 2 Moore & P. 20. The evidence is, of course, not rendered less admissible where the declarant knows the fact which he declares. For the purpose of proving a marriage in cases of pedigree, where the object is to trace relationship, the declarations of deceased members of the family are competent. 1 Wharton, *Ev. § 212*. It has been stated that declarations in regard to particular facts are not competent. This is true in cases where proof of custom, right of way, of common, and the like is offered. But, in a case of pedigree, it is always a particular fact that is to be proved, and in relation to which the declarations of the deceased person are offered, and in such cases the particular facts stated, such as birth (place or time, where material), marriage and death, are competent. 1 Phil. *Ev. (Cow. & H. & Edw. notes)*, \*251; 1 Wharton, *Ev. § 209*.

In respect to such proof of particular facts, it has been said that "a birth, however, from a single woman, a birth from a married woman, a death, a marriage, is a particular fact, or a single act, which, of course, is provable by hearsay (hearsay from a proper quarter) on a question of pedigree." Per *Vice-Chancellor Knight-Bruce* in *Shields v. Boucher*, *supra*.

The only case looking to the contrary, that I have found, is *Westfield v. Warren*, 8 N. J. L. 306, where Ewing, *Ch. J.*, said that, where 12 L. R. A.

marriage was to be shown as a substantive, independent fact, it was within none of the exceptions to the general rule, and that hearsay evidence could not be received. The case was one regarding the settlement of a pauper, and might perhaps have been placed upon the ground that it was not a case of pedigree at all.

In *Rees v. Erith*, 8 East, 589, *Chief Justice Ellenborough* held, in a case of a settlement of a pauper, that it was not a case of pedigree, but simply a question as to what place an undisputed birth derived from acknowledged parents had taken place in. I think it entirely clear that from the nature of the case, as well as upon authority, a case of pedigree forms an exception to the general rule as to proof of a particular fact by hearsay, reputation or tradition. As to what is a case of pedigree, an examination of the question shows that a case is not necessarily one of that kind, because it may involve questions of birth, parentage, age or relationship. Where these questions are merely incidental, and the judgment will simply establish a debt for a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death or birth are incidentally inquired of. *Whittuck v. Waters*, 4 Car. & P. 375. Thus in *Haines v. Guthrie*, L. R. 18 Q. B. Div. 818, it was held, both in the queen's bench division, and in the court of appeal, that declarations of a deceased father were not admissible in evidence to prove the age of his son who had been sued for the price of a horse sold him, and who had set up the defense of infancy. They would have been admissible, the court stated, if the case had been one of pedigree. Prett, *M. R.*, in the course of his opinion in the court of appeal, shows the absence of those facts which make up a case of pedigree; for he says: "What the family of the defendant is, is immaterial; whose son he is, is immaterial; whether he is a legitimate or an illegitimate son is immaterial; and whether he is an elder or a younger son is immaterial; no question of family is raised in the case." It simply involved the point of the age of the defendant for the purpose of thereby determining his liability upon a contract which he had made, and upon which, if of age, he was liable. The judgment would in such case establish no fact in any contest the defendant might have in regard to property depending upon his being a member of his father's family, and his age at any particular time. It was not at all a genealogical controversy, but a mere collateral issue, and hence the rule in pedigree cases did not apply. In the case at bar, however, the case is solely one of pedigree, and the evidence must be judged of with regard to this fact.

The case of *Re Taylor*, 9 Paige, 611, 4 L. ed. 887, where the chancellor held that the declarations of one of the parties, made after the cohabitation had ceased, could not be admitted in evidence, was not a pedigree case, but only involved the appointment of a committee for the father, who was insane, and such declarations were held inadmissible, as not being a part of the *res gestæ*.

A careful examination of the question has led me to the conclusion that the evidence of Flanders and Saltzman, regarding Eisenlord's

declarations, should have been received as in a case of pedigree. Other evidence, of course, may be offered that may be definite enough to be competent, though most of what was offered, other than that to which I have alluded, was altogether too vague to be admissible. It identified no one, and really amounted to nothing. Although admissible, the evidence is liable to grave suspicion. Indeed, we are bound to say that this whole case presents itself as full of suspicion. The silence of the woman during all these years as to the marriage, silence which was continued until the death of her alleged husband, is, in and of itself, a suspicious fact. Admissions of a marriage are, under such circumstances, most unsatisfactory, and open to grave doubt. If such declarations were in truth ever made, there are many motives which it is impossible

to fathom, and which may at the same time operate upon an individual, and induce him to make an admission of this kind when it is wholly untrue. Where the facts are of comparatively recent occurrence, and the alleged declarations of the deceased are at war with his known actions during his life, and where there was no cohabitation or recognition of the party as wife or husband, it may be averred that the evidence is to be looked upon with very great distrust. Still, within the authorities the evidence is competent. Under our rulings there may be evidence enough in the case to require its submission to a jury.

*The judgment must be reversed, and a new trial granted, costs to abide event.*

All concur, *Andrews and Finch, JJ.*, on first two grounds. *Gray, J.*, absent.

### NEW YORK COURT OF APPEALS (3d Div.).

*Ida PEIL, Appt.,*

*v.*

*James M. REINHART, Resp't.*

(.....N. Y.....)

1. **Permitting a stairway carpet with holes in it to remain on the stairs of a tenement house with notice of its condition renders the owner liable for injuries to a tenant from a fall caused by catching her foot in one of the holes.**
2. **The fall of a tenant in a tenement house, caused by a hole in a stair carpet, does not as matter of law show contributory negligence, although she knew of the holes in the carpet and the stairway was well lighted at the time.**

(June 23, 1891.)

**A**PPPEAL by plaintiff from an order of the the General Term of the City Court of

Brooklyn, reversing a judgment of the Trial Term in favor of plaintiff and granting a new trial in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion.

*Mr. Fernando Solinger*, for appellant:

A landlord who lets rooms in a building to different tenants, with a right of way in common over the staircase, is bound to use reasonable care to keep such staircase in repair; if he fails to do so he is liable to a tenant injured thereby while in exercise of reasonable care.

*Looney v. McLean*, 129 Mass. 83; *Donohue v. Kendall*, 18 Jones & S. 889; *Neyer v. Miller*, 19 Jones & S. 516; *Lindsey v. Leighton*, 150 Mass. 285.

While previous knowledge, by a party injured, of a dangerous situation, or impending danger, from which a person of ordinary intelligence might reasonably apprehend injury, generally imposes upon him greater care and

#### NOTE.—Of the landlord's liability.

A landlord, whose neglect to use ordinary skill in making repairs on the demised premises causes a personal injury to the tenant, is liable therefor, although his undertaking to make the repairs was gratuitous and by the tenant's solicitation. *Gill v. Middleton*, 105 Mass. 477.

It is well settled that, for an injury occasioned by want of due care and skill in doing what one has promised to do, an action may be maintained against him in favor of the party relying on such promise and injured by the breach of it, although there was no consideration for the promise. *Ben-den v. Manning*, 2 N. H. 239; *Thorne v. Deas*, 4 Johns. 84; *Elisee v. Gatward*, 5 T. R. 143; *Shiells v. Blackburne*, 1 H. Bl. 153; *Baife v. West*, 22 Eng. L. & Eq. 508.

A landlord, having let to different tenants the five tenements with a common passageway, was bound to keep the passageway in repair. *Looney v. McLean*, 129 Mass. 83.

But the duty to repair does not include the removal of snow or ice which might accumulate on the passageway, and render the use of it difficult and dangerous. *Woods v. Naumkeag Steam Cotton Co.* 134 Mass. 367; *Watkins v. Goodall*, 138 Mass. 433.

13 L. R. A.

It is equally well settled that the landlord is liable to respond to either the tenant or to a stranger for damages arising from either the improper or unworkmanlike construction of the premises. *White v. Montgomery*, 58 Ga. 204; *Learoyd v. Godfrey*, 138 Mass. 315; *McCarthy v. York County Sav. Bank*, 74 Me. 315; *Nash v. Minneapolis Mill Co.* 24 Minn. 501; *Godley v. Hagerty*, 20 Pa. 387; *Kimmell v. Burfeind*, 2 Daly, 155; *Scott v. Simons*, 64 N. H. 426; *Gear, Land. and Ten.* § 173.

And the same degree of liability attaches to the negligence of the landlord, or of his duly authorized agents, in the care or management of the leasehold premises, so far as the same are under his control. *Center v. Davis*, 39 Ga. 211; *Glickauf v. Maurer*, 75 Ill. 239; *Milford v. Holbrook*, 91 Mass. 17; *Learoyd v. Godfrey*, 138 Mass. 315; *Toole v. Beckett*, 67 Me. 544. See *Campbell v. Portland Sugar Co.* 63 Me. 552; *Powers v. Harlow*, 53 Mich. 507; *Jones v. Freidenburg*, 66 Ga. 605; *Totten v. Phipps*, 52 N. Y. 264; *Vann v. Rouse*, 94 N. Y. 401; *Stapenhorst v. American Mfg. Co.* 15 Abb. Pr. N. S. 856; *Lansing v. Stone*, 37 Barb. 15; *Williams v. Macready*, 2 Cin. L. Bull. 272.

Where by either contractual agreement or operation of law it becomes the landlord's duty to make certain repairs, any failure or neglect to per-

caution in approaching it, the degree of care required is a question of fact for the jury.

*Dowd v. Fitzpatrick*, 18 N. Y. Week. Dig. 343; *Pomfroy v. Saratoga Springs*, 7 Cent. Rep. 44, 104 N. Y. 459, 469; *Hawley v. Northern Cent. R. Co.* 82 N. Y. 371; *Looney v. McLean*, *supra*; *Parsons v. New York Cent. & H. R. R. Co.* 8 L. R. A. 683, 113 N. Y. 864.

The law holds a defendant to stricter accountability if he holds out inducements or makes promises to repair, upon which a person injured has relied.

*Laning v. New York Cent. R. Co.* 49 N. Y. 536; *Palmer v. Dearing*, 98 N. Y. 7.

In proving the condition of the carpet at the time of the accident, the evidence that other persons fell on it at about the same time was not improper.

*Pomfroy v. Saratoga Springs*, *supra*.

*Mr. George F. Elliott*, for respondent:

The plaintiff should have been nonsuited, because upon the facts as stated by herself (assuming, but not conceding, that the defendant was chargeable with the condition of the carpet) it cannot be by anybody deliberately concluded that she used the proper care to avoid the danger so well known to her. The circumstance, itself, of her catching her foot was evidence of negligence on her part.

*Koch v. Edgewater*, 14 Hun, 544; *Niven v. Rochester*, 76 N. Y. 619; *Lansigan v. New York Gas Light Co.* 71 N. Y. 29.

The plaintiff went down these stairs very often. If so, the greater care was necessary, and it would have been easy for her to have avoided the danger of falling by just putting in a few tacks in the carpet, the labor of a few moments, which would at least temporarily remove the danger even if the defendant had contracted to keep this carpet in repair; she could have properly done this.

*Myers v. Burns*, 35 N. Y. 269.

But the defendant was not liable for the defect in the stairway, or chargeable with legal negligence to its tenants for its being out of repair.

1. He had not covenanted to keep the carpet in good condition.

*O'Brien v. Capwell*, 59 Barb. 497.

2. Even if there was an agreement to keep in repair in this respect, the halls, such agree-

ments have reference to the pecuniary use and the benefit to be derived from their enjoyment. If the covenant is broken, the tenant may sue for his damage for loss of enjoyment or annul the lease, or make the repairs himself on notice and recover the amount, but cannot sue for injuries to persons in his family, who knew of the defects as well as himself, and yet continue the occupation of the rooms without repairing himself, or abandoning the premises.

*Flynn v. Hatton*, 43 How. Pr. 333; *Walker v. Swayzee*, 3 Abb. Pr. 136; *Hexter v. Knox*, 63 N. Y. 561; *Myers v. Burns*, *supra*.

3. In the absence of a contract the landlord is not liable to any extent for the want of repair in the premises.

*McGlathan v. Tallmadge*, 37 Barb. 313; *Sherwood v. Seaman*, 2 Bosw. 190; *Howard v. Doolittle*, 8 Duer, 464-473, and cases cited; *Hart v. Windsor*, 12 Mees. & W. 63; *Doupe v. Genin*, 45 N. Y. 119.

*Bradley, J.*, delivered the opinion of the court:

The plaintiff, as tenant of the defendant, occupied some rooms in a tenement-house of the latter, and had access to such rooms by means of a stairway common to the occupants of the building. It appears by the evidence on her part that in descending the stairway in the evening of January 15, 1888, the plaintiff fell and received the injuries complained of and that such fall was caused by the defective condition of the stair carpet; that the carpet had been in such condition for several months; and that the attention of the defendant had in December previous been called to it by the plaintiff, and he said he would remove it. There was some conflict in the evidence of the parties as to the latter fact, and as to the subject of the injury and its cause; but that there were, and for considerable time had been, holes in the stairway carpet, was not seriously questioned. It was the duty of the defendant to use reasonable care to keep this stairway in repair and suitable condition for the safe passage of his tenants over it in their way to and from their rooms, and for failure to do so he was chargeable with liability for injuries suffered by them without their fault while properly using it for such purpose. *Looney v. McLean*,

form that duty will fasten the liability upon the landlord, under which the tenant by an appropriate action may recover. *Dempsey v. Hertzfeld*, 30 Ga. 866; *Whittle v. Webster*, 55 Ga. 180; *Lowell v. Spaulding*, 4 Cush. 277; *Gridley v. Bloomington*, 63 Ill. 47; *Flynn v. Trask*, 98 Mass. 550; *Benson v. Suarez*, 19 Abb. Pr. 61; *Dowd v. Fitzpatrick*, 18 N. Y. Week. Dig. 343; *Donohue v. Kendall*, 13 Jones & S. 336; *Allegheeny v. Campbell*, 107 Pa. 530.

*Landlord's ignorance of defect, no excuse.*

It has been decided in a recent case that it was not necessary to show that the landlord had actual knowledge of the defect complained of. His duty was that of due care; and ignorance of the defect was no defense. *Gill v. Middleton*, 105 Mass. 477. See also *Readman v. Conway*, 126 Mass. 374; *Looney v. McLean*, 129 Mass. 38; *Watkins v. Goodall*, 133 Mass. 533; *Lindsey v. Leighton*, 150 Mass. 235.

*Effect of notice.*

After the landlord has been duly apprised of the

defective condition of the demised premises, and a reasonable time has elapsed since the notice of such defect was imparted, he will become liable for any injury resulting from the dangerous condition aforesaid. *Reichenbacher v. Pahmeyer*, 3 Ill. App. 217; *Coke v. Gutkese*, 80 Ky. 523, 44 Am. Rep. 499; *Cesar v. Karutz*, 60 N. Y. 229; *Minor v. Sharon*, 113 Mass. 477, 17 Am. Rep. 123; *Albert v. State*, 6 Cent. Rep. 447, 66 Md. 323; *Owings v. Jones*, 9 Md. 103.

In the absence of fraud or deceit, there is no implied covenant that the demised premises are fit for occupation or for the particular use which the tenant intends to make of them. The maxim of *caveat emptor* applies. *Cleves v. Willoughby*, 1 Hill, 83; *Post v. Vetter*, 2 E. D. Smith, 243; *Howard v. Doolittle*, 8 Duer, 464; *Robbins v. Mount*, 4 Robt. 552; *Flynn v. Hatton*, 43 How. Pr. 333; *Jaffe v. Harteau*, 56 N. Y. 363; *O'Brien v. Capwell*, 59 Barb. 497; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Poyser*, 9 Cush. 242; *Royce v. Guggenheim*, 103 Mass. 301; *McAdam, Land. and Ten.* § 242.

129 Mass. 53; *Lindsey v. Leighton*, 150 Mass. 285; *Donohue v. Kendall*, 18 Jones & S. 886; *Neyer v. Miller*, 19 Jones & S. 516.

The conclusion was warranted by the evidence that the condition of the carpet was such as to justify apprehension of danger of tripping in passing upon the stairway, and that at the time in question the plaintiff's foot was caught in a hole in the carpet, thus causing her fall and injury; and that the defendant was chargeable with negligence for permitting it to remain in such condition, and with its consequences to the plaintiff, unless her negligence contributed to the injury which she sustained. It is urged that as she was cognizant of the situation, and the hall of the stairway was well lighted by a lamp, her fall was necessarily attributable to the fault or negligence of the plaintiff. Her previous knowledge of the condition of the passageway on the stairs imposed upon her the duty to exercise a greater degree of care than otherwise may have been required of her in passing over them, but she was not required to desist from using the stairway by reason of the ruptures in the carpet; and, while the question may have been a close one of fact, it could not properly be held as matter of law that the plaintiff was guilty of contributory negligence, and therefore the motion for nonsuit was properly denied. *Palmer v. Dearing*, 93 N. Y. 7; *Looney v. McLean*, 129 Mass. 88.

The question presented would have been quite different if the staircase had been part of the premises demised to the plaintiff. Then the evidence may not have warranted a recovery by her, and many of the cases cited by the defendant's counsel would have been applicable. But the stairway was not under the control of any of the tenants, but was provided by the defendant for the common use of those having occasion to pass to and from the rooms which they occupied as his tenants and the weight of the evidence bearing upon the question of negligence of the defendant, or of contributory negligence of the plaintiff, is not here for consideration. The appeal to the general term having been taken only from the judgment entered on the verdict, presented there for review questions of law only, dependent upon exceptions. To review in general term questions of fact arising upon a trial of an action at law by jury, it is essential that a motion be made for a new trial, at circuit, on the minutes, or at special term on a case, and that an appeal be taken from the order thereupon made as well as from the judgment, if one has been unqualifiedly entered upon the result of the trial. *Wright v. Hunter*, 46 N. Y. 409. And in such case an order reversing that denying a new trial, and granting it, is not reviewable in this court. *Harris v. Burdett*, 78 N. Y. 136.

There was no error in the reception of the evidence of the condition of the stair carpet the morning following the injury, as without proof to the contrary it was reasonable to assume that its then condition was substantially the same as at the time in question.

The order should be reversed, and the judgment entered on the verdict affirmed.

All concur.

12 L. R. A.

Cornelius W. CARNWRIGHT, *Recept.*,  
v.

Morgan GRAY *et al.*, Exrs., etc., of Samuel  
P. Freleigh, Deceased, *Appts.*

(.....N. Y.....)

1. A promissory note, although non-negotiable, need not express any consideration, nor need evidence of consideration be given in the first instance in a suit to recover on it.
2. A note payable "thirty days after death" may be a valid instrument.

(*Follett, Ch. J., and Vann. J., dissent.*)

(June 2, 1891.)

**A** PPEAL by defendants from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Ulster Circuit in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

Statement by Brown, J.:

The action was brought to recover upon a written instrument, of which the following is a copy:

"Quarryville, September 2, 1871.

"Thirty days after death I promise to pay to Cornelius Carnwright fifteen hundred dollars, with interest.

"Samuel P. Freleigh."

The plaintiff gave no evidence of the trans-

**NOTE.**—*Commercial paper, consideration.*

In an action upon a promissory note, whether negotiable or not, the plaintiff sustains the burden of proof by producing the note and proving its execution. It is evidence, under the hand of the promisor of a contract made upon a good consideration, even if the words "value received" are omitted. *Townsend v. Derby*, 3 Met. 383; *Burnham v. Allen*, 1 Gray, 496; *Dean v. Carruth*, 108 Mass. 242.

*The early ruling.*

Although it was once held to be necessary to have in the body of the instrument an express acknowledgment of consideration, in order to raise the presumption of consideration (*Cramlington v. Evans*, 1 Show. 5), it is now generally held, in England (*Poplewell v. Wilson*, 1 Strange, 264; *Claxton v. Swift*, 2 Show. 496; *Grant v. DaCosta*, 3 Maule & S. 351; *Mackleod v. Kneec*, 2 Ld. Raym. 1451), and in the United States, to be unnecessary. *Mandeville v. Welch*, 18 U. S. 5 Wheat. 277, 5 L. ed. 57; *Kendall v. Galvin*, 15 Me. 131; *Townsend v. Derby*, 3 Met. 383; *Dean v. Carruth*, 108 Mass. 242; *Goshen & M. Turnp. Co. v. Hurdin*, 9 Johns. 217; *Hughes v. Wheeler*, 3 Cow. 83; *Underhill v. Phillips*, 10 Hun. 591; *Kinsman v. Birdall*, 3 E. D. Smith, 395; *Peasley v. Boatwright*, 3 Leigh, 196; *Hubble v. Fogardie*, 3 Rich. L. 413; *Hunley v. Lang*, 5 Port. (Ala.) 154; *Murry v. Clayborn*, 3 Bibb, 300; *Matlock v. Livingston*, 9 Smedes & M. 496; *People v. McDermott*, 3 Cal. 233. See *Tiedeman, Com. Paper*, § 153.

*When consideration is implied.*

An absolute indorsement of a bill of exchange or promissory note imports a valid consideration passing from the indorsee to the indorser; but in order that this quality should attend the instrument it should be for the payment of money only, absolutely and at all events. 3 Kent, Com. 74; 1 Dan. Neg. Inst. 2; *Chitty, Bills*, 153, 154, 157, 213, 219;

action out of which the instrument arose, and none of the actual consideration thereof, but, having offered testimony tending to prove the genuineness of the maker's signature, put the note in evidence, and rested his case.

**Messrs. Peter Cantine and John J. Linsom**, for appellants:

A negotiable promissory note, expressing value received, is prima facie evidence of a consideration.

Edwards, Bills and Prom. Notes, pp. 78, 811; Dan. Neg. Inst. 163; 1 Parsons, Bills and Notes, p. 127.

If the note is not strictly speaking a promissory note, such as one payable in chattels, a consideration must be alleged and proved.

*Spear v. Downing*, 84 Barb. 522.

Where a note contains the words "value received" and the complaint alleges a particular consideration, that consideration must be proved.

*Jerome v. Whitney*, 7 Johns. 321; *Saxton v. Johnson*, 10 Johns. 418; *Walrad v. Petrie*, 4 Wend. 575.

A non-negotiable note, without the words

"value received," or other equivalent words, is not evidence from which a consideration can be implied.

*Edgerton v. Edgerton*, 8 Conn. 6; *Bristol v. Warner*, 19 Conn. 7; *Courtney v. Doyle*, 10 Allen. 129; Dan. Neg. Inst. § 163, 1 Parsons, Bills and Notes, p. 127.

While cases can be found in this State, where the courts have suggested in their opinions that non-negotiable promissory notes, without words expressing value received, import a consideration, yet on examination, they show that either the plaintiff did affirmatively prove a consideration on the trial or that the words expressing a consideration appeared in the body of the note.

See *Saxton v. Johnson*, *supra*; *Kimball v. Huntington*, 10 Wend. 675; *Goshen & M. Turnp. Co. v. Hurin*, 9 Johns. 217; *Cruger v. Armstrong*, 8 Johns. Cas. 5; *Conroy v. Warren*, 8 Johns. Cas. 259; *Roubitschek v. Blank*, 80 N. Y. 479; *Kinsman v. Birdsall*, 3 E. D. Smith, 395; *Dean v. Carruth*, 108 Mass. 242; *Richards v. Barlow*, 1 New Eng. Rep. 577, 140 Mass. 218; *Paine v. Noels*, 53 How. Pr. 273.

The burden of proving a consideration re-

Story, Prom. Notes, § 128; *Dean v. Hall*, 17 Wend. 221; *Overton v. Tyler*, 3 Pa. 346.

But this rule ceases to operate in case of a restrictive indorsement. The paper is no longer negotiable, imports no consideration from an indorser, nor does it by implication disclose a promise to pay. Dan. Neg. Inst. 515; Edwards, Bills and Notes, §§ 111, 112; Bayley, Bills and Notes, 107; Chitty, Bills, 253, 259; 3 Kent, Com. 92; *Power v. Finnie*, 4 Call, 411; *Wilson v. Holmes*, 5 Mass. 543; *Sigourney v. Lloyd*, 8 Barn. & C. 622; *Treuttl v. Barandon*, 8 Taunt. 100; *Anchor v. Bank of England*, Dougl. 637; *Blaine v. Bourne*, 11 R. I. 119; *Edie v. East India Co.* 2 Burr. 1216, 1227; *Holliday v. Atkinson*, 5 Barn. & C. 501; *Sweeney v. Easter*, 68 U. S. 1 Wall. 166, 17 L. ed. 681; *Averett v. Booker*, 15 Gratt. 163; *Brown v. Jackson*, 1 Wash. C. C. 512; *Snee v. Prescott*, 1 Atk. 247.

A bill negotiable on its face implies a valid consideration, and hence it is not necessary for the holder to allege and prove its presence. *Smith v. Gardner*, 4 Bosw. 54; Bayley, Bills and Notes, 67; *Bank of Orleans v. Barry*, 1 Dento, 118; *Warren v. Lynch*, 5 Johns. 239; *Central Bank of Brooklyn v. Lank*, 1 Bosw. 202; *Jerome v. Whitney*, 7 Johns. 321; *Bigelow v. Colton*, 13 Gray, 300; *Lines v. Smith*, 4 Fla. 47; *Plets v. Johnson*, 3 Hill, 113; *United States v. White*, 2 Hill, 59; Edwards, Bills and Notes, 165, 166; *Bank of Troy v. Topping*, 13 Wend. 557; 1 Parsons, Bills, 237; 1 Dan. Neg. Inst. 161.

#### Restrictive indorsement.

The restrictive indorsements which are held to negative the presumption of a consideration are such as indicate that they are not intended to pass the title, but merely to enable the indorsee to collect for the benefit of the indorser, such as indorsements "for collection" or others showing that the indorser is entitled to the proceeds. These create merely an agency, and negative the presumption of the transfer of the bill and the indorsee for a valuable consideration. *Hook v. Pratt*, 78 N. Y. 371.

Where the indorsement purports to pass the title to the bill therein from the indorser, and devert him of all beneficial interest, a consideration for such transfer is presumed. The citation from 3 Kent, Com. 92, states the principle to be that when the indorsement is a mere authority to receive the money for the use or according to the directions of the indorser, it is evidence that the indorsee did not

give a valuable consideration for it and is not the absolute owner. This accords with the statement of the principle by Wilmot, J., in *Edie v. East India Co.* 2 Burr. 1227. See also *Hook v. Pratt*, *supra*.

#### Effect of a condition as to payment.

If the instrument is made payable out of a particular fund, or hinges upon some condition, or in something besides money, it loses its character as a bill of exchange, and no longer imports a consideration. In an action upon such a note, consideration must be alleged and proved, unless it be stated in the body of the instrument that it was given for value received. *Atkinson v. Manks*, 1 Cow. 691; *De Forrest v. Frary*, 6 Cow. 151; *Bilderback v. Burlingame*, 27 Ill. 311.

#### The effect of the phrase "for value received."

The words "for value received," so frequently incorporated with the body of a negotiable instrument, are no longer considered necessary to denote the presence of a consideration. *Benjamin v. Tillman*, 2 McLean, 213; *People v. McDermott*, 8 Cal. 238; *Holliday v. Atkinson*, 5 Barn. & C. 503; *Grant v. Da Costa*, 3 Maule & S. 351; *Townsend v. Derby*, 3 Met. 363; *Hatch v. Trayer*, 11 Ad. & El. 703; *Hubble v. Fogarty*, 3 Rich. L. 413; *Kendall v. Galvin*, 15 Me. 181; *Hughes v. Wheeler*, 8 Cow. 77; *Clayton v. Gosling*, 5 Barn. & C. 300; *Mackled v. Snee*, 3 Ld. Raym. 1481; *Arnold v. Sprague*, 34 Vt. 403; *Poplewell v. Wilson*, 1 Strange, 264; *White v. Ledwick*, 4 Dougl. 247; *Jones v. Jones*, 6 Mea. & W. 84; *Story*, Prom. Notes, §§ 51-53.

It remains to add that by statutory enactment in some of the States, notably, Arkansas (Rev. Stat. 1874, §§ 568, 569), Missouri (Rev. Stat. 1879, § 545), and Pennsylvania (Purdon, Dig. (1872) p. 1173, § 1), it is required that all promissory notes must contain the words "for value received," in order to make them negotiable; but the note or bill does not necessarily presume a consideration existing prior to its execution—it does import consideration, that is at least contemporaneous. *Johnston v. Zane*, 11 Gratt. 533. See *Tiedeman*, Com. Paper, § 153.

As between the original parties, the consideration of a note is open to inquiry. *Wilson v. Ellsworth*, 26 Neb. 246. See note to *Kulenkamp v. Groß* (Mich.) 1 L. R. A. 594.

mains upon the plaintiff notwithstanding the presumption, and if there is any evidence in the case on this point on behalf of the defendant, the plaintiff must show by a preponderance of the whole evidence that the note was given for a valuable consideration.

*Perley v. Perley*, 8 New Eng. Rep. 737, 144 Mass. 104; *Powers v. Russell*, 18 Pick. 69; *DeLano v. Bartlett*, 6 Cush. 364; *Simpson v. Davis*, 119 Mass. 269; 1 Dan. Neg. Inst. § 164; *Brynn v. Russell*, 52 Hun, 17.

The presumption of consideration and delivery can be overcome by proving facts and circumstances which overcome the presumption.

*Anthony v. Harrison*, 14 Hun, 218, affirmed in 74 N. Y. 618; *Sawyer v. Warner*, 15 Barb. 282; 1 Greenl. Ev. §§ 79-81, and note; *Dryer v. Brown*, 52 Hun, 321.

*Messa F. L. Westbrook* and *J. N. Fiero*, for respondent:

A non-negotiable note need not express on its face a consideration.

*Kimball v. Huntington*, 10 Wend. 676; *Goshen & M. Turnp. Co. v. Hurlin*, 9 Johns. 217; *Paine v. Noelke*, 54 How. Pr. 335; *Townsend v. Derby*, 8 Met. 364; *Underhill v. Phillips*, 10 Hun, 592; *Payne v. Gardiner*, 29 N. Y. 146; *Luquer v. Prosser*, 1 Hill, 258.

Promissory notes partake in a very high degree of the character of specialties and are deemed, prima facie, to be founded upon a valuable consideration, and may be generally declared on without specially stating what the particular consideration is; in which circumstance they differ from other unsealed contracts whether written or unwritten.

Story, Prom. Notes, § 7; 8 Kent, Com. 77, 78; *Downing v. Backenstoos*, 8 Cal. 187; *Goshen & M. Turnp. Co. v. Hurlin*, supra; *Bank of Troy v. Topping*, 9 Wend. 277; *Kimball v. Huntington*, supra; *Luquer v. Prosser*, 1 Hill, 267; *Paine v. Noelke*, 58 How. Pr. 278, 54 How. Pr. 335; *Powers v. French*, 1 Hun, 583; *Underhill v. Phillips*, supra; *Hughes v. Wheeler*, 8 Cow. 83; *Townsend v. Derby*, 8 Met. 363; *Dean v. Carruth*, 108 Mass. 242; *Sibley v. Phelps*, 6 Cush. 178; *Richards v. Barlow*, 1 New Eng. Rep. 577, 140 Mass. 218; *People v. McDermott*, 8 Cal. 288; *Dugan v. Campbell*, 1 Ohio, 115; *Richmond v. Patterson*, 8 Ohio, 369; *Cummings v. Freeman*, 3 Humph. 143; *Coursin v. Ledlie*, 81 Pa. 506; *Flint v. Phipps*, 16 Or. 444; *Hunley v. Lang*, 5 Port. (Ala.) 157.

*Brown, J.*, delivered the opinion of the court:

When the plaintiff rested his case, and again at the close of the testimony, the defendants moved to dismiss the complaint upon the ground that no proof had been given that the instrument sued upon had any consideration. These motions were denied, and the court instructed the jury that the instrument was a promissory note, and imported a consideration and that the burden rested upon the defendants to show that it was without a consideration. The exceptions to these rulings present the principal question argued upon this appeal. The Statute of this State in reference to promissory notes provides as follows (1 Rev. Stat. 768): "Section 1. All notes in writing, made and signed by any person, whereby he

shall promise to pay to any other person, or his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed; and shall have the same effect, and be negotiable in like manner, as inland bills of exchange, according to the custom of merchants." "Sec. 4. The payees and indorsees of every such note payable to them or their order, and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned against the makers and indorsers of the same, respectively, in like manner as in cases of inland bills of exchange, and not otherwise."

Our Statute is a substantial re-enactment of the Statute of Anne (8 & 4 Anne, chap. 9), which provided that "all notes signed by a person promising to pay to another, his, her or their order, or to bearer," should be construed to be by virtue thereof due and payable to any such person to whom the same is made payable, etc. This statute was held by the courts of England to include within its terms a non-negotiable note. *Smith v. Kendall*, 6 T. R. 123; *Burchell v. Slocock*, 2 Ld. Raym. 1545; 8 Kent, Com. 77. In the case first cited Lord Kenyon said: "A note may be made payable to A. or bearer, A. or order, or to A. only." Similar decisions were made by the courts of this State under our own Statute. *Downing v. Backenstoos*, 8 Cal. 187; *Goshen & M. Turnp. Co. v. Hurlin*, 9 Johns. 217; *Kimball v. Huntington*, 10 Wend. 675; *Hall v. Farmer*, 5 Denio, 484. In *Downing v. Backenstoos* a non-negotiable note was declared on as within the Statute, and the defendant demurred on the ground that the declaration did not allege the transaction and consideration upon which the note was given. The court gave judgment for the plaintiff, saying: "The very point was settled in *Green v. Long*, April Term, 1798, in conformity to the adjudications in Westminster Hall." In *Goshen & M. Turnp. Co. v. Hurlin* it was said: "The note set forth is a good promissory note within the Statute, though it has no words 'bearer or order.' This is the established English law, and the same rule is recognized by this court."

In *Kimball v. Huntington* the action was upon a due-bill in this form: "Due Kimball & Kenston three hundred and twenty-five dollars, payable on demand." Judge Nelson said: "The instrument is a promissory note within the Statute. Neither the acknowledgment of value received nor negotiable words are essential to bring it within the Statute." See also *Carver v. Hayes*, 47 Me. 257; *Franklin v. March*, 6 N. H. 364.

No authority is cited in the courts of this State or of England holding that a non-negotiable note is not within the terms of the laws cited, and we are of the opinion that the language of our Statute includes a note payable to a person without words of negotiability. The instrument sued upon being, therefore, a promissory note within the Statute of this State, it follows that it imports a consideration. By the express terms of the Statute the sum of money therein mentioned is declared to be "due and payable, as therein expressed." That it is "due and payable" according to its terms is the legal conclusion which the court

must draw from the instrument itself. A valid contract is thus declared to exist, and of course a consideration must be implied. Hence "value received" need not appear on the face of the note, as those words express only what the law implies. *Hatch v. Traves*, 11 Ad. & El. 702; *Hall v. Farmer*, 5 Denio, 484. The effect of laws which make promissory notes negotiable, or which authorize actions of debt upon them, though non-negotiable, is to take them out of the common-law rule which requires that every contract must be shown by the party who sues upon it to be supported by a consideration, and enables the holder to maintain an action thereon without alleging or proving a consideration. In other words, a consideration is implied from the character of the instrument. *Peasley v. Boatwright*, 2 Leigh, 195; *Hatch v. Traves*, *supra*. The English Statute was enacted to settle the controversy that prevailed, whether, under the customs of merchants, promissory notes were negotiable. They were thereby declared to be assignable or indorsable over in the same manner as inland bills of exchange were according to the customs of merchants, and holders were empowered to maintain actions thereon in the same manner as they might do upon any inland bill of exchange made or drawn according to the custom of merchants. Our Statute contains similar provisions. Promissory notes and inland bills of exchange were by virtue of these laws put upon an equality. They were made negotiable if they contained words of negotiability; but, whether negotiable or not, and whether they expressed value received or not, it was no longer necessary in actions thereon to aver and prove consideration. Such was and is the rule as to inland bills of exchange. 1 Dan. Neg. Inst. § 161; *Raubitschek v. Blank*, 80 N. Y. 479; *Averett v. Booker*, 15 Gratt. 168; *Wells v. Brigham*, 6 Cush. 6. And the same rule under the Statute was made applicable to promissory notes. *Townsend v. Derby*, 3 Met. 368; *Dean v. Carruth*, 108 Mass. 242; *Bank of Troy v. Topping*, 9 Wend. 277, and 18 Wend. 557; *Chitty, Bills*, 9th Am. ed. 78-181; *Paine v. Noeike*, 58 How. Pr. 273; *Story, Prom. Notes*, § 51; 8 Kent, Com. 77, 78; 1 Parsons, Cont. 6th ed. 249; 1 Parsons, Notes and Bills, p. 193.

The Statute does not require a note to express value received upon its face, and no definition of such an instrument requires the expression of that fact. The note sued upon, although by its terms payable after the death of the maker, was a valid instrument. A promissory note is defined to be a written engagement by one person to pay absolutely and unconditionally to another person therein named, or to the bearer, a certain sum of money at a specified time or on demand. *Story, Prom. Notes*, § 1; *Coolidge v. Ruggles*, 15 Mass. 387. It must contain the positive engagement of the maker to pay at a certain definite time, and the agreement to pay must not depend on any contingency, but be absolute, and at all events. Tried by this standard, the instrument set out in the complaint was a valid promissory note. The fact that it was payable after the death of the maker did not affect its character. 8 Kent, Com. 76. It follows from these views that the motion to dis-

miss the complaint was properly denied, and there was no error in the charge of the court.

The point made by the appellants that the court erred in its charge as to the burden of proof on the question of consideration, assuming that evidence *pro* and *con* upon that question was given, was not raised at the trial. The proposition made by the defendants at the close of the judge's charge, and the only one to which an exception appears in the record, was as follows: "In order that there may be no doubt about our position, we ask the court to charge the jury that there has been no evidence given of consideration, and to direct a verdict for the defendants upon that ground." The defendants, having thus squarely planted themselves on the ground that there was no evidence of consideration, and asked the court to direct a verdict in their favor, cannot now claim that there was evidence for the jury, and that they were entitled to a different instruction from that given. The defendants' claim all through the trial was that the note did not import a consideration, and that the plaintiff could not recover without proof of that fact; and his motion to dismiss the complaint and to direct a verdict in his favor, and his exceptions to the charge, all sharply present that question, but he nowhere claimed that he had given evidence which, if believed by the jury, overcame the presumption arising in favor of the note. This clearly appears from the statement I have quoted.

The exceptions to the admission of evidence present no error, and the judgment should be affirmed.

All concur, except Follett, Ch. J., and Vann, J., dissenting, and Parker, J., not voting.

Alfred COLVILLE, *Reppt.*,

v.

William J. MILES, *Appt.*

(....N. Y.....)

**Title to the hay, oats and straw, is not reserved to the owner of a farm as against attaching creditors of a tenant, under a lease by which the tenant agrees to raise enough stuff to feed the stock of the place, or, if he fails to do so, buy what may be necessary.**

(June 2, 1891.)

**NOTE.—Rights of the landlord as against attaching creditors of the tenant.**

The stipulation not to remove the produce—hay, oats and straw—is in the nature of a covenant upon which, if broken, the lessors may base an action for damages, but which does not affect the lessee's title to the production of the farm. *Smith v. Putnam*, 3 Pick. 221; *Walker v. Fitts*, 24 Pick. 191.

The principle established by the case under review is vindicated by a decision of the New York supreme court, holding that where the lease containing a security clause for the rent reserved had not been filed as a chattel mortgage when the levies were made, such lease became invalid and nugatory as against the parties plaintiff in an attachment suit who had by superior diligence secured a judgment and perfected a levy before the landlord had filed his lease. *Stewart v. Beale*, 7 Hun, 405, affirmed, 68 N. Y. 623.



**A** PPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Orange County Circuit in favor of plaintiff in an action brought to recover possession of certain farm produce which defendant had seized under executions against a third person. *Reversed.*

Statement by Follett. *Ch. J.:*

Appeal from a judgment of the General Term of the Supreme Court of the Second Judicial Department, affirming a judgment entered on the verdict of a jury. This action (replevin) was begun October 18, 1886, to recover a quantity of hay, oats and straw grown in that year by a tenant on a farm owned by the plaintiff, which, in April, 1884, was leased, with stock in which the landlord and tenant were jointly interested, for an annual rent of \$960, payable in monthly installments of \$80 each. The tenant, Patrick Kane, occupied the farm until the 1st of October, 1886, when he left, indebted to the plaintiff for \$100 rent, and to various persons. On the 5th, 6th and 14th of that month the defendant, a constable, seized a part of the hay, oats and straw grown on the farm, by virtue of six warrants of attachment issued by a justice of the peace. The property was taken by the sheriff under the process issued in this action, and was subsequently

delivered to the plaintiff. From April, 1880, to April, 1884, Kane worked the farm on shares, he having one third and the plaintiff two thirds of its products; but in April, 1884, the farm, the stock owned by the landlord, as well as that in which both were interested, was let as above stated. On the trial the value of the property was assessed at \$1,000, and the title was found to be in the plaintiff.

*Mr. M. N. Kane*, for appellant:

Under this lease the title to these crops vested in the tenant.

*Hawkins v. Giles*, 45 Hun, 318; *McCombs v. Becker*, 3 Hun, 342, 5 Thomp. & C. 550; *Johnson v. Orofoot*, 53 Barb. 574, 37 How. Pr. 59; *Steffin v. Steffin*, 4 N. Y. Civ. Proc. 179, 17 N. Y. Week. Dig. 418; *Briggs v. Austin*, 29 N. Y. S. R. 249; *Symonds v. Hall*, 87 Me. 354, 59 Am. Dec. 58; *Turner v. Bachelder*, 17 Me. 257.

There must be a clear express contract that the title shall be and remain in the landlord in order to effect that result.

*Van Hoozer v. Cory*, 34 Barb. 9; *Cressey v. Sabre*, 17 Hun, 120; *Reynolds v. Ellis*, 4 Cent. Rep. 232, 108 N. Y. 115; Benjamin, Sales, § 79, note K; *Andrew v. Newcomb*, 32 N. Y. 417.

Assuming that this arrangement gave the title to this property to Colville, it is perfectly apparent that Kane's interest in it was a leviable

It is a well-authenticated general rule that if a lease contains no reservations, the tenant is entitled to remove all the crops harvested during his term. *Wiley v. Conner*, 44 Vt. 68; *Clark v. Harvey*, 54 Pa. 142.

In case of crops to be sown, it vests potentially from the time of the bargain, actually as soon as the suit arises. *Andrew v. Newcomb*, 32 N. Y. 417.

Where a tenant sold crops covered by a mortgage clause in a lease to a vendee who had full notice of such clause, the crops went into his hands impressed with the lien thereof; and when he sold them, he took the proceeds in trust for the purchaser of said premises at the sheriff's sale, and became liable to him for the amount. *Butt v. Ellett*, 86 U. S. 19 Wall. 544, 23 L. ed. 183.

When a state statute confers upon the landlord a lien upon the crops upon the demised premises in any year for the rent of that year, but gives no specific lien upon other property of the tenant, prior to the levy of a distress warrant by the landlord, he has no lien on property of the tenant on the premises except the crops. *Morgan v. Campbell*, 89 U. S. 22 Wall. 331, 23 L. ed. 798.

Where the lessee of a tenant for life has growing crops unharvested at the time of the latter's death, he is entitled to them. *Bradley v. Bailey*, 1 L. R. A. 437, 56 Conn. 374, 7 Am. St. Rep. 316.

A landlord can make a valid agreement with a tenant that the title to the crop raised by the latter on the landlord's premises shall remain in the landlord until he has been paid his rent and advances. *De Vaughn v. Howell*, 82 Ga. 336; *Pelton v. Draper*, 61 Vt. 364.

The lessee of a farm for one half the crops as rent owns the other half free from the landlord's debts. *Stickney v. Stickney*, 77 Iowa, 699.

New York Code, § 1754, vests the possession of the crop in the landlord only in order to secure a compliance with the terms of the lease; as against all other persons the title is in the tenant or his assignees. *Keeler v. Cornelison*, 98 N. C. 333; *Bridgers v. Dill*, 97 N. C. 222.

In certain cases of leases, covenants that the les-

sor shall have all the grain to be grown upon the lands rented as security for unpaid rent have been held good. *Conderman v. Smith*, 41 Barb. 404; *Van Hoozer v. Cory*, 34 Barb. 9; *McCaffrey v. Woodin*, 66 N. Y. 459, and cases cited. See *Cressey v. Sabre*, 17 Hun, 120.

Where lease of farm provides that half of the hay raised on it shall be consumed thereon by cattle kept by the lessee, and the other half be divided between the lessor and lessee, the property in the whole of the hay remains in the lessee until the division is made. The lessor has no claim *in rem* upon it before division. When the division is made under the contract, the portion divided vests separately in the lessor and lessee, but the other undivided half to be consumed on the farm still remains the property of the lessee. *Symonds v. Hall*, 87 Me. 354, 59 Am. Dec. 58.

It has been held, and is stated in *Waples on Attachment*, p. 498, that one who has a lien on goods for money advanced must have it recorded or must give notice to an attaching creditor if he would maintain his lien as superior to that of such creditor. *Quinn v. Halbert*, 55 Vt. 224.

If the attacher knows of the existence of the lien for advances, or that of a vendor for purchase money, it is immaterial from what source his knowledge is obtained; he is bound to respect it. *McPhail v. Gerry*, 55 Vt. 174.

Any notice of such pre-existing liens answers the purpose of recording, so far as the attacher is concerned. *Kelsey v. Kendall*, 43 Vt. 27; *Allen v. McCalla*, 25 Iowa, 464; *McGavran v. Haupt*, 9 Iowa, 83; *Boyd v. Beck*, 29 Ala. 703; *De Vandal v. Malone*, 25 Ala. 272; *Dearing v. Watkins*, 16 Ala. 20; *Smith v. Zurcher*, 9 Ala. 308; *Magee v. Carpenter*, 4 Ala. 469.

The burden is on the prior lienholder to show notice (*Whitcomb v. Woodworth*, 54 Vt. 544), and it has been thought that he must show that the notice emanated from himself (*Stearns v. Wrisley*, 30 Vt. 661; *Farmers & M. Bank v. Drury*, 35 Vt. 469); but if the attacher knew of that fact it ought to matter whence his information came. See *Waples, Attachm.* p. 499.

one. For Kane's interest was not only a possessory right, but he had the right to absolutely dispose of it, and use it, to consume it and convert it into milk there upon this farm, and with this dairy of cows. This was a leviable interest, and was properly attached by Kane's creditors.

*Van Antwerp v. Newman*, 3 Cow. 548, approved in 23 N. Y. 282; *Putnam v. Wyley*, 8 Johns. 482; *Hull v. Carnley*, 11 N. Y. 501, 17 N. Y. 202; *Edw. Bailm. § 368*; *Reinmiller v. Skidmore*, 7 Lans. 161.

*Mr. John Vincent*, for respondent:

Kane could not, during the pendency of the lease, sell or carry away the crops, nor give any title to them. He had, then, no right of property in them, and no leviable interest, even while on the farm as tenant. If he had none while on the farm, he certainly had none after he left it.

*Held v. Builders Mut. F. Ins. Co.* 111 Mass. 38; *Wilton v. Holmes*, 26 N. Y. Week. Dig. 24.

A tenant who abandons his lease by his own act or default loses all claim to crops or implements.

*Talbot v. Hill*, 68 Ill. 106; *Samson v. Rose*, 65 N. Y. 411; *Reeder v. Sayre*, 70 N. Y. 180.

*Follett, Ch. J.*, delivered the opinion of the court:

Frequently the title to the products of lands leased for agricultural purposes is reserved by the lessor, or a lien is created as security for the payment of rent; but no such claim is put forward in this case. It is not asserted that the landlord and tenant owned the products jointly, and title was in the one or the other in severalty. This action was brought and maintained on the theory that the plaintiff held the legal title to the property in question. The only witness who gave evidence in support of the action was the plaintiff, who testified: "As near as I can recollect, he (Kane) was to take charge of the stock. He was to raise enough stuff on the place to feed the stock; and, if there was not enough to carry them through the year, he was to buy what was necessary to carry it out, which he has not been doing for the last two years. The stuff was not to be sold. There was forty odd head of cattle. You do not raise stuff to sell when you have cattle. . . . The hay and grain were not to be removed; it was not raised to sell; it belonged to the cattle. Q. Did you have any interest in the farm after you made the lease to Mr. Kane, or the products of it in any way? A. No; I gave that up with the lease of the cows. I leased the cows, and leased everything. I gave him all that the ground produced. I never received any of the products for the sale of young stock or produce sold from said farm. I never gave any direction about working the farm, or made any inquiry of Kane as to what he was using on the farm, or what he sold off the farm. I did not care so long as he raised the milk. I told him he could use anything he wanted except the stock. I was entitled to two thirds of the stock when it was sold. He sold it all and pocketed it; and I never got my two thirds. . . . He put on seven cows. He kept sheep on the farm. I do not know what he did with them. . . . When the farm was leased the hay

and grain was not mentioned at all. He was to raise enough stuff on the farm to keep the cattle. If there was not enough raised on the place he was to buy what was requisite. What was raised on the place was to be fed to the cattle. . . . There was no conversation particularly in which anything was said about feeding the cattle from the products raised on the farm. He was to raise the stuff and support the cattle. If the place did not support the cattle he was to buy whatever was necessary. That was the agreement. I cannot state what he said. I am stating what I said. I said it, and he agreed to it."

This is all the testimony given in behalf of the plaintiff, which tends to show that he reserved the title to the products of the farm. The tenant, and a witness who heard the bargain, testified that it was not agreed that the crops were to be fed on the place, and that no reservation was made in respect to them. The court instructed the jury, in effect, that if the plaintiff's evidence was true the title to the property was in him, and that he was entitled to recover; to which the defendant excepted. The court was also asked to dismiss the complaint, upon the ground that the plaintiff had failed to establish title, which was refused, and an exception taken. In this, we think, the court erred. If the plaintiff had the title to this property, it might have been taken in execution for his debts, or he could have sold it to a purchaser in good faith and for value, to the exclusion of the tenant and all claiming under him. Such consequences do not flow from the contract testified to by the plaintiff. He did not testify that title to the hay and grain was reserved by him, but that the tenant agreed to feed enough of it on the farm to support the stock. This did not amount to a reservation of title, but was an executory contract, for a violation of which the landlord could have recovered damages.

The question involved in this case has been several times considered by the Supreme Court of this State. In *Johnson v. Crofoot*, 53 Barb. 574, 87 How. Pr. 59, a farm was let by a written lease for an annual money rent. The lease contained a stipulation that the tenant "should feed out the hay and straw in a careful and farmer-like manner;" and it was further agreed that if sufficient hay and straw were not raised to keep the stock the landlord was to supply the deficiency. It was also provided: "The parties of the first part [landlords] are to have full title, with the privilege of taking possession, at any and all times, of any and all products of the farm in payment of the balance due on the rent." A judgment was recovered against the tenant during the existence of the lease, and an execution issued to the defendant, who levied upon and sold about sixty tons of hay raised on the farm by the tenant, and then being in his actual possession on the farm. The plaintiff brought trover, claiming that under the lease the title to the hay never passed to or vested in the tenant, but that it was to remain on the farm for the purpose of feeding the stock. Verdict was directed for the defendant at the circuit, which direction was sustained at general term, the court saying: "But it is argued by the counsel for the plaintiff that it [lease] was not a mortgage, and that the title to such

hay as should grow on the place did not pass to Tift [the tenant] because he stipulated in the lease that he would cut and get in in good order all the hay, and that he would feed out the hay and straw in a saving manner; and because it was further stipulated that he was to have the privilege of keeping a span of horses all the time, and a third horse during haying, which, it is claimed, is inconsistent with the idea that the title to the hay was to be in him." In answer to this contention the court said: "The covenant on the part of Tift was to save all the hay and straw, and to carefully feed it to the stock; and to keep but two horses except during haying time was only an agreement binding on him at law, and if he chose to keep more horses, or to sell and improvidently use the hay, it did not authorize Miller and Rumble, the lessors, to interfere with him, either by taking possession of it (for they were entitled to possession only as security for the unpaid rent), or to restrain such use of it by injunction."

In *McCombs v. Becker*, 8 Hun, 842, 5 Thomp. & C. 550, the defendant leased his farm and forty cows for a money rent. It was stipulated that the tenant should take good care of the cows, and, in case the hay raised on the farm should be insufficient to winter them, the landlord should supply the deficiency at the rate of \$3 per ton, and if there should be a surplus, the landlord should have it, and pay the tenant \$3 per ton for it. A judgment was recovered against the tenant, and an execution issued under which part of the hay was purchased by the plaintiff, and afterwards the defendant (the landlord) converted it to his own use. In an action brought for the conversion it was held that the plaintiff was entitled to recover, the court saying: "True, the landlord was to have the surplus hay, and pay \$3 per ton for it, but this was an executory contract for its purchase, the breach of which would be compensated in damages. It follows that the hay was the tenant's, and subject to sale upon execution against him."

*Hawkins v. Giles*, 45 Hun, 818, arose over a lease of a farm and seven cows from April 1, 1883, to April 1, 1884, for \$175 rent. The lessee agreed "to feed out all the fodder on said farm that is raised on said farm, . . . and winter said stock—seven cows—through to grass in the spring of 1884 on hay." In December, 1883, an execution creditor of the lessee levied upon about 25 tons of hay grown upon the farm during that year which was sold to the plaintiff in the action. The owner of the farm prevented him from taking the hay claiming (1) that the tenant left without fully paying the rent; (2) that the hay was required to keep the cows through to grass of 1884; (3)

that he was entitled to the manure which would be made by the hay being fed on the farm. It was held that the title to the hay was in the tenant, and was subject to sale under the execution, and the judgment entered in favor of the plaintiff was affirmed. *Steffin v. Steffin*, 4 N. Y. Civ. Proc. 179, 17 N. Y. W. Dig. 418, arose over an agreement to cultivate a farm on shares, the occupant agreeing to deliver "one half of all the products of said farm to [the owner] Mary A. Lockwood." An execution was issued against the occupant, and levied upon grain grown on the farm. It was held that the title to the property was in the occupant, the owner having a lien.

In *Turner v. Bachelder*, 17 Me. 257, a farm, with tools, four cows, and other stock, was leased for a term of years, the landlord to have "one half of all the corn and grain and potatoes that shall grow on the farm, and half of the calves, and half of the lambs, and half of the wool. There was a clause in the lease that the lessor was to furnish four cows, one horse and other stock sufficient to eat up all the hay that should grow on said farm." The hay was levied upon and sold by a creditor of the lessee, who was held to have a leviable interest in it, and that the lessor had no title to it.

In *Symonds v. Hall*, 87 Me. 354, a farm was worked upon shares. By one of the terms of the agreement "one half of the hay cut on the farm is to be eat by the stock kept on the farm, and the other half of the hay is to be divided equally between the contracting parties." An execution creditor of the occupier seized and sold the hay. The owner of the land brought trover. It was held that the title to the hay before division was in the occupier, and that the plaintiff was not entitled to recover for the undivided hay sold under the execution.

In *Orcutt v. Moore*, 184 Mass. 48, the principle decided in the three cases last cited was held to be the law in Massachusetts. The case at bar was decided upon the authority of *Heald v. Builders Mut. F. Ins. Co.*, 111 Mass. 88, in which it was held that a clause in a lease similar in effect to the agreement testified to by the plaintiff amounted to a reservation of the title to the owner of the land. This case seems to be in conflict with the cases decided by the Supreme Court of this State; and, believing the rule declared by our courts rests upon well-recognized principles, we must decline to follow the Supreme Court of Massachusetts and overrule the judgments of our own courts.

*The judgment should be reversed, and a new trial granted, with costs to abide the event.*

All concur, except *Brown, J.*, not sitting.

## GEORGIA SUPREME COURT.

CITY OF ATLANTA, *Plf. in Err.*,  
v.  
FIRST PRESBYTERIAN CHURCH.

(....Ga....)

\*A local statute which confers upon the municipal government power and authority to assess one third of the cost of grading, paving, macadamizing and otherwise improving the roadway or street proper, on real estate abutting on each side of the street improved, subjects alike all real estate owned by individuals or private corporations without respect to the purpose or use for which the property is held or to which it is devoted. Churches are not exempt; and, after paying such assessment, the religious corporation to which a church belongs cannot recover back the money so paid into the city treasury. *Trustees of First M. E. Church v. Atlanta*, 76 Ga. 181, overruled.

(February 27, 1891.)

**ERROR** to the Superior Court for Fulton County to review a judgment in favor of plaintiff in an action brought to recover back money paid under protest in satisfaction of a street assessment alleged to have been erroneously made. *Reversed*.

The facts are stated in the opinion.

*Messrs. J. B. Goodwin, J. T. Pendleton and J. A. Anderson* for plaintiff in error.

*Messrs. Hop Smith & Burton Smith* for defendant in error.

**Bleckley, Ch. J.**, delivered the opinion of the court:

This was an action by the church, a body corporate and politic, against the City, brought in February, 1887, to recover the sum of \$616.87, the amount paid by the plaintiff to the defendant in January, 1885, in satisfaction of a *sf. fa.* which the city had issued against, and caused to be levied upon, the church building and the premises on which the same was situate, said premises fronting

\*Head note by **BLECKLEY, Ch. J.**

**NOTE.**—*Exemption from taxes generally does not exempt church property from special assessment.*

The fact that property is occupied for purposes of religious worship will not exempt it from assessment for street improvements. *Re New York*, 11 Johns. 80; *Northern Liberties v. St. Johns Church*, 13 Pa. 104; *Second Universalist Soc. v. Providence*, 6 R. I. 238; *Lefevre v. Detroit*, 2 Mich. 587; *Trustees of M. E. Church v. Ellis*, 38 Ind. 3; *Ramesch v. United Brethren Christ Church*, 4 West. Rep. 730, 107 Ind. 1; *Broadway Baptist Church v. McAtee*, 8 Bush, 508.

A charter of a religious corporation, providing that its property shall be "exempt from all taxation and assessments, special or general, for any and all purposes whatever," does not exempt it from paying for the opening of a street in proportion to the benefit or advantage derived from it. Such local assessment is not within the meaning of the word "tax." *Chicago v. Baptist Theological Union*, 3 West. Rep. 93, 115 Ill. 245.

The exemption of a corporation, in its charter, "from all taxation of every kind," does not exempt it from the special taxation of contiguous

and abutting on Marietta Street. The *sf. fa.* was issued for the *pro rata* share of these premises of the cost incurred in the year 1883 by the City in paving with Belgian blocks the roadway or street proper on which the premises abutted. The payment was made under protest, and to prevent a sale of the property in pursuance of the levy. The street was paved by virtue of the Act of September 8, 1881, amending the charter of the City, and the provisions of the Act were fully complied with. The church building was used only for church purposes and religious worship. At the trial the facts were agreed upon, and reduced to writing, and, by consent of parties, the only question raised was stated thus: "Is property occupied by a church, and used for church purposes only, and religious worship, liable for street improvement under the said Act of 1881?" The court instructed the jury to find for the plaintiff; and after verdict the defendant moved for a new trial because of error in this instruction, and because the verdict was contrary to law and to evidence. The motion was overruled.

The Act in question (Acts 1880-81, p. 358) was construed by a majority of this court as then constituted, in *Trustees of First M. E. Church v. Atlanta*, 76 Ga. 181; and that decision was afterwards held by a full bench to be conclusive upon the parties in that case, the same case having again come up for review. The principle of *res adjudicata* made the latter ruling a necessary corollary to the former, whether the first in order was correct or incorrect. But as the present case, although it involves the same question touching the right construction of the Act of 1881, is a new case, and between different parties, or with one of the parties different, the duty of construing the Act *de novo* cannot be declined by the present bench, save upon the ground that the former construction is satisfactory, or, if not, that it should be acquiesced in because of some mischief or public inconvenience likely to result from adopting and promulgating a different construction

property for local improvements. *Illinois Cent. R. Co. v. Decatur*, 1 L. R. A. 613, 126 Ill. 92.

An Act providing that lands belonging to incorporated cemetery associations should be exempt from taxes, rates, assessments, etc., does not extend to municipal assessments levied to defray the expenses of local improvements. *Buffalo Cemetery Assn. v. Buffalo*, 43 Hun, 137.

A tax for street improvements is not against the person, but against the property. *Hawthorne v. East Portland*, 13 Or. 371.

Special assessment for local improvements. See note to *Chester v. Black* (Pa.) 6 L. R. A. 803.

Street assessments. See note to *Birmingham v. Klein* (Ala.) 3 L. R. A. 369.

Exemptions from taxation, not to apply to special assessments. See note to *Adams County v. Quincy* (Ill.) 6 L. R. A. 155.

Church property not exempt from special assessments. *Illinois Cent. R. Co. v. Decatur* (Ill.) 1 L. R. A. 613; *Wallace v. Myers* (N. Y.) 4 L. R. A. 171.

Strict construction. See notes to *Catlin v. Trinity College* (N. Y.) 3 L. R. A. 208; *Church of St. Monica v. New York* (N. Y.) 7 L. R. A. 70.

after the first has stood undisturbed for a period of nearly five years. The rule of *stare decisis* is a wholesome one, but should not be used to sanctify and perpetuate error in so short a term as five years, without very weighty reasons in behalf of public policy.

At the last term of this court, we recognized the rule in *Scott v. Steward*, 48 Ga. 772, as a right rule of decision where many transactions of the public at large, based on an exposition of the law declared ten or eleven years ago, would probably be disturbed or vitiated by expounding the law differently now. We deprecate and distrust rash innovation as much as the most conservative magistrates ought; but it has never been the doctrine of any court of last resort that the law is to be a refuge and safe asylum for all the errors that creep into it. Indeed, the mind, private or official, which closes down upon all the errors it embraces, refusing to effect them when exposed, is no longer fit for the pursuit of truth. Courts, like individuals, but with more caution and deliberation, must sometimes reconsider what has been already carefully considered, and rectify their own mistakes. If this is to be done in any case, it would seem to be a case like the present, where a change of decision would uproot no transaction founded on the prior decision, and where the effect in the particular controversy at the bar would be simply to leave the parties where they had placed themselves by doing aright what one of them now seeks to have undone. If, in very truth, according to the real law of the matter, the church corporation paid to the City a debt which it justly owed, and for which it was legally liable, it could not recover back the money consistently with Christian morality, were there no other obstacle to withdrawing the cash from the city treasury. Nor does the corporation desire so to do, for it has united with the city in formulating thus the question to be decided: "Is property occupied by a church, and used for church purposes only and religious worship, liable for street improvement under the said Act of 1881?" We could not answer truly according to our judicial convictions by citing and following the case in 76 Ga., for we think that case misconstrues the Act, and unduly restricts its application.

The Act, after conferring power to grade, pave, macadamize and otherwise improve the streets, invests the mayor and general council with "power and authority to assess one third of the cost of grading, paving, macadamizing, . . . and otherwise improving the roadway or street proper, on the real estate abutting on each side of the street improved; provided, that before any street, or portion of a street, shall be so improved, the persons owning real estate which has at least one third of the fronting on the street, or portion of a street, the improvement of which is desired, shall, in writing, request the commissioners of streets and sewers to make such improvements, and said commissioners shall have approved the same, and shall forward the same, with their approval, to the mayor and general council, with a statement of the character of the improvement proposed to be made,

and an estimate of the cost of the same, and said mayor and general council shall by ordinance direct the said work to be done." Acts 1880-81, pp. 359, 360.

The Act proceeds to confer power to adopt by ordinance a system of equalizing assessments, and prorating the cost "on the real estate according to its frontage on the street, or portion of a street, so improved." It declares "that the amount of assessment on each piece of real estate shall be a lien on said real estate from the date of the passage of the ordinance providing for the work and making the assessment;" and it gives the mayor and general council "authority to enforce the collection of the amount of any assessment so made for work . . . upon streets, by executions to be issued by the clerk of council against the real estate so assessed, and against the owner thereof, at the date of the ordinance making the assessment, which execution may be levied by the marshal of said City on such real estate; and after advertisement and other proceedings, as in cases of sale for city taxes, the same may be sold at public outcry to the highest bidder, and such sale shall vest an absolute title in the purchaser: provided, that the defendant shall have a right to file an affidavit to contest the amount due, etc. Id. p. 360.

It only requires that language shall be taken in its ordinary signification, in conformity to the rule of construction laid down in section 4 of the Code, for us to be able to hold, not as a conjecture, but with absolute certainty, that the terms, "real estate abutting on each side of the street improved," include all lands so abutting, no matter to whom they belong, nor how the buildings upon them may be occupied or used. Church property, therefore, is manifestly within the letter of the Act, and as clearly within it as any other property whatsoever. The grant of power to assess it is no less express than is the grant of power to assess any other. The Act neither makes nor hints at any discrimination, but uses words which embrace all real estate as appropriately and completely as they embrace any part of the same. It would be as consistent with the letter of the Statute to deny that it comprehends any real estate at all as to deny that it comprehends all that abuts on the street. This is the plain truth; and yet the opinion of the court in 76 Ga. 187, 188, launches the argument by referring to the rule that no corporation can exercise any power not expressly conferred or necessarily implied; and after observing that places of religious worship, etc., are not brought directly by name within the provisions of the Act, adds: "And we do not think they can be brought within it by construction or necessary implication, unless it is made to appear that the property so exempted from taxation is used for purposes of 'private or corporate profit or income.'" This seems to be the fundamental error of the opinion. It treats the City as invoking implication, whereas the City points to an express grant, and the Church invokes implication to limit the words of the grant. True, church property is not brought in by its special name, nor is any

other; the name applied to all alike being "real estate abutting on each side of the street improved." The property now in question, though belonging to a religious corporation, and used exclusively for worship and church purposes, is "real estate," and it abuts on Marietta Street,—the street improved. The true and only problem is whether it can be taken out of the Act by implication, not whether it can be brought in. The Legislature, by not excepting any real estate whatever, has put it in; and no consistent and enforced construction of the Act can be arrived at without setting out from this standpoint. To deny the natural import of the words of a statute, and thus exclude from them something that they evidently comprehend, and then to argue that this same thing cannot be brought in by implication, is to expel the occupant, and then keep him out because he was never in. If the words, "the real estate abutting on each side of the street improved," are not definite and free from all manner of ambiguity, no words can be. And yet, clear and definite as they are, we can be morally certain that they comprehend more than the Legislature intended they should; for they cover, by their letter, public as well as private property, and subject the whole alike to assessment, lien, levy and sale. That the public property of the United States, the State, the county or the city was intended to be dealt with thus is so improbable that we can have no hesitation in holding that an implied exception as to all public property can and should be engrafted upon the Act by construction. And just here the real question in its ultimate form emerges: Can a like exception in favor of church property—which all will agree is not public, but strictly private, property—be recognized and the words of the Statute still further narrowed by construction so as to exclude it also? No answer to this question is afforded by citing the clause of the Constitution which authorizes the General Assembly to exempt church property as well as public property from taxation, and citing with it the Act of 1878 (Code, § 798), by which the power was exercised throughout its whole extent, and thereby, for the time being, exhausted. This court has ruled in *Hayden v. Atlanta*, 70 Ga. 817,—a case which arose out of the identical Statute we are now construing,—that the taxation to which that power relates is taxation for revenue, and not local assessments for the improvement of streets, which latter are in the nature of an interchange of equivalents between the public and the owners of property locally benefited by the improvement. By general and now almost unanimous concurrence throughout the jurisprudence of the American States, there is an essential difference between the two species of taxation; and many rules, whether constitutional or statutory, which govern the former are without application to the latter. See, besides, the citations in *Hayden v. Atlanta*, *supra*; *Birmingham v. Klein*, 89 Ala. 461, 8 L. R. A. 869; *Speer v. Athens*, 85 Ga. 49, 9 L. 12 L. R. A.

R. A. 402; 2 Dillon, Mun. Corp. 4th ed. §§ 777, 778.

Consistency requires that when the Constitution has been ruled, as in *Hayden v. Atlanta*, not to apply to local assessments, its provisions on the subject of taxation should not be treated as authority, direct or indirect, for holding property of any kind exempt from such assessments. If it supplies no rule for levying assessments, and declares no exemption from their imposition, what control can it possibly have when a statute on the subject of assessments is under construction? To appeal to it in the discussion is either to recede from the doctrine that it is silent on assessments, or to invoke what it says on one subject to limit what the Legislature has expressly said when treating of another. Surely, the mere grouping of church property with public property, first by the Constitution, and then by the Statute, in dealing with taxation proper, is no sufficient reason for concluding that the Legislature intended that they should stand upon the same footing in the law of local assessments, where no such intention has been anywhere declared. The argument that because the Legislature, under express authority granted to it by the Constitution, has expressly exempted church property from taxation, therefore it has impliedly exempted it from local assessment, is manifestly fallacious. The Constitution itself exempts nothing, not even public property; it only gives authority to the General Assembly to make certain exemptions. Without some express promulgation of the legislative will, no private property whatever could claim exemption from general taxation. How can a system of express exemption from such taxation be a legitimate premise from which to conclude that the Legislature intends a system of implied exemption as to certain private property to run through its enactments on the subject of local assessments? Having once made the distinction between the two species of taxation, and professing still to adhere to it, we ought to accept its consequences. In no other way can consistency be maintained; and nothing inconsistent is law, for the law is never in conflict with itself, nor one part with another part.

It may be said, however, that the opinion we are reviewing does not cite the Constitution, and the Statute under it exempting church property from taxation, as authority, direct or indirect, but only as evincing on the part of the State a friendly spirit and disposition towards religious institutions and instrumentalities. For this purpose we concede the citation would be legitimate. The Constitution defines very explicitly the fiscal relation which the State is to bear to religion. It declares, on the one hand (Code, § 5006): "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution."

This settles it that the State shall pay nothing to the Church. It declares, on the other hand (Id. §§ 5181, 5182, 5184): "All

taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

The General Assembly may, by law, exempt from taxation all public property; places of religious worship or burial; all institutions of purely public charity; all buildings erected for and used as a college, incorporated academy, or other seminary of learning; the real and personal estate of any public library, and that of any other literary association, used by or connected with such library; all books and philosophical apparatus; and all paintings and statuary of any company or association kept in a public hall, and not held as merchandise, or for purposes of sale or gain: provided, the property so exempted be not used for purposes of private or corporate profit or income.

All laws exempting property from taxation, other than the property herein enumerated, shall be void." This settles it that the church, like other proprietors, shall pay taxes upon its whole property, unless the Legislature shall think proper to exempt its places of religious worship, etc., not used for purposes of private or corporate profit or income. All property of the church not embraced in this power of exemption stands, with reference to the State, upon exactly the same footing as if it belonged to individuals, and had no connection with religious uses whatever. With respect to it, there can be no exemption from general taxation expressly granted; much less any resulting from implication only. And the scheme of the Constitution evidently is to have no implied exemptions at all; certainly none other than of public property. It may be that were the Legislature to lay a tax for the benefit of the State upon all property, without having declared any exemption whatever, the Statute might be construed as impliedly excepting public property; but no court, we apprehend, would feel warranted in extending the implication to church property. Thus the matter stands with reference to the species of taxation with which the Constitution deals, to wit, taxation for revenue. The policy of the State, as indicated by the Constitution, is to make no discrimination in favor of property devoted to religious purposes save by express statute. While the Legislature is empowered to extend favor to such property, it is expected to do so, if at all, by express provision. And such is now our whole statutory scheme with reference to churches and religion. The policy is to favor them,—favor them highly,—but to leave no favor whatever to implication. This is shown by the opinion we are reviewing. It correctly refers to a great number of topics in respect to which favors have been granted, but they have all been exaggerated. In the whole range of our state legislation since the adoption of the Code, we know of no instance in which the Legislature has been understood to intend any favor or privilege in behalf of the church which it has failed to set down and specify in express terms. Taking the Code

12 L. R. A.

and all our statutes together, we have a comprehensive and specific enumeration of particulars, in respect to which religion and those engaged in its ministrations are preferred or favored. But surely this is no warrant for a court to add to these favors by construction or implication. On the contrary, as the Legislature has expressed so much, the inference ought to be that its expressions are co-extensive with its will and intention.

Glancing now at the current of authority, let us see how the stream runs. In *People v. McCreery*, 34 Cal. 456, the supreme court of that State says: "The meaning of taxation must be kept in view; and that is, a charge levied by the sovereign power upon the property of its subject. It was not a charge upon its own property, nor upon property over which it has no dominion. This excludes the property of the State, whether lands, revenue or other property, and the property of the United States." Accordingly, it was held in *Doyle v. Austin*, 47 Cal. 353, that a statute providing for the opening of a street, and for the payment of the expenses by assessment upon the lands benefited, was not vitiated by an express exception from liability in making the assessment of lands belonging to the United States, the State of California, and the city, respectively, although it appeared by the report of the assessors that these lands would be benefited to the extent of \$800,000. That property belonging to the public, and held for public uses, is exempt from taxation when not expressly subjected thereto, is held in the following cases: *Rochester v. Bush*, 80 N. Y. 302; *Schuykill County Directors of Poor v. North Manheim Twp. School Directors*, 42 Pa. 21; *Louisville v. Com.* 1 Duvall, 295. The same rule prevails as to assessments for local improvements of a public nature. *Worcester County v. Worcester*, 116 Mass. 193; *Baltimore County Comrs. v. Board of Managers of Maryland Hospital*, 62 Md. 127; *State v. Hartford*, 3 Am. & Eng. Corp. Cas. 610, the editor citing 49 Conn. 89, which is a mis-citation.

In Missouri, it would seem, an exemption is not implied in favor of all public property. *St. Louis Public Schools v. St. Louis*, 26 Mo. 468. And in Illinois, under the Constitution of 1870, such exemptions are not implied. *Adams County v. Quincy*, 130 Ill. 566. In New York, certain words contained in a city charter were construed to subject property of the State to assessment for the improvement of a street. *Hassan v. Rochester*, 67 N. Y. 528. In Texas (*Harris County v. Boyd*, 70 Tex. 287), an exemption in the Constitution protecting the property of counties, cities and towns, held only for public purposes, from forced sale and from taxation, was ruled to extend to an assessment against a court-house for the improvement of a street. It is manifest, however, that this decision could have been rested upon the general principle announced by the courts of Massachusetts, Maryland and Connecticut, to the effect that public property is not included in the statutes for local assessments unless specially named.

Implied exceptions in favor of public property also prevail over general words in a statute founded on the exercise of the power of eminent domain. *Atlanta v. Central R. & Bkg. Co.* 58 Ga. 120; *St. Louis, J. & O. R. Co. v. Trustees*, 48 Ill. 308.

We thus see that to engraft an exception upon the amended charter of Atlanta in favor of public property has the sanction of authority. But no such rule prevails, so far as we know or have been able to ascertain, in favor of private property used for religious purposes. In the following cases, churches, although not expressly named in assessment statutes, were held to be subject to assessment for local improvements, notwithstanding they were exempt by express law from general taxation: *Re New York*, 11 Johns. 77. And see *Harlem P. Church v. New York*, 5 Hun. 442; *Re Second Ave. M. E. Church*, 66 N. Y. 395; *People v. Syracuse*, 2 Hun. 438; *Northern Liberties v. St. John's Church*, 13 Pa. 104; *Lefevre v. Detroit*, 2 Mich. 586; *Ottawa v. Trustees of Free Church*, 20 Ill. 423; *Broadway Baptist Church v. McAtee*, 8 Bush. 508; *Lockwood v. St. Louis*, 24 Mo. 20. And see *Pt. Wayne First P. Church v. Pt. Wayne*, 86 Ind. 338; *Second Universalist Soc. v. Providence*, 6 R. I. 285. The like rule has been applied to cemeteries. *Baltimore v. Green Mt. Cemetery*, 7 Md. 517; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506; *Lima v. Cemetery Asso.* 42 Ohio St. 128. And to hospitals, asylums, and other charitable institutions. *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *Lafayette v. Male Orphan Asylum*, 4 La. Ann. 1; *Bouton Seaman's Friend Soc. v. Boston*, 116 Mass. 181. And see

*Chicago v. Baptist Theological Union*, 115 Ill. 245, 3 West. Rep. 96; *Re St. Joseph's Asylum* 69 N. Y. 853. Also, to institutions of learning, etc. *Re College Street*, 8 R. I. 474.

If express words are requisite to exempt private property from general taxation there is no reason why like words are not equally necessary to exempt it from assessments. *Lima v. Cemetery Asso. supra.* Instances of such express exemption are furnished by *State v. Newark*, 86 N. J. L. 478; *State v. St. Paul*, 86 Minn. 529. But in *Chicago v. Baptist Theological Union*, 115 Ill. 245, 3 West. Rep. 96, it was held that even an express exemption from assessment could not be granted, under the Constitution of Illinois, because violative of the principle of equality. Inasmuch as the Constitution of Georgia neither expressly nor by implication lays down any principle whatever touching local assessments, being entirely silent on the subject, there would seem to be no defect of power in the Legislature to spare churches from such assessments at pleasure. We rule, not that the Legislature might not have granted the exemption now contended for, had it been so disposed, but that it has not done so. The question of legal discrimination in favor of church property over secular property, in the matter of bearing burdens, is one of public policy; and it is for the Legislature, not the courts, to mould that policy and proclaim it. The services of religion to the State are of untold value; but it is the glory of religion in this country that it serves as a volunteer, without money and without price.

*Judgment reversed*

## ALABAMA SUPREME COURT.

Minnie E. FARRIOR, Appt.,

NEW ENGLAND MORTGAGE SECURITY CO.

(.....Ala.....)

**Overruling decisions of the state court of last resort** which were in force at the time a mortgage was given by a married woman, and which upheld its validity under the statutes, does not affect the right of the mortgagee.

(June 23, 1891.)

**NOTE.—Judicial power in interpretation and construction of statutes.**

It is a part of the judicial power to determine what the laws are, and all questions involving the validity and effect of statutes when thus determined are authoritatively settled. *Smith v. Judge of Twelfth Dist.* 17 Cal. 558; *Sears v. Cottrell*, 5 Mich. 254; *Shumway v. Bennett*, 29 Mich. 465; *Taylor v. Porter*, 4 Hill, 143; *Murray v. Hoboken*, L. & I. Co. 59 U. S. 18 How. 272, 15 L. ed. 372; *State v. Dexter*, 10 R. I. 841; *Vanzant v. Waddell*, 3 Yerg. 293; *State Bank v. Cooper*, Id. 599; *Jones v. Perry*, 10 Yerg. 59; *State v. Dewa*, R. M. Charl. 400; *Greene v. Briggs*, 1 Curt. C. C. 811; *Beiser v. William Tell Sav. Fund Asso.* 39 Pa. 146.

The Legislature as the representative of the nation L. R. A.

**APPEAL** by defendant Minnie E. Farrow from a decree of the Chancery Court for Lowndes County in favor of plaintiff in an action brought to foreclose a mortgage. *Affirmed.*

The case is stated in the opinion:

*Messrs. Watts & Son* for appellant.

*Messrs. Webb & Tillman*, for appellee:

At the time the mortgage was made to the loan company, the court had decided in favor of its validity.

*Goodlett v. Hansell*, 66 Ala. 151; *Turner v. Kelly and Mason v. Kelly*, 70 Ala. 85.

tion expresses the national will by means of statutes. These statutes are expounded by the courts so as to form the body of the statute law. Wilberforce, *Statute Law*, §.

The best exposition of a statute or any other document is that which it has received from contemporary authority (*Philadelphia & E. R. Co. v. Catawissa R. Co.* 63 Pa. 20, 61; *Grant v. Hickox*, 64 Pa. 284; *Packard v. Richardson*, 17 Mass. 121); and this is also the rule of the civil law. See Dig. 1, 2, 37; 3 Inst. 11, cited in *Endlich, Interpretation of Statutes*, 500; *Trustees of Catholic C. Church v. Manning*, 72 Md. 118.

Where the principles applicable and controlling in respect to the constitutionality of a statute have been determined by adjudications in support of a



The statute of Alabama having received this construction, and the decision remaining unreversed at the time of the mortgage, no subsequent judicial decision reversing the former construction can affect the rights of the contracting parties.

*Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 206, 17 L. ed. 526; *Olcott v. Fond du Lac County Suprs.* 88 U. S. 16 Wall. 678, 21 L. ed. 882, and other cases cited therein; *Douglass v. Pike County*, 101 U. S. 686, 25 L. ed. 971, reaffirmed in *Taylor v. Ypsilanti*, 105 U. S. 72, 26 L. ed. 1012; *Ralls County v. Douglass*, 105 U. S. 782, 26 L. ed. 958.

Mr. Caldwell Bradshaw also for appellee.

Coleman, J., delivered the opinion of the court:

Many of the questions raised by the pleadings in this case have been considered and adjudicated in recent decisions of this court. *New England Mort. Secur. Co. v. Ingram* (Ala.) 9 So. Rep. 140; *Nelms v. Edinburg Am. L. Mort. Co.* Id. 141; *American F. L. Mort. Co. v. Sewell*, Id. 148.

The one question of supreme importance presented for review in this record did not arise in either of the foregoing cases cited. On or about May 1, 1888, in order to procure a loan from the New England Mortgage Security Co., J. S. Farrior and his wife, Minnie E. Farrior, executed a promissory note to the company, and secured the same by mortgage on certain lands in Lowndes County, Ala. By deed of conveyance executed by J. S. Farrior to his wife on the 3d of October, 1882, a part of these lands were conveyed to her to pay and satisfy an indebtedness of the husband to the wife. The consideration of this deed is stated to be for "two thousand and seven dollars, the amount of money and property used and converted of the corpus of the separate estate of the wife." At the time the note and mortgage was made to secure the loan, the wife had no legal capacity to bind her statutory estate by mortgage or other contract, but she could bind her equitable separate estate as if she were a *feme sole*. By repeated decisions of this court in reference to the Married Woman's Law creating in the wife a statutory separate estate, it was held that a conveyance of lands from the husband to the wife vested in the wife an equitable separate estate; and this was the effect of such conveyance, notwithstanding the consideration was property the corpus of her statutory estate, or indebtedness of the husband on account of money, the corpus of her statutory estate, used and converted by him. These de-

cisions of the supreme court of this State, thus construing the Statute, and declaring the character of the estate conveyed to the wife, and her capacity to incur it by contract, were in force at the time the note and mortgage involved in the present case were executed. *Turner v. Kelly*, 70 Ala. 85; *Goodlett v. Hansell*, 66 Ala. 161; *McMillan v. Peacock*, 57 Ala. 129.

Subsequent to this time, but before the filing of complainant's bill, the supreme court of the State overruled these authorities, and held that "by no contract between the husband and wife can her statutory separate estate be converted into an equitable estate, with power in the wife to charge it," and expressly and "intentionally" overruled the former decisions which hold to the contrary. *Loeb v. McCullough*, 78 Ala. 583; *Jordan v. Smith*, 88 Ala. 302; *Parker v. Marks*, 83 Ala. 548. The reasons *pro* and *con*, upon which the different decisions rest, need not be here reconsidered. The court adheres to the later decisions and reaffirms the rule of law declared in *Loeb v. McCullough*, and quoted *supra*.

The question presented for consideration is the effect of the later decision upon contracts and rights of property acquired under the Statute, as construed by the former decisions, and while those decisions were in force. It has been repeatedly declared in repeated decisions by the highest tribunal in this country, and many eminent jurists, that a fixed and received construction of a statute made by the supreme court of the State makes a part of such statute law. *Green v. Neal*, 81 U. S. 6 Pet. 297, 8 L. ed. 404; *Shelby v. Guy*, 24 U. S. 11 Wheat. 868, 6 L. ed. 497.

In the case of *Ohio L. Ins. & T. Co. v. Debois*, 57 U. S. 16 How. 433, 14 L. ed. 1008, Taney, Ch. J., held "that the sound and true rule was, that, if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent Act of the Legislature or decisions of its court altering the construction of the law."

In the case of *Taylor v. Ypsilanti*, 105 U. S. 72, 26 L. ed. 1012, this authority was reaffirmed, and also the case of *Douglass v. Pike County*, reported in 101 U. S. 677, 25 L. ed. 996, in which it was held that "the true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment, that is to say, make it prospective, but not retroactive.

statute, such adjudications are conclusive. *People v. Briggs*, 114 N. Y. 63; *People v. Arensberg*, 7 Cent. Rep. 247, 105 N. Y. 123; *People v. West*, 8 Cent. Rep. 758, 106 N. Y. 293; *People v. Kibler*, 8 Cent. Rep. 761, 106 N. Y. 321.

After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself. *Davenport German Sav. Bank v. Franklin County*, 128 U. S. 626, 32 L. ed. 519, citing *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 996; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 356; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872; *Anderson v. Santa Anna Twp.* 116 U. S. 366, 29 L. ed. 632.

13 L. R. A.

So where a judicial construction has been given to a statute, the re-enactment of the statute is generally held to be in effect a legislative adoption of the construction. *Dollar Sav. Bank v. United States*, 86 U. S. 19 Wall. 227, 23 L. ed. 80.

And the Legislature, in adopting the statute of another State, adopts with it the judicial construction of that State, as understood at the time. *Trabant v. Rummel*, 14 Or. 17; *Lindley v. Davis*, 6 Mont. 453; *Pratt v. American Bell Teleph. Co.* 1 New Eng. Rep. 764, 141 Mass. 225.

The judicial construction of a statute is part of the law. See *note* to *Ryalls v. Mechanics Mills* (Mass.) 5 L. R. A. 637.

After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." The following authorities hold the same rule: *Olcott v. Fond du Lac County Supra.* 88 U. S. 16 Wall. 689, 21 L. ed. 386; *Fairfield v. Gallatin County,* 100 U. S. 52, 25 L. ed. 546; *Carroll County Supra. v. United States,* 85 U. S. 18 Wall. 71, 21 L. ed. 771; *Gelspeke v. Dubuque,* 68 U. S. 1 Wall. 206, 17 L. ed. 525.

Sutherland on Statutory Construction (§ 819), says: "A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of these rights. To devest them by a change of the construction is to legislate retroactively. The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded, so as to affect the obligations of existing contracts made on the faith of the earlier adjudications."

In the case of *Geddes v. Brown*, 5 Phila. 180, the facts were that in the year 1848 the Legislature passed a law enlarging the power of married women over their property, and enabling them to deal with it in many respects as if they were single. The supreme court of the State declared that under this law a married woman might convey or incur property settled to her separate use. On the faith of this case, the mortgagee took his mortgage. By a subsequent decision of the supreme court the former decision was overruled, and it was held that property settled to the separate use of a married woman could not be alienated unless the power was conferred by the deed. The decision of the court in *Geddes v. Brown* was (and it is only the conclusion of the court that we cite) that a party who acts in accordance with the law as laid down by the highest tribunal in the State, while it is still law, shall not suffer because it is subsequently set aside, and another and inconsistent rule substituted for it. The validity of the mortgage was upheld in the case cited. Endlich, on the Interpretation of Statutes (§ 868), holds that a "judicial interpretation of a statute becomes a part of the statute law, and a change of it is, in practical effect, the same as a change of the statute." The author cites, with other cases to sustain the text, the case of *Geddes v. Brown, supra*.

It is contended that the reverse of these principles have been recognized, if not fairly held, in this State, and we have been referred to the case of *Prince v. Prince*, 67 Ala. 565, and *Boyd v. State*, 53 Ala. 608. In the first case the contention was that, as the Statute had not been construed when the mortgage which gave rise to the litigation was executed, the grave doubt among members of the legal profession "as to the proper construction of the Statute was a sufficient consideration to uphold a compromise of the mortgage debt." The court held that everyone was required to know the proper construction of the Statute, applying the maxim, *ignorantia facti excusat*, 12 L. R. A.

*ignorantia juris non excusat.* The question was not before the court in that case. In the latter case (*Boyd v. State*, 53 Ala. 615) the present chief justice rendered the opinion, and on an application for a rehearing expressly called attention to the fact that a different principle controlled the conclusion of the court in the *Boyd Case* from that held in the authorities referred to in this opinion, and declared that "in none of them was it decided or contended that any right existed or could be maintained which rested alone on a statute which the court pronounced unconstitutional." This case was affirmed by the Supreme Court of the United States (94 U. S. 648, 24 L. ed. 308), in which it was held that "the constitutionality of the Act was not drawn in question" by the previous decisions of the state court so as to necessitate a decision of that question. The case of *Bibb v. Bibb*, 79 Ala. 444, though limiting the principle in its application to the subject matter of the particular litigation, clearly recognized the right of parties acquired under decisions of the supreme court in the following pertinent language: "The quieting of litigation; the public peace and repose; respect for judicial administration of the law, and confidence in its reasonable certainty, stability and consistency; and all considerations of public policy,—call for permanently upholding acts done, contracts executed, rights vested, and titles to property acquired on the faith of decisions of the court of last resort." Persons contracting are presumed to know the existing law, but neither they nor their legal advisers are expected to know the law better than the courts, or to know what the law will be at some future day. Any principle or rule which deprives a person of property acquired by him, or the benefit of the contract entered into, in reliance upon and strict compliance with the law in all respects as interpreted and promulgated by the court of last resort at the time of the transaction, and no fault can be imputed to him unless it be held a fault not to foresee and provide against future alterations in the construction of the law, must be radically wrong. Such a principle or rule of law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the supreme court of the State. We hold the doctrine to be sound and firmly established by the decisions of the Supreme Court of the United States, and enunciated by many eminent text-writers, that rights to property, and the benefits of investments acquired by contract, in reliance upon a statute as construed by the supreme court of the State, and which were valid contracts, under the statute as thus interpreted, when the contracts or investments were made, cannot be annulled or devested by subsequent decisions of the same court overruling the former decisions; that as to such contracts or investments it will be held that the decisions which were in force when the contracts were made had established a rule of property upon which the parties had a right to rely, and that subsequent decisions cannot retract so as to impair rights acquired in good faith under a statute as construed by the former decisions. The application of these principles leads to an affirmation of the decision of the lower court.

*Affirmed.*

## MAINE SUPREME JUDICIAL COURT.

Gustavus C. KILGORE

v.

Frank U. RICH.

(....Me....)

1. An infant's board-bill while attending school is included among the necessities for which he may be compelled to pay.
2. One who pays an infant's debt for necessities at the infant's request has a good cause of action against him for the reasonable value of such necessities.

(April 7, 1891.)

**EXCEPTIONS** by defendant to rulings of the Supreme Judicial Court for Waldo County (Walton, J.) made during the trial of an action upon an account to which defendant interposed the plea of infancy, which resulted in a verdict in plaintiff's favor. *Exceptions overruled.*

*NOTE.—The governing rule.*

The question of necessities is governed by the real circumstances of the infant, and not by what its situation may appear to be. An infant when at home, under the care of his father and supported by him, cannot be made liable for necessities. If he could be made liable, the father would be deprived of the right of exercising his discretion as to the manner and degree of his support. *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Angel v. McLehlan*, 18 Mass. 81; *Elrod v. Myers*, 2 Head, 58; *Connolly v. Hull*, 8 McCord, L. & Tyler, Infancy and Coverture, p. 107.

*Classification of infants' contracts.*

The contracts of infants are usually divided into three classes, namely: such as are binding, such as are void and such as are voidable only. The distinctions laid down in a case which has been frequently approved are, that where the court can pronounce that the contract is for the benefit of the infant, as, for instance, for necessities, there it shall bind him; when it can pronounce it to be to his prejudice, it is voidable only, and it is in the election of the infant to affirm it or not. *Keane v. Boycott*, 2 H. Bl. 511. And see *Reg. v. Lord*, 12 Q. B. 757; *United States v. Bainbridge*, 1 Mason, 58; *Wheaton v. East*, 5 Yerg. 41; *Cronise v. Clark*, 4 Md. Ch. 408; 2 Kent, Com. 236; *Robinson v. Weeks*, 55 Me. 102; *Baltimore Monumental Bldg. Asso. No. 2 v. Herman*, 38 Md. 128.

*Infants' contracts for necessities enforceable.*

It is a well-established doctrine that contracts for "necessaries" are binding upon an infant; but even upon such contracts, only the value of the articles furnished can be recovered (*Hyer v. Hyatt*, 8 Cranch, C. C. 276; *Parsons v. Keys*, 48 Tex. 557); and all the authorities concur in the rule that if an infant live with his parent or guardian, who duly cares and provides for him, he cannot bind himself for necessities. *Kraker v. Byrum*, 13 Rich. L. 163; *Walling v. Toll*, 9 Johns. 141; *Guthrie v. Murphy*, 4 Watts, 80.

Nor is he liable for necessities merely because his father is poor and unable himself to pay for them. *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371.

*Law implies a promise to pay.*

Ordinarily when one renders to another valuable 12 L. R. A.

The case sufficiently appears in the opinion. *Mr. William H. Fogler*, for defendant: Until a person is twenty-one years of age he is, in law, an infant, and is incapable of entering into a binding contract.

If he live with his parents or guardian, who duly care and provide for him, he cannot bind himself for necessities.

*Walling v. Toll*, 9 Johns. 141; *Swift v. Bennett*, 10 Cush. 486; *Connolly v. Hull*, 8 McCord, L. 6. See *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Ford v. Fothergill*, 1 Esp. 211.

Nor can he bind himself for necessities because his father is poor and unable to pay for them.

*Hoyt v. Casey*, 114 Mass. 397.

He is liable for money borrowed by him to pay for necessities, even if the money borrowed be expended for such necessities.

*Schouler*, Dom. Rel. 555; 1 Bl. Com. 466, note.

An infant is liable for necessities suitable to

service, the law will imply a promise to pay therefor by him for whom such service is rendered, and this upon the ground that as such party cannot infer service of this character to be gratuitous, it must be implied that he promised to pay for it; but no such implication can arise against a minor residing with his father, delivering over to him his wages and entitled to look to him for support. *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371.

We consider it by all means the better and sounder doctrine that an action can be maintained against an infant upon his negotiable paper given for necessities, either by the original payee or by one subsequent holder, and that the plaintiff may recover the full face of the paper, or so much thereof as represents the reasonable value of the necessities, for infancy can be shown, and the consideration, therefore, of the paper be inquired into, no matter who may be plaintiff. *Bradley v. Pratt*, 23 Vt. 378; *Earle v. Reed*, 10 Met. 387; *Dubose v. Wheddon*, 4 McCord, L. 231; *Aaron v. Harley*, 6 Rich. L. 26; *Askey v. Williams*, 74 Tex. 304. And see *Rainwater v. Durham*, 2 Nott & McC. 524, 10 Am. Dec. 637.

In *Bradley v. Pratt*, *supra*, *Redfield, J.*, said: "I do not well comprehend why, upon principle, any express contract may not be said to be binding upon him, when it is shown to have been given for necessities, and the price to have been reasonable, if it be one where the consideration may be inquired into. . . . And as confessedly the infant may *prima facie* avoid his note or bill by merely showing the fact of his infancy at the time of making the contract, what is the impropriety in allowing the plaintiff to recover in all cases by showing the consideration to be for necessities?"

In *Askey v. Williams*, 74 Tex. 304, it was well remarked: "We apprehend the better doctrine to be that an infant may make an express written contract for necessities upon which he may be sued, but that by showing that the price agreed to be paid was unreasonable, he can reduce the recovery to a just compensation for the necessities received by him. It is to his benefit to hold the express contract not void, but voidable; for if it be voidable merely, he can secure the advantage of a good bargain, and may relieve himself of it if it be a bad one, while, on the other hand, to hold it void would deprive him of the benefit of an advantageous contract." See extended note to the case of *Craig v. Van Bebber*, 100 Mo. 524, 18 Am. St. Rep. 569.

his rank and condition, when he can obtain them only by pleading his personal credit.

*Kline v. L'Amoureux*, 2 Paige, 419, 2 L. ed. 971.

An infant is liable to a person who furnishes or advances money on credit for the purchase of necessities, provided he would be liable if the necessities were purchased on his own credit.

*Conn v. Coburn*, 7 N. H. 368; *Swift v. Bennett*, *supra*.

In the case at bar, at the time the money was paid by the plaintiff, the board had been furnished to the defendant upon either his credit or that of his father. Neither the defendant's necessities, his comfort nor his welfare required that the plaintiff should pay the debt thereby contracted.

*Mr. Joseph Williamson*, for plaintiff:

Since the days of *Lord Coke*, education has been recognized as one of the necessities for an infant equally with proper meat, drink, and apparel.

Co. Litt. 173.

#### What are necessities.

To determine in all cases what articles are, under the circumstances and conditions of the case, and what are not, necessities, is a determination of great delicacy. *Mr. Lawson*, in his well-known work on "Rights, Remedies and Practice," in vol. 2, at § 829, gives an exhaustive enumeration of the articles deemed necessary and others considered not, and sustains the position of his text by a formidable array of authority. From the decisions there cited it appears that necessities are not simply such things as are absolutely necessary for the existence and support of the infant, but include all such articles as are requisite to maintain him in his station of life. *Leake*, Cont. 549; *Breed v. Judd*, 1 Gray, 458; *Story*, Sales, 34, 35.

While infants are liable for necessities purchased by them when not supplied by the parent or guardian, they are not bound by an agreement to pay a particular sum. Whether the articles purchased were necessities, and whether the sum agreed to be paid was a fair price, are questions to be determined by the court. *Parsons v. Keys*, 48 Tex. 557.

In *McKanna v. Merry*, 61 Ill. 179, the rule is stated to be, that "the articles furnished or money advanced must be actually necessary, in the particular case, for use, not mere ornament; for substantial good, not mere pleasure; and must belong to the class which the law generally pronounces necessary for infants. Boarding, lodging, food, medicine and education are clearly necessities. *Watson v. Cross*, 2 Duv. 147; *Hyman v. Cain*, 8 Jones, L. 111; *Bradley v. Pratt*, 23 Vt. 378; *Glover v. Ott*, 1 McCord, L. 572; *Peters v. Fleming*, 6 Mees. & W. 48; *Stone v. Dennison*, 13 Pick. 6, 23 Am. Dec. 654; *Squier v. Hydliff*, 9 Mich. 274; *Wilhelm v. Hardman*, 13 Md. 144.

But an oversupply of goods, otherwise necessary, ceases to be a supply of necessities as to the excess. *Johnson v. Lines*, 6 Watts & S. 30, 40 Am. Dec. 543.

An infant who buys goods not necessities, on credit, and does not return them, is liable for so much of the price as is equal to the benefit derived from the purchase. *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Bartlett v. Bailey*, 59 N. H. 408.

But other things also fall within the definition. Accordingly, the following have been held to be necessities: an attorney's services in defending him in a bastardy proceeding (*Barker v. Hibbard*, 54 N. H. 539, 30 Am. Rep. 160); or counsel fees in recovering his estate (*Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434); or prosecuting an action for

Money paid for an infant for necessities is recoverable from him.

*Chitty*, Cont. 142.

If money be laid out for reasonable necessities furnished an infant, he is liable to the person advancing the money.

*Metcalf*, Cont. 79.

An infant is liable to an action at the suit of a person advancing money to a third party to pay for necessities furnished to the infant.

*Swift v. Bennett*, 10 Cush. 436; *Randall v. Sweet*, 1 Denio, 460; *Conn v. Coburn*, 7 N. H. 368; 3 Bacon, Abr. 394.

*Peters, Ch. J.*, delivered the opinion of the court:

The jury found that at the request of the defendant, then an infant, the plaintiff paid for him a board bill which he had previously contracted while attending school. It was ruled at the trial that the expense of an infant's board while attending school might be regarded as necessities. The correctness of this ruling is perhaps unquestioned. At all events, *Coke's*

breach of promise of marriage (*Munson v. Washband*, 31 Conn. 308, 38 Am. Dec. 151); horses, in England (*Hart v. Prater*, 1 Jur. 623); *contra*, in this country (*Bainwater v. Durham*, 2 Nott & McC. 524, 10 Am. Dec. 687; *Grace v. Hale*, 2 Humph. 27, 38 Am. Dec. 296); livery for a servant (*Hands v. Slaney*, 8 T. R. 578); watches (*Peters v. Fleming*, 6 Mees. & W. 48); wedding clothes (*Sams v. Stockton*, 14 B. Mon. 332); or a bridal outfit (*Jordan v. Coffield*, 70 N. C. 110). And the following have been held to be not necessities: articles merely for adornment (*Lefils v. Sugg*, 15 Ark. 187); cigars and tobacco (*Bryant v. Richardson*, L. R. 8 Exch. 23, *note*); a college education (*Middlebury College v. Chandler*, 18 Vt. 683, 42 Am. Dec. 537); an insurance policy (*New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345); jewelry (*Ryder v. Wombwell*, L. R. 8 Exch. 90); repairs to the infant's dwelling-house (*Tupper v. Cadwell*, 13 Met. 559, 46 Am. Dec. 704); rent of a building for carrying on a trade or manual occupation (*Lowe v. Griffith*, 1 Scott. 458, 1 Hodges, 30); goods to carry on his trade with (*Mason v. Wright*, 13 Met. 306; *Stone v. Withpool*, 1 Latch, 21; *Whittingham v. Hill*, 1 Cro. Jac. 424; *Whywall v. Campton*, 2 Strange, 1063; *Tuberville v. Whitehouse*, 1 Car. & P. 94; *Decell v. Lowenthal*, 57 Miss. 331, 34 Am. Dec. 449); lumber to build a house (*Freeman v. Bridger*, 4 Jones, L. 1, 67 Am. Dec. 253); the board of horses, the principal use of which was in the infant's business of hackman, though occasionally used to carry his family out to ride (*Merriman v. Cunningham*, 11 Cush. 40); that where horseback exercise is prescribed by a physician, it is a necessity (*Hart v. Prater*, 1 Jur. 623); nor is a farrier's bill for work looking after the infant's horses (*Clowes v. Brooke*, 2 Strange, 1100, *Andrew*, 277); nor are saddles, bridles, whips, liquors, fiddles, fiddle-strings, powder and pistols, etc. (*Beeler v. Young*, 1 Bibb, 619; *Glover v. Ott*, 1 McCord, L. 572; *McKanna v. Merry*, 61 Ill. 179); nor is money lent to the minor a necessity (*Barie v. Peale*, 1 Salk. 237; *Beeler v. Young*, *supra*; *Smith v. Gibson*, *Peake*, Adm. Cas. 53; *Darby v. Boucher*, 1 Salk. 279; *Probert v. Knouth*, 2 Rep. 473, *note*; *McKanna v. Merry*, 61 Ill. 177), even though raised by mortgage to pay off a prior mortgage on property inherited by the infant (*Magee v. Welsh*, 18 Cal. 155; *West v. Gregg*, 1 Grant, Cas. 53, 114; *Hicknell v. Hicknell*, 111 Mass. 265); nor though raised at the request of the infant to relieve him from a draft for military duty (*Dorrell v. Hastings*, 28 Ind. 473); though if lent to procure a release from arrest for neces-

enumeration of the kinds of necessities has always been accepted as true doctrine, which are these: "necessary meat, drink, apparel; necessary physic, and such other necessities, and likewise his good teaching or instruction, whereby he may profit himself afterwards."

It was also ruled at the trial that an infant, being liable to one person for such a bill, could make himself liable to another who should pay such bill for him at his request, the liability to such other person not to be measured by the amount actually paid, but limited, irrespective of the contract price, to such sum as would be a reasonable compensation for the board. This ruling does not appear to infringe against any legal principle, and an examination of the case satisfies us that it is well supported by the authorities.

The infant's liability is in no way enlarged by owing the debt to one rather than to another. The rule lends no temptation to create a debt as it is already created. The right to

transfer the liability from one to another might be a great convenience to a minor. One creditor might be unable or unwilling to wait for payment, while a friend and acquaintance, as a substituted creditor, might be accommodating in that respect. It would give a self-supporting minor more facilities for support. We have not, in our examination of authorities, noticed any case that opposes the principle.

In *Clarke v. Leslie*, 5 Esp. 28, it was held that an infant who was threatened with arrest upon a process sued out against him on a debt for necessities would be liable to a person who, at his request, advanced money to release him. In that case there was legal pressure, but in many instances moral pressure would be great.

*Swift v. Bennett*, 10 Cush. 486, is a case where an infant bought an outfit for a whaling voyage, drawing for the amount of the bill on the plaintiffs, who accepted the bill, and paid it when it became due. They were allowed to collect of the infant what the goods were rea-

saries, or if the infant is charged in execution, it is held to be recoverable; but to entitle the plaintiff so to recover, he must show that the money was advanced under such circumstances. *Clarke v. Leslie*, 5 Esp. 28.

So an infant is liable for money paid at his request to satisfy a debt which he had contracted for necessities. *Randall v. Sweet*, 1 Denio, 460.

#### *Ends of the common law.*

The common law has failed to make provision for enforcing moral or legal obligations of the parent to maintain and educate his minor child. Statutory enactment has, in part, supplied this omission, but, in the absence of such provision, the liability of the parent for the necessities furnished in the support and maintenance of his minor child is regarded as a legal obligation reposing upon an implied authorization from the parent.

The situation is well expressed by the Supreme Court of the State of New York. In the case of *Raymond v. Loyl*, 10 Barb. 488, Mr. Justice Hand, writing for reversal, and voicing the unanimous sentiment of the court, holds that there is no legal obligation on a parent to maintain his child independent of the statute. Hence the third person, who supplies an infant with necessities, cannot maintain an action against the parent therefor, unless the latter has expressly or impliedly contracted to pay the amount.

In *Van Valkenburgh v. Watson*, 18 Johns. 480, the court says, that if the parent neglects that duty any other person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise on the part of the parent to pay; and *Simpson v. Robertson*, 1 Esp. 17, and *Ford v. Fothergill*, Id. 211, are cited.

An extract is also given from *Bainbridge v. Pickering*, 2 W. Bl. 1235. And *Chancellor Walworth* said, in *Re Ryder*, 11 Paige, 188, 5 L. ed. 101, that a stranger may furnish necessities for the child, and recover of the parent compensation therefor, where there is a clear and palpable omission of duty, on the part of the parent, in supplying a minor child with necessities. He cites *Van Valkenburgh v. Watson*, *supra*.

*Chancellor Kent* advances the same doctrine, and cites the same case, one in Connecticut, the two *not prius* cases from *Bainbridge (supra)* and *Stone v. Carr*, 3 Esp. 1.

Though stated so broadly, and by such eminent jurists, an examination of the cases throws doubt upon this position. Reeve was not a very careful writer. He cites 1 Bl. Com. 446, to show that it is a

common-law duty of parents to support minor children. Blackstone says this duty is "a principle of natural law" (1 Bl. Com. 447). That "it is a principle of law, that there is an obligation on every man, to provide for those descended from his loins; and the manner in which this obligation shall be performed is thus pointed out;" and immediately refers to the provisions of the statutes on the subject; and adds, on the next page: "No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident, and then is only obliged to find them with necessities, the penalty on refusal being no more than 80 s. a month." And Mr. Chitty, in his note (1 Bl. Com. 448 a), says there is no legal obligation on a parent to maintain his child, independent of the statutes, and therefore a third person, who may relieve the latter, even from absolute want, cannot sue the parent for reasonable remuneration, unless he expressly or impliedly contracted to pay, and cites *Le Blanc, J.*, *Cooper v. Martin*, 4 East, 84; *Hunt v. Wotton*, T. Raym. 260; *Beshch v. Coghill*, Palmer, 559; *Baker v. Keen*, 2 Starkie, 501. He adds that "the common law considered moral duties of this nature, like others of imperfect obligation, as better left in their performance to the impulses of nature."

The doctrine here laid down which relieves a father from liability for necessities furnished to his infant son in the absence of an express promise to defray such expense, or proof of such facts and circumstances as may imply such promise, is approved in *Gotts v. Clark*, 78 Ill. 280; *McMillen v. Lee*, 78 Ill. 445; *Murphy v. Ottenheimer*, 84 Ill. 40; *Johnson v. Smallwood*, 88 Ill. 75; *Schnuckle v. Bierman*, 89 Ill. 456.

That a parent is under an obligation to provide for the maintenance of his infant children is a principle of natural law; and it is upon this natural obligation alone that the duty of a parent to provide his infant children with necessities of life rests; for there is no rule of municipal law enforcing this duty. *Hunt v. Thompson*, 4 Ill. 179, 36 Am. Dec. 538.

Where it appears that the father has deserted his family, or has driven a child by cruel treatment from his home, the infant is said to have taken with him an authorization from the father for necessities furnished him, in order to relieve him from absolute want. *Stanton v. Willson*, 3 Day, 37; *Poock v. Miller*, 1 Hilt. 108; *Townsend v. Burnham*, 88 N. H. 270; *Pidgin v. Oram*, 8 N. H. 350; *Owen v. White*, 5 Port. (Ala.) 438.

sonably worth to him, in an action for money paid on his account. So in *Conn v. Coburn*, 7 N. H. 368, a person who signed an infant's note given for necessities, as a surety, was allowed, after payment of the note, to recover the amount paid, not upon the note, but as money paid for the benefit of the infant. *Randall v. Sweet*, 1 Denio, 460, is precisely in point in the present case.

The defendant relies on the rule generally prevailing in the cases that money is not a necessary, though lent to an infant who afterwards purchases necessities with it. "But," says Mr. Bishop, "one who pays money at his [infant's] request to a third person for necessities can recover it." Bishop, Cont. § 914. The difference is between lending or paying. Mr. Wharton (Wharton, Cont. § 72) finds the doctrine adopted in late American cases, that a person who lends money to an infant to purchase "specific necessities stands in the position of the tradesman who furnishes the necessities. In the case at bar the plaintiff could have taken an assignment of the claim, and been entitled to recover it; and there really is no good reason to defeat his claim as it is here presented.

*Exceptions overruled.*

**Walton, Virgin, Libbey, Haskell and Whitehouse, JJ., concur.**

Inhabitants of PHILLIPS

v.

Inhabitants of MADRID.

(...Me....)

# **1. Statutory prohibition of the guilty party to remarry within a certain time after**

## **NORM.—Scope of legislative enactments.**

Legislative enactments have no extraterritorial force, and when a state law forbids, in unqualified terms, the doing of an act, it must always be understood that the thing is only forbidden within the State. *Charles v. People*, 1 N. Y. 180; *Sims v. Sims*, 75 N. Y. 403; *National Trust Co. v. Gleason*, 77 N. Y. 400; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Western Transp. & C. Co. v. Kilderhouse*, 87 N. Y. 430.

The rights and incidents of a marriage, in the country where celebrated, shall follow and be allowed everywhere. *Royal Bank of Scotland v. Cuthbert*, 1 Rose, Cas. Bk. App. 481; *Andrews v. Herriot*, 4 Cow. 508, note a, 512.

The statute and decree prohibiting the marriage of the guilty party can have no effect beyond the territorial limits of the State. *Moore v. Hegeman*, 92 N. Y. 521.

A statute providing in general terms that the guilty party shall not marry after divorce applied only to divorces granted within the State. *Bullock v. Bullock*, 122 Mass. 8.

But whether a prohibition has any effect out of the State where the divorce is granted has been much disputed. In most States such a prohibition is regarded as a penalty. *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, citing most of the cases decided prior to 1881.

In such States the incapacity to marry depends entirely upon the prohibition; the marriage relation is wholly dissolved. *People v. Hovey*, 5 Barb. 117; *Moore v. Hegeman*, 27 Hun, 68; *Dickson v. Dickson*, 1 Yerg. 110.  
13 L. R. A.

a decree of divorce has no force out of the State in which the decree is granted.

## **2. The Maine Statute prohibiting the guilty party in a divorce suit to remarry applies only to divorces granted by the courts in that State.**

(March 12, 1891.)

CASE from Franklin County submitted upon an agreed statement of facts for the opinion of the full court in an action brought to recover compensation for poor supplies alleged to have been furnished by plaintiff to persons having a legal settlement in defendant Town. *Judgment for plaintiff.*

The facts sufficiently appear in the opinion.

**Mr. Prince A. Sawyer**, for plaintiff:

While the courts of one State can sunder the bonds of matrimony when the libellant is a resident within the jurisdiction of the court, and thus free both parties,—for when one ceases to be a husband the other ceases to be a wife,—yet no extraterritorial penalty or condition can be pronounced.

*Stearns v. United States*, 3 Paine, C. C. 301.

The marriage prohibition connected with the Massachusetts Divorce Laws does not affect a marriage contracted by the libellee in another State.

*West Cambridge v. Lexington*, 1 Pick. 510.

The prohibition of the libellee to marry again is in the nature of a penalty enacted by the State of Massachusetts, but "the courts of one sovereignty will not take cognizance of and enforce the Penal Code of another."

*Stearns v. United States*, *supra*.

**Mr. H. L. Whitecomb** for defendant.

**Libbey, J.**, delivered the opinion of the court:

Assumpsit for pauper supplies furnished by

## **Constitutional provisions on the subject.**

The Constitution of the United States provides that "full faith and credit shall be given in each State to the Public Acts, records and judicial proceedings of every other State." U. S. Const. art. 4, § 1.

And the Act of Congress of May 26, 1790, after providing for the mode of authenticating the Acts, records and judicial proceedings of the State, has declared, "And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." 1 U. S. Stat. at L. p. 123, chap. 11; U. S. Rev. Stat. p. 170, § 905. See *Shumway v. Stillman*, 4 Cow. 282; *D'Arcy v. Ketchum*, 52 U. S. 11 How. 165, 13 L. ed. 648; *Mills v. Dur-yea*, 11 U. S. 7 Cranch, 481, 3 L. ed. 411; *Wood v. Watkinson*, 17 Conn. 500.

If a judgment is conclusive in the State where it is pronounced, it is equally conclusive everywhere. See Story, Const. § 1812.

It therefore follows that "if a court has jurisdiction in a divorce cause, valid according to the law of the State in which it is taken, and not obnoxious to principles of interstate comity, and it pronounces a divorce, and the decree has become matter of record in the court, it is binding in all the other States of the Union." 2 Bishop, Mar. and Div. § 199; Wait, Act. and Def. § 110.

## **The general doctrine stated.**

The general doctrine is, that a decree of divorce—

the plaintiff Town for the relief of Lorestein Hinkley, Ella R. Hinkley, as his wife, and Bernard C. Hinkley and Harry L. Hinkley, their sons.

By the agreement of the parties, it appears that Lorestein Hinkley had his legal settlement in the defendant town, and the right to recover for what was furnished him is admitted. The right to recover for the supplies furnished Ella R. and the two sons depends upon the legality of the marriage of said Lorestein and Ella R.

By the agreed facts, it appears that said Ella R. was legally married to one Wardwell of Clinton, in this State, May 25, 1879; that she and her husband afterwards moved to Massachusetts, where they separated, and she returned to this State; that while she was residing here a libel for divorce was commenced by her husband in the court of Massachusetts, duly served on her in this State, and that a decree nisi of divorce was granted by the court there in November, 1882, for the adultery of the wife, which was duly made absolute in November, 1883. Said Ella R. remained in this State, and on the 6th of September, 1884, was duly married to said Hinkley, in said Town of Phillips.

It is claimed by the defendants that by the Statute of Massachusetts, and of this State, in 1883, a husband or wife for whose fault a divorce was granted could not marry again within two years from the decree of divorce, and as that time had not elapsed when the paupers were married, in September, 1884,

their marriage was illegal, and that Ella R. and her two sons do not take the pauper settlement of said Lorestein.

We think this contention is not sound. When the divorce was granted, Ella R. was no longer the wife of Wardwell. *Burien v. Shannon*, 115 Mass. 438; *Com. v. Putnam*, 1 Pick. 186. The prohibition to remarry within the time named was in the nature of a penalty. It had no force as a disability to remarry out of the State of Massachusetts. It did not attach to the person of the wife in this State. This rule is held in many courts. *Cox v. Combs*, 8 B. Mon. 281; *People v. Chase*, 28 Hun, 810; *Ponsford v. Johnson*, 2 Blatchf. 51; *Moore v. Hegeman*, 92 N. Y. 521; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Thorp v. Thorp*, 90 N. Y. 602; *Van Storch v. Griffin*, 71 Pa. 240; *Com. v. Lane*, 118 Mass. 458.

Nor does the prohibition upon the guilty party to remarry by the Statute of this State attach to said Ella R. Our statute applies only to divorces granted by the courts in this State. It has no reference to a decree granted in another State. *Bullock v. Bullock*, 122 Mass. 3.

We think the marriage of said Lorestein and Ella R. was legal, and that the plaintiffs are entitled to judgment for the full amount claimed.

*Defendants defaulted.*

**Peters, Ch. J., and Walton, Virgin, Haskell and Whitehouse, JJ., concur.**

from the bond of matrimony, when unnumbered by any statutory limitations or restrictions, operates to release the parties respectively from all the obligations which the dissolved marriage imposed. In other words "with the dissolution the obligations arising from the marriage are completely discharged, and the parties stand in the same position as though such marriage had never been contracted." *Field, Ch. J.*, in *Barber v. Barber*, 16 Cal. 378. And see *Forrest v. Forrest*, 8 Bosw. 661, 9 Abb. Pr. 286; *People v. Hovey*, 5 Barb. 117.

But in many of the States statutory restrictions and prohibitions have been placed on one or both of the parties to the divorce, and questions of much interest have arisen in respect to the extent of such restraints. Thus, under a general statute which authorizes a divorce and also forbids the guilty party to contract a second marriage during the lifetime of the innocent party, arises the question whether such guilty party may marry in any other State or country. And although, agreeably to the weight of authority, this question should be answered affirmatively (see *West Cambridge v. Lexington*, 1 Pick. 508; *Ponsford v. Johnson*, 2 Blatchf. 51; *Clark v. Clark*, 8 Cush. 386; *Dickson v. Dickson*, 1 Yerg. 110; yet, an opposite view has been entertained in some of the New York cases. See *Cropey v. Ogden*, 11 N. Y. 228; *Smith v. Woodworth*, 44 Barb. 198. See also *Williams v. Oates*, 5 Ired. L. 536; *Wait, Act. and Def. art. 2, § 2*.

In *Harding v. Alden*, 9 Me. 140, it was held, by the Supreme Judicial Court in Maine, that a decree of divorce did not fall within the rule that a judgment rendered against one not within the State, nor bound by its laws, nor amenable to its jurisdiction, was not entitled to credit against the defendants in another State; and that divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognized, in the absence of all fraud, as opera-

tive and binding everywhere, so far as related to the dissolution of the marriage, though not as to other parts of the decree, such as an order for the payment of money by the husband. This is an important and valuable decision, and settles the question, so far as the judicial authority of a single State can do it, against the English rule, and places it upon the same principles of justice, good morals and policy which render a marriage valid by the law of the place where it was solemnized, valid everywhere. 2 Kent, Com. 13th ed. \*110, note a.

A decree in a divorce suit will have no extraterritorial effect when the defendant is domiciled in another State, and is not served with process, nor with notice of the proceedings. *Doughty v. Doughty*, 28 N. J. Eq. 681.

We must concede that a State may adjudge the status of its citizen towards a nonresident; and may authorize to that end such judicial proceedings as it sees fit; and that other States must acquiesce, so long as the operation of the judgment is kept within its own confines. But that judgment cannot push its effect over the borders of another State, to the subversion of its laws and the defeat of its policy, nor seek across its bounds the person of one of its citizens, and fix upon him a status, against his will and without his consent, and in hostility to the laws of the sovereignty of his allegiance. *People v. Baker*, 76 N. Y. 78.

The courts of New York have no common-law jurisdiction over the subject of divorces, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute. *Griffin v. Griffin*, 47 N. Y. 184; *Davis v. Davis*, 76 N. Y. 221; *Kamp v. Kamp*, 59 N. Y. 219.

The subject of divorce is exclusively regulated by statute, and actions relating thereto can only be maintained pursuant to statutory provisions. *Combs v. Combs*, 17 Abb. N. C. 265.

## MISSISSIPPI SUPREME COURT.

STOWERS, Appt.,  
v.

POSTAL TELEGRAPH CABLE CO.

(.....Miss.....)

**Compensation for the erection of a telegraph line in a street** must be made to abutting owners although the fee of the street is in the public and the right thereto cannot be defeated by the action of the municipal authorities.

(May 4, 1891.)

**APPEAL** by complainant from a decree of the Chancery Court for Warren County sustaining a motion to dissolve an injunction which had been granted to restrain defendant from erecting poles in the street in front of complainant's property in the City of Vicksburg. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Birchett & Shelton* for appellant.

*Messrs. Warren Cowan and McIntosh, Williams & Russell* for appellee.

**Cooper, J.**, delivered the opinion of the court:

There is some conflict in the authorities, but the decided weight is to the effect that telegraph lines form no part of the equipment of a public street, but are foreign to its use, and that where the abutting owner is the owner of the fee to the center of the street he is entitled to additional compensation for the additional burden placed upon his land. *Lewis, Em. Dom. § 131, citing Board of Trade Telegr. Co. v. Barnett, 107 Ill. 507; Dusenbury*

*v. Mutual Telegr. Co. 11 Abb. N. C. 440; Metropolitan Teleph. & Telegr. Co. v. Colwell Lead Co. 18 Jones & S. 488; Tiffany v. United States Illum. Co. 19 Jones & S. 280; Broome v. New York & N. J. Telegr. Co. 42 N. J. Eq. 141, 5 Cent. Rep. 814. Contra, Hewitt v. Western U. Telegr. Co. 4 Mackey, 424; Pierce v. Drew, 186 Mass. 75; Julia Bldg. Assn. v. Bell Teleph. Co. 88 Mo. 258, 5 West. Rep. 357, though the question was not involved in the decision of the case then before the court, Arnold, Ch. J., in Theobald v. Louisville, N. O. & T. E. Co., 66 Miss. 279, 4 L. R. A. 785, stated, in delivering the opinion of the court, that there was no difference in right in cases where the owner of the abutting land owned the fee to the center of the street, and those in which the fee was in the public. To that declaration, and upon the authorities there cited, we now give the force of decision. It follows that it was not competent for the City of Vicksburg, by the action of its municipal authorities, to authorize the erection of the telegraph wires by the Telegraph Company, to the injury of appellant, without having first made compensation to him for the injury inflicted upon him. The authority granted by the municipality will protect the Company in its interference with the rights of the public, which is represented by the local authorities; but it cannot operate to withdraw from the appellant his right of property, and confer it upon the Company. That right is secured by constitutional provision, and can only be secured by the exercise of the right of eminent domain, and upon due compensation being first made.*

The decree is reversed, the injunction reinstated, and cause remanded.

**NOTE.**—Construction of telegraph line; rights of abutting owners.

The construction of a telegraph and telephone line on a railroad company's right of way imposes an additional servitude or burden on the land, for which the owners are entitled to compensation, unless constructed in good faith for the use of the railroad, and to facilitate the operation of its road. *American Teleph. & Telegr. Co. v. Smith, 7 L. R. A. 300, 71 Md. 535.*

A telegraph company cannot invoke the equitable power of the court to restrain interference by abutting owners with its poles in city streets, even though its lines have been erected by legislative sanction. *Metropolitan Teleph. & Telegr. Co. v. Colwell Lead Co. 67 How. Pr. 363.*

12 L. R. A.

**Authority to construct, a mere license.**

Statutes giving the right to telegraph companies to erect lines upon, over or under streets grant no interest in the streets, but at most confer a license which can be revoked by the Legislature at any time. *American Rapid Telegr. Co. v. Hess, 125 N. Y. 641.*

Even if they gave them any interest therein, it would be subject to the general power of the Legislature to regulate their use and remove such lines if they should become a nuisance. *Ibid.*

Telegraph lines erected in the streets of cities may be removed therefrom as a nuisance, under proper authority from the Legislature; and such removal is not a taking of property for public use. *Ibid.*



# RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress and Development of the Law during the Last Quarter of the Judicial Year Beginning with Oct. 1, 1890, Classified as Follows.

- I. PUBLIC, OFFICIAL AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.
- V. FIDUCIARIES AND REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.
- VII. PROPERTY RIGHTS; LIENS; GIFTS; WILLS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

## I. PUBLIC, OFFICIAL AND STATUTORY MATTERS.

### *Constitutional Law.*

An exceedingly interesting case discussing what is meant by "the law of the land," and the constitutional provision as to depriving persons of "property," decides that a statute providing that personal property of an intestate lunatic, if derived from an intestate husband or wife, shall go to the latter's next of kin, is unconstitutional. (Tenn.) 70.

A license tax on peddlers is not an unconstitutional regulation of commerce. (D. C.) 624.

An Indiana case of great importance upholds the power of the Legislature to regulate the pressure of natural gas in pipes within the State, and holds that such an exercise of police power does not constitute an unlawful regulation of interstate commerce. (Ind.) 652.

A mere innovation or change in the law does not impair the obligation of a contract within the meaning of the Federal Constitution. (Pa.) 290.

The constitutional protection of the obligation of a contract, and the rule that it cannot be impaired by a change of decisions, is illustrated by a case deciding that a mortgagee's right under a mortgage given by a married woman when the state decisions held that she had capacity to make it cannot be affected by the overruling of those decisions. (Ala.) 856.

An important decision on the constitutionality of the Act of Congress known as the Anti-Trust Law sustains it in all respects. (C. M. D. Tenn.) 758.

### *Extradition.*

That there is no duty to surrender fugitives to another government under the law of nations is declared by a very exhaustive opinion reviewing the authorities, both judicial and executive, although in conflict with the rule laid down by Kent and Story; and therefore under the Treaty of Mexico, which creates no obligation on the part of either government to surrender its own citizens, a citizen of the United States cannot be surrendered to Mexico as a fugitive. (D. C. W. D. Tex.) 589.

### *Appropriations; Assessments; Taxes.*

The disposal of sewage by cities and towns

forming one sixth of the State in population is a public purpose for which the Legislature can appropriate money. (Mass.) 417.

This does not prevent the Legislature from requiring such cities and towns to repay it, although they do not have the title to the works constructed for that purpose. *Id.*

The delegation to commissioners of the apportionment of the expense on the different cities and towns may be made without giving them any other rule than to apportion it as they shall deem just and equitable, subject to approval by a court, and the apportionment need not be based entirely on benefit to property. *Id.*

Coal in its natural state may be severed from the ownership of the realty for purposes of taxation. (Ill.) 247.

The "capital stock" of a corporation liable to taxation under N. Y. Laws 1857, chap. 456, § 8, is the actual capital owned by the corporation and not the shares of stock. (N. Y.) 762.

An elaborate discussion of the question of the exemption of church property from street assessments is presented in a case which decides that no such exemption is implied by an express exemption from taxation. (Ga.) 852.

The tax on that part of a telegraph line in any town is to be assessed, under N. Y. Laws, not according to its value as part of a line in operation, but according to the actual value of the property actually in the town. (N. Y.) 251.

Personal property of a non-resident invested or habitually kept within the State is subject to collateral inheritance tax under N. Y. Laws 1887. (N. Y.) 401.

A certificate by the proper officer that there are no unpaid taxes on certain lands is conclusive against the public in favor of one who purchases in reliance thereon. (Pa.) 751.

The power of the municipal corporations to tax a bridge across a navigable river in Arkansas extends only to that part which is above high-water mark, although one half of the bridge is within the county in which the corporation is situated. (Ark.) 487.

*Eminent Domain.*

There is no taking of property within the constitutional provision as to compensation in the case of damage to rice fields by a dam made in harbor improvements, which raises the low-water level in a navigable river, and destroys the drainage of the fields, and increases their liability to overflow in time of freshets. (C. C. S. D. Ga.) 678.

A railroad is located so as to exclude appropriation of the land by another road when the company has made a definite location, but not merely by staking out the line. (Pa.) 220.

A telegraph line in a street is held in Mississippi to be such an additional burden that the abutting owners are entitled to compensation, even if they do not own the fee. (Miss.) 864.

*Municipal Matters.*

An ordinance prohibiting second-hand clothing to be brought into or offered for sale within a town without first proving that it did not come from a place where contagion or infection is or has been prevailing, is unreasonable and void in the absence of any epidemic or other apparent necessity therefor. (Miss.) 528.

The validity of an ordinance establishing fire limits is upheld by a decision which declares it not unreasonable because the power is reserved to grant special permits for wooden buildings within such limits. (Wash.) 150.

A city owning the fee of streets in trust for the public can maintain trespass for the taking of coal beneath the surface, although the surface of the streets is not injured, and recover the full value of the coal. (Ill.) 826.

A public pump in a city street maintained by city authorities is not a nuisance to an abutting lotowner, and a well abandoned by a former owner of the land may be fitted up for public use without consent of the abutting owner. (Ind.) 259.

The revocation of licenses by the mayor of a city without notice to the licensee is not so unreasonable or oppressive as to make ordinances giving him that power invalid. (R. I.) 57.

A privilege by a town to a private person to place weighing scales in a street is authorized by Iowa Code, § 456, and after he has incurred expenses on the faith of it, it cannot be revoked unless the public interest requires it. (Iowa) 115.

*Courts.*

An action arising under the Interstate Commerce Act is held by the Louisiana Supreme Court not to be within the jurisdiction of state courts. (La.) 725.

Membership in a state bar association, which may be liable for the costs of a proceeding to disbar an attorney, does not disqualify a judge to sit therein. (Ala.) 184.

*Amicus Curia.*

An interesting case involving the rights and duties of an attorney as *amicus curia* holds that he may and should move to dismiss a suit if he knows it to be fictitious. (Nev.) 815.

*Officers.*

That the rule as to officers *de facto* does not  
12 L. R. A.

apply to a mere usurper is illustrated by a decision holding an election void when held by a mere usurper of the office of registrar. (N. C.) 202.

A citizen of the State may be eligible to a county office, although he has moved into the county so recently that he cannot vote. (Tex.) 364.

*Elections.*

Votes may be given for the same man as a candidate for two incompatible offices. (Ill.) 125.

The decision of a tie vote by lot is not a violation of the constitutional provision that elections shall be by ballot. (Ind.) 285.

The prohibition by Connecticut Election Laws of words other than those expressly permitted on ballots does not make the ballot void by the use of the word "for" before the name of the office to be filled, but does make it void by the addition of other words to the legal name of the office, or by addition of the name of a candidate for an office not then to be filled at that election. (Conn.) 551.

This case also holds, in substance, that a citizens' party may be formed for the purpose of a single town meeting without any steps to perpetuate itself. *Id.*

A candidate independently nominated is entitled, under the Maryland Election Laws, to a place on the official ballot in addition to that among the group of candidates of a political party which has also nominated him in convention. (Md.) 586.

The word "canvass" in the South Dakota statutes, within twenty days after which notice of a contest of election must be given, includes the decision of a tie vote by lot, as provided by statute. (S. Dak.) 705.

*Statutory Construction; Repeal.*

The question whether provisions of a statute are directory or mandatory is raised in a case holding that a provision that the "clerk of the court shall cite" the judge of another district in certain cases is merely directory and that a citation by the judge with the assent of the clerk is sufficient. (Conn.) 358.

The maxim of *ejusdem generis* is discussed in a case holding that the words "all other officers," following an enumeration of county, township and precinct officers, includes officers of school districts. (Ill.) 125.

A dummy railroad operated by steam is held by an Alabama decision to be a railroad within the meaning of statutes regarding the operation of railroads. (Ala.) 880.

A person selling and delivering goods from house to house being included in the description of a "peddler" in a Legislative Act is not taken out of it by the fact that he is paid only by a salary. (D. C.) 624.

The term "month" in a statute is held by a Florida decision reviewing numerous decisions to mean calendar, not lunar, month. (Fla.) 770.

A statute applying to a certain class of counties created by the Constitution is not repealed by a general statute without negative words. (Pa.) 192.

I. CONTRACTUAL AND COMMERCIAL RELATIONS.

*Construction and Effect of Contracts.*

That time is not of the essence of a contract unless made so by express agreement, or the nature of the contract or of the circumstances under which it is made, is reaffirmed and illustrated by an Oregon decision. (Or.) 289.

Support of an incompetent person, which is by a declaration in trust made a charge on a farm, may be required to be furnished elsewhere than on the farm, where there is nothing in the declaration of trust to limit it to that place. (N. Y.) 667.

A contract to leave all one's property at death to an adopted child will not prevent him from transferring it without an attempt to defraud the child. (Ind.) 120.

A corporation is liable for money loaned to it although on the security of the note of individuals only; the test is whether the note was the consideration or only a security for the money. (Pa.) 223.

A contract is invalidated by the subsequent enactment of police regulations which render its performance illegal as to one of the parties. (Ind.) 652.

*Signature.*

A cross-mark alone opposite a seal may constitute a sufficient signature to a deed when placed under a clause containing the grantor's name and saying that he signed his name and affixed his seal.

The letters "D. S. C." may also constitute a sufficient signature by a witness to the deed whose name was Solomon Davis. *Id.*

*Delivery.*

Delivery by a mortgagor, a few hours before killing himself, of a mortgage for record at his own expense, is a good delivery to the mortgagee, although the latter has no knowledge of it until after the mortgagor's death. (Minn.) 171.

*Consideration; Public Policy.*

A minor's abstinence from intoxicating liquors, etc., is a good consideration for a promise by his uncle to pay him money. (N. Y.) 463.

The establishment of a new butter store is no consideration for an agreement of grocers to buy no butter from the makers for two years, and such an agreement is void as tending to create a monopoly. (Iowa) 428.

A purchase of stock by a broker for a customer, who puts up a margin, is a sale of stock on margin within the prohibition of the California Constitution. (Cal.) 511.

An agreement to prevent competition in the manufacture of fish glue under a patent making an article of great value out of one nearly worthless is not against public policy. (Mass.) 563.

*Statute of Frauds.*

A writing may constitute a sufficient memorandum under the Statute of Frauds, although it is made subject to the terms of another not yet in existence where the latter is subsequently procured in writing. (Mass.) 561.

Entry under a parol agreement for a written lease on certain conditions creates only a 12 L. R. A.

tenancy at will until a written agreement is made. (N. M.) 67.

A promise by the owner of a building to pay for work partly finished, made to induce its completion, where the principal contractor for whom the work was begun had made default in payment, is an original and not a collateral contract. (Ind.) 502.

*Assignment.*

The rule that a contract for service involving personal skill cannot be assigned applies to a lawyer's contract for an option to purchase lands in consideration of the use of his skill in removing clouds on the title. (Ill.) 496.

*Rescission.*

A formal re-entry by a lessor, who has remained in actual possession of the premises, is not necessary in order to terminate an oil and gas lease, and his election to forfeit it is a constructional entry. (Pa.) 290.

A purchaser is not entitled to a return of money paid or of unpaid purchase-money notes on the vendor's retaking possession of the property for default in payment of an installment, where the contract gives him a right to do so and reserves title until all is paid. (Mich.) 446.

False statements as to the market value of an article, made to a dealer therein to induce a purchase, does not justify a rescission, at least where it is clear that he did not believe them. (Mass.) 831.

*Sales.*

A conditional sale valid where it is made, by which the title is retained until the purchase money is paid, may be upheld against an innocent purchaser from the original vendee in another State to which the property is taken without payment, although by the laws of the former State the conditional sale would be held invalid as to a bona fide purchaser because not recorded. (Ala.) 700.

Acceptance, after inspection or fair opportunity to inspect it, of wheat furnished under a contract for wheat of a certain grade, precludes the buyer from denying that the contract is satisfied. (Ky.) 899.

*Warranty.*

A warranty of the soundness of horses is made by a bill of sale stating that they are sound and kind. (Vt.) 693.

*Bailment.*

Riding a hired horse a few miles beyond the point to which he was hired to go will not make the hirer liable for loss of the horse, where, after returning from the extra trip, he fell on the homeward road and died a day or two afterwards, unless the extra ride caused or materially contributed to this result. (Ga.) 397.

*Innkeepers.*

A check for a valise given by a porter without authority to a transient guest on his departure is not sufficient to make the innkeeper liable for it. (Ala.) 883.

*Carriers.*

A passenger is chargeable with notice of the stipulations of a ticket for a voyage which

plainly purports to be a contract, although he did not read them. (Mass.) 840.

An Oregon case extensively reviews the right of a passenger to damages for forcible expulsion from a train where he refuses to pay fare and his ticket does not on its face entitle him to passage, although he has paid for it supposing he could ride on it. The case holds that he should leave the train quietly and seek a proper remedy for damages or else pay his fare. (Or.) 828.

A contract exempting a carrier from liability, valid where it was made, will be upheld by the courts of a State in which such contracts are held void as against public policy. (Mass.) 840.

A stipulation fairly and voluntarily entered into, limiting the amount of recovery for loss of goods shipped where their value is not specified, is valid even if the loss is due to slight or ordinary negligence. (Kan.) 799.

Stage property, paraphernalia, etc., are not baggage for which a carrier is liable as an insurer unless accepted as such by the carrier. (Or.) 818.

That joint through rates for transportation of freight may be compelled by statute is decided in Iowa. The decision also holds that carriers may be compelled to send carload lots to destination without unloading, unless at the carriers' expense, and that the transfer of less quantities to other cars must be a cost which is to be made a part of the through rate. (Iowa) 486.

#### *Insurance.*

The option of the insurer to refund the premiums or pay the policy according to the equities of the case, where the insured died by his own hand while insane, is not waived by failure to exercise it within the sixty days after proofs of loss allowed for payment if it is made within a reasonable time. (Wis.) 690.

Knowledge of an insurance agent as to the deafness of the insured constitutes a waiver of the objection that such deafness is a bodily infirmity contrary to a representation in his application. (N. C.) 815.

A promise to pay to the wife of the person insured a sum of money upon his death for permission to take out the insurance is void where the payee has no insurable interest in the life. (N. C.) 409.

Life insurance payable to the wife of the insured or in case of her death to his children vests in her if she survives him, although she dies before obtaining it, and her estate therein will not go to his children. (Colo.) 209.

#### *Bills and Notes.*

A note payable to a certain person "*et al.*, or order," is not negotiable. (Iowa) 488.

A promissory note, although non-negotiable, need not express any consideration. (N. Y.) 845.

That the materiality of an alteration of a note does not depend upon the fact that it is a detriment to the party claiming to be released

thereby, is shown by a decision that adding "& Co." to the name of the maker of a note is a material alteration as to an indorser. (Ala.) 140.

Signature of a payee to an assignment written out on the back of a note makes him liable as an ordinary indorser. (Minn.) 870.

An indorser of a forged bill is liable to the indorsee on its dishonor without proof of demand or notice. (Utah) 484.

The time for notice of dishonor of a note which is indorsed when overdue is the same as in case of notes indorsed before maturity, although the same diligence is not necessary in respect to demand. (Tenn.) 727.

An assignment of a note carries a guaranty not referred to, but which is all that gives the note value. (Conn.) 870.

An assignee of a mortgage and note secured thereby as collateral security, to whom a forged copy of the note is delivered with the mortgage, has a good title to the note as against one to whom the assignor after maturity transfers the genuine note. (Ohio) 41.

Collateral security for a note or any other liability of the maker does not constitute a special pledge or give an indorser any claim to preference in the application of the proceeds. (Mass.) 181.

#### *Banks.*

Certification of a check by a bank on the drawee's application releases the drawer. (Ill.) 492.

A check given by an insolvent to his creditor is held worthless after the insolvent's death if not previously presented or certified, although by the law of the State checks are regarded as assignments. (La.) 802.

A case of the highest importance to banks and depositors, decided by the New York Court of Appeals in almost exact conflict with the already famous *Vagliano v. Bank of England Case*, decides that a depositor without negligence is not prejudiced by the fact that the bank has paid money on checks with indorsements of the payees' names forged by his clerk, who stole the checks; that the fact that the checks were payable to a fictitious person does not make them payable to bearer under the New York statute, where the maker supposed the payee to be a real person. (N. Y.) 791.

#### *Interest.*

A good illustration of the law as to interest on contracts between citizens of different States is presented by a decision that notes and a deed of trust signed and dated in Texas, but delivered by an agent in New York, may bear interest according to the law of Texas. (Tex.) 98.

#### *Money.*

Spanish milled dollars constitute a good tender for ground rent reserved in such dollars at a time when they were legal tender, although they have been demonetized by Act of Congress and Spain has ceased to coin them. (Pa.) 219.

### III. CORPORATIONS AND ASSOCIATIONS.

See also *infra*, VI., *Electricity*.

The promotion of the cause of temperance is too vague a description of the objects of a corporation to bring its funds within the control of equity as a public charity and prevent division thereof among the members. (Cal.) 117.

(DOMESTIC RELATIONS; PERSONAL CAPACITY—FIDUCIARIES AND REPRESENTATIVES.)

The state board of agriculture is held in Indiana to be a private corporation, although no shares of stock are issued. (Ind.) 604.

The State only can question the right of foreign corporations to hold lands in excess of the amount limited by statute. (Ga.) 529.

The deed of a corporation may be lawfully acknowledged by a representative having authority to execute it. (N. Y.) 588.

The doctrine that a corporation is estopped to deny the validity of a contract under which it has received benefits on the ground that it was not made in conformity to statutory requirements is upheld in the case of a water-works company which had issued bonds. (C. W. D. Pa.) 168.

*Directors.*

Directors are personally liable for a contract made by them before they have any authority to create a corporate obligation. (Ohio) 346.

*Stockholders.*

The right of pledgors and pledgees of corporate stock and of the holders of a majority of the stock in respect to voting for directors is extensively discussed in a case from North Dakota. (N. Dak.) 781.

The rights of a bona fide purchaser of stock issued by a corporation having legal authority to do so, in place of surrendered stock, are to be protected where he had no notice of any illegality in the surrender and cancellation of the original certificate. (Ind.) 498.

The doctrine that payment of subscriptions

to a corporation, made in property, must be at its real value, is discussed and well illustrated by a case in which subscriptions amounting to \$200,000 were paid by \$5,000 worth of property. (Ala.) 307.

The liability of stockholders as partners, where they have formed a foreign corporation solely because they could not organize a corporation under the laws of their own State, is asserted by a decision of the Texas Court of Appeals. (Tex.) 866.

*Receiver.*

The powers of a receiver of an insolvent corporation are held not to extend to the enforcement of claims against stockholders which creditors of the company might enforce, but as to which the corporation is estopped. (Ill.) 828.

*Church.*

A church site and edifices may be sold to pay the salary of the pastor. (Ga.) 155.

*Partnership.*

The right of a surviving partner to borrow money in good faith to pay the debts of the firm is upheld as a valid claim on the firm assets under an assignment for creditors, although the firm was in fact insolvent at the time of the loan. (N. Y.) 146.

The right of individual creditors to be paid out of the separate property of a partner in preference to firm creditors is discussed and upheld on a review of the authorities. (Mo.) 254.

IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.

Statutory prohibition to remarry within a certain time has no force out of the State in which the decree of divorce is granted. (Me.) 862.

Connivance of a husband in his wife's adultery is not shown, where he already suspects her to be guilty, by merely suffering her in a single instance to avail herself of an opportunity thereof for which she has already arranged without his knowledge, even though he purposely refrains from warning her because he hopes to obtain evidence which will entitle him to a divorce. (Mass.) 524.

The right to alimony on decreeing the nullity of a void marriage cannot be conferred by a statute passed after such marriage took place. (W. Va.) 50.

The right to dower does not exist in favor of the wife on annulment of a marriage which was contracted in good faith, because the husband had a former wife living, although she had not been heard from in five years before

the second marriage, and this was therefore valid, under New York laws, until its nullity was proclaimed by a court. (N. Y.) 859.

Disaffirmance of deeds by infants is discussed in a case which holds that any unequivocally expressed intention to disaffirm after coming of age is sufficient; but where the infant is the grantee, this does not reinvest title without reconveyance. (Ala.) 186.

Insane delusions are discussed in a case which defines them as conceptions that originate spontaneously without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis, and which holds that they do not include a belief or aversion, formed on an apparent cause, however insufficient. (Or.) 161.

The discharge of a person from an insane asylum is held to be in itself a restoration to his capacity to sue, under California statutes. (Cal.) 104.

V. FIDUCIARIES AND REPRESENTATIVES.

A letter acknowledging indebtedness and saying that the money is in bank and to be considered on interest, not to be interfered with by the writer until the other is capable of taking care of it, creates a trust. (N. Y.) 463.

The right to support out of the net rents of a farm, or interest on its price if sold, which is given by a declaration of trust made by a grantee, is held to be not limited to support on 12 L. R. A.

the farm, and the trustee is held to have a duty of actual supervision and a responsibility which is not escaped by transferring the land charged with the support. (N. Y.) 667.

A person can recover back money paid to a broker as commissions on discovering that he was acting as agent for the other party also. (Pa.) 895.

A foreign executor who takes out ancillary

letters is subject to suit even by a non-resident creditor. (N. Y.) 237.

*Executors de son tort* are not recognized by

the laws of Missouri, as the statutory system of administration is inconsistent with the common law in that regard. (Mo.) 187.

## VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.

### *Conversion.*

Wrenching machinery from a mill against the protest of a co-tenant, and carrying it away, may constitute conversion. (N. C.) 261.

### *Buildings.*

Permitting a stairway carpet with holes in it to remain on the stairs of a tenement house with notice of its condition renders the owner liable for injuries to a tenant from a fall caused by catching her foot in one of the holes. (N. Y.) 843.

A contractor is not liable to a stranger to the contract for injuries caused by defects in a building which has been completed and accepted by the owner. (Pa.) 322.

A presumption of negligence from the fact of an accident arises in the case of the fall of a heavy sign by its own weight. (Ark.) 189.

### *In Public Service.*

Negligence in blasting for a schoolhouse is within the rule that negligent or defective performance of public service creates no liability. (Mass.) 160.

### *Infants.*

A child of tender years may be chargeable with the consequences of his own negligence when injured while trespassing. (Pa.) 216.

### *Railroad Injuries.*

It is negligence to run a railway train without a cow-catcher on the engine. (Ala.) 108.

Riding on the platform of a street-car when there is room inside is not negligence *per se*. (Mich.) 129.

It is not negligence as matter of law for a person who has stepped off from a railroad track, to allow a train to pass, to step on again without looking out for the rear section of the train, which was broken off and following it some distance away. (Tenn.) 184.

An attempt to board a moving train is negligence as matter of law if made by one in a safe position, and without necessity, where a misstep would involve serious consequences. (N. Y.) 429.

The duty of a railroad company to have lookouts on the front of a train is held to apply to the rear section of a train which is broken in two, if there were employes upon it who could have acted as lookouts. (Tenn.) 184.

A railroad company contracting to furnish cars for stone at a quarry, and charged with the duty of selecting them, is liable to a servant of the quarryman for failure to use ordinary care to select safe cars, although it would not be liable to him for breach of duty arising purely under the contract. (Mo.) 746.

### *Injury by Servant.*

A street-railway company is liable for its driver's abuse of a passenger and threatening to arrest him for giving him counterfeit money, but not for an arrest which the driver causes to be made without any instructions to do so. (La.) 337.

12 L. R. A.

### *Injury to Servants.*

Proper rules for the conduct of his business must be furnished by a master in order to prevent liability to a servant for negligence of fellow servants. (N. Y.) 454.

The duty of a master to warn or instruct his servants as to danger is discussed in a case which holds that no warning is necessary of the obvious danger from molten iron which will flow into a trench where men are working if a wall is broken through, but is necessary as to the danger from the flying of the metal when the "boil" is punctured and the shell broken. (Ala.) 232.

A rule, not expressly assented to by an employe, that he must take all risks, and that remaining in the service is an acceptance of the rule, does not bind him. (Ga.) 842.

The assumption of known risks applies to the case of a brakeman who is injured by a low bridge over a railroad track, of which he had knowledge. (W. Va.) 297.

A panic-stricken employe is not relieved from the duty of diligence to escape from danger, although less diligence may be required of him. (Ala.) 232.

A very vigorous discussion of the true rule of liability for negligence of fellow servants is presented in a North Dakota case, which decides that the character of the work in which the negligence occurred is the test, and not the relative rank of the servants. (N. Dak.) 97.

Failure of a railroad company to furnish transportation to a place where food and shelter can be procured to a car repairer, sent out to repair a car, on account of which he is compelled to walk nine miles in the night in cold and dangerous weather in order to find shelter, renders the company liable for injuries thereby sustained, and is the proximate cause of such injuries. (Minn.) 257.

### *Proximate Cause.*

See also last point, *supra*.

The question of proximate cause is again illustrated in a case where the negligence which caused a collision at one crossing is held the cause of injury at a second crossing. (Pa.) 268.

The rule that a negligent act or omission will not constitute negligence if it was merely a condition and not a proximate cause of the injury is applied to the case of a servant who was injured by a falling wall of which he had no warning, while he was disregarding a warning of another danger. (Conn.) 279.

### *Injury on Highway or Bridge.*

A town is not relieved from liability for injury to a traveler by the fact that the innocent act of another traveler co-operated with a defect in the highway in producing the injury. (Mass.) 249.

A telegraph wire hanging so low across a highway as to cause an injury will render a town liable if it had notice or ought to have had notice of the defect. (Minn.) 249.

The narrowness of a bridge and the insufficiency of its railings are not the proximate cause of an injury to one whose cutter was dragged off the bridge by his horse, which fell and broke the railing in consequence of disease or choking by the harness. (Iowa) 482.

*Act of God.*

An injury caused by a March wind not stronger than might be expected at that season is not the act of God. (Ark.) 189.

*Nuisances.*

The history and nature of nuisances and the remedies therefor are discussed in a very clear

opinion in a West Virginia case concerning an alleged nuisance of the noise of a manufactory. (W. Va.) 58.

Deposits of coal slack, etc., by a mining company where they are washed down by a stream to the injury of others make the company liable for the damages, if the results could have been anticipated by persons of ordinary intelligence and prudence. (Ohio) 577.

A public pump in a street maintained by a city is held not to be a nuisance to an abutting owner where the well had been abandoned by a former owner and fitted again for use by the city. (Ind.) 259.

VII. PROPERTY RIGHTS; LIENS; GIFTS; WILLS.

*Property.*

The right to transmit property by inheritance is "property" within the meaning of a constitutional provision as to depriving of property; but the next of kin of a living person have no "property" in his estate within the meaning of such a provision. (Tenn.) 70.

*Loss.*

The rule as to repairs, rather than that as to building contracts, governs on the destruction by fire of a building nearly completed, for which the contractor was to furnish part only of the labor and materials. (Mass.) 571.

The loss by fire of a house in possession of a vendee under a defective deed falls upon him where he is the equitable owner of the premises. (Wis.) 178.

The question who must bear the loss in case of the neglect of an officer to record a deed delivered for record is decided against the grantee as between him and a bona fide purchaser. (Wash.) 884.

*Transfer of Possession.*

On an exchange by husband and wife of his wagon for her sleigh, which were both kept before and after in a barn leased by him, there is no such change of possession as will uphold her title to the wagon against the husband's creditors. (Vt.) 600.

*Heirs.*

A widow is an heir of her husband within the meaning of that term in a will to the extent of \$5,000 up to which she is given an estate in fee by the Massachusetts Statute, but not as to the estate which she has the option of taking in lieu of dower. (Mass.) 721.

The question, "who are the heirs-at-law" of a person within the meaning of a Massachusetts will which gives them an estate in a certain event, if he is not then living, is to be determined by the law of Massachusetts, although the person named is domiciled in another State. *Id.*

The statutory right of children not named in a will to share as in case of intestacy is not affected by a power of sale contained in the will. (Cal.) 46.

The estate of an heir-at-law in property subject to sale under a power is not an actual estate until the power is exercised, which is alienable, devisable and descendible, or is determined by sale under the power. (N. J.) 62.

*Electricity.*

A question of very great importance at the present time is discussed in two important 12 L. R. A.

opinions, each of which decides that no vested rights of a telephone company are interfered with by the introduction of an electric railway the use of which interferes with the ground circuit of the telephone system. (Ohio) 534; (C. C. M. D. Tenn.) 544.

*Ice.*

A recent opinion as to the right to cut ice on a meandered unnavigable stream holds that the same rights exist in the ice that exist in the water, and that any person who can get access to it without repossessing on the land of riparian owners may cut the ice and acquire property therein. (Iowa) 588.

*Trees.*

The rights of adjoining owners to trees on the boundary line are those of tenants in common, and one may enjoin the other from cutting them down. (Iowa) 484.

*Private Way.*

A fence may be made along a statutory private road if necessary to its reasonable enjoyment, as for driving cattle, especially where the owner of the soil has land on one side only. (Mich.) 601.

*Docks and Wharves.*

The right to a dock between low-water mark and the channel of a river may be reserved on conveyance of the adjacent land, under a statute giving owners the right to construct such docks below low-water mark. (Mass.) 617.

A decision of the Supreme Court of the State of Washington, extensively reviewing the authorities, holds that a riparian proprietor on the shore of the sea or its arms has no right, as against the State or its grantees, to extend wharves in front of his land below high-water mark. (Wash.) 632.

*Patents.*

The patentability of a combination of old elements is clearly discussed in a case deciding that the result produced by the combination must be due to their co-operative action; and that an element which does not affect the action of all the others destroys the patentability of the combination, making it a mere aggregation. (C. C. S. D. N. Y.) 107.

*Tenancy.*

Title to the hay, oats, and straw is not reserved to the owner of a farm as against attaching creditors of a tenant, under a lease by which the tenant agrees to raise enough stuff to feed the stock of the place, or, if he fails to

do so, buy what may be necessary. (N. Y.) 848.

The right of a person under a lease, giving him the exclusive right to quarry stone for a term of years, is merely an incorporeal hereditament and not an estate in the land; and such lease gives him no right to recover as owner for stone quarried and taken away by trespassers. (N. Y.) 60.

#### *Life Tenant.*

A life tenant cannot make a valid agreement for the removal of buildings erected on the land if they are not within any of the exceptions to the rule against removal of fixtures. (Ark.) 97.

#### *Liens; Judgments.*

The doctrine of exemption of a public corporation from mechanics' liens in Pennsylvania applies to a water company which is bound to furnish water at reasonable rates and after twenty years to transfer its works to a municipality if required at a certain amount above cost, and which is protected from competition until it can pay a certain dividend. (Pa.) 324.

Mechanics' liens on a building erected on land purchased under a contract are superior to the vendors' lien. (Neb.) 38.

One who has attached real estate, but has not obtained judgment, is a "creditor having a lien" within the meaning of the Minnesota Statute relating to redemption of land. (Minn.) 741.

The technical common-law rule that a judgment lien did not attach to a mere equity is not in force in Minnesota, although not abrogated by statute as all reasons for the old law have ceased to exist. *Id.*

A purchaser of land from Daniel J. Murphy is not charged with notice of a judgment docketed against Daniel Murphy. (Pa.) 58.

#### *Homestead.*

In a hotel which is exempt as a family homestead rooms used for hotel purposes, but which cannot be reached without going through rooms used by the family, are part of the homestead. (Iowa) 477.

A tenant in common has no homestead right in the premises in Tennessee. (Tenn.) 519.

Land held by husband and wife as tenants by entireties is subject to the Tennessee Homestead Laws, making an exemption of real estate belonging to the head of a family to the amount of \$1,000. (Tenn.) 514.

#### *Powers.*

No limitation of time is imposed upon a power in the nature of a trust not limited in terms, unless the rule against perpetuities is

involved or the power is controlled by an inherent quality in the nature of the trust or in the object for which the power was granted. (N. J.) 62.

#### *Trust.*

The rights of creditors to income given by a trust in favor of their debtor, free from his creditors, with another disposition provided the court should hold it subject to his debts, extend only to income accrued before such decision. (Ky.) 87.

A deed in trust for a married woman and her children, she having none at the time, gives her the whole estate. (Ga.) 157.

#### *Gift.*

A gift of a note without delivery cannot be made even by a sealed instrument, at least where this shows an intent merely to give the money when the note was collected. (Ind.) 506.

#### *Wills.*

The lack of testatrix's signature at the end of an instrument written by her own hand and containing her own name at the beginning is not supplied by her statement that the instrument is her will and a request to a subscribing witness to sign it. (N. Y.) 452. See also *supra*, II., *Signature*.

A widow's election to take against the will of her husband is equivalent to her death as respects the distribution of the estate under the will, and any loss to beneficiaries by reason thereof must come out of the residuary legacy alone, if there is enough left to pay the specific legacies. (Pa.) 227.

A bequest of personality to a "community" in a foreign country is valid if it has capacity to take by the laws of that country. (N. Y.) 620.

Legal incapacity of a legatee to perform a condition on which the gift is made will prevent it from taking effect, although the time for performance was subsequent thereto. (Mass.) 110.

The legal incapacity of a town to support a clergyman entirely defeats a bequest to be made "strictly on this condition," that it shall support him. *Id.*

A bequest for an art institute when one worthy of the city is founded by contribution of citizens is not void for indefiniteness, and is charitable; nor is it void for remoteness where the income is to be given annually in the meantime in prizes for the best works of art produced by artists of the State. (R. I.) 414.

Silence of the legatee, who had said she was to be paid \$10,000 on the reply of the testatrix that \$3,000 of it had been paid, is not an admission of such payment. (Mass.) 566.

### VII. CIVIL REMEDIES, RULES AND PRINCIPLES.

#### *Law and Equity.*

The distinction between law and equity jurisdiction in federal courts is illustrated by a decision that a remedy in an action at law to enforce a specific lien upon property conveyed to secure a note cannot be enforced in a federal court. (C. C. S. D. Ga.) 681.

#### *Abstract Questions.*

The refusal of a court to decide abstract questions is well illustrated in a case where 12 L. R. A.

the court refused to decide as to the legality of a proposed contract between plaintiff and defendant in an action for trespass which they presented by a stipulation as a basis for a judgment in the case. (Ill.) 326.

#### *For Breach of Statutory Duty.*

An action of tort will lie for a railroad company's breach of its statutory duty to stop at a station for a passenger. (N. C.) 113.



*Malicious Prosecution.*

The finding of an examining magistrate is only prima facie evidence of probable cause in an action for malicious prosecution. (Kan.) 760.

The rule that a malicious prosecution must have terminated before a suit for damages will lie does not apply where the complaint is not of the action but of an excessive attachment of goods, not for security but to injure the defendant. (Mass.) 288.

*Recovering Back Money Paid.*

The right to recover back money paid under a mistake of law is upheld by a Connecticut decision in the case of an overpayment by an administrator to a creditor, both mistakenly supposing the estate to be solvent. (Conn.) 285.

Money paid to redeem from a tax sale may be recovered back where the sale was void because of a double assessment. (Pa.) 688.

*Reformation of Deed.*

The fact that a grantor intended to convey only his own land, which he did convey as bounded by one of an adjoining owner, will not prevent reformation of the deed for mutual mistake of fact where both parties supposed that the land staked and pointed out all belonged to him, although it did not; and damages for breach of covenant may be had on the deed as reformed. (Conn.) 273.

*Specific Performance.*

Specific performance will be granted to the seller of stock on the ground of mutuality of right and remedy, where the purchaser would be entitled to such relief if he asked it. (W. Va.) 776.

An option for shares of stock may be specifically enforced if they have a unique and special value to the purchaser. *Id.*

*Exemption; Custody of Law.*

A "teamster or other laborer" who "habitually earns his living" with a horse or team, within the meaning of an Exemption Law, includes one who sells oil, delivering it by a tank wagon usually driven by his boy, although he makes a few sales and delivers the oil at the room where it is stored. (Iowa) 476.

Funds set apart by an assessment society to be paid to the families of members are exempt, under Minnesota Statutes, from seizure by legal process for debts due from members of the family of a deceased member or from the society itself. (Minn.) 273.

Money sued for is not in the custody of the law so as to be beyond the reach of garnishment, where both suits are in the same jurisdiction. (R. I.) 801.

A distributee's share of money in the hands of a clerk of court is subject to garnishment after final decree and order of distribution. (Cal.) 508.

*Remedy of Landlord.*

A landlord's lien on crops for rent under Ill. Rev. Stat., chap. 80, can give him no right to maintain a personal action for damages against a bona fide purchaser from the tenant, although he may follow the goods and distrain for his rent. (Ill.) 605.

*Injunction.*

The rule that an injunction will not lie to

prevent a libel does not apply to the circulation of posters, etc., in carrying out a boycott, but the boycott will be enjoined. (C. C. S. D. Ohio) 198.

Money paid in condemnation proceedings may be kept by injunction while it is under the control of the court and applied on a mortgage debt where the mortgagee has been omitted by mistake from the condemnation proceedings. (Ill.) 84.

*Mandamus.*

Mandamus is the proper remedy to compel a railroad company to build a farm crossing. (Wis.) 180.

*Writ of Possession.*

The common-law rule requiring a writ of possession in aid of a judgment in ejectment to be issued within a year and a day is not in force in Illinois, where execution on judgments can be had at any time within seven years. (Ill.) 81.

*Limitation.*

An application of a payment, if made to a debt already barred, will not remove the bar as to the balance, but if made to one not barred will interrupt the running of the Statute. (Me.) 712.

*Preferences by Confessing Judgment.*

Confessions of judgment made in contemplation of a general assignment for creditors are held in New York in harmony with most decisions in other jurisdictions to be within the Statute governing preferences in general assignments. (N. Y.) 808.

*Judgment on Penal Bond.*

An extended discussion of the rule as to judgment on a penal bond is presented in a case deciding that where the bond is for a continuing liability, judgment should be for the penalty, with an assessment of damages so far as they have accrued, leaving future damages to be recovered by after process of *scire facias*. (Me.) 90.

*Damages.*

The price to be paid to a volunteer for enduring suffering caused by a personal injury cannot be regarded as the standard in determining the amount of damages in an action for such injury. (Pa.) 698.

*Set-Off.*

Loss caused by unskillful work may be set off against a claim for wages, and the set-off is not limited to the particular days during which the damage was done. (Pa.) 831.

*Question for Jury.*

The right of the jury to determine the trade meaning of words does not extend to the determination whether such terms in a contract relating to that business were used in that meaning. (S. C.) 875.

*View of Jury.*

The power of a court at common law to permit a view by the jury of premises in a suit for damages to them is exhaustively discussed in a case which decided in favor of that power. (Ill.) 689.

*Presumptions.*

The presumption in favor of the validity of a judgment does not extend to a case of personal service on a defendant, who is a non-resident, where the proof does not show whether

or not the service was made within the State. (Mass.) 574.

The presumption of continuance applies to a foreign law which has been proved by a governmental publication. (N. Y.) 620.

#### Evidence.

The opinion of an expert may be given on the question whether the word in the date of a written instrument is "Jany" or "July." (N. Y.) 456.

The admissibility of opinions of witnesses is discussed in a case in which opinions as to the danger of a broad step or raised part of a station platform were excluded. (Pa.) 298.

Experienced advertisers and distributors of samples are competent to testify whether or not a certain number of samples is a reasonable number to furnish an agent in one year for distribution. (Pa.) 398.

The competency of declarations of a man that he is married and has a son is denied so far as it depends on the rule as to *res gesta*, where he never lived with the alleged wife or had anything to do with the son, but are held admissible to show the legitimacy of the son as hearsay in case of pedigree. (N. Y.) 836.

In the same case a judgment for plaintiff in an action for seduction of his daughter is held inadmissible against her son in an action to enforce his rights as heir of the judgment defendant. *Id.*

And the mother in such a case is held not to have "any interest in the event" which makes her incompetent to testify to the fact of the marriage. *Id.*

Declarations of voters made before or after election, and not as part of the *res gesta*, are not admissible in an election contest to show their disqualification. (Ark.) 862.

A convincing opinion in a Massachusetts case decides that evidence is not admissible to show subsequent precautions against other accidents as an admission of negligence at the time of an accident. (Mass.) 554.

A note with nothing on its face to show any intent to bind anyone but the signer cannot be shown by parol to have been given by him as president of a corporation. (Mo.) 714.

Books of a corporation are not evidence against a director or stockholder to prove an account against him in an action on behalf of the corporation. (N. Y.) 478.

### IX. CRIMINAL LAW AND PRACTICE.

One who holds intoxicating liquors for members of a club as tenants in common is liable for making a sale without license, when he furnishes the drinks to members on payment of the cost price. (N. C.) 412.

Authority from parent or guardian to sell intoxicating liquors to a minor, under Georgia Statutes, must be special for each occasion, and a general permit without limitation as to time or quantity is void even as to a single sale. (Ga.) 488.

A gift enterprise includes a sale of coffee on each package of which is a slip concealing the name of some article of crockery, to which the buyer is entitled. (Md.) 89.

12 L. R. A.

But if it does not involve the element of chance it cannot be prohibited by the Legislature, even though carried on by a merchant to secure custom. (Md.) 425.

An arrest for a misdemeanor cannot be made without warrant on the authority of a letter from a police officer of another State. (Mass.) 379.

The error of allowing a prosecuting attorney to comment on defendant's failure to give evidence of good character is not altered by the fact that the defendant's counsel had gone outside of the evidence in making statements as to his good character. (Ga.) 449.

# INDEX TO NOTES.

(The General Index follows this.)

<b>Action;</b> effect of collusion	815	intimidation and threats; when conspiracies actionable	198
<b>Advancements;</b> doctrine of; distinguished from gift; intention; effect on legacy	508	<b>Contracts;</b> Statute of Frauds as to lease for not more than three years	67
<b>Aliens;</b> disabilities of; escheat of property	530	Validity of; in fraud of statute; gambling; illegality as a defense; secret agreement	120
<b>Alteration of instruments;</b> ratification of altered or forged note	140	Equity jurisdiction to correct mistakes; effect of parol agreement on sealed instruments; reformation of deed; mistake in description, boundaries, etc.	273
<b>Appeal;</b> exceptions to exclusion of evidence; purpose and effect; when must be taken; must be specific	554	Construction of terms used in	375
<b>Assignment;</b> of contracts for personal services	498	Consideration, necessity and sufficiency; mutual and concurrent promises; past act; marriage; benefit to promisor and detriment to promisee; waiver of legal right; illegality or immorality of consideration; performance of legal obligation; moral obligation	463
<b>Bailment;</b> letting of horse for hire	397	For building; extra work	503
<b>Banks;</b> effect of certification of check	493	Effect of destruction of building upon	571
Relation to depositors; pass book as evidence of right to draw money; paying out customer's funds; loss by payment on forged signature	791	Option; election	690
<b>Benefit societies.</b> See <b>INSURANCE.</b>		Option contracts; when not illegal	775
<b>Bills and notes.</b> See also <b>ALTERATION OF INSTRUMENTS.</b>		<b>Corporation;</b> estopped to deny liability on contracts	168
Constructive notice to purchaser after maturity	41	Individual liability on contracts; foreign; law of comity; estoppel to deny incorporation	398
Indorsement and transfer without recourse	570	Execution of deed by	588
Indorser cannot question maker's signature	434	Liability for acts of officers	714
Presentation, demand and notice	727	Stock certificates, ownership of; pledge; mode of transfer; right to vote upon; directors, how chosen	781
Implication of consideration	845	<b>Courts;</b> federal; suit by assignee of chose in action	681
<b>Boycotting.</b> See <b>CONSPIRACY.</b>		Concurrent jurisdiction of federal and state	725
<b>Buildings.</b> See <b>MUNICIPAL CORPORATIONS.</b>		Power to interpret and construe statutes	854
<b>Carriers;</b> passengers on car platform	139	<b>Custody of law.</b> See <b>GARNISHMENT.</b>	
Liability for torts	118	<b>Damages;</b> measure of for personal injuries, pain and suffering	698
Liability for tortious acts of agents; assaulting passenger; ejecting passenger from train	337	<b>Debtor and creditor;</b> one receiving credit responsible for the debt; effect of taking security	223
Ejection of passenger for refusal to pay fare	823	<b>Deed;</b> necessity and sufficiency of delivery; delivery to third person; in escrow; by recording; presumptions or evidence of delivery	171
Stipulation in ticket	840	Signature by mark or cross	205
Railroads as; rates of freight; long and short hauls; interstate regulations; duty to public; reasonableness of rates for local traffic; through rates; connection with bridge company; refusal to furnish cars	436	<b>Drains and sewers;</b> authority of Legislature over; taxation for; construction of	417
Duty to furnish proper cars	746	<b>Eminent domain;</b> rights of mortgagee	84
Limiting liability by contract; valuation fixed in bill of lading	790	Location of railroad; when sufficient to exclude another road	230
<b>Charitable uses and trusts;</b> what constitute; for benevolent purposes; uncertainty as to bequests	414	Market value of property	610
<b>Checks.</b> See <b>BANKS.</b>		Right of; power of general government	675
<b>Citizenship;</b> of State	354	<b>Entireties.</b> See <b>HUSBAND AND WIFE.</b>	
<b>Collusion.</b> See <b>ACTION.</b>		<b>Equity;</b> jurisdiction to correct mistakes	273
<b>Commerce;</b> interstate, power of Congress to regulate; Wilson Bill	624	<b>Escheat;</b> defined; question how determined; procedure to declare; interest subject to; title or possession of State	523
Domestic, state sovereignty over	673	<b>Evidence;</b> opinion, when not admissible	293
<b>Conditional sales.</b> See <b>SALES.</b>		Expert and opinion testimony as to hand-	875
<b>Conflict of laws;</b> extra-territorial force of statutes	303		
<b>Conspiracy;</b> defined; coercing choice of employment; lawful combinations of workmen; boycotting; combination, when a conspiracy; printers' unions; dictation to and coercion of employers and employes;			

Writing, and weight of; qualification of experts; comparison of handwriting	456	<b>Judgment—Continued.</b>	
Of books of account of corporation	478	By confession; statement in	741, 819
Of precautions after accident	559	Validity of	810
Of offer to sell property; admissions of party; view of jury	609	<b>Landlord and tenant; liens of</b>	69
Presumptions of continuance	620	Rights of landlord as against attaching creditors	848
Proof of oral warranty when sale is in writing	628	<b>Liens; of mechanics, priority; rule in various States</b>	28
Declarations as to marriage or pedigree	828	<b>Lottery; by gift enterprise</b>	59
<b>Executors and administrators; executor <i>de son tort</i></b>	187	<b>Malicious prosecution; defense of reasonable and proper cause</b>	760
Sale of choses in action	498	<b>Mandamus; to compel performance of corporate duties</b>	180
<b>Fences; statutory provisions concerning; rights of adjoining owners; unlawful removal</b>	601	<b>Master and servant; liability of master for negligence of co-servant acting under authority</b>	97
<b>Garnishment; of property in custody of law</b>	508	Assumption of ordinary risks by employé; master's duty to secure safety of servant	348
<b>Gas; natural, as article of commerce</b>	652	<b>Mines; leases of oil lands, covenants in</b>	220
<b>Gift enterprise; as a lottery</b>	89	<b>Mortgage; sufficiency of description of premises</b>	177
<b>Guaranty; transfer by assignment of commercial paper</b>	270	<b>Municipal corporations; power to prescribe fire limits, and restrict erection of wooden buildings</b>	150
<b>Heirs; who are; meaning of term</b>	721	<b>Negligence; liability for injuries caused by materials falling into street</b>	189
<b>Highways; obstructions authorized</b>	115	Contributory, of infant	218
<b>Homestead; exemption of portion of building; use of portion for business purposes; effect of renting portion; double house</b>	477	Contributory, as a defense: proximate cause; voluntary assumption of peril; concurrent or co-operative causes; intervening agency	279
In estate held in common	519	Duty as essential element of	322
<b>Husband and wife; second marriage, when void <i>ab initio</i></b>	80	<b>Notice; constructive; as to overdue paper</b>	41
Effect in other States of prohibition against re-marrying	828	By entry of judgment	58
Tenancy by the entirety; right of husband; lease or conveyance of property	514	<b>Nuisance; of noise</b>	53
Connivance as a defense to divorce suit; effect of abandonment	524	By pollution of stream	577
Fraudulent transactions between	600	Injunction against	758
<b>Ice; on river, common right to use or take; rights of riparian owner; on private waters; sale of by parcel</b>	588	<b>OIL. See MINES.</b>	
<b>Infants; what necessary to disaffirm contract</b>	136	<b>Patent; for combination</b>	107
Liability for necessities; classification of contracts; what are necessities	859	<b>Payment; application by creditor</b>	712
<b>Injunction; against co-tenant; in partition suit; as to water right</b>	484	<b>Pleading; plea <i>ipse daretur continuans</i></b>	301
<b>Innkeeper; responsibility as bailee; for what property; for property lost or stolen; when not liable; relation of guest and host must exist; who is guest; mere depositary</b>	882	<b>Pledge; right of surety to control</b>	181
<b>Insolvency; preferences in assignments; general or partial assignment; schedule; preference by judgment</b>	808	<b>Possession; writ of</b>	61
<b>Insurance; certificates in benefit society; distinction between certificate and life policy</b>	209	<b>Principal and agent; agent's responsibility on contracts</b>	346
Wager policy on life	409	Agent acting in double capacity; his purchase of the subject of agency	336
<b>Intoxicating liquors; sale by social club</b>	412	<b>Principal and surety; right of surety to control application of collaterals</b>	131
Sale to minor	438	<b>Proximate cause; in negligence cases; concurrent or co-operating causes; intervening agency</b>	279
<b>Joint tenants and tenants in common; liability of tenant in common to action of trover; exclusive possession of property; destruction; loss or conversion of property; refusal to permit division or severance; sale of property by one of tenants; misuse of property; permanently changing form; trover against co-tenant</b>	261	<b>Public improvements; what are; taxation for</b>	417
Right to injunction against each other; fiduciary relations	484	Effect of exemption from taxes as to special assessment	828
<b>Judgment; notice of entry</b>	58	<b>Railroads; liability of company for torts</b>	112
Constitutional provision as to faith and credit; presumption of validity; jurisdictional facts	574	Duty to fence tracks	120
		<b>Real property; Recording Acts; when instrument regarded as recorded; who suffers by failure of clerk to make record or by his mistake in recording</b>	384
		<b>Records. See REAL PROPERTY.</b>	
		<b>Sale; effect of acceptance of goods</b>	289
		Conditional; doctrine of waiver of condition; transfer of title; change of possession	700
		Of personal property on installment plan; late decisions	448
		Warranty of soundness of horse	626
		<b>Set-off; for damage by negligence and want of skill in performance of services</b>	328

<b>Specific performance; when granted; discretion of court; forfeiture clause in contract; incapacity to perform; materiality of time; time, when essence of contract; mutuality of rights and remedies</b>	289	<b>Time; meaning of "month"</b>	779
<b>Of contract for corporate stock</b>	776	<b>Trial; comments of prosecuting attorney</b>	449
<b>States; sovereignty of; relation of general government as to commerce and navigable waters; admission of</b>	674	<b>Offer of proof</b>	556
<b>Statute of Frauds. See CONTRACTS.</b>		<b>Trusts; creation or declaration of</b>	697
<b>Statutes; prospective operation</b>	50	<b>Voters and elections; voting for the same person for incompatible offices</b>	125
<b>When mandatory and when directory; enabling; imposing duties; conferring new rights and remedies; grant of special powers; authority conferred by; words "may" "shall" and "must;" permissive words in: protection of personal and property rights; tax laws; mode and manner of doing act; provisions as to time for doing act</b>	353	<b>Election contest; notice to contestee; procedure</b>	705
<b>Street railways. See CARRIERS.</b>		<b>Warranty. See SALE.</b>	
<b>Taxes; on successions and collateral inheritances; validity of statutes; under New York statutes; what legacies and interests liable or exempt; exemption of beneficent and charitable associations; contingent estates; gifts to children by adoption; corporations, associations, etc., when not exempt; assessment and apportionment; payment</b>	401	<b>Waters. See also NUISANCE; WHARVES.</b>	
<b>Levy by mistake</b>	618	<b>Inland seas and lakes; great ponds; territorial jurisdiction of State; establishment of dock and harbor lines; right and title of littoral proprietors; ownership of tide lands; qualified property in water front; title to islands in river; law of accretion; riparian rights</b>	638
<b>Negligent acts of tax officers</b>	751	<b>Public right of navigation; state sovereignty over inland navigable waters</b>	632, 673
<b>On corporate stock; ascertaining value; distinction between capital and shares</b>	723	<b>Title to soil under navigable waters</b>	632, 677
<b>12 L. R. A.</b>		<b>Wharves; right of riparian owners to dock to low-water mark</b>	617
		<b>Wills; testamentary capacity as affected by insane delusion</b>	161
		<b>Election between inconsistent rights, how made; acts which determine; election by widow</b>	237
		<b>Gift to heirs</b>	731
		<b>Witnesses; cross-examination of; extent and restrictions</b>	698
		<b>Exclusion of testimony against decedent on ground of interest</b>	826



# GENERAL INDEX

TO

## OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

### ABORTION.

Conspiring to commit an abortion is not a felony at common law. *Scott v. Eldridge* (Mass.) 379

**ACCRETIONS.** See **WATERS AND WATERCOURSES**, 8.

### ACKNOWLEDGMENT.

The acknowledgment of a deed of a corporation aggregate may be made by a representative of the corporation who has authority to execute the deed, in the absence of any statute particularly relating to the acknowledgment or proof of such deeds. *Hopper v. Lovejoy* (N. J.) 583

### ACTION OR SUIT.

1. An action of tort will lie for a railroad company's breach of its statutory duty to stop at a station for a passenger. *Purcell v. Richmond & D. R. Co.* (N. C.) 118

2. A creditor of a decedent cannot base a right of action against a third person on the latter's conversion of assets of the estate, in a State where the law does not recognize executors *de son tort*. *Roselle v. Harmon* (Mo.) 187

3. A claim for the reformation of a deed, and one for damages for breach of covenants of the deed as amended, may be joined in the same action, under Conn. Gen. Stat. § 877, providing that legal and equitable remedies may be enforced in one action. *Butler v. Barnes* (Conn.) 278

4. The rule that a malicious prosecution must have terminated before a suit for damages can be based thereon does not apply to a just cause of action, in respect to which the only grievance is that an excessive attachment of goods was made, not to secure the debt, but to injure the defendant. *Zinn v. Rice* (Mass.) 286

5. A city, having the legal title to its streets in trust for the public, can maintain trespass for the removal of coal underlying the streets and recover the full value of the coal, although no actual damage has been done to the surface of the streets. *Union Coal Co. v. La Salle* (Ill.) 826

6. An action commenced by collusion, without any real controversy, will be dismissed. *Haley v. Eureka County Bank* (Nev.) 815

7. A judgment by default and the assign-

ment thereof will not prevent dismissal of the suit as collusive. *Id.*

### NOTES AND BRIEFS.

Action; effect of collusion. 815

### ACT OF GOD.

An injury is not attributable to an act of God, but to neglect, where it is caused by the fall of a sign in a wind such as might be expected in the regular course of the seasons. *St. Louis, I. M. & S. R. Co. v. Hopkins* (Ark.) 189

### ADVANCEMENTS.

#### NOTES AND BRIEFS.

Advancements; doctrine of; distinguished from gift; intention; effect on legacy. 566

### AGRICULTURAL SOCIETIES.

A state board of agriculture, created a body corporate with perpetual succession, including as *ex officio* members the president of each county agricultural society, and which is in a sense an educational institution, required to hold an annual meeting and receive reports from county societies and make an annual report to the Legislature, its funds having been received for the most part from other sources than the State, is a private, and not a public corporation, although no shares of stock are issued. *Downing v. Indiana State Board of Agri.* (Ind.) 664

### ALIENS.

#### NOTES AND BRIEFS.

Aliens; disabilities of; escheat of property. 539

### ALTERATION OF INSTRUMENTS.

See also **BILLS AND NOTES**, 6; **EVIDENCE**, 6.

1. The indorser of a note before it was signed, who gave it to the maker to be signed, for the purpose of raising money for both of them, is not released as indorser by the fact that the maker changed his signature to that of his firm by adding "& Co.," since, so far as the indorser was concerned, he could have signed the firm name in the first place. *Montgomery v. Crosthwait* (Ala.) 140

2. A material alteration of a promissory note by any of the parties thereto discharges

from liability all other parties not consenting to or authorizing the alteration, whether or not it is apparently or presumably to their benefit or detriment. *Id.*

8. Adding "& Co." to his name by the maker of a note is a material alteration of it, which will release the indorser if done without his consent or authority. *Id.*

4. The fact that the addition of "& Co." to the maker's name on a note is ineffectual to bind his partners will not prevent it from being a material alteration as to an indorser. *Id.*

#### NOTES AND BRIEFS.

Alteration of instruments; ratification of altered or forged note. 140

#### AMICUS CURIE. See also MOTION.

An attorney as *amicus curie* may move to dismiss an action as collusive; and it is his duty to do so if he knows or has reason to believe that the action is fictitious. *Haley v. Eureka County Bank* (Nev.) 815

#### APPEAL AND ERROR.

1. A freehold is involved so as to give jurisdiction to the Supreme Court of Illinois of an appeal from an order overruling a motion to quash a writ of possession in aid of a judgment in ejectment. *Bowser v. Chicago W. D. R. Co.* (Ill.) 81

2. It will be presumed upon appeal that the court found against a counterclaim, if it omitted to set out any finding in regard to it and the evidence clearly justifies a finding against it. *Wetzel v. Duffy* (Wis.) 178

3. The certificate of the judge that a transcript contains all the evidence will be accepted as true against an objection that the evidence is not all included, in the absence of any specific reference to show that fact. *Spencer v. Andrews* (Iowa) 115

4. An order will be treated as a part of the record and legitimately before the court for examination on the rehearing of an appeal, if the case was submitted by both parties at the first hearing, upon the theory that the order was properly in the record. *Republic L. Ins. Co. v. Swigert* (Ill.) 828

5. Error may be assigned upon an interlocutory order which is continued in force by the final decree, and involves and determines a matter of substantial right. *Id.*

6. An order for the payment of a dividend to creditors, made during the course of proceedings for the winding up of an insolvent insurance company, to which no objection was taken until a rehearing of an appeal from the final decree in the case had been granted, and upon which the receiver has acted and had his report confirmed,—will not be disturbed. *Id.*

7. The rule that the dissolving of an injunction is discretionary, and that the refusal of the court below to dissolve it will not be disturbed unless the discretion is abused, does not apply to cases involving questions of law arising upon the face of the pleading. *Burlington, O. R. & N. R. Co. v. Dey* (Iowa) 486

8. An exception to the exclusion of a question L. R. A.

tion cannot be maintained where there is nothing to show what the answer would have been or what there was an offer to prove. *Shinnors v. Proprietors of Locks & Canals* (Mass.) 554

9. Neglect to make a finding not requested cannot be objected to on appeal, if the evidence is not sufficient to require it as matter of law. *Wetzel v. Duffy* (Wis.) 178

10. Findings that a judgment was confessed in contemplation of an assignment for creditors and in fraud of the statute governing such assignments, though classified among conclusions of law, will be given the same effect to uphold the judgment as if they were designated as findings of fact. *Berger v. Varrelmann* (N. Y.) 808

11. The right result of a case on its merits will not be disturbed because the record of a judgment referred to in the petition was not copied and annexed as an exhibit. *Lyons v. Planters Loan & Sav. Bank* (Ga.) 155

12. An instruction subject to criticism in the abstract is not prejudicial if it was correct when tested by the only evidence in the case to which it could relate. *Holland v. Tennessee Coal, I. & R. Co.* (Ala.) 232

13. Allowing the State's counsel to argue before the jury, after objection by the prisoner's counsel, that the defendant's character is bad because he had a right to prove his good character and has not done so, is an error which will require a reversal of a conviction. *Benett v. State* (Ga.) 449

14. A judgment will not be reversed for improperly allowing a former verdict to go to the jury with other papers, where it was not known or read by them until their own verdict was agreed upon. *Georgia P. R. Co. v. Donlin* (Ga.) 843

15. Permitting a paper to be read in evidence which was set out in the complaint, and thus made a part of the record in the cause, cannot be detrimental to the objecting party so as to constitute reversible error. *Citizens Street R. Co. v. Robbins* (Ind.) 498

16. An order for a new trial on plaintiff's motion, even if inadvertently granted as to one of the defendants, whose right to an undivided half of real property in dispute was admitted to be as the judgment determined it, must be reversed as to him. *Lee v. Fletcher* (Minn.) 171

17. A rehearing will not be granted in order to consider points not made in the argument upon which the case was originally submitted. *Kellogg v. Cochran* (Cal.) 104

18. A writ of possession which has been executed will not be quashed unless a writ of restitution should be granted, as the quashal would otherwise do no good. *Bowser v. Chicago W. D. R. Co.* (Ill.) 81

#### NOTES AND BRIEFS.

Appeal; exceptions to exclusion of evidence; purpose and effect; when must be taken; must be specific. 534

#### ARREST.

An arrest for a misdemeanor cannot be made without warrant, on the authority of a letter



from a police officer of another State. *Scott v. Eldridge* (Mass.) 879

NOTES AND BRIEFS

Arrest; legality; of fugitive. 879

**ASSIGNMENT.** See also **BILLS AND NOTES**, 18, 19.

A lawyer cannot make a valid assignment of a contract giving him an option as to certain lands in consideration of the use of his professional skill in removing clouds on the title, unless the contract has been fully performed on his part. *Sloan v. Williams* (Ill.) 496

NOTES AND BRIEFS.

Assignment; of contracts for personal services. 496

**ASSUMPSIT.**

1. Money paid to a broker for effecting the sale of real estate in ignorance of the fact that he is also the agent of the purchaser may be recovered back, even if the sale is an advantageous one. *Cannell v. Smith* (Pa.) 295

2. An overpayment by an administrator to a creditor, in the mistaken belief that the estate is solvent, where the mistake is one of law or of fact, may be recovered back although the creditor received it in good faith believing that he was justly entitled thereto. *Mansfield v. Lynch* (Conn.) 285

3. Advancements to a contractor, made by the owner of a building, may be recovered for failure of consideration, on its destruction by fire before completion, although the contractor can set off his claim on an implied assumpsit for the value of what was already done, where he is discharged by the fire and entitled to such compensation because the contract was for part only of the labor and materials. *Butler v. Byron* (Mass.) 571

NOTES AND BRIEFS.

Assumpsit; right to recover back overpayment by executor or administrator. 285

**ATTORNEYS' FEES.** See **CONSTITUTIONAL LAW**, 6; **COSTS AND FEES**.

**BAGGAGE.** See **CARRIERS**, 9-13.

**BAILMENT.**

1. One who hires a horse to go to a certain point has no right, without the consent of the owner, to go with the horse beyond that point, unless forced to do so by circumstances which he cannot control. *Farkas v. Powell* (Ga.) 897.

2. Riding a hired horse a few miles beyond the point to which he was hired to go will not make the hirer liable for loss of the horse, where, after returning from the extra trip, he fell on the homeward road, and died a day or two afterwards, unless the extra ride caused or materially contributed to this result. *Id.*

NOTES AND BRIEFS.

Bailment; letting of horse for hire. 897

**BANKS.** See also **CHECKS**, 1.

1. A depositor has the right to assume when checks are returned to him by the bank that it

has ascertained the genuineness of indorsements thereon. *Shipman v. Bank of the State of New York* (N. Y.) 791

2. Payment of checks stolen from the depositor without negligence on his part, by his clerk, who forged the indorsements of the payees' names, constitutes no defense to the bank against an action by the depositor for its deposit, especially where the bank made no inquiry as to the genuineness of the indorsements, but relied upon the responsibility of the persons presenting the checks for payment. *Id.*

3. The fact that the forger of indorsements on checks has made good the amount to the payees constitutes no defense to the bank which has paid out money on the checks, in an action by the depositor on his deposit money founded upon the checks, where he has not profited by such payment. *Id.*

NOTES AND BRIEFS.

Banks; relation to depositor or holder of check. 803

Effect of certification of check. 493

Relation to depositors; passbook as evidence of right to draw money; paying out customer's funds; loss by payment on forged signature. 791

**BASTARDY.** See **JUDGMENT**, 3.

**BENEVOLENT SOCIETIES.** See **INSURANCE**, 1, 2, **NOTES AND BRIEFS**.

**BILLS AND NOTES.** See also **ALTERATION OF INSTRUMENTS**, **NOTES AND BRIEFS**; **CORPORATIONS**, 5; **DEBTOR AND CREDITOR**; **EVIDENCE**, 39, 40.

1. A note payable to a certain person "et al., or order," is not negotiable, because of uncertainty as to the unnamed payees. This rule is not changed by Iowa Code, § 2085, making an instrument promising to pay money or property to another negotiable if such is the manifest intent of the maker. *Gordon v. Anderson* (Iowa) 488

2. A negotiable paper note made payable to a fictitious person and negotiated by the maker, which is given the same validity as against the maker and all persons having knowledge of the facts as if payable to bearer, by N. Y. Rev. Stat. 768, § 5, includes only paper made with knowledge that the payee is fictitious, and does not include paper made by one who supposes the payee to be a real person and which is fraudulently negotiated by a third person without the maker's fault. *Shipman v. Bank of the State of New York* (N. Y.) 791

3. A promissory note, although non-negotiable, need not express any consideration. *Carnwright v. Gray* (N. Y.) 845

4. A note payable "thirty days after death" may be a valid instrument. *Id.*

5. A stipulation in a promissory note, to pay all costs of collecting if not paid at maturity, does not destroy its negotiability. *Montgomery v. Crosthwait* (Ala.) 140

6. No new consideration is necessary in order to make valid a ratification of a note by one who was entitled to his release therefrom because of an alteration. *Id.*

7. The indorsement of a waiver of protest and notice of protest implies knowledge of all the paper contains at the time, and precludes any defense based on matters then apparent on the face of the instrument. *Montgomery v. Crosthwait* (Ala.) 140

8. Acknowledgment of liability by an indorser will not prevent his discharge for lack of notice of dishonor, unless made with full knowledge of his discharge. *Rosson v. Carrol* (Tenn.) 727

9. Statements by an indorser to third persons, merely showing that he thought himself still liable on a note from which he had been discharged by failure to give him notice of dishonor, does not establish an admission of liability. *Id.*

10. One who sends paper for collection, whether he indorses it or not, is entitled to notice of dishonor and to one day thereafter to notify prior indorsers. *Id.*

11. Demand of payment of a note indorsed when overdue, which is ineffectual because not followed by protest or notice, prevents any effectual demand and protest on a subsequent date. *Id.*

12. The time for notice of dishonor of a note is the same whether it was indorsed before or after maturity. *Id.*

13. An indorser of a forged bill is liable to the indorsee on its dishonor, without proof of demand or notice. *Hamer v. Brainard* (Utah) 434

14. The signature of the payee to an assignment written out on the back of a negotiable note makes him liable as an ordinary indorser. *Maine Trust & Bkg. Co. v. Butler* (Minn.) 370

15. The phrase "without recourse," or its equivalent, must be used to limit and qualify an indorsement made on the back of a negotiable note. *Id.*

16. Payments by the maker of a note which are not indorsed upon it are of no effect as against a subsequent bona fide purchaser of the note before maturity without notice of the payments. *Kernohan v. Durham* (Ohio) 41

17. An equitable claim of right or title to a negotiable note may be asserted by a third party not a party to the instrument, against an indorsee after maturity. *Id.*

18. An assignment of a mortgage and the note secured thereby as collateral security, before maturity of the note, accompanied by a delivery of the mortgage and what purported to be the note, but which was in fact a forgery of it, will pass a valid title to the note as against one to whom the assignor transfers the genuine note after maturity. *Id.*

19. An assignment of a note on which is indorsed a guaranty not referred to in the assignment, but which is all that gives the note any value, assigns the guaranty also. *Lemmon v. Strong* (Conn.) 270

#### NOTES AND BRIEFS.

Bills and notes; constructive notice to purchaser after maturity. 41

Negotiability of. 141, 483

Indorsement and transfer without recourse. 370

Indorser cannot question maker's signature. 424

Presentation, demand, and notice. 727

Implication of consideration. 345

**BLASTING.** See MUNICIPAL CORPORATIONS, 2.

**BOARD.** See CONTRACTS, 12.

**BOND.** See JUDGMENT, 2.

#### BOUNDARIES.

1. The same rule governs as to the boundaries on streams of water of incorporated territories and of lands of individuals. *N. Smith & V. B. Bridge Co. v. Hawkins* (Ark.) 487

2. The boundary of an incorporated town or city on a navigable river in Arkansas, like that of an individual proprietor, extends only to high-water mark, although the county boundary goes to the middle of the channel. *Id.*

#### NOTES AND BRIEFS.

Boundaries; of land on navigable stream. 487

**BOYCOTT.** See also CONSPIRACY, NOTES AND BRIEFS; INJUNCTION, 1.

A boycott is an illegal conspiracy in restraint of trade. *Casey v. Cincinnati Typographical Union No. 3* (C. C. S. D. Ohio) 196

**BROKERS.** See also ASSUMPTIO, 1.

It is against public policy for one to act as broker for both parties, unless that fact is fully communicated to them. *Cannell v. Smith* (Pa.) 395

**BUILDINGS.** See also MUNICIPAL CORPORATIONS, NOTES AND BRIEFS.

1. An ordinance establishing fire limits within which wooden buildings cannot be erected is authorized by a city charter giving the city power to make regulations for the prevention of fire, provided such means are proper or necessary to the accomplishment of the end in view. *Olympia v. Mann* (Wash.) 159

2. The reservation by a city council to itself, in an ordinance establishing fire limits within which the erection of wooden buildings is prohibited, of the right to grant special permits for the erection of such buildings within such limits, does not make the ordinance so unreasonable as to render it void. *Id.*

**BURDEN OF PROOF.** See EVIDENCE, II.

**CANCELLATION.** See EQUITY.

**CARRIERS.** See also EVIDENCE, 9; MASTER AND SERVANT, 17.

1. The fact that a passenger does not sign a ticket which constitutes a contract and has a blank space for his signature does not relieve him from the effects of its stipulations. *Fonseca v. Ounard Steamship Co.* (Mass.) 340

2. A ticket for a voyage, purporting to be a contract, containing written and printed folios which cover the greater part of two

quarto pages, bearing the signature of the carrier's agent, with a blank space for that of the passenger, charges him with notice of the stipulations; and they are binding on him although he did not read them. *Id.*

8. A passenger who refuses to pay fare or leave the train, and who furnishes only a ticket which does not on its face entitle him to passage on that train, although he was told by the carrier's agent that he could ride upon it, cannot recover for injuries received in putting him off the train without more force than is necessary. He should either pay his fare, or quietly leave the train and resort to his appropriate remedy for any damages sustained. *Peabody v. Oregon R. & Nav. Co. (Or.)* 823

4. It is contributory negligence, as a matter of law, for one under no coercion or necessity, to attempt to get upon a moving train, no matter what the speed, in a place where a false step or a misstep would possibly, if not certainly, be serious. *Hunter v. Cooperstown & S. V. R. Co. (N. Y.)* 429

5. Ordinary care is required of a passenger in alighting from a train and leaving the platform; and in the absence of such care no recovery can be had for injuries sustained by falling over a raised portion of the platform. *Graham v. Pennsylvania Co. (Pa.)* 293

6. Riding on the platform of a street car when there is room inside is not negligence *per se*. *Upham v. Detroit City R. Co. (Mich.)* 139

7. For abuse and defamation of a passenger by the driver of a street car, who charges the passenger with having given him counterfeit money and threatens to have him arrested, the street-car company may be held liable. *Lafitte v. New Orleans City & L. R. Co. (La.)* 337

8. A street-railroad company is not liable for the act of a driver without instructions in causing the arrest of a passenger on a charge of passing counterfeit money. *Id.*

9. Carriers are the insurers of baggage in the same manner and to the same extent as of goods or freight. *Oakes v. Northern P. R. Co. (Or.)* 818

10. Carriers of passengers are responsible for the carriage and safe delivery of such baggage as by custom and usage is ordinarily carried by travelers; and the payment of the usual fare includes, in legal contemplation, a compensation for the conveyance of such baggage. *Id.*

11. Baggage, within the rule of a carrier's liability, is confined to articles usually carried as such for the personal use of the passenger, or for his convenience, instruction, or amusement on the journey, and does not include that which is carried for the purpose of business,—such as merchandise or the like. *Id.*

12. Articles which are not properly personal baggage, but which are taken by the passenger as such with the carrier's knowledge, either with or without payment of an extra charge, will be regarded as such in respect to the carrier's liability. *Id.*

13. Stage properties, costumes, paraphernalia, advertising matter, etc., are not "bag-

gage" within the rule of a carrier's liability, unless accepted as such. *Id.*

14. A receipt or contract stipulating that the carrier shall be liable only for a certain sum on the loss of an article, unless its just and true value is stated therein, will be upheld where no value is stated, if it was freely and voluntarily entered into, although the loss results from slight or ordinary negligence. *Pacific Exp. Co. v. Foley (Kan.)* 799

15. A statute giving railroad commissioners authority to fix joint rates for a railroad makes the rules thus fixed only prima facie evidence, although not expressly limiting them to that effect, where the only penalties are for charging unjust and unreasonable rates, and a former statute which did not extend to joint rates, and of which this was an amendment, expressly limited the effect of the commissioners' order as to rates, to prima facie evidence. *Burlington, C. R. & N. R. Co. v. Doy (Iowa)* 436

16. There is no uncertainty in a statute prescribing a penalty for unreasonable railroad charges, and declaring that rates fixed by railroad commissioners as the maximum shall be prima facie reasonable, on the ground that it does not permit any charge with certainty of its reasonableness, as the State is precluded from denying that the commissioners' rates are reasonable. *Id.*

17. A statute requiring freight in car-load lots to be transferred without unloading, unless the unloading is done without charge, and that smaller quantities shall be transferred into the cars of the connecting carrier at cost, which shall be made a part of the joint rate, does not interfere with the constitutional guarantees for the protection of the rights and property of the carriers. *Id.*

18. The power to establish joint "through rates" for connecting carriers is included within the power of the State to regulate rates of charges for transportation of freight by railroads. *Id.*

19. A railroad company is not compelled to enter involuntarily into contract relations with other companies, by a statute requiring the adoption of joint rates, or, in default thereof, the fixing of such rates by railroad commissioners, as in the latter case the obligation of the company as to the rates is one imposed by law, and not by contract. *Id.*

#### NOTES AND BRIEFS.

Carriers; liability for torts. 113

Passengers on car platform. 139

Liability for tortious acts of agents; assaulting passenger; ejecting passenger from train. 337

Ejection for refusal to pay fare. 833

Stipulation in ticket. 840

Negligence in boarding a moving train. 430

Railroads as; rates of freight; long and short hauls; interstate regulations; duty to public; reasonableness of rates for local traffic; through rates; connection with bridge company; refusal to furnish cars. 436

Duty to furnish proper cars. 746

Limiting liability by contract; valuation fixed in bill of lading. 799

## CHARITABLE USES.

1. The legal incapacity of a town to support a clergyman entirely defeats a bequest to it made "strictly on this condition," that it shall support him. *Bullard v. Shirley* (Mass.) 110
2. A bequest for an "art institute" is not void for indefiniteness,—especially when a codicil refers to its distribution of prizes for works "of the fine arts." *Almy v. Jones* (R. I.) 414
3. The phrase "worthy of the city," in a will giving a fund for an art institute when citizens have contributed funds necessary to found one worthy of the city, does not make the gift void for indefiniteness. *Id.*
4. A bequest is not void for remoteness where it gives a fund for an art institute, to take effect when the necessary funds to found one are contributed, and in the meanwhile the income is to be distributed annually in prizes for the best works of art by artists belonging to or residing in the State. *Id.*
5. A bequest is a lawful charity in every respect, where it is given for an art institute when established, and the income is to be given, in the mean time, in annual prizes for works of art. *Id.*
6. The promotion of the cause of temperance is too vague and uncertain as a description of the objects for which a corporation was formed to enable a court to say that funds contributed for the use of the corporation constitute a public charity which can be administered by a court of equity. Hence a division of the fund by the corporation among its own members is not such a perversion thereof as amounts to an injury to the public so as to demand a forfeiture of the corporate charter. *People, Attorney-General, v. Dashaway Assn.* (Cal.) 117

## NOTES AND BRIEFS.

- Charitable uses; validity of gifts for. 110  
What constitute; for benevolent purposes; uncertainty as to bequests. 414

## CHECKS. See also BANKS, NOTES AND BRIEFS.

1. Certification of a check by a bank on the drawee's application releases the drawer. *Metropolitan Nat. Bank v. Jones* (Ill.) 492
2. A check given by an insolvent to a creditor cannot be collected after the insolvent's death, without previous presentment or certification. *Bernard v. Whitney Nat. Bank* (La.) 802

## CITIZENS.

## NOTES AND BRIEFS.

- Citizenship; of State. 864

## CLAIMS. See COURTS, 6.

## CLUBS. See INTOXICATING LIQUORS, 1.

## COAL. See TAXES, 1, 2.

## COLLATERAL SECURITY. See PLEDGE AND COLLATERAL SECURITY.

12 L. R. A.

## COLLUSION. See ACTION OR SUIT, NOTES AND BRIEFS.

## COMMERCE. See also CONSPIRACY.

1. A license tax on peddlers is not an unconstitutional regulation of commerce. *Re Wilson* (D. C.) 624
2. Small packages of goods sold from house to house have lost their distinctive character of imports, where wholesale packages have been sold by an agent, for each of which he credits the purchaser with the retail price of one of the small packages therein contained, and then sells these as an advertisement for the purchasers, if these small packages are either taken from the packages sold at wholesale, or are shipped in a larger package directly to the agent. *Id.*
3. State regulation of the pressure of natural gas transported in pipes within the State, which operates upon all alike, is not an unlawful regulation of interstate commerce. *Jamieson v. Indiana Natural Gas & O. Co.* (Ind.) 652

## NOTES AND BRIEFS.

- Commerce; interstate; power of Congress to regulate. 624, 755  
Wilson Bill as to intoxicating liquors. 755  
Domestic; state sovereignty over. 673

## CONDITION. See CHARITABLE USES, 1; WILLS, 11.

## CONFLICT OF LAWS.

1. A contract to carry a passenger, exempting the carrier from liability even for negligence, if it was valid where it was made, will be upheld by the courts of a State in which such contracts are held void as against public policy. *Fonseca v. Cunard Steamship Co.* (Mass.) 840
2. The rate of interest on a contract between citizens of different States may be made according to the law of either State. *Dugan v. Lewis* (Tex.) 93
3. The law of Texas governs the rate of interest on notes secured by a trust deed given for money borrowed in New York, where the bargain was made and the money and papers delivered by an agent in behalf of a citizen of Texas, who signed and dated the papers in the latter State, where the stipulated rate of interest would have been usurious in New York, but not in Texas, and the deed of trust provides that the contract "shall be construed according to the law of the State of Texas, where the same is made." *Id.*
4. A conditional sale valid where it is made, by which the title is retained until the purchase money is paid, may be upheld against an innocent purchaser from the original vendee in another State to which the property is taken without payment, in accordance with the law of that State, although by the laws of the former State the conditional sale would be held invalid as to a bona fide purchaser, because not recorded. *Weinstein v. Freyer* (Ala.) 700
5. A bequest of personalty to a "community" in a foreign country is valid if it has capacity to take by the laws of that country. *Re Huss* (N. Y.) 620

6. The question as to who are the heirs at law of a person, within the meaning of a Massachusetts will which gives them an estate in a certain event if he is not then living, is to be determined by the law of Massachusetts, although the person named is domiciled in another State. *Proctor v. Clark* (Mass.) 721

## NOTES AND BRIEFS.

Conflict of laws; as to usurious agreements. 98

Extra-territorial force of statutes. 862

**CONSPIRACY.** See also ABORTION; BOYCOTT.

A combination between coal producers in one State and coal dealers in another to regulate prices of coal in a certain city, and to divide any advances in price in excess of the advances in freights, and tending to monopolize the coal trade of the city among members of the combination, is in violation of Act of Congress July 2, 1890, prohibiting conspiracies in restraint of trade and commerce. *United States v. Jellico Mountain Coke & C. Co.* (C. C. M. D. Tenn.) 758

## NOTES AND BRIEFS.

Conspiracy; defined; coercing choice of employment; lawful combinations of workmen; boycotting; combination, when a conspiracy; printers' unions; dictation to and coercion of employers and employés; intimidation and threats; when conspiracies actionable. 198

**CONSTITUTIONAL LAW.** See also CONTRACTS, 25, 26.

1. Constitutional provisions are to be construed with reference to prior well-known practices and usages. *Johnston v. State*, *Sefton* (Ind.) 235

2. The next of kin of a person are not deprived of any "property" by a statute which provides that on the death of the person the personal property shall go to other persons; and therefore the constitutional provision as to depriving persons of "property" does not apply to the statute so far as it relates to them. *Dibrell v. Lanier* (Tenn.) 70

3. The right to transmit property by inheritance to one's descendants or next of kin is "property," within the meaning of the constitutional provision that a person shall not be deprived of property except by judgment of his peers or of the law of the land. *Id.*

4. A statute providing that the personal estate of an intestate lunatic, if derived from an intestate husband or wife, shall go to the latter's next of kin, is unconstitutional because the classification of persons thereby made is unnatural, arbitrary, and capricious, in consequence of which the statute is not a "law of the land" within the meaning of the Constitution. *Id.*

5. Special proceedings applicable to the specified subject-matter, and conformable to the rules requiring notice and the acquisition of jurisdiction, and which affect all persons alike whose property or rights come within the lawful scope of the proceedings, are prosecuted 12 L. R. A.

with "due process of law." *Burlington, C. R. & N. R. Co. v. Dey* (Iowa) 456

6. Permitting the recovery of attorneys' fees on recovery against a railroad company for violation of a statute regulating rates does not violate the constitutional provision as to equality. *Id.*

7. The regulation of the pressure of natural gas transported in pipes is within the police power of the Legislature, to be exercised according to its discretion, in the absence of facts to show oppression or usurpation under a pretext of exercising police power. *Jamieson v. Indiana Natural Gas & O. Co.* (Ind.) 659

## NOTES AND BRIEFS.

Constitutional law; validity of class legislation. 70

**CONTRACTS.** See also MISTAKE; MUNICIPAL CORPORATIONS, 4.

1. A promise, in consideration of permission to insure the life of a person, to pay his wife a sum of money after his death, is on a void consideration where the promisor has no insurable interest in the life on which the insurance is taken, and therefore cannot be enforced. *Burbage v. Windley* (N. C.) 409

2. An agreement by grocers not to buy any butter from the makers for two years, if a firm shall open a butter store in the place, is void for lack of consideration, where such firm neither pays anything therefor nor buys any established plant, place of business, or goodwill. *Chaplin v. Brown* (Iowa) 438

3. A minor's abstinence from intoxicating liquors and tobacco, and from swearing and playing cards or billiards for money, is a good consideration for a promise by his uncle to pay him a sum of money. *Hamor v. Sidway* (N. Y.) 463

4. There is sufficient consideration for a contract to settle litigation between corporations, under a patent which both parties suppose to be, but which is not in fact, valid,—especially where the contract includes mutual covenants as to the conduct of their business, and is partly executed before the invalidity of the patent is discovered. *Gloucester Ininglass & G. Co. v. Russia Cement Co.* (Mass.) 563

5. A promise by a board to pay for heating apparatus for a public building, made to induce the completion thereof by the other party, who had already partly furnished it under agreement with the chief contractor for the building, who had made default in payment, is an original, and not a collateral, contract within the Statute of Frauds. *Gibson County Comrs. v. Cincinnati Steam Heating Co.* (Ind.) 502

6. The words "two-thirds part at the least of the thing demised," in the exception as to leases for not more than three years, in the Statute of Frauds, mean two-thirds part of the rental value of the demised premises, and not of the value of the fee. *Childers v. Lee* (N. M.) 67

7. A series of papers appearing to relate to the same contract may constitute a sufficient memorandum within the Statute of Frauds,

although only one of them is signed by the party to be charged. *Freeland v. Rits* (Mass.) 561

8. A written agreement for a sublease, "to be made subject" to a lease not yet in existence, but which is to be obtained, is not, for that reason, insufficient under the Statute of Frauds after such lease is obtained in writing. *Id.*

9. A parol agreement to adopt a child as heir and to leave her all one's property at death is within the Statute of Frauds, where the estate at death consists of property of which a parol transfer is not valid under the statute. *Austin v. Davis* (Ind.) 120

10. Performance on the part of a girl, of a parol contract to live with a man and his wife during their lives, in consideration of their agreement to leave her all their property, will not take the agreement out of the Statute of Frauds. *Id.*

11. A man is not prevented from transferring his property, by an agreement to leave all his property at death to an adopted child, if the transfer is not made for the purpose of defrauding the latter. *Id.*

12. A bond reciting the proposal of a board of commissioners "to advance" the money to the obligor, who binds himself to complete the job of furnishing heating apparatus for a public building, in consequence of the default of the principal contractor for the building, is a contract to pay for the work when completed, and not merely to "advance" money. *Gibson County Comrs. v. Cincinnati Steam Heating Co.* (Ind.) 502

13. The word "shipped," in a contract by a lessee of a quarry to pay certain rates for stone shipped, cannot be construed to include stone not shipped, although quarried and ready for shipment. *Crawford v. Oman & S. Stone Co.* (S. C.) 875

14. The words "dimension stone," in a quarry lease fixing prices for such stone, must be construed in their technical trade meaning, in the absence of anything in the contract to indicate the contrary, where both parties are quarry men. *Id.*

15. Time is not of the essence of a contract for the sale of real estate, unless made so by the express agreement of the parties, or by the nature of the contract itself, or by the circumstances under which it was made. Courts of equity will ordinarily infer that interest on the deferred payments will be a sufficient compensation for the delay. *Frink v. Thomas* (Or.) 239

16. Although there is no stipulation in the contract that time shall be essential, or anything in the nature or circumstances of the agreement to make it so, it can nevertheless be made so by a performance, or tender of performance, by one party and a demand of the other. *Id.*

17. Where the payment of the purchase money and the making of the deed are to occur simultaneously, they are regarded as concurrent acts which disable either party from putting an end to the contract without performance, or a valid offer to perform, on his part. *Id.*

18. The agreement is void as tending to 12 L. R. A.

create a monopoly, where all the grocers in a town agree to give up dealing in butter if a new firm shall establish a butter store in the place and pay as much as dealers in neighboring towns. *Chaplin v. Brown* (Iowa) 428

19. A purchase of stock by a broker for his customer, who puts up a margin, and, aside from commissions and interest, simply receives or pays the difference between the buying and selling values, is invalid under Cal. Const. art. 4, § 26, as a sale of stock on margin, and can give the broker no right to enforce the customer's indebtedness to him thereon. *Cushman v. Root* (Cal.) 511

20. An agreement to prevent competition between two corporations in the manufacture of fish glue under a patent, whereby an article nearly worthless is to be converted into one of large value, is not against public policy. *Gloucester Ininglass & G. Co. v. Russia Cement Co.* (Mass.) 563

21. Objection to a variance between a lease agreed upon and the one delivered is waived by refusal to accept any lease. *Freeland v. Rits* (Mass.) 561

22. Mere failure to pay the purchase money according to the terms of the contract will not entitle the vendor to have a contract rescinded. *Frink v. Thomas* (Or.) 239

23. On the destruction by fire of a building towards the erection of which the contractor is to contribute only part of the labor and materials, while the owner is to do the grading, excavating, stone work, brick work, painting, and plumbing, the contractor is discharged from his obligation, and can recover on an implied assumpsit for the value of what he has already done. *Butterfield v. Byron* (Mass.) 571

24. A contract is invalidated by the subsequent enactment of police regulations which render its performance illegal as to one of the parties. *Jamieson v. Indiana Natural Gas & O. Co.* (Ind.) 652

25. An innovation or change in the law by a judicial decision does not impair the obligation of an existing contract, where neither the Constitution, nor a statute, nor any enactment that has the force of the law, is applied to affect the contract. *Ray v. Western Pennsylvania Natural Gas Co.* (Pa.) 290

26. A statute empowering the state auditor to institute proceedings for the dissolution of insurance companies which upon examination seem to be insolvent, or in such condition as to render their further continuance in business hazardous to the insured or to the public, and to apply for an injunction to prevent their further proceeding with the business, and for a receiver,—is not unconstitutional as impairing the obligation of contracts. *Republic L. Ins. Co. v. Swigert* (Ill.) 828

27. Overruling decisions of the state court of last resort which were in force at the time a mortgage was given by a married woman, and which upheld its validity under the statutes, does not affect the right of the mortgagee. *Farrior v. New England Mortg. S. Co.* (Ala.) 856

#### NOTES AND BRIEFS.

Contracts; Statute of Frauds as to lease for not more than three years. 67

Validity of; in fraud of statute; gambling; illegality as a defense; secret agreement. 120

Equity jurisdiction to correct mistakes; effect of parol agreement on sealed instruments; reformation of deed; mistake in description, boundaries, etc. 273

Construction of terms used in. 275

Consideration; necessity and sufficiency; mutual and concurrent promises; past act; marriage; benefit to promisor and detriment to promisee; waiver of legal right; illegality or immorality of consideration; performance of legal obligation; moral obligation. 468

For building; extra work. 502

Effect of destruction of building upon. 571

To prevent competition. 568

Option; election. 690

Sales on margins or options. 511

Option contracts; when not illegal. 776

**CONVERSION.** See TROYER, 2.

**CORPORATIONS.** See also ACKNOWLEDGMENT; CHARITABLE USES, 6; CONTRACTS, 26; EVIDENCE, 15; LIENS, 2.

1. The State alone can complain of a completed contract entered into by a corporation in violation of constitutional or statutory requirements. *Wood v. Corry Waterworks Co.* (C. C. W. D. Pa.) 168

2. A corporation which has received and enjoyed the fruits of its mortgage bonds cannot assail their validity in the hands of a bona fide holder for value, on the ground that they exceeded in amount one half of the capital stock paid in, contrary to the statute. *Id.*

3. The fact that the constitutional requirement as to notice to stockholders was not complied with before the execution of a mortgage of the corporate property is not a valid defense to a suit on the mortgage, if every stockholder was present when the mortgage was determined on and voted in favor of it, and the corporation has received the benefit of the money raised thereby. *Id.*

4. A corporation which has entered into and received the benefits of a contract which it had the power to make will not be permitted to avoid paying the consideration money, by showing that in making the contract it did not conform to the statutory requirements and limitations imposed on it. *Id.*

5. A corporation which used mules in its business is liable on notes for mules given in its name by its president, where he had frequently bought mules of the payee and given therefor notes of the corporation, which it had always paid, and the seller had no reason to suppose that the present purchase was not made for the corporation as the president represented it to be. *Sparks v. Despatch Transfer Co.* (Mo.) 714

6. Persons acting as directors of a corporation when less than the necessary amount of stock has been subscribed, and they are without authority to create any corporate obligation, become personally liable though acting in good faith. *Farmers Co.-Op. T. Co. v. Floyd* (Ohio) 846

7. A director or stockholder is not chargeable as such with actual knowledge of the business transactions of the corporation. *Rudd v. Robinson* (N. Y.) 478

8. The denial of his right to vote will not justify one who has a majority of the stock of a corporation in withdrawing from a meeting and organizing another meeting and voting there; but his vote at the original meeting would have been effective notwithstanding the rejection. *Re Argus Printing Co.* (N. D.) 781

9. Holders of a majority of the stock of a corporation, after acquiescing in the organization of a meeting and participating in its business, cannot withdraw and organize another meeting at the same time and place. *Id.*

10. A vote of stockholders representing a majority of the subscribed capital stock is necessary to the choice of a director. *Id.*

11. The pledgee of stock, in whose name it stands on the corporate records, has a right to vote the stock at a meeting of the directors, and the pledgor has not; but equity may compel the pledgee in a proper case to give him a proxy. *Id.*

12. To be eligible as a director under a statute which requires directors to be stockholders, a person must appear to be a stockholder on the corporate records. *Id.*

13. The transferee of stock upon the corporate records is qualified to vote and become a director, although the transfer was made for the express and sole purpose of so qualifying him, if it was not in furtherance of a fraudulent scheme. *Id.*

14. Before a corporation can safely permit a transfer, upon its books, of stock which belonged to a deceased person, and which it knows has been directed by order of court to be sold by the administrator at private sale, it should ascertain whether or not such a sale has been made under the order as vests title in the purchaser. If it fails to do so, it is liable to make good any loss occasioned by its permitting the transfer. *Citizens Street R. Co. v. Robbins* (Ind.) 496

15. One who, in good faith and without notice, purchases in the market a certificate of stock which has been wrongfully issued by the corporation in lieu of certificates which belonged to a decedent's estate, and which were not legally sold and disposed of by the administrator, receives a good title as against the decedent's estate, if there was nothing on the face of the certificate to put him on inquiry or to give him notice of the infirmity of the title. Such purchaser cannot be required to make an examination of the records to ascertain the validity of the title, before he can safely purchase it. *Id.*

16. Payment of a stock subscription amounting to \$250,000, by a bond for title to land on which only \$5,000 had been paid and which was worth no more than the price at which it was bought, leaves the subscribers liable to creditors for the difference between the actual value of the land and the amount of the subscription, where the State Constitution prohibits the issue of stock except for money or property actually received, and statutes require payments by property to be at its money

value. *Elyton Land Co. v. Birmingham Warehouse & Elev. Co.* (Ala.) 807

17. A corporation may, if it acts in good faith, lawfully receive from its subscribers who have paid a certain percentage of their subscriptions, a surrender of the certificates held by them, and issue, in lieu thereof, certificates for as many fully paid shares of stock as the money paid in will buy, thereby releasing them from further liability, as far as the claims of the company itself are concerned. *Republic L. Ins. Co. v. Swigert* (Ill.) 828

18. In a statutory proceeding by the state auditor to wind up a corporation, to which the stockholders are not made parties, the corporation has the duty to protect their rights; and it may therefore object to the making of an order directing the receiver to bring suits for unpaid stock subscriptions. *Id.*

19. Stockholders are liable as partners on contracts of a corporation which they have undertaken to form for a certain business under the laws of another State, solely because a corporation for such business could not be legally organized in the State where it was to be carried on. *Empire Mills v. Alston Grocery Co.* (Tex. App.) 866

20. The State only can question the right of foreign corporations to hold lands in excess of the amount limited by statute. *American Mortg. Co. v. Tennille* (Ga.) 529

21. The law of comity does not require that a mercantile corporation organized under the laws of another State shall be allowed to do business in Texas, as the repeal in 1885 of a statute granting the privilege of organizing mercantile corporations is a direct prohibition against the operation of such corporations in the State. *Empire Mills v. Alston Grocery Co.* (Tex. App.) 866

#### NOTES AND BRIEFS.

Corporation; estopped to deny liability on contracts. 168

Liability of stockholder. 807

Individual liability on contracts: foreign; law of comity; estoppel to deny incorporation. 866

Disposition of property on dissolution. 828

Execution of deed by. 588

Liability for acts of officers. 714

Stock certificates, ownership of; pledge; mode of transfer; right to vote upon; directors, how chosen. 781

#### COSTS AND FEES.

1. A stipulation to pay all costs of collecting, not less than 10 per cent, "refers to attorneys' fees, as the parties are liable for court costs without any stipulation. *Montgomery v. Crosthwait* (Ala.) 140

2. A provision allowing attorneys' fees on recovery by the plaintiff does not impose a "penalty for exercising the right of defense." *Burlington, C. R. & N. R. Co. v. Dey* (Iowa) 436

#### COURTS. See also FIRES; MUNICIPAL CORPORATIONS, 1.

1. Where a controversy concerning the title  
13 L. R. A.

to government land is still pending in and undetermined by the land department of the United States, the courts of a State will not interfere. *Frink v. Thomas* (Or.) 239

2. A circuit court of the United States has no jurisdiction in an action at law upon a note to enforce a specific lien upon property conveyed to secure it, according to a remedy and practice given by state law, without foreclosure proceedings. *American Freehold Land & Mortg. Co. v. Thomas* (C. C. S. D. Ga.) 681

3. Circuit courts of the United States may constitutionally be given jurisdiction of suits by the government to enjoin illegal combinations in restraint of interstate commerce; and it does not depend on diverse citizenship of the parties. *United States v. Jellico Mountain Coke & O. Co.* (C. C. M. D. Tenn.) 753

4. Congress may give the federal courts exclusive jurisdiction when a right arises under a law of the United States. *Copp v. Louisville & N. R. Co.* (La.) 725

5. A state court has no jurisdiction of an action for damages against a carrier for violation of the Interstate Commerce Law, as that provides for redress, either by procedure before the Commission or suit before a federal court. *Id.*

6. A claim against the United States for damages to rice fields by the construction of a dam in making harbor improvements is one sounding in tort, and is not within the jurisdiction of the circuit court. *Mills v. United States* (C. C. S. D. Ga.) 678

7. Membership in a state bar association does not disqualify a judge to hear a proceeding brought by it for the disbarment of an attorney, although the association may be liable for the costs if defeated. *Ex parte Alabama State Bar Assn.* (Ala.) 184

8. Proceedings before a special judge, even by consent of parties, are *coram non judge* and void if the regular judge is not in fact disqualified, although he supposes he is and refuses to sit. *Id.*

9. A probate judge cited by the probate judge of another district to act in his place, who acts with the assent of the clerk, is a judge *de jure*, although the statute prescribes that the "clerk of the court shall cite" the judge in such cases, as that provision is merely directory. *Gallup v. Smith* (Conn.) 853

10. Officers of school districts are included in the words "all other officers," in Ill. Act April 8, 1873 (Ill. Rev. Stat. chap. 46), giving the county court jurisdiction of contests of election of county, township, and precinct officers, and all other officers for the contest of whose election no provision is made. *Misch v. Russell* (Ill.) 125

11. Courts must uphold a statute unless it is so plainly and palpably in conflict with the Constitution as to leave no doubt or hesitation in the judicial mind as to its invalidity. *Burlington, C. R. & N. R. Co. v. Dey* (Iowa) 436

12. A question not raised by the pleadings as to the power of a city to sell coal under its streets, cannot be raised for adjudication by stipulation of the parties, in an action by the city for trespass in removing such coal, where



no contract has been in fact made or attempted before the suit, but one is agreed on in such stipulation, providing the court will uphold the power of the city to make it. *Union Coal Co. v. La Salle* (Ill.) 826

#### NOTES AND BRIEFS.

Courts; federal; suit by assignee of chose in action. 681

Concurrent jurisdiction of federal and state. 725

Power to interpret and construe statutes. 856

#### COVENANT. See also MISTAKE.

1. An action for reformation of a deed as to the description of the property, as well as for damages for breach of covenant of warranty, may be brought against the remote grantor who conveyed to plaintiff's grantor with the same covenants that were contained in plaintiff's deed. *Butler v. Barnes* (Conn.) 278

2. The support of an incompetent person who has always lived on a certain farm, to which a vendee of the farm binds himself by a declaration of trust to apply the net rents of the farm, or the interest on the purchase price if it should be sold, and which is made a first lien on the farm in case of a sale thereof, is not limited to support on the farm, where there is nothing in the declaration to show that intent. *McArthur v. Gordon* (N. Y.) 667

#### CROPS. See LANDLORD AND TENANT, 5, 6.

#### CUSTODY OF LAW. See GARNISHMENT, NOTES AND BRIEFS; MONEY IN COURT, 2.

#### CUSTOM AND USAGE.

1. A custom of others to be equally negligent is no defense to one charged with negligence. *Columbus & H. C. & L. Co. v. Tucker* (Ohio) 577

2. A usage which is not according to law, though universal, cannot be set up to control the law. *Id.*

#### DAMAGES.

1. Punitive damages are recoverable of a railroad company for disregard of its statutory duty to stop at a station for a passenger, when it has advertised for passengers for that train and has room for them, or could by reasonable diligence have had cars enough to accommodate them. *Purcell v. Richmond & D. R. Co.* (N. C.) 118

2. Damages resulting directly from a wrongful act are recoverable, as a general rule, whether they could or could not have been foreseen or contemplated as a probable result. *Sahmaker v. St. Paul & D. R. Co.* (Minn.) 257

3. The measure of damages for quarrying and carrying away stone by trespassers, in a suit by lessees merely of the exclusive right to quarry the stone, does not extend to the full value of the stone, but merely to the damages actually occasioned by invasion of such 13 L. R. A.

exclusive right; but nominal damages at least should be granted. *Baker v. Hari* (N. Y.) 60

4. The measure of damages in an action against an agent for making a contract with plaintiff without authority is the loss sustained by the failure of the contract. *Farmers Co-Op. T. Co. v. Floyd* (Ohio) 346

5. The price to be paid to a volunteer for enduring suffering caused by a personal injury cannot be regarded as the standard in determining the amount of damages in an action for such injury; and an instruction which suggests such an idea of a price, in connection with the difficulty in fixing the amount, is misleading. *Spaulding v. Pennsylvania Co.* (Pa.) 698

#### NOTES AND BRIEFS.

Damages; measure of, for personal injuries, pain, and suffering. 698

#### DEBTOR AND CREDITOR.

A loan of money to a corporation will render it liable for the debt, although the note of individuals, instead of the note of the corporation, was taken therefor because it was supposed to be better security. The test is whether the note was received as a consideration for the money, or only as a security. *Philadelphia Third Nat. Bank's Appeal* (Pa.) 238

#### NOTES AND BRIEFS.

Debtor and creditor; one receiving credit responsible for the debt; effect of taking security. 238

#### DEED. See also ACKNOWLEDGMENT; EVIDENCE, 7, 18, 14; INFANTS, 5.

1. Delivery of a deed for record, though not known to the grantee, is, if followed by his assent, a good delivery. *Lee v. Fletcher* (Minn.) 171

2. The letters "D. S. C.," written by the witness to a deed whose name is Solomon Davis, may constitute a sufficient signature as a witness. *Deeroux v. McMahon* (N. C.) 205

3. A cross-mark opposite a seal, made by the grantor of a deed immediately under a clause containing his name and stating that he has "signed his name and affixed his seal," constitutes a sufficient signature and may be construed as an adoption of the name in such clause as a signature. *Id.*

#### NOTES AND BRIEFS.

Deed; necessity and sufficiency of delivery; delivery to third person; in escrow; by recording; presumptions or evidence of delivery. 171  
Signature by mark or cross. 205

#### DEFINITIONS. See also VOTERS AND ELECTIONS, 9.

1. A debt is any kind of obligation of one man to pay money to another. *Dunsmoor v. Furstenfeldt* (Cal.) 503

2. Delusions are conceptions that originate spontaneously in the mind, without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. *Potter v. Jones* (Or.) 161

8. A belief or aversion formed on apparent cause, leading to an erroneous view of conduct, however insufficient the state of facts on which it is based may be, shows only an error of judgment or want of reasoning power, but not an absolute want of intellect on the subject, and therefore does not constitute an insane delusion. *Potter v. Jones* (Or.) 161

**DELEGATION OF POWER.** See PUBLIC IMPROVEMENTS, 4, 5.

**DELIVERY.** See DEED, 1; MORTGAGE, 8.

**DESCENT AND DISTRIBUTION.** See also CONTRACTS, 11.

1. Where a will contains no devise of lands, but the testator has disposed of his entire estate by means of a power to sell and divide the proceeds of sale, the lands descend to his heirs at law subject to the power of sale and the trusts declared thereon contained in the will. *Morse v. Hackensack Sav. Bank* (N. J.) 63

3. The estate of an heir at law intermediate the testator's death and the exercise of a power of sale is an actual estate which is alienable, devisable, and descendible, and liable to seizure and sale of lands; but when the power of sale is executed, the estate of the heir or his alienee is determined, and the purchaser under the power becomes seized, under the devise, by a title paramount to the title of the heir by descent. *Id.*

8. A widow is an "heir" of her husband to the extent of \$5,000. up to which she is given an estate in fee by Mass. Stat. 1880, chap. 811, but not in respect to the life estate given by Mass. Gen. Stat. chap. 90, § 15 (Mass. Stat. 1854, chap. 406, § 1), which is a purely optional interest in lieu of dower. Consequently she can take only the sum of \$5,000 under a will in favor of his "heirs." *Proctor v. Clark* (Mass.) 721

**DIVORCE.** See HUSBAND AND WIFE, 4-6.

**DOWER.**

1. A widow cannot be compelled to release her dower in lands sold by her husband by a contract which she did not sign. *Sloan v. Williams* (Ill.) 496

2. The express denial of dower, in New York statutes, where a divorce is granted for the wife's adultery, does not by implication give dower in case of annulment of a marriage made in good faith, because the husband had a former wife living. *Price v. Price* (N. Y.) 859

3. No dower right exists in favor of a woman whose marriage was annulled because the husband had a wife living, although she had not been heard from within five years before the second marriage, which was contracted by both parties in good faith, and was therefore valid under 2 N. Y. Rev. Stat. 189, § 6, until its nullity was pronounced by a court. *Id.*

#### NOTES AND BRIEFS.

Dower; right of wife on annulment of marriage. 859  
12 L. R. A.

**DRAINS.** See also PUBLIC IMPROVEMENTS, 3, 5, 6.

#### NOTES AND BRIEFS.

Drains and sewers; authority of Legislature over; taxation for; construction of. 417

**DUMMY RAILROADS.**

A dummy railroad operated by steam and running beyond the lines of a municipality, organized under Ala. Act Feb. 25, 1887, which authorizes corporations to construct such roads in a city or town and also "upon any of the public roads of any county," upon such terms and in such manner as may be authorized by the city and county authorities respectively, is a "railroad" within the meaning of Ala. Code, § 1145, requiring trains to be stopped within 100 feet of a place where the track crosses the track of another railroad. *Birmingham Mineral R. Co. v. Jacobs* (Ala.) 830

**EJECTMENT.**

1. A writ of restitution will not be granted to restore to a defendant in ejectment the possession of property taken under a writ of possession, merely because the latter was not issued within a year and a day after the rendition of the judgment. *Bowser v. Chicago W. D. R. Co.* (Ill.) 81

13. The common-law rule that a writ of possession cannot be issued to enforce a judgment in ejectment after the lapse of a year and a day is abrogated in Illinois by the statute, which, though making no express provision as to writs of possession, provides that execution may issue upon a judgment at any time within seven years,—especially when construed with another statute providing that rules of pleading and practice in other actions are applied to actions of ejectment. *Id.*

**ELECTION.** See also EXECUTORS AND ADMINISTRATORS, 2, 3.

#### NOTES AND BRIEFS.

Election; to take gift under will. 63

**ELECTRICAL USES AND APPLIANCES.**

1. In the present state of electrical science a telephone company cannot maintain a bill for an injunction against the operation of an electric railway, to prevent damages incidentally sustained by the escape of electricity from its rails. *Cumberland Teleph. & Tel. Co. v. United Electric R. Co.* (C. C. M. D. Tenn.) 544

3. Interference with the ground circuit of a telephone system by the subsequent introduction of the "single-trolley system" of electric-street railways, of which the ground also is a constituent part, interferes with no vested right of the telephone company, and gives it no right of action. *Cincinnati Inclined Plane R. Co. v. City & S. Tel. Assn.* (Ohio) 534

8. Disturbance of a telephone system previously established, the poles and wires of which are upon the streets, by the introduction of electro motive power upon a street railway, entitles the telephone company to no remedy

except to readjust its methods to meet the new conditions. *Id.*

#### NOTES AND BRIEFS.

Electricity; relative rights of electric railways and telegraph companies in the use of. 587

**ELECTRIC RAILROADS.** See ELECTRICAL USES AND APPLIANCES, 2, 3; TELEPHONES.

#### EMINENT DOMAIN.

1. The building, by a State or its grantees, of wharves upon the shore of navigable waters, will not constitute either a taking or damaging of the private property of riparian proprietors for public use. *Eisenbach v. Hatfield* (Wash.) 683

2. Damage to rice fields by the construction of a dam in harbor improvements, thus raising the low-water level in a navigable river, and destroying the drainage of the fields, and increasing their liability to overflow in time of freshets, does not constitute a taking of the property, within the meaning of the constitutional provision for compensation. The rights of riparian owners are subordinate to the power of the government to control and improve navigation. *Mills v. United States* (C. C. S. D. Ga.) 678

3. A railroad is located so as to exclude the appropriation of the land selected by another road, when a definite location has been adopted by the action of the company; but the act of the engineer in staking out the line is not a sufficient location. *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.* (Pa.) 220

4. The whole improvement must be taken into consideration in determining whether property is damaged by a public improvement, —such as the change of grade of a street. *Springer v. Chicago* (Ill.) 609

5. No damages can be recovered on account of a public improvement, where no property is actually taken, if its fair market value is as much immediately after as before the improvement. *Id.*

6. Compensation for the erection of a telegraph line in a street must be made to abutting owners, although the fee of the street is in the public; and the right thereto cannot be defeated by action of the municipal authorities. *Stowers v. Postal Tele. C. Co.* (Miss.) 864

#### NOTES AND BRIEFS.

Eminent domain; rights of mortgagees. 84

Location of railroad; when sufficient to exclude another road. 230

Market value of property. 610

Right of; power of general government 675

**ENTIRETIES.** See HOMESTEAD, 1; HUSBAND AND WIFE, NOTES AND BRIEFS.

#### EQUITY.

A suit to cancel a deed to an infant, after his disaffirmance on coming of age, can be maintained on his subsequently claiming to affirm it, as the disaffirmance did not reinvest  
12 L. R. A.

the grantor with title. *McCarty v. Woodstock Iron Co.* (Ala.) 138

#### NOTES AND BRIEFS.

Equity; jurisdiction to correct mistakes. 278

#### ESCHEAT.

#### NOTES AND BRIEFS.

Escheat; defined; question how determined; procedure to declare; interest subject to; title or possession of State. 539

**ESTOPPEL.** See also HIGHWAYS, 2.

1. Where a vendee enters into possession of land under a contract of purchase, he will not be permitted to obtain an outstanding title and assert it against his vendor, but such title will enure to the benefit of the vendor. *Prink v. Thomas* (Or.) 289

2. Where the vendor is prevented from complying with his contract by the wrongful act of the vendee in obtaining an outstanding title to a portion of the land, so far as that portion of the land is concerned, in a suit by the vendor to rescind, the vendee is estopped from claiming that no tender of the deed has been made. *Id.*

3. Specific performance of a contract will not be defeated for failure of consideration, where, after knowledge of the failure, the defendant has chosen to avail himself of the benefits of the contract and to go on under it. *Gloucester Isinglass & G. Co. v. Russia Cement Co.* (Mass.) 563

4. A person is not estopped from denying that a so-called corporation with which he has made a contract is in fact a legal corporation, and from claiming that the stockholders are individually liable on the contract. *Empire Mills v. Alston Grocery Co.* (Tex. App.) 366

5. Silence of a legatee who had said she was to be paid \$10,000, on the reply of the testatrix that \$3,000 of it had been paid, is not an admission of such payment. *Jaques v. Swasey* (Mass.) 566

6. A candidate is not estopped from obtaining a writ of mandamus to compel election officers to decide a tie vote by lot, according to law, by the fact that he requested them not to do so, since all parties had equal knowledge of the law, and the duty was to the public, and not simply to the candidate. *Johnston v. State, Sefton* (Ind.) 235

#### EVIDENCE.

##### I. JUDICIAL NOTICE.

##### II. PRESUMPTIONS; BURDEN OF PROOF.

##### III. DOCUMENTARY; PAROL AS TO WRITINGS.

##### IV. VIEW OF JURY.

##### V. OPINIONS.

##### VI. DECLARATIONS; RELEVANCY; WEIGHT.

#### NOTES AND BRIEFS.

##### I. JUDICIAL NOTICE.

1. Courts must take judicial notice of a treaty with a foreign government. *Ex parte McCabe* (D. C. W. D. Tex.) 589

2. Judicial notice will be taken of the relative distances from a certain place to another part of the same State and to neighboring States. *Jamieson v. Indiana Natural Gas & O. Co.* (Ind.) 652

3. Judicial notice will be taken of the course of business of railroad companies to transfer cars over more than one railroad without breaking bulk. *Burlington, O. R. & N. R. Co. v. Dey* (Iowa) 486

4. Courts take judicial notice of the fact that natural gas is a dangerous agency. *Jamieson v. Indiana Natural Gas & O. Co.* (Ind.) 652

## II. PRESUMPTIONS; BURDEN OF PROOF.

5. A foreign law proved by a governmental publication is presumed to continue until the present time, in the absence of proof to the contrary. *Re Huss* (N. Y.) 620

6. The burden of proving that a note was altered after indorsement is upon the indorser, where he relies on that fact as a defense. *Montgomery v. Orshwast* (Ala.) 140

7. The signing of a deed by the grantor and its possession by the grantee constitute prima facie evidence of delivery. *Devereux v. McMahon* (N. C.) 205

8. The fall of a large wooden sign of its own weight from its position over a public sidewalk raises the presumption of negligence in respect to its fastenings. *St. Louis, I. M. & S. R. Co. v. Hopkins* (Ark.) 189

9. The provision of a statute that rates fixed by railroad commissioners shall be regarded as prima facie reasonable is within the power of the State as to prescribing rules of evidence in all proceedings under the laws of the State. *Burlington, O. R. & N. R. Co. v. Dey* (Iowa) 486

10. The presumption is that county officers in making changes in the heating apparatus of a new public building made only such as were proper. *Gibson County Comrs. v. Cincinnati Steam Heating Co.* (Ind.) 502

11. The presumption in favor of the validity of a judgment does not extend to a case of personal service on a defendant who is a non-resident, where the proof does not show whether or not the service was made within the State. *Rand v. Hanson* (Mass.) 574

12. The burden of proof is upon a company owning a railroad in operation, to show that it does not itself operate it. *Peabody v. Oregon R. & Nav. Co.* (Or.) 828

## III. DOCUMENTARY; PAROL AS TO WRITINGS.

13. A mistake of the register of deeds in copying the true name of a witness to a deed on the records, instead of the letters "D. S. C.," which constituted the actual signature of the witness, will not annul the probate or destroy the competency of a copy of the record as evidence. *Devereux v. McMahon* (N. C.) 205

14. An objection that there is a variance between the original and a copy of the record of a deed, which copy is made evidence by N. C. Code, § 1251, without accounting for the original

unless upon a rule or order of court suggesting a variance or other sufficient ground, will not avail after the copy has been read in evidence, and the original thereafter voluntarily furnished the other party without any order of court. *Id.*

15. Books of account of a corporation are not competent evidence of themselves to establish an account or claim against a trustee or stockholder, in an action brought in behalf of the corporation. *Rudd v. Robinson* (N. Y.) 478

16. A judgment for the plaintiff in an action for the seduction of his daughter is not competent evidence against her son, in an action to enforce his claim to be the lawful heir of such judgment defendant. *Biscotford v. Clum* (N. Y.) 836

17. An oral condition that an order shall "be no sale" if the market price is not as it is represented is a condition subsequent, and not precedent, and cannot be proved to affect the terms of an unconditional written order. *Lilienthal v. Suffolk Brew. Co.* (Mass.) 821

18. Parol evidence is not admissible to show that a negotiable note signed by an individual in his own name merely, with nothing on its face to show any intent to bind anyone but himself, was given by him as president of a corporation. *Sparks v. Despatch Transfer Co.* (Mo.) 714

19. Evidence that no witnesses were sworn or hearing had before a probate judge as stated in the records of the probate court is inadmissible. *Gallup v. Smith* (Conn.) 353

## IV. VIEW OF JURY.

20. Courts have power to permit a view by the jury of premises the damage to which is the subject of controversy in a civil action. *Springer v. Chicago* (Ill.) 600

21. A statute making it obligatory on a court to permit a jury in eminent-domain proceedings to view the premises, on application of either party, does not exclude the common-law right of a court in other cases to permit a view in its discretion. *Id.*

## V. OPINIONS.

22. Opinions of witnesses, expert or other, are not admissible where the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men without special knowledge or training. *Graham v. Pennsylvania Co.* (Pa.) 298

23. Opinions of witnesses that a raised part of a depot platform or broad step 4 feet wide and 9 inches high is a dangerous place are not admissible, as a brief statement would convey a perfect comprehension of the place, and jurymen are capable of judging of the danger. *Id.*

24. The opinion of an expert may be given on the question whether the word in the date of a written instrument is "Jany" or "July." *Dresler v. Hard* (N. Y.) 456

25. On the question whether or not a proper distribution of samples in a city was made by an agent, a witness may testify that he made an investigation and could not find that any

distribution was being made. *Perry v. Jensen* (Pa.) 393

26. An experienced advertiser and distributor of samples is competent to testify that distribution of samples of a medicine for dyspepsia through a district telegraph company is not a proper method of distribution by an agent to whom samples are furnished, and whose contract requires him to use "his best reasonable endeavors to introduce and sell the medicine." *Id.*

27. One who has been in the advertising business more than twenty years, and has distributed pamphlets and samples, including some of a medical nature, for various business establishments, in several large cities and in different States, is competent to testify whether or not 481,000 samples of a medicine for dyspepsia was a reasonable number to be furnished to an advertising agent in one year for his distribution. So also is a witness who for several years has been manager of a chemical company which dealt in infants' food and pepsin preparations, and which, he says, has distributed many samples and at least a half million circulars throughout the United States, in different localities. *Id.*

28. Statements of a witness that a party "examined the note thoroughly" is admissible, where the issue is as to the party's knowledge of the way the note was signed. *Montgomery v. Crosthwait* (Ala.) 140

## VI. DECLARATIONS; RELEVANCY; WEIGHT.

29. Declarations of voters, made before or after election, and not as part of the *res gesta*, are not admissible in an election contest to show their disqualification. *Rucks v. Renfrow* (Ark.) 362

30. Statements of advertisers in a newspaper at the time of withdrawing their patronage, that it was because they had been visited by a committee of a typographical union and were threatened with loss of business, are admissible as part of the *res gesta* in an action to enjoin a boycott. *Casey v. Cincinnati Typographical Union No. 3* (C. C. S. D. Ohio) 193

31. A man's declarations that he is married and that a certain child is his son and heir, although not admissible to prove marriage, as part of the *res gesta*, when he never lived or cohabited with the alleged wife and never had anything to do with the son, are admissible as hearsay evidence concerning pedigree, on the question of the legitimacy of the son. *Eisenlord v. Clum* (N. Y.) 836

32. Communications to an attorney acting as the agent of both parties to a controversy are not privileged in an action between such parties. *Haley v. Eureka County Bank* (Nev.) 815

33. A conversation in the presence of an attorney is not a privileged communication in an action between the parties to the controversy. *Id.*

34. What a witness has heard as to the character of a person cannot be given in evidence on the part of the person for whom he has testified that he knows the character under inquiry, although such matters may be brought  
12 L. R. A.

out on cross-examination. *Montgomery v. Crosthwait* (Ala.) 140

35. Evidence that many well-regulated furnaces habitually employ inexperienced men for a particular service is admissible on the question of negligence in employing such men for that kind of work in a furnace. *Holland v. Tennessee Coal, I. & R. Co.* (Ala.) 283

36. Precautions after an accident, to prevent other accidents, cannot be proved for the purpose of showing that they were needed at the time of the accident, as an admission of negligence. *Shinners v. Proprietors of Locks & Canals* (Mass.) 554

37. An offer to sell property may be proved against the owner as an admission of its value at or near the time of the offer. *Springer v. Chicago* (Ill.) 609

38. Testimony of witnesses as to their offers for horses need not be admitted to show the soundness of the horses, where they have already testified fully that the horses were sound. *Hobart v. Young* (Vt.) 693

39. Testimony that a notice of dishonor was given by a witness a "day or two after he received notice," and that it was "on the 16th or 17th of April, immediately after" he received notice,—is insufficient to show that it was given in due time. *Rosson v. Carroll* (Tenn.) 727

40. A notary's testimony that he has an "impression" that he sent a notice of protest to a certain person by mail is not sufficient proof of that fact, where his certificate states merely that he handed the notices to an express agent from whom the notes had been received. *Id.*

## NOTES AND BRIEFS.

Evidence; opinion evidence, when not admissible. 293

Expert and opinion testimony as to handwriting, and weight of; qualification of experts; comparison of handwriting. 456

Of books of account of corporation. 473

Of precautions after accident. 559

Of offer to sell property; admissions of party; view of jury. 609

Presumptions of continuance. 620

Proof of oral warranty when sale is in writing. 693

Declarations as to marriage or pedigree. 833

## EXECUTION. See also LEVY AND SEIZURE.

A sheriff's deed on the sale of lands under an execution takes effect as an actual conveyance from the date of the sale, and not from the date of the execution and delivery of the deed. *Morse v. Hackensack Sav. Bank* (N. J.) 63

## EXECUTORS AND ADMINISTRATORS.

1. There can be no executor *de son tort* where the statute laws of a State on the subject of administration, taken together as forming one entire system, are wholly repugnant to and inconsistent with the common law in that respect. *Roselle v. Harmon* (Mo.) 187

3. Where a testator by his will directs the sale of his lands and the division of the proceeds among his heirs at law, the latter may dispense with the sale, and elect to take the lands in lieu of the proceeds of sale. *Morse v. Hackensack Sav. Bank* (N. J.) 63

3. The principle on which the doctrine of election rests is the identity of the interest the heirs take as heirs at law and in the proceeds of the conversion. When the testator charges his estate, real and personal, with the payment of his debts, and directs his executors to sell his real and personal estate and divide the proceeds between his two children, the latter cannot elect to take the lands as heirs at law, and by such election impair or defeat the rights of testator's creditors. *Id.*

4. A nonresident plaintiff may sue a foreign executor who has taken out ancillary letters, although the precise force and effect of the judgment in such a case is not determined. *Hopper v. Hopper* (N. Y.) 287

5. A foreign executor becomes a domestic executor liable to be sued as such, when he takes out ancillary letters. *Id.*

6. Although the common-law right of the administrator to dispose of decedent's personal property does not exist, and the terms of an order of court allowing property to be disposed of at private sale must be strictly complied with, yet an approval of the sale by the court is not necessary to pass the title if the court's order does not require a confirmation. The title passes upon the purchaser's compliance with the terms of the sale. *Citizens Street R. Co. v. Robbins* (Ind.) 498

7. A private sale, by an administrator, of personal property of the decedent upon a credit of ten years, with the purchaser's individual note as security, is void if made under an order of the court which permits a private sale but directs the taking of good and sufficient security for payment of purchase money, without naming the time of credit to be allowed, where the statute allows a credit of only one year. *Id.*

#### NOTES AND BRIEFS.

See also ASSUMPSIT.

Executors and administrators· executor *de son tort*. 187

Sale of choses in action. 498

**EXEMPTION.** See INSURANCE, 6; LEVY AND SEIZURE, 1.

**EXPECTANCY.** See CONSTITUTIONAL LAW, 2.

#### EXTRADITION.

1. The law of nations does not require the surrender of a fugitive, whether citizen or alien, to a foreign government, in the absence of a treaty stipulation requiring it. *Ex parte McCabe* (D. C. W. D. Tex.) 589

2. A citizen of the United States cannot be surrendered to Mexico as a fugitive, under the treaty with that country, which provides that "neither of the contracting parties shall be bound to deliver up its own citizens." The 12 L. R. A.

surrender is not to be made according to the will or discretion of the Executive, but only when required by the treaty. *Id.*

3. A warrant to compel a person demanded as a criminal by a foreign government to appear and submit to a preliminary examination, when issued by a county judge under U. S. Rev. Stat. § 5370, although he styles himself also an extradition agent, is not invalid because it does not recite the source of his authority to issue it. *Id.*

4. A complaint made under oath is necessary to authorize a warrant to compel a preliminary examination of a person demanded by a foreign government as a criminal. *Id.*

#### FENCES.

##### NOTES AND BRIEFS.

Fences; statutory provisions concerning; rights of adjoining owners; unlawful removal. 603

#### FINES.

Penalties imposed upon railroad corporations for violation of statutes are not excessive, if no greater than are necessary to enforce obedience to the statute, although they might appear excessive if imposed upon individuals. *Burlington, O. R. & N. R. Co. v. Dey* (Iowa) 486

#### FIRES.

Where a city is given power to make regulations for the prevention of fire, and the propriety or necessity of the methods to be pursued to accomplish that object is left to the discretion of the council, the courts will not be warranted in setting aside as improper an ordinance adopting means which the council has by its acts declared proper. *Olympia v. Mann* (Wash.) 150

#### FIXTURES.

An agreement by a life tenant that buildings erected on the land shall remain chattels and be removable by the builder is not valid as to remaindermen, so as to authorize their removal after the expiration of the life tenancy. *Demby v. Pares* (Ark.) 87

**FORFEITURE.** See LANDLORD AND TENANT, 3, 4.

#### FRAUD AND FRAUDULENT CONVEYANCES.

1. False statements as to the market price of hops, made to the president of a brewing company to induce the purchase of a car-load, do not justify its rescission, where he had said as to the statements first made that he did not believe them, and as to others that he had no means of information, and in addition made an oral condition, on giving a written order for the hops, that it should be no sale if the price was not as represented. *Lilienthal v. Suffolk Brew. Co.* (Mass.) 891

2. There may be circumstances and conditions under which the default of creditors in not requiring the execution of a power of sale in their favor may amount to laches which a court of equity will lay hold of as proof of:

fraud; but in such cases the ground of relief is fraud in knowingly permitting a power of sale to be kept outstanding as a standing menace, with intent to protect trust property from the creditors of the person ultimately entitled. *Morse v. Hackensack Sav. Bank* (N. J.) 62

## NOTES AND BRIEFS.

Fraud; false representations as to matters of opinion. 821

**GARNISHMENT.** See also **INSURANCE**, 6; **MONEY IN COURT**, 2.

Money sued for is not in the custody of the law, so as to be beyond the reach of garnishment, where both suits are in the same jurisdiction. *Smith v. Carroll* (R. I.) 801

## NOTES AND BRIEFS.

Garnishment; of life insurance fund. 878  
Of property in custody of law. 508

**GAS.** See also **CONSTITUTIONAL LAW**, 7.

## NOTES AND BRIEFS.

Gas; natural, as article of commerce. 652

**GIFT.**

1. In *dation en paiement*, delivery and possession are essential to operate a transfer so as to exclude third persons; and everything doubtful or ambiguous must be interpreted against the transferee. *Bernard v. Whitney Nat. Bank* (La.) 802

2. A valid gift of a note retained in the holder's possession is not made by a sealed instrument acknowledged and attested by witnesses, which declares that he does "hereby give" the note, and says, in a later clause, that the money is "to be given . . . when the note falls due," for specified purposes. *Gammon Theo. Sem. v. Robbins* (Ind.) 506

**GIFT ENTERPRISE.** See also **LOTTERY**.

A gift enterprise which does not involve the element of chance cannot be prohibited by the Legislature, even though it is carried on by a merchant to induce customers to buy his goods. *Long v. State* (Md.) 425

## NOTES AND BRIEFS.

Gift enterprise; as a lottery. 89

**GUARANTY.**

## NOTES AND BRIEFS.

Guaranty; transfer by assignment of commercial paper. 270

**HACKS.**

To confer upon the mayor power to revoke hackmen's licenses does not exceed the authority given to a city council "to make laws, ordinances, and regulations relative to hackney carriages." *Child v. Bemis* (R. I.) 57

**HEIRS.** See also **WILLS**, 4  
12 L. R. A.

## NOTES AND BRIEFS.

Heirs; who are; meaning of term. 721

**HIGHWAYS.** See also **ACTION OR SUIT**, 5; **ELECTRICAL USES AND APPLIANCES**, 2, 3; **EMINENT DOMAIN**, 4; **PUBLIC IMPROVEMENTS**, 7, 8; **TELEPHONES**.

1. Permission may be granted by an incorporated town, under Iowa Code, § 456, to a private person to place weighing scales in a street in front of his lots, where they will serve the public convenience and do not constitute an obstruction to travel. *Spencer v. Andrew* (Iowa) 115

2. A town is estopped from revoking permission to a person to place scales in a street in front of his lot, until the interests of the public require a revocation, where, on the faith of the permission, he has purchased scales and incurred other expenses,—such as enlarging a building with which they were to be connected,—for the purpose of preparing them for use. *Id.*

3. The use by a firm of a privilege granted to one member to place scales in a street, where it was granted with the knowledge and expectation that it was to be used by the firm, is no ground for revoking the privilege. *Id.*

4. A well in a city street, abandoned by a former owner of the land, may be fitted up and maintained for public use by the municipal authorities, without the consent of the abutting owner. *Loebtutter v. Aurora* (Ind.) 259

5. A public pump in a city street is not a nuisance to an abutting lot owner, when maintained by the city authorities. *Id.*

6. A telegraph wire across a highway, hanging so low as to cause an injury to a traveler, is a defect for which the town is liable, if it had, or ought to have had, notice thereof. *Hayes v. Hyde Park* (Mass.) 249

7. The co-operation of the act of a traveler who is not guilty of negligence or any wrongful act, with a defect in a highway, in causing an injury to another traveler, will not relieve the town from liability. *Id.*

## NOTES AND BRIEFS.

Highways; obstructions authorized. 115

Liability of town for accident upon. 249

**HOMESTEAD.**

1. Real estate held by husband and wife jointly as tenants by entireties is subject to the right of homestead exemption, under Tenn. Code, § 2985, exempting real estate belonging to the head of a family to the amount of \$1,000; and the right may be claimed by the wife after a decree of divorce by which she is given the homestead. *Shelton v. Orr* (Tenn.) 514

2. A tenant in common has no homestead right in the premises, under Tenn. Code, § 2985, exempting "a homestead or real estate in the possession of or belonging to each head of the family," and § 2986, giving each head of the family the right to elect where the "exemption shall be set apart, whether living on the same or not." *Joyce v. J. I. Case Threshing Mach. Co.* (Tenn.) 519

3. A separate building used for business

purposes, and a stable used for hotel purposes, on the same lot with a hotel which is exempt as a family homestead, are not part of the homestead. *Cass County Bank v. Weber* (Iowa) 477

4. The homestead exemption extends to the entire building used both for a family residence and a hotel, where no rooms used exclusively for hotel purposes could be used without passing through rooms occupied by the family, and the rooms used for the office and bar-room, sitting and dining room, were also in common use by the family. *Id.*

#### NOTES AND BRIEFS.

Homestead; exemption of portion of building; use of portion for business purposes; effect of renting portion; double house. 477

In estate held in common. 519

#### HUSBAND AND WIFE. See also CONTRACTS, 27.

1. A void contract by a married woman to leave to an adopted child all her property at death cannot be ratified after she becomes sole. *Austin v. Davis* (Ind.) 120

2. A marriage between a man and a woman who had a husband then living is absolutely void without a decree, under W. Va. Code 1860, chap. 109, § 1, and confers no right to alimony. *Stewart v. Vandervoort* (W. Va.) 50

3. A marriage void *in toto* at the time it is made cannot be made valid by a subsequent statute, so as to impose upon the husband the burden of alimony. *Id.*

4. Connivance of a husband in his wife's adultery is not shown, where he already suspects her to be guilty, by merely suffering her in a single instance to avail herself of an opportunity therefor which she has already arranged without his knowledge, even though he purposely refrains from warning her because he hopes to obtain evidence which will entitle him to a divorce. *Wilson v. Wilson* (Mass.) 524

5. Statutory prohibition to remarry within a certain time after divorce has no force out of the State in which the decree is granted. *Phillips v. Madrid* (Me.) 862

6. The Maine statute prohibiting the guilty party in a divorce suit to remarry applies only to divorces granted by the courts in that State. *Id.*

#### NOTES AND BRIEFS.

Husband and wife; second marriage, when void *ab initio*. 50

Effect in other States of prohibition against remarrying. 862

Tenancy by the entirety; right of husband; lease or conveyance of property. 514

Connivance as a defense to divorce suit; effect of abandonment. 524

Fraudulent transactions between. 600

#### ICE.

1. The same rights exist in ice upon a stream that exist in the waters of the stream. *Brown v. Cunningham* (Iowa) 583  
12 L. R. A.

2. Ice on an unnavigable stream which was meandered in the government survey, and the ice of which has never been transferred by the United States, may be cut and property therein acquired by any person who can get access to it without trespassing upon the lands of riparian owners. *Id.*

#### NOTES AND BRIEFS.

Ice; on river, common right to use or take; rights of riparian owner; on private waters; sale of, by parol. 583

#### INFANTS.

1. An infant's board bill while attending school is included among the necessities for which he may be compelled to pay. *Kilgore v. Rich* (Me.) 859

2. One who pays an infant's debt for necessities, at the infant's request, has a good cause of action against him for the reasonable value of such necessities. *Id.*

3. A child of tender years may be a trespasser and be subject to the consequences of his trespass. *Rodgers v. Lees* (Pa.) 216

4. A letter by the grantee in a deed, soon after coming of age, demanding, without qualification or condition, the repayment of money which he had paid, on the sole ground that he was a minor at the time of the purchase, although claiming that he was morally justified, under the circumstances, in repudiating the trade,—is a sufficient disaffirmance of the purchase. *McCarty v. Woodstock Iron Co.* (Ala.) 136

5. Disaffirmance of a deed by the grantee on coming of age, because of his infancy at the time of the purchase, does not, *proprio vigore*, divest him of the legal title and reinvest it in the grantor. *Id.*

6. Disaffirmance of a deed by the grantee on coming of age, because of his infancy when it was made, is conclusive; and he cannot thereafter affirm it without the other party's consent, although no other action has been taken by either party to restore the other to his original condition by transfer of the title or consideration. *Id.*

#### NOTES AND BRIEFS.

Infants; what necessary to disaffirm contract. 136

Liability for necessities; classification of contracts; what are necessities. 859

#### INJUNCTION. See also ELECTRICAL USES AND APPLIANCES, 1; TRIAL, 1.

1. An injunction may be issued to restrain the publication and circulation of posters, circulars, etc., for carrying out a conspiracy to boycott the complainant. *Casey v. Cincinnati Typographical Union No. 3* (C. C. S. D. Ohio) 193

2. Upon the hearing of a motion for a preliminary injunction, the rules of evidence are applied less strictly than upon the final hearing of the cause; and consequently evidence that would not be competent in support of an application for a perpetual injunction may be admitted. *Id.*



3. The cutting down of trees on a boundary line by one of the common owners may be enjoined at the suit of the other. *Musch v. Burkhardt* (Iowa) 484

4. That one owner has cut down and appropriated part of the trees on a boundary line will not defeat his right by injunction to prevent the other owner from cutting down the remainder. *Id.*

5. Courts of equity should proceed with great caution in abating or restraining a factory as a nuisance by injunction, and not enjoin unless the fact of nuisance is made in some way to appear clearly beyond all ground of fair questioning. *Powell v. Bentley & G. Furniture Co.* (W. Va.) 58

NOTES AND BRIEFS.

Injunction; against cotenant; in partition suit; as to water right. 484

INNKEEPERS.

An innkeeper is not liable for the theft of a valise left by a transient guest who has paid his bill and gone away, although it was checked for him by a porter, where the latter had no authority to check it, and no other person at the hotel had any notice that the valise was left. *Glenn v. Jackson* (Ala.) 882

NOTES AND BRIEFS.

Innkeeper; responsibility as bailee; for what property; for property lost or stolen; when not liable; relation of guest and host must exist; who is guest; mere depositary. 882

INSANE PERSONS. See also DEFINITIONS, 2, 3.

1. The power of a court to restore to capacity, under Cal. Code Civ. Proc. § 1766, persons adjudged insane or incompetent, is applicable only to incompetent persons for whom guardians have been appointed under § 1764. *Kellogg v. Cochran* (Cal.) 104

2. A person committed to an insane asylum is restored to his legal capacity to sue, by his discharge from the asylum by the resident physician, in accordance with the California statutes (Cal. Pol. Code, § 2197; Cal. Act March 9, 1885; Dear Pol. Code, p. 850). *Id.*

NOTES AND BRIEFS.

Insane persons; conclusiveness of adjudication as to insanity. 104

INSOLVENCY.

1. A confession of judgment, made in contemplation of a general assignment for creditors which immediately follows, must be treated as part of the assignment in respect to prohibited preferences. *Berger v. Varrolmann* (N. Y.) 808

2. The lack of the knowledge of a creditor on receiving a confession of judgment, that his debtor intends immediately to make a general assignment, does not exempt the judgment from the provisions of the New York statute in respect to preferences in such assignments. *Id.*

13 L. R. A.

NOTES AND BRIEFS.

Insolvency; preferences in assignments; general or partial assignment; schedule; preference by judgment. 806

INSURANCE. See also CONTRACTS, 1.

1. An incorporated association for the purpose of obtaining employment for its members while living, and to render pecuniary assistance in a stated amount to the families of deceased members by assessments upon the survivors, is a life insurance company within the meaning of Minn. Gen. Stat. 1878, chap. 34, § 368. *Brown v. Balfour* (Minn.) 873

2. An association engaging in the business of life insurance must be treated to that extent as a mutual benefit association. *Brace v. Chartrand* (Colo.) 209

3. A policy of life insurance will be construed, so far as possible, as a will. *Id.*

4. Life insurance payable to the wife of the insured upon his death, and in case of her death to his children, is vested in her if she survives him, and becomes a part of her estate although she dies before obtaining the money; and her estate will not go to his children. *Id.*

5. A claim that deafness is a bodily infirmity which is covered by a representation by an applicant for accident insurance that he is free from bodily infirmities is deemed to have been waived where the insurer's agent, by personal observation, knew or had abundant opportunity to know the extent of applicant's deafness, before the application was signed, notwithstanding a provision in the policy that the company's agents shall have no power to waive its conditions. *Follett v. United States Mut. Acci. Assn.* (N. C.) 815

6. No part of the fund set apart or appropriated in accordance with the rules, regulations, and by-laws of either of the societies or associations enumerated in Minn. Gen. Stat. 1878, chap. 34, § 368, or by any society or association similar thereto (§ 369), to be paid over to the family of a deceased member (unless the amount exceeds the sum of \$5,000), can be seized or appropriated by legal process to satisfy a debt due from a member of the family, or from the society or organization itself. *Brown v. Balfour* (Minn.) 873

7. An option of the insurer to refund premiums paid, with interest, or pay the amount of the policy on the life of one who died by his own hand while insane, according to the equities of the case, is not waived by failure to make it within sixty days allowed after proofs of loss for payment, if it is made within a reasonable time. *Salentine v. Mutual Ben. L. Ins. Co.* (Wis.) 690

NOTES AND BRIEFS.

Insurance; certificates in benefit society; distinction between certificate and life policy. 209

Effect of misrepresentations. 316

Wager policy on life. 409

INTEREST. See also CONFLICT OF LAWS, 2, 3.

Interest may be awarded or withheld in

the discretion of the jury in actions for damages for negligence. *Ell v. Northern P. R. Co.* (N. D.) 97

## INTOXICATING LIQUORS.

1. One who furnishes drinks to members of a club as tenants in common, from intoxicating liquors which they have given him to hold for them, on payment to him of the cost price, which he uses to replenish the stock, makes a sale of intoxicating liquors, within the meaning of a statute requiring a license for such sales. *State v. Neis* (N. C.) 419

2. Written authority required by statute from the parent or guardian for selling or furnishing intoxicating liquors to a minor must be special for each occasion. A general permit or license for the minor to drink beer and whiskey in a specified bar-room, without limitation as to time or quantity, is void and will not justify even one sale. *Gill v. State* (Ga.) 433

### NOTES AND BRIEFS.

Intoxicating liquors; sale by social club. 419

Sale to minor. 433

## JOINT TENANTS AND TENANTS IN COMMON. See also HOMESTEAD, 2; TREES.

A tenant in common may be liable for conversion in wrenching and carrying away machinery from a mill, against his cotenant's protest. *Waller v. Bowling* (N. C.) 261

### NOTES AND BRIEFS.

Joint tenants and tenants in common; liability of tenant in common to action of trover; exclusive possession of property; destruction, loss, or conversion of property; refusal to permit division or severance; sale of property by one of tenants; misuse of property; permanently changing form; trover against cotenant. 261

Right to injunction against each other; fiduciary relations. 434

## JUDGMENT. See also EVIDENCE, 11, 16; NAME.

1. In judgment by confession, a statement of the facts out of which the confessed indebtedness arose is sufficient if it contains enough to enable creditors and others to investigate the bona fides of the judgment. *Atwater v. Manchester Sav. Bank* (Minn.) 741

2. The order of commitment of a person to an insane asylum is not conclusive evidence against him, in an action for the malicious prosecution of him as an insane person. *Kellogg v. Cochran* (Cal.) 104

3. A judgment for a penalty, with an assessment of damages, so far as they have accrued, leaving future damages to be recovered by after process of *scire facias*, is required in an action on a penal bond by Me. Rev. Stat. chap. 82, § 82, where the liability of the party in the bond is a continuing liability, as in the case of a bond given in bastardy proceedings; but such a judgment is not required by that Act in an 12 L. R. A.

action on a bond conditioned to pay a single sum on a day certain, because in such case there can be but one breach and one assessment. *Corson v. Dunlap* (Me.) 90

4. A motion to vacate what purports to be a judgment, but which is a nullity because of lack of jurisdiction, may be granted even after the term in which the entry is made. *American Freshhold Land & Mortg. Co. v. Thomas* (C. C. S. D. Ga.) 681

5. A ruling on a demurrer does not bind the court to follow it in deciding whether or not the facts proved as alleged in the petition demurred to entitle the plaintiff to recover. *Brown v. Cunningham* (Iowa) 583

### NOTES AND BRIEFS.

Judgment; notice of entry. 58

Constitutional provision as to faith and credit; presumption of validity; jurisdictional facts. 574

By confession; statement in. 741, 810

Validity of judgment by confession. 810

## JUDICIAL NOTICE. See EVIDENCE, I.

## LANDLORD AND TENANT.

1. An entry under a parol agreement to lease a room for a year, provided the lessor obtains a renewal of the ground lease, does not create a tenancy from year to year, but only a tenancy at will, although the ground lease is obtained, where no written lease of the room is accepted or tendered. *Childers v. Lee* (N. M.) 67

2. Permitting a stairway carpet with holes in it to remain on the stairs of a tenement-house, with notice of its condition, renders the owner liable for injuries to a tenant from a fall caused by catching her foot in one of the holes. *Pell v. Reinhart* (N. Y.) 843

3. The election of a lessor who is in the actual possession of the premises, to forfeit an oil and gas lease for default of the lessee, may be regarded as a constructive entry under his title. *Ray v. Western Pennsylvania Natural Gas Co.* (Pa.) 290

4. A lessee cannot set up his own default as a defense to an action for money due by him on the lease, on the ground of a forfeiture created by such default. *Id.*

5. A landlord's lien on crops for rent, under Ill. Rev. Stat. chap. 80, can give him no right to maintain a personal action for damages against a bona fide purchaser from the tenant, although he may follow the goods and distrain for his rent. *Finney v. Harding* (Ill.) 605

6. Title to the hay, oats, and straw, is not reserved to the owner of a farm as against attaching creditors of a tenant, under a lease by which the tenant agrees to raise enough stuff to feed the stock of the place, or, if he fails to do so, buy what may be necessary. *Coleville v. Miles* (N. Y.) 848

### NOTES AND BRIEFS.

Landlord and tenant; liens of. 605

Rights of landlord as against attaching creditors. 848

**LEASE.** See LANDLORD AND TENANT; MINES, NOTES AND BRIEFS.

### LEVY AND SEIZURE.

1. The words "teamster or other laborer" who "habitually earns his living" with a horse or team, in the Iowa Code, which makes such horse or team exempt, include one whose business is to sell oil which he delivers, for the most part, by a tank wagon usually driven by his boy, although a few sales are made and the oil delivered at a room where it is stored. *Consolidated Tank-Line Co. v. Hunt* (Iowa) 476

2. The residuary interest or estate of the grantor in land conveyed in trust to pay certain charges and debts is subject to the lien of an attachment or judgment and to sale on execution. *Atwater v. Manchester Sav. Bank* (Minn.) 741

**LICENSE.** See also HACKS; HIGHWAYS, 3, 3.

1. A vested right cannot be acquired in a license granted under an ordinance that gives or reserves the power to revoke it. *Child v. Bemus* (R. I.) 57

2. The power to revoke licenses in his discretion, conferred on the mayor by the common council of a city, is not unreasonable or oppressive, though exercised without his giving notice to the licensee. *Id.*

**LIENS.** See also LANDLORD AND TENANT, 5.

1. A mechanics' lien on a public corporation is not authorized by Pa. Act April 7, 1870, providing for the sale of the property and franchises of a corporation on execution. *Guest v. Lower Merion Water Co.* (Pa.) 324

2. A water company is a public corporation exempt from mechanics' liens, where it is bound to furnish water at reasonable rates and after twenty years to transfer its works to a municipality at 10 per cent above cost less dividends received, if required to do so, and which is protected from competition until it is able to declare an 8 per cent dividend. *Id.*

3. A laborer or materialman is entitled to a lien against the property paramount to the vendor's lien, where a vendee of lands, under a contract of sale containing a stipulation that he shall construct a building upon the premises, erects a building thereon, but the labor performed and material furnished are not fully paid for. *Bohn Mfg. Co. v. Kountze* (Neb.) 88

### NOTES AND BRIEFS.

Liens; of mechanics; priority; rule in various States. 33

**LIFE TENANT.** See also FIXTURES.

### NOTES AND BRIEFS.

Life tenants; agreement as to removal of buildings. 87

### LIMITATION OF ACTIONS.

1. The Statute of Limitations begins to run at the date of payment, against the right to re-  
12 L. R. A.

cover back money paid for lands at a tax sale which is void because resulting from a double assessment, in the absence of fraud or concealment. *Clapp v. Pinegrove Twp.* (Pa.) 618

2. An application of a payment to a debt not already barred will interrupt the running of the statute and extend the time as to the balance. *Blake v. Sawyer* (Me.) 712

3. An application of a payment by a creditor to a debt already barred by statute will not remove the bar as to the balance of the debt. *Id.*

**LOSS.** See VENDOR AND PURCHASER, 1.

**LOTTERY.** See also GIFT ENTERPRISE.

A sale of packages of coffee, on each of which is a slip of paper to be torn off, having on the under side the name of some article of crockery that the buyer of the package is entitled to, is a violation of Md. Code Gen. Pub. Law, art. 27, § 185, prohibiting gift enterprises. *Long v. State* (Md.) 89

### NOTES AND BRIEFS.

Lottery; by gift enterprise. 89  
What constitutes. 426

**MALICIOUS PROSECUTION.** See also ACTION OR SUIT, 4.

The finding of an examining magistrate that an offense has been committed, and that there "is probable cause to believe the defendant guilty thereof," is only prima facie evidence of probable cause, in an action for malicious prosecution brought by such defendant against the prosecuting witness. *Ross v. Hizon* (Kan.) 761

### NOTES AND BRIEFS.

Malicious prosecution; probable cause and termination of action. 288  
Defense of reasonable and probable cause. 760

### MANDAMUS.

1. Mandamus is the proper remedy to compel a judge to act in proceedings, where he has improperly refused on the ground of supposed disqualification. *Ex parte Alabama State Bar Assn.* (Ala.) 184

2. A writ of mandamus is properly directed to a corporation in its corporate name. *State, Grady, v. Chicago, M. & N. R. Co.* (Wis.) 180

3. Mandamus is the proper remedy to compel a railroad company to perform its statutory duty to make a farm crossing. *Id.*

4. Actions for penalties for the refusal of a railroad company to make a farm crossing do not constitute such an adequate remedy at law as to bar a writ of mandamus to compel the construction of a crossing. *Id.*

### NOTES AND BRIEFS.

Mandamus; to compel performance of corporate duties. 180

**MARK.** See DEED, 2.

**MARSHALING.**

The principle that a person having two funds to satisfy his demand should not by his election disappoint a party having but one fund applies to a mortgagee omitted by mistake from condemnation proceedings, and who has a right either to foreclose upon the land or take the money paid for condemnation; and while the money is in the hands of the court he may be compelled to accept it before resorting to the land, where his right is saved to contest the sufficiency of the compensation assessed in the condemnation proceedings to which he was not a party. *Calumet River R. Co. v. Brown* (Ill.) 84

**MASTER AND SERVANT.** See also CARRIERS, 7, 8; SET-OFF AND COUNTERCLAIM.

1. If work may be well done by unskilled and inexperienced persons, a master is not negligent in respect to his duty to other employes by employing them. *Holland v. Tennessee Coal, I. & R. Co.* (Ala.) 283

2. The danger of flying molten iron when a boiler of iron is punctured should be pointed out to employes working in a trench into which the iron would flow if a wall of earth was punctured, and who would be instantly enveloped by the flying metal if it should be thrown out. *Id.*

3. A master need not instruct his employes as to an open and unobscured danger from a boiler of iron so situated that the melted iron would flow into the trench where the men are working, if a wall of earth between the trench and the boiler was broken through. *Id.*

4. A failure to make proper rules or establish a proper method for the conduct of his business will make the master liable for injuries to his servant, caused by improper or negligent conduct of the work by coemployes, which the observation of a proper and sufficient rule would have prevented. *Ford v. Lake Shore & M. S. R. Co.* (N. Y.) 454

5. A general rule that freight is to be safely loaded so that it cannot fall off the cars is not sufficient as a rule for loading timber above the sides of the car, so as to relieve the railroad company from liability for injury to a servant by the fall of timber from a gondola car on which it was piled above the sides without stakes to hold it, although stakes were furnished by the company to be used in the discretion of its servants. *Id.*

6. An employe is not bound by a rule that the regular compensation for services covers all risks, and that remaining in the service will be considered an acceptance of such condition of employment, where he has not expressly agreed to the rule. *Georgia P. R. Co. v. Dooly* (Ga.) 343

7. A brakeman assumes the risk on account of a highway bridge over the track, which is so low that he cannot pass under it while standing erect on top of a car, where he knows the facts as to the bridge and continues in the employment. *Williamson v. Newport News & M. V. Co.* (W. Va.) 297

8. A servant is not justified in assuming 12 L. R. A.

that a car furnished his employer by a railroad company is in good repair and supplied with proper brakes, if he knows that other cars so furnished have many of them been defective. *Roddy v. Missouri P. R. Co.* (Mo.) 748

9. A railroad company which has contracted to furnish cars for stone at a quarry is not liable to a servant of the other party to the contract for injuries resulting from any breach of duty arising purely under the contract; but if it was charged with the duty of selecting the cars, it is liable to such servant for injuries resulting from a failure to use ordinary care to provide cars which are reasonably safe. *Id.*

10. Running a freight train without a cow-catcher attached to the engine is negligence which will entitle an employe to recover for injuries occasioned by derailment of the train in running over a cow. *Tennessee Coal, I. & R. Co. v. Kyle* (Ala.) 103

11. An employe struck by brick from a falling wall, while standing on a platform helping to put ice in a brick building, in consequence of which he was knocked or fell to the ground, is not guilty of contributory negligence which will defeat a recovery for his injuries because, in violation of his orders, he had left the part of the platform which had a railing and gone to a part which had none, and on which he had been warned not to stand on account of the danger of falling, where he had no warning of any danger from the wall, and his injuries, though chiefly caused by his fall, would have been greater if he had not fallen out of the way of the brick. *Smithwick v. Hall & U. Co.* (Conn.) 279

12. The proximate cause of an injury sustained by an employe in walking to find shelter, because of the employer's failure of duty to furnish him transportation from the place to which he had been sent to repair a wrecked car,—is the neglect of the employer. *Schumaker v. St. Paul & D. R. Co.* (Minn.) 257

13. Failure of duty to furnish an employe who has been sent out to repair a wrecked car, transportation to some place where he can procure food and shelter, for which he is compelled to walk 9 miles in the night, in cold and dangerous weather, renders the railroad company liable for injuries thereby sustained. *Id.*

14. The negligence of the foreman of a gang in failing to block a pile which was shoved against a servant, injuring him, because it was not blocked, is the negligence of a fellow servant, although the foreman had authority to employ and discharge him and had control of him in doing the work. *Ell v. Northern P. R. Co.* (N. D.) 97

15. Whether a negligent servant is a fellow servant of an employe who is injured by his negligence depends, not on their relative rank, but on the character of the work the negligence with respect to which resulted in the injury. *Id.*

16. The negligence of another servant engaged in the same general business with the injured servant is the negligence of a fellow servant, whatever position the former occupies with respect to the latter, as to all acts which pertain to the duties of a mere servant as con-

tradistinguished from the duties of the master to his employes. *Id.*

17. Street-railroad companies are not liable for willful and tortious acts of their servants committed outside of the scope of their employment. *Lafitte v. New Orleans City & L. R. Co. (La.)* 387

#### NOTES AND BRIEFS.

Master and servant; liability of master for negligence of co-servant acting under authority. 97

Care for safety of servant. 257, 343

Assumption of risk. 232, 297, 342

Sufficiency of rule for servants. 454

#### MAXIMS.

1. Aqua carrit et debet currere ut currere solebat. *Brown v. Cunningham (Iowa)* 583

2. Damnum absque injuria. *Columbus & H. O. & I. Co. v. Tucker (Ohio)* 577

3. Nova constitutio futuris formam debet imponere non præteritis. *Stewart v. Vanderbilt (W. Va.)* 50

4. Qui facit per alium facit per se. *Devereux v. McMahon (N. C.)* 205

5. Sic utere tuo ut alienum non lædas. *Cincinnati Inclined Plane R. Co. v. City & S. Teleg. Assn. (Ohio)* 584; *Columbus & H. O. & I. Co. v. Tucker (Ohio)* 577

#### MECHANICS' LIENS. See LIENS.

#### MINES. See also NUISANCES, 3.

1. Lessees having a right merely to quarry stone on the premises, which is a mere incorporeal hereditament, are under no implied obligation to protect the premises from trespassers, and are therefore not entitled, on that ground, to recover as owners for the conversion of the stone by trespassers. *Baker v. Hart (N. Y.)* 60

2. A lease giving the sole and exclusive right to quarry stone on certain lands for a term of years does not transfer the land, or make the lessees owners of any stone which they do not actually quarry out and sever from the land, or entitle them to recover as owners for the conversion of stone quarried and taken away by trespassers, although they are entitled to the damages sustained by invasion of their exclusive right. *Id.*

#### NOTES AND BRIEFS.

Mines; right as to quarrying and cutting granite. 60

Leases of oil lands; covenants in. 290

#### MISTAKE. See also ASSUMPTION, 2.

A mutual mistake of covenantor and covenantee in supposing that land staked and pointed out to the grantee all belonged to the grantor, while in fact it included a strip belonging to an adjoining owner whose land was made a boundary by the description of the premises in the deed, entitles the grantee to have the deed reformed so as to include such strip, and then to damages for breach of the 12 L. R. A.

covenant of warranty and seisin for failure of title to such strip. *Butler v. Burnes (Conn.)* 278

#### MONEY.

A reservation of the ground rent in "Spanish milled silver dollars," without specifying their weight or fineness, at a time when they were legal tender by Act of Congress, is presumed to be for the benefit of the owner of the rent; and a tender of such dollars for the rent is good, even after Congress has demonetized them and Spain has ceased to coin them and provided for their withdrawal, substituting a new coinage, the use of which is obligatory. *Johnson v. Ash (Pa.)* 210

#### NOTES AND BRIEFS.

Money; what is valid tender. 210

#### MONEY IN COURT.

1. Money in the hands of a county treasurer for a person entitled to the compensation paid in condemnation proceedings may be withheld by injunction from the owner of the premises, where a mortgagee has been omitted by mistake from the condemnation proceedings; and a decree may be made for the application thereof upon the mortgage, saving the mortgagee's right to contest the sufficiency of the amount. *Calumet River R. Co. v. Brown (Ill.)* 84

2. A distributee's share of money in the custody of a clerk of court after final decree and order of distribution, if nothing remains to be done except to pay over the money, is a "debt" of record and subject to garnishment by a creditor of the distributee, although money in custody of the court cannot, as a general rule, be reached by garnishment. *Dunsmoor v. Furstenfeldt (Cal.)* 508

#### MONOPOLY. See CONTRACTS, 18.

#### MORTGAGE. See also CONTRACTS, 27; CORPORATIONS, 2, 3.

1. A mortgage may be valid without a note or bond, although it purports to secure and substantially describes one. *Lee v. Fletcher (Minn.)* 171

2. A mortgage is not invalid as to the amount of the debt actually due, in the absence of fraud, because it is made, without the mortgagor's knowledge, for more than the amount of the debt. *Id.*

3. Delivery of a mortgage by the mortgagor, for record at his own expense, a few hours before he killed himself, may constitute a good delivery to the mortgagee, although the latter had no knowledge of the instrument until after the mortgagor's death. *Id.*

4. An attaching creditor who has not yet obtained judgment has a lien on the real estate attached, within the meaning of Minn. Gen. Stat. 1878, chap. 66, § 823, and chap. 81, § 16, relating to the redemption of real estate. *Atwater v. Manchester Sav. Bank (Minn.)* 741

5. Confession of judgment to enable an attorney to redeem land from a mortgage and thereby secure compensation for his services

is not a fraud on purchasers at the mortgage sale. *Atwater v. Manchester Sav. Bank* (Minn.) 741

#### NOTES AND BRIEFS.

Mortgage; sufficiency of description of premises. 177

#### MOTION.

No notice need be given of a motion by an *amicus curia* to dismiss an action as fictitious. *Haley v. Bureka County Bank* (Nev.) 815

**MUNICIPAL CORPORATIONS.** See also ACTION OR SUIT, 5; BOUNDARIES; BUILDINGS; FIRES; LICENSE; QUARANTINE.

1. A court should not set aside a municipal ordinance for unreasonableness, unless it is manifestly so on its face, or is based on fraud, or was passed in wanton disregard of private rights, or exceeded the power of the council. *Olympia v. Mann* (Wash.) 150

2. Negligence in blasting for the construction of a schoolhouse, the work being purely for the benefit of the public, cannot create any liability against a city unless by force of some statute. *Howard v. Worcester* (Mass.) 160

3. Only that part of a bridge across a navigable river which is above high-water mark can be taxed by a municipal corporation in Arkansas, although one half of the bridge is within the county in which the municipality is situated. *Pt. Smith & V. B. Bridge Co. v. Hawkins* (Ark.) 487

4. A change in a matter of detail—such as in the heating of a public building—may be made without filing plans and specifications and advertising for proposals as required by statute in letting the original contract for the building. *Gibson County Comrs. v. Cincinnati Steam Heating Co.* (Ind.) 503

#### NOTES AND BRIEFS.

Municipal corporations; power to prescribe fire limits and restrict erection of wooden buildings. 150

Liability of, for negligence of agent. 160

#### NAME.

The record of a judgment against Daniel Murphy is not notice of the judgment to one who takes a conveyance of lands from the judgment debtor, whose name appeared in the title deeds as Daniel J. Murphy. *Crouse v. Murphy* (Pa.) 58

**NEGLIGENCE.** See also CARRIERS, 4, 5; EVIDENCE, 8; MASTER AND SERVANT, 9; MUNICIPAL CORPORATIONS, 3; PROXIMATE CAUSE.

1. The negligence of a common carrier cannot be imputed to a passenger, so as to defeat his right to recover against a third person for negligence. *Bunting v. Hogsett* (Pa.) 268

2. It is the duty of one who knows that his office sign fastened over a sidewalk has been removed from its fastenings by workmen of an electric-light company and replaced by them, to see that the fastenings are safely re-  
12 L. R. A.

stored; and he is liable for failure to do so, if anyone is injured by its fall. *St. Louis, L. M. & S. R. Co. v. Hopkins* (Ark.) 189

3. A contractor, after completing and delivering possession of a building and its acceptance by the owner, is not liable to a stranger to the contract for injuries resulting from defects in the construction of the building. *Curtin v. Somerset* (Pa.) 323

4. A car with defective brakes is not such an imminently dangerous instrument as to make the owner liable, for the simple act of leaving it upon the track, to one who is injured by it, if he has no contractual or other relation to the owner. *Roddy v. Missouri P. R. Co.* (Mo.) 746

5. A millowner is not liable for injury to a boy who was a trespasser, by a fall from a ball and chain used for hoisting material, where the boy got upon it while it was in motion produced in some way, only a moment after it had been stopped and hung up out of reach, and not left carelessly dangling in condition to move. *Rodgers v. Lees* (Pa.) 216

6. A boy six or seven years old, who gets upon a ball attached to a chain used as a hoisting apparatus for a mill, while it is in motion, for the express purpose of riding up on it, although warned by a companion not to do it, is chargeable with the consequences of his recklessness, and no recovery can be had for his death by falling. *Id.*

7. An act or omission that merely increases or adds to the extent of a loss or injury will not have the effect of contributory negligence to defeat a recovery, though it will affect the amount of damages. *Smithwick v. Hall & U. Co.* (Conn.) 279

8. A negligent act or omission, to constitute contributory negligence, must operate as a proximate cause of the injury, or one of the proximate causes, and not merely as a condition. *Id.*

#### NOTES AND BRIEFS.

Negligence; liability for injuries caused by materials falling into street. 189

Contributory; of infant. 216

Contributory, as a defense; proximate cause; voluntary assumption of peril; concurrent or co-operating causes; intervening agency. 279

Duty as essential element of. 323

Doctrine of privity of contract as affecting liability. 746

#### NOTICE.

A clerk's knowledge of his own wrong in forging checks and fabricating false papers to conceal his crime cannot be imputed to his principal. *Shipman v. Bank of the State of New York* (N. Y.) 791

#### NOTES AND BRIEFS.

Notice; constructive; as to overdue paper. 41

By entry of judgment. 53

**NUISANCES.** See also HIGHWAYS, 5; INTERSECTION, 5.

1. The standard as to the effect of an al-

leged nuisance must be the man of normal nervous sensibility and ordinary mode of living. *Powell v. Bentley & G. Furniture Co.* (W. Va.) 58

2. The noise of a factory, which materially interferes with and impairs the ordinary physical comfort of human existence, may be treated as a nuisance. *Id.*

3. Deposits of coal slack, dirt, and refuse, by a mining company upon its own lands, in a place from which they are washed down, polluting a stream and injuring the lands of other persons, render the company liable for the damages, if the deposits were made intentionally and the result might have been anticipated by persons of ordinary intelligence and prudence, although they were made without malice and upon the only feasible place or places in which the company could make them and carry on its business of mining coal. *Columbus & H. C. & I. Co. v. Tucker* (Ohio) 577

## NOTES AND BRIEFS.

Nuisance; of noise.	58
What constitutes in highway.	259
By pollution of stream.	577
Injunction against.	758

## OFFICERS.

1. A citizen of the State is not ineligible to hold office in the county of his residence, because he moved there so short a time before election that he cannot vote, where neither the Constitution nor statutes provide that a county officer must be a voter in the county. *Steusoff v. State, Lacour* (Tex.) 864

3. A mere intruder who, without color of authority, simply assumes to act as an officer, is not an officer *de facto*, where the public know or ought to know that he is an usurper; and his acts are absolutely void for all purposes. *State, Van Amringe, v. Taylor* (N. C.) 202

## NOTES AND BRIEFS.

Officers; <i>de facto</i> , who are.	202
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**OIL.** See LANDLORD AND TENANT, 3; MINES, NOTES AND BRIEFS.

**OPINIONS.** See EVIDENCE, V.

**PARLIAMENTARY LAW.** See CORPORATIONS, 10.

**PARTNERSHIP.** See also CORPORATIONS, 19.

1. Money loaned to a surviving partner for the express purpose of paying the debts of the firm, and so used, creates a valid claim in equity against the assets of the firm, and may be treated as such in a subsequent assignment for creditors of the firm, although the firm was in fact insolvent at the time of the loan, where this fact was not known either by the lender or the survivor. *Durant v. Pierson* (N. Y.) 146

2. Individual creditors of one partner have the exclusive right to the satisfaction of their debts out of his separate property, in the same 12 L. R. A.

way that partnership creditors have the right to payment from the firm property; and until such primary claims are satisfied in either case, neither class of creditors is entitled to any share of the fund thus primarily devoted to the other class of debts. *Hundley v. Farris* (Mo.) 254

## NOTES AND BRIEFS.

Partnership; power of surviving partner; liability of firm assets for individual debt.	146
Rights of firm or individual creditors.	255

## PATENTS.

1. A new result produced by a combination of old elements must be due to their co-operative action; they must so act that each qualifies every other. If they act independently, or if one acts independently of the others, it is an aggregation, and not a patentable combination. *National Progress Bunching-Mach. Co. v. John R. Williams Co.* (C. C. S. D. N. Y.) 107

2. A combination, to be patentable, must not only be new, but it must produce a new result, or an old result in a better form. *Id.*

3. A patent for a cigar bunching-machine which consists of a combination of old elements, one of which is a "bunch receiver" or receptacle which performs no function except to hold the bunch after it is finished, instead of letting it fall to the floor or into a box or into the hand of the operator, is invalid because there is only an aggregation of the parts, and not a combination, the function of the other parts being entirely independent of the bunch receiver. *Id.*

4. An unusually specific description of the parts in a claim for a combination of elements all of which are old, where the patent is only for an improvement upon prior machines, cannot be broadened by construction so as to cover the use of a combination which leaves out some of the elements described. *Id.*

## NOTES AND BRIEFS.

Patent; for combination.	107
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**PAYMENT.** See also BILLS AND NOTES, 16.

A promissory note given by the trustees and officers of a church, and a suit thereon prosecuted to judgment against the makers, will not necessarily extinguish a debt of the church for which it was given. The question of fact whether it was given in payment, or as collateral only, remains open. *Lyons v. Planters Loan & Sav. Bank* (Ga.) 155

## NOTES AND BRIEFS.

Payment; application by creditor.	713
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## PEDDLER.

1. A person selling and delivering goods from house to house, being included in the description of a "peddler," in a legislative Act, is not taken out of it by the fact that he is paid only by a salary. *Re Wilson* (D. C.) 624

2. A peddler, within a legislative description which includes those who sell and deliver wares from house to house, need not be per-

sonally interested in the sales, but may work on a salary. *Re Wilson* (D. C.) 624

**PENALTY.** See COSTS AND FEES, 2; FINES; USURY.

**PERPETUITIES.** See also CHARITABLE USES, 4.

A gift over 'is not affected by the rule against perpetuities, where the primary gift fails at once and as matter of law on the face of a will. *Bullard v. Shirley* (Mass.) 110

## PLEADING.

1. The omission of a prayer for process is amendable, and is waived by appearance and pleading. *Lyons v. Planters Loan & Sav. Bank* (Ga.) 155

2. Where the material fact in controversy is only the existence of a debt, the judge may decree the appropriate equitable relief under the allegations of the pleadings and the admissions of the answer, upon a verdict of the jury finding in favor of the plaintiff, so much for principal and so much for interest. *Id.*

3. Demurring generally to the plaintiff's petition is pleading to the merits. After appearance at the first term, and demurring generally at a subsequent term, it is too late to raise the question of service, by motion or otherwise. *Id.*

4. In a suit by a vendor for a rescission of a contract for the sale of real estate, on account of a failure to pay the purchase money, the complaint must allege that he has tendered to the vendee a valid deed conveying to him all the land according to the terms of the agreement, and demanded performance on the part of the vendee. *Frink v. Thomas* (Or.) 239

5. A plea *puis darrein continuance* is sufficient to set up a defense that defendant has been garnished in another suit as trustee of the plaintiff. *Smith v. Carroll* (R. I.) 801

6. Allegations of a petition for an injunction, that the right and liberty of contracting with reference to its business is denied to the petitioner, and that its property is therefore taken from it without its consent, and that it is compelled to enter into involuntary, unreasonable, and unprofitable contracts,—do not amount to allegations of facts, but to mere statements of conclusions, and are not, therefore, admitted by a motion to dissolve the injunction. *Burlington, C. R. & N. R. Co. v. Dey* (Iowa) 486

7. Waiver as a defense for nonperformance of a contract must be pleaded. *Freeland v. Rits* (Mass.) 561

## NOTES AND BRIEFS.

Pleading; plea *puis darrein continuance*. 801

## PLEDGE AND COLLATERAL SECURITY.

1. Collateral security given by the maker of a note "for the payment of this note or any of my liabilities, . . . due or to become due," gives an indorser of such note no right to a preference in the application of the proceeds of such security to such note as against other notes not 12 L. R. A.

indorsed by him. *Fall River Nat. Bank v. Slade* (Mass.) 181

2. The rights of an indorser as to the application of collateral security given by the maker to the holder of a note are to be determined by the terms of the pledge as they exist at the time of the sale of the security, and are not affected by pledges formerly made to secure different notes, in a series of renewals of which the present note is the last. *Id.*

## NOTES AND BRIEFS.

Pledge; right of surety to control. 131

**POLICE POWER.** See CONSTITUTIONAL LAW, 7.

## POSSESSION.

### NOTES AND BRIEFS.

Possession; writ of. 81

**POWER.** See also FRAUD AND FRAUDULENT CONVEYANCES, 2.

No limitation of time is imposed upon a power in the nature of a trust, not limited in terms, unless the rule against perpetuities is involved, or the power is controlled by an inherent quality in the nature of the trust or in the object for which the power was granted. *Morse v. Hackensack Sav. Bank* (N. J.) 69

**PRESUMPTIONS.** See EVIDENCE, II.

**PRINCIPAL AND AGENT.** See also ASSUMPSIT, 1; BROKERS.

A person who contracts as agent, having in fact no authority to do so, is personally responsible to those who contract with him in ignorance of his want of authority, though he acts in good faith, believing that he is invested with such authority. *Farmers Co-Op. T. Co. v. Floyd* (Ohio) 346

## NOTES AND BRIEFS.

Principal and agent; agent's responsibility on contracts. 346

Agent acting in double capacity; his purchase of the subject of agency. 395

## PRINCIPAL AND SURETY.

### NOTES AND BRIEFS.

Principal and surety; right of surety to control application of collaterals. 131

## PRIVATE ROADS.

A fence may be maintained along a statutory private road across the end of the farm of another person, when necessary to the owner's reasonable enjoyment of the road,—as, for instance, where its use is for driving stock through it,—especially where the owner of the soil has land only on one side of the road. *Harvey v. Crans* (Mich.) 601

## PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 82, 83.

## PROPERTY.

The law favors vested rather than contingent estates. *Brace v. Chartrand* (Colo.) 209



**PROXIMATE CAUSE.** See also MASTER AND SERVANT, 11, 19; NEGLIGENCE, 8; RAILROADS, 8; TRIAL, 5, 6.

1. Where an efficient adequate cause for injuries has been found, it must be considered as the true cause, unless another, not incident to it, but independent of it, is shown to have intervened. *Schumaker v. St. Paul & D. R. Co.* (Minn.) 257

2. The narrowness of a bridge and the insufficiency of its railings are not the proximate cause of an injury to an occupant of a cutter dragged off the bridge by a horse which fell and broke the railing in consequence of disease or choking by the harness. *McClain v. Garden Grove* (Iowa) 483

3. Negligence of the engineer of a donkey engine operated on a track used in connection with a furnace, which caused a collision with a railroad train where the tracks crossed, is the proximate cause of injuries to a passenger on the train, received in a collision at a second crossing, where the rear coach of the train was derailed in the first collision and the train came to a full stop on the second crossing, where it was struck by the donkey engine, from which, after reversing it and shutting off the steam, the engineer and fireman had jumped before the first collision, but which started again at once, the throttle being reopened by the jar of the collision or otherwise, and ran into the train on the second crossing. *Bunting v. Hogsett* (Pa.) 268

NOTES AND BRIEFS.

Proximate cause; in case of collision with train. 268

In negligence cases; concurrent or co-operating causes; intervening agency. 279

**PUBLIC IMPROVEMENTS.** See also EMINENT DOMAIN, 4, 5.

1. The title to works of public improvement need not be given to cities or towns by the Legislature, in order to subject them to the expense of such works. *Re Kingman* (Mass.) 417

2. Cities and towns are not exempted from the power of the Legislature to subject them to the burden of assessments for local improvements, by the fact that the improvements are of such general public utility that the Legislature might lawfully pay the expense thereof with money of the State. *Id.*

3. The disposal of sewage from a number of cities and towns containing one sixth of the population of the State is a matter of general public utility for which the Legislature can properly appropriate money from the state treasury. *Id.*

4. The Legislature can delegate to commissioners to be appointed by a court the power to determine the proportions of expense to be paid by different counties, towns, or cities for a local improvement. *Id.*

5. No rule need be laid down by the Legislature for the guidance of commissioners in making an apportionment among cities and towns, subject to acceptance by a court, of the expense of a system of sewage disposal, other 12 J. R. A.

than to direct them to determine it as they shall deem just and equitable, where the State Constitution gives power to make "all manner of wholesome orders, laws," etc., not repugnant thereto. *Id.*

6. Benefit to property is not the only consideration to be regarded in apportioning among cities and towns the expense of a system of sewage disposal, but there are many elements to be considered, some of which are the exigencies or special need of such improvements, the area to be accommodated, the present or probable population and wealth, the value of the land, and its adaptability for homes and other uses. *Id.*

7. An express exemption of church property from taxation does not extend by implication to assessments for street improvements. *Atlanta v. First Presby. Church* (Ga.) 859

8. Property occupied by a church and used only for church purposes and religious worship is not exempt from assessments for improvements to a street on which it abuts, under a statute authorizing such assessments to be made on abutting property. *Id.*

NOTES AND BRIEFS.

Public improvements; what are; taxation for. 417

Effect of exemption from taxes as to special assessment. 859

**PUBLIC POLICY.** See BROKERS; CONTRACTS, 18-20.

**PUBLIC PUMP.** See HIGHWAYS, 5.

**PUMP.** See HIGHWAYS, 5.

**QUARANTINE.**

An ordinance prohibiting second-hand clothing to be brought into or offered for sale within a town, without first proving that it did not come from a place where contagion or infection is or has been prevailing, is unreasonable and void in the absence of any epidemic or other apparent necessity therefor. *Kosciusko v. Stomberg* (Miss.) 528

**QUARRIES.** See MINES.

**RAILROADS.** See also EMINENT DOMAIN, 8; MASTER AND SERVANT, 10; TRIAL, 9.

1. It is no excuse for failure to stop a railroad train within 100 feet of a place where the track crosses another railroad, as required by statute, that the rear of the train would thus be left standing across another track. *Birmingham Mineral R. Co. v. Jacobs* (Ala.) 830

2. When a railroad train breaks in two, leaving servants of the company on the rear section, which is permitted to continue on its way by force of gravitation, the company owes the duty, even to persons trespassing on its tracks, to station lookouts in such positions on the moving cars that they can watch the tracks ahead of them and warn persons thereon of their danger, a neglect of which may render

the company liable for the injuries caused thereby. *Patton v. East Tennessee, V. & G. R. Co.* (Tenn.) 184

3. Negligence of a railroad company in failing to use proper appliances and employ competent servants, which results in the breaking in two of a moving train, will not warrant a recovery against it by one who, after waiting for the first section of the train to pass him, and without observing the approach of the other section, steps on to the track in front of it and is injured. Such negligence is not the proximate cause of the injury. *Id.*

#### NOTES AND BRIEFS.

Railroads; liability of company for torts.	118
Duty to fence tracks.	180
Liability for death of person struck by train.	184

#### RATIFICATION. See also BILLS AND NOTES, 6.

An act which may be authorized or consented to *in limine* may be effectually ratified after it has been performed. *Montgomery v. Oosthuis* (Ala.) 140

#### REAL PROPERTY. See also DEED; INFANTS, 5; NAME; TAXES, 7.

1. Children born subsequent to the execution of a deed to a trustee for their mother and her children, she being married but having no children at the time, take no interest thereunder, but the mother takes the whole estate. *Baird v. Brooklyn* (Ga.) 157

2. The record of a deed is not complete, so as to constitute constructive notice of its existence, under Wash. Sess. Laws 1869, pp. 818-819, §§ 18, 19, 24, until it is filed, recorded, and entered in the index book in the manner required by those sections. *Bitchie v. Griffiths* (Wash.) 384

3. A recording officer who fails to record a deed delivered to him by the grantee for record is not to be considered as the agent of subsequent *bona fide* purchasers, but as the agent of the grantee; and in such case the rule applies that, when one of two innocent persons must suffer, the misfortune must rest on the person in whose business and under whose control it happened and who had it in his power to avert it. *Id.*

4. A certificate given by the recorder to a grantee, that a deed is properly recorded, does not relieve the latter from the responsibility of seeing that it is actually so recorded. *Id.*

#### NOTES AND BRIEFS.

Real property; Recording Acts; when instrument regarded as recorded; who suffers by failure of clerk to make record, or by his mistake in recording. 384

#### RECEIVERS.

A receiver appointed in a statutory proceeding instituted by the state auditor to wind up an insolvent insurance company has no authority to sue for unpaid stock subscriptions which 12 L. R. A.

the company has released by a contract binding on itself, either by the terms of the statute, or by the order of appointment, or by an assignment to him by the company of its effects, made in pursuance of such order. Such receiver does not represent the rights of creditors. *Republic L. Ins. Co. v. Swigert* (Ill.) 323

#### RECORDS. See REAL PROPERTY, 2, 2, NOTES AND BRIEFS.

#### REHEARING. See APPEAL AND ERROR, 17.

#### RELIGIOUS SOCIETIES.

A church site and edifice may be sold to pay the salary of the pastor. In contemplation of law, justice is not only a cardinal, but the pontifical, virtue. *Lyons v. Planters Loan & Sav. Bank* (Ga.) 155

#### RESTITUTION. See EJECTMENT, 1.

#### RESUME.

Subjects discussed and points decided. 865

#### RIPARIAN RIGHTS. See WHERVES, 2.

#### SALE.

1. Acceptance, after inspection or fair opportunity to inspect it, of wheat furnished under a contract for wheat of a certain grade, precludes the buyer from denying that the contract was satisfied. *Jones v. McEwan* (Ky.) 399

2. On a sale reserving title until all payments are made, retaking possession under express provision of the contract for default in payment of installments does not rescind the contract, or excuse performance by the purchaser, or entitle him to a return, either of the installments already paid or of his unpaid purchase-money notes. *Tufts v. D'Arcambal* (Mich.) 446

3. On an exchange by husband and wife of his wagon for her sleigh, which were both kept, before and after, in a barn leased by him, there is no such change of possession as will uphold her title to the wagon against the husband's creditors. *Wheeler v. Selden* (Vt.) 600

4. An express warranty of soundness is made by a bill of sale of horses, which describes them as "sound and kind," especially where the buyer had not the peculiar means which the seller possessed of knowing the facts. *Hobart v. Young* (Vt.) 693

5. A verbal warranty of horses on a day when the price was fixed, but prior to the actual purchase, when a written bill of sale was made, may be binding on the seller. *Id.*

#### NOTES AND BRIEFS.

Sale; effect of acceptance of goods. 399

Of personal property on installment plan; late decisions. 446

Warranty of soundness of horse. 695

Conditional; doctrine of; waiver of condition; transfer of title; change of possession. 700

**SCALES.** See HIGHWAYS, 1.

**SCHOOLS.** See COURTS, 10.

**SET-OFF AND COUNTERCLAIM.**  
See also ASSUMPT, 3.

Loss caused by the unskillful work of a servant may be set off against his claim for wages; and the set-off is not limited to his wages for the particular days during which the damage was done. *Glennon v. Lebanon Mfg. Co.* (Pa.) 821

**NOTES AND BRIEFS.**

Set-off; for damage by negligence and want of skill in performance of services. 321

**SHIPPING.** See CARRIERS, 3.

**SIGNATURE.** See DEED, 2, 3; WILLS, 3.

**SPECIFIC PERFORMANCE.**

1. Equity can enforce an agreement when the remedy at law would be inadequate for inability to give a conditional or modified judgment, or to preserve the benefit of the agreement to all parties interested. *Bumgardner v. Leavitt* (W. Va.) 776

2. Where specific performance would be granted to the purchaser if he were to apply, the seller is entitled to like relief on the ground of mutuality of right and remedy. *Id.*

3. Specific execution of a contract for shares of stock may be enforced when they have a unique and special value to the purchaser, and the loss cannot be adequately compensated by damages at law. *Id.*

4. The modification of a contract in details by common understanding and mutual consent will not defeat a right to specific performance, if it is still clear what the rights of the parties are under the contract as modified. *Gloucester Isinglass & G. Co. v. Russia Cement Co.* (Mass.) 533

5. The specific performance of a contract to deliver fish skins may be compelled on the ground that damages for failure to perform would be irreparable, where both parties are engaged in manufacturing the skins into glue, and complainant would be able to procure them elsewhere and thus continue its business, only with great difficulty, if at all. *Id.*

**NOTES AND BRIEFS.**

Specific performance; when granted; discretion of court; forfeiture clause in contract; incapacity to perform; materiality of time; time, when essence of contract; mutuality of rights and remedies. 239

Of contract for corporate stock. 776

**STATE.**

**NOTES AND BRIEFS.**

State; sovereignty of; relation of general government as to commerce and navigable waters; admission of. 674

**STATUTE OF FRAUDS.** See CONTRACTS, NOTES AND BRIEFS.

12 L. R. A.

**STATUTES.** See also COURTS, 9.

1. A statute which applies only to a limited number of counties, although not local or special for the reason that it applies to all of a certain class created by the Constitution itself, is not impliedly repealed by a general statute without negative words. *Egmer v. Luzerna County* (Pa.) 192

2. By application of the maxim *ejusdem generis*, which is only an illustration of specific application of the broader maxim *noscitur a sociis*, general and specific words which are capable of an analogous meaning, being associated together, take color from each other so that the general words are restricted to a sense analogous to the less general; but the rule does not require the entire rejection of the general terms. *Misch v. Russell* (Ill.) 125

3. A statute must be construed as prospective in operation, except where the intent that it shall operate retrospectively is expressed in clear and unambiguous terms, or is necessarily implied from its language, which would be inoperative otherwise than retrospectively. *Stewart v. Vandervoort* (W. Va.) 50

4. The most satisfactory and conclusive test of the question whether the provisions of a statute are mandatory or directory is whether the prescribed mode of action is of the essence of the thing to be accomplished; in other words, whether it relates to matters material or immaterial, to matters of convenience or of substance. *Gallup v. Smith* (Conn.) 353

5. Where a statute is susceptible of conflicting and doubtful construction, that construction should be adopted which supports it in all its parts. *Burlington, O. R. & N. R. Co. v. Dey* (Iowa) 436

**NOTES AND BRIEFS.**

Statutes; prospective operation. 50

When mandatory and when directory; enabling; imposing duties; conferring new rights and remedies; grant of special powers; authority conferred by; words "may," "shall," and "must;" permissive words in; protection of personal and property rights; tax laws; mode and manner of doing act; provisions as to time for doing act. 352

**STIPULATIONS.** See COURTS, 12.

**STREET-RAILWAY COMPANIES.**

See CARRIERS, 6-8, NOTES AND BRIEFS.

**SUPPORT.** See TRUSTS, 4.

**TAXES.** See also MUNICIPAL CORPORATIONS, 3.

1. The right to coal and minerals in their natural state can be severed from the ownership of the land by a contract, so as to subject such property to taxation. *Consolidated Coal Co. v. Baker* (Ill.) 247

2. The separation, for purposes of taxation, of coal or other minerals from the ownership of the land, is not prohibited by Ill. Rev. Stat. chap. 120, requiring real property containing minerals to be valued at the price for which it would sell, including the minerals. *Id.*

3. In assessing that part of a telegraph "line" in any town, for taxes, under N. Y. Laws 1886, chap. 659, providing for its assessment in the same manner as lands of residents, its value as part of a telegraph line in operation is not to be considered,—especially since a tax on the business and franchises of the company is provided for by another statute; but the property actually in the town—such as the wires, poles, and interest and easement in the land occupied—is to be assessed at its full value. *People, Western U. Teleg. Co. v. Dolan* (N. Y.) 251

4. The "capital stock" of a corporation liable to taxation under N. Y. Laws 1887, chap. 456, § 3, is the actual capital owned by the corporation, and not the shares of stock. *People, Union Trust Co. v. Coleman* (N. Y.) 763

5. Assessors have no discretion to take the value of the shares of stock of a corporation as that of its capital stock, where they know the value of the latter. *Id.*

6. Personal property of a nonresident, invested or habitually kept within the State, is subject to the collateral-inheritance tax imposed by N. Y. Laws 1887, chap. 718, § 1, on property of a resident which passes by will or by the intestate laws of the State, or, if the decedent was a nonresident, on property "within the State." *Re Romaine* (N. Y.) 401

7. A certificate by the register of unpaid taxes, that he finds none against certain land, is conclusive in favor of one who purchases it in reliance upon the certificate. *Philadelphia v. Baxter* (Pa.) 751

8. The holder of a tax certificate, who redeems the land from a subsequent tax sale to the county, which is void because of a double assessment, all taxes due having been paid by the landowner, may recover back the money paid the county for such redemption. *Clapp v. Pinegrove Twp.* (Pa.) 618

#### NOTES AND BRIEFS.

Taxes; on successions and collateral inheritances; validity of statutes; under New York statutes; what legacies and interests liable or exempt; exemption of beneficent and charitable associations; contingent estates; gifts to children by adoption; corporations, associations, etc., when not exempt; assessment and appraisal; payment. 401

Levy by mistake. 618

Negligent acts of tax officers. 751

On corporate stock; ascertaining value; distinction between capital and shares. 762

**TELEGRAPHS.** See EMINENT DOMAIN, 6; HIGHWAYS, 6; TAXES, 3.

#### TELEPHONES.

A franchise granted to a telephone company, of constructing and operating its lines along and upon streets, is subordinate to the rights of the public in the street for the purpose of travel. *Cincinnati Inclined Plane R. Co. v. City & S. Teleg. Assn.* (Ohio) 534

**TIME.** See also WRIT AND PROCESS.

The term "months," used in a statute 12 L. R. A.

concerning the publication of orders in chancery cases for absent defendants to appear and plead and for decrees *pro confesso* in default thereof, mean calendar, and not lunar months, unless there is something in the statute indicating that a contrary meaning was intended. *Guaranty Trust & S. D. Co. v. Buddington* (Fla.) 770

#### NOTES AND BRIEFS.

Time; meaning of "month." 770

**TREES.** See also INJUNCTION, 3, 4.

Trees standing on a boundary line belong to the adjoining owners as tenants in common. *Musch v. Burkhardt* (Iowa) 484

**TRESPASS.** See ACTION ON SUIT, 5; INFANTS, 3.

**TRIAL.** See also EVIDENCE, 14; JUDGMENT, 5.

1. An injunction by a federal court against illegal combinations in restraint of interstate commerce, although they are made misdemeanors, does not violate the provisions of U. S. Const. requiring the trial of crimes to be by jury. *United States v. Jellico Mountain Coke & O. Co.* (C. C. M. D. Tenn.) 753

2. A stipulation in a note, that the entire amount shall be due after thirty days' default in payment of interest, creates a condition precedent to an action brought before the date named for the maturity of the principal, and prevents a trial without a jury, as provided by Ga. Const. § 4, ¶ 7, Ga. Code, 5145, in case of "unconditional contracts," where an issuable defense is not filed under oath or information. *American Freehold Land & Mortg. Co. v. Thomas* (C. C. S. D. Ga.) 681

3. Failure to demand a jury is a waiver of the right to a jury trial. *Haley v. Bureau County Bank* (Nev.) 815

4. Improper argument by defendant's counsel, by making statements outside the evidence as to his client's good character, will not justify the State's counsel in arguing, against defendant's objection, that his failure to offer proof of good character raises an inference that his character was not good. *Bennett v. State* (Ga.) 449

5. The question of proximate cause is ordinarily one of fact for the jury. *Sokumaker v. St. Paul & D. R. Co.* (Minn.) 267

6. But it is for the court where the facts are not in dispute. *Bunting v. Hogsett* (Pa.) 268

7. Whether terms of art were used in their ordinary meaning or not, in a contract between men familiar with the business to which the terms relate, cannot be left to the jury, although they may determine the meaning of the terms in that business. *Crauford v. Oman & S. Stone Co.* (S. C.) 375

8. An instruction that there is proof that plaintiff was suffering from Bright's disease, and that it was a dangerous disease and should be taken into consideration in determining his expectation of life and loss of earning power, in a suit for personal injuries, is proper where there is testimony of medical experts that he is

suffering from that disease, with little, if any, evidence to the contrary. *Bunting v. Hogsett* (Pa.) 268

9. The jury must determine whether or not a person was guilty of such contributory negligence as will prevent his recovering damages from a railroad company for injuries received while he was walking upon its tracks, where he had left the track to allow a train to overtake and pass him, and then returned to it in front of a section of the train which had become detached and was following the first section by the force of gravitation, the approach of which he failed to discover because he was crossing a bridge over a waterfall, the noise of which prevented his hearing the approaching train. *Patton v. East Tennessee, V. & G. R. Co.* (Tenn.) 184

10. The fall of a tenant in a tenement-house, caused by a hole in a stair carpet, does not, as matter of law, show contributory negligence, although she knew of the holes in the carpet and the stairway was well lighted at the time. *Peil v. Reinhardt* (N. Y.) 843

11. The breach of an injunction bond requires the question of a right to recover at least nominal damages thereon, to be submitted to the jury. *Brown v. Cunningham* (Iowa) 588

12. An instruction that a railroad bed is in a defective condition when it is not reasonably safe for the passage of trains over it need not be qualified by reference to other railroads in the State. *Georgia P. R. Co. v. Dooly* (Ga.) 843

#### NOTES AND BRIEFS.

Trial; comments of prosecuting attorney. 449  
Offer of proof. 556

**TROVER.** See also JOINT TENANTS AND TENANTS IN COMMON; LANDLORD AND TENANT, 5.

1. No demand is necessary before suit for conversion of property carried away in the face of plaintiff's protest. *Waller v. Bowling* (N. C.) 261

2. After suit is brought for conversion, plaintiff cannot be compelled to take back the property. *Id.*

**TRUSTS.** See also COVENANT, 2.

1. A trust is created by a letter from an uncle to a nephew who had written claiming a sum of money, acknowledging that the nephew had earned it and saying, "I had the money in the bank, the day you were twenty-one years old, that I intended for you;" and, "I don't intend to interfere with the money in any way until I think you are capable of taking care of it;" then adding in a postscript, "You can consider the money on interest." *Hamer v. Sidway* (N. Y.) 463

2. A declaration of trust, made in consideration of a conveyance of land, although at a later date, is valid and irrevocable, and cannot be limited or affected by subsequent acts or contracts of the trustee with a stranger to the parties named in the instrument. *McArthur v. Gordon* (N. Y.) 667

3. The liability of a trustee who, in consideration of a deed, has charged property with

a trust for the support of an incompetent person, cannot be avoided by transferring the property charged with such support; but he is liable for such part of the expense thereof, if not furnished by his grantee, as cannot be recovered from the land itself or from a second grantee. *Id.*

4. It is the duty of a trustee to exercise a supervision over the care and comfort of an incompetent person for whose support, in consideration of the conveyance of a farm, he has made a declaration of trust to appropriate the net rents of the farm or the interest on its price if sold; and he should apply the proceeds, so far as necessary to that purpose, wherever, within reasonable limits, such person may be cared for and supported. *Id.*

5. Under a statute providing for the subjection of beneficial interests to the payment of the beneficiary's debts, if a fund is devised to trustees with directions to pay the income to testator's son during his life, free from the claims of creditors, and with further directions that if a court of last resort shall at any time determine that the income is liable to be subjected to the payment of the son's debts then the trustees shall pay it to the son's wife for her separate use, income which accrues prior to a decision by a court of last resort authorizing the application is applicable to the payment of the son's debts, but not that which accrues after such decision. *Bull v. Kentucky Nat. Bank* (Ky.) 87

#### NOTES AND BRIEFS.

Trusts; provision against alienation of trust property by beneficiary. 87  
Creation or declaration of. 667

#### USURY.

A stipulation in a deed of trust to secure notes and interest coupons, that in default of any payment the whole sum of the principal shall become due at the lender's option, is to be construed as a penalty, and will not be enforced except upon cancelling unearned interest notes, and therefore it does not make the contract usurious. *Dugan v. Lewis* (Tex.) 93

**VENDOR AND PURCHASER.** See also ESTOPPEL, 1, 2; REAL PROPERTY, 3.

1. The loss by fire of a house on land in the actual possession of a vendee as owner, he having secured part of the purchase money by mortgage and paid the balance, must be borne by him, although he holds under a defective deed, as he is the equitable owner of the premises. *Weteler v. Duffy* (Wis.) 178

2. Upon the correction by the court of a deed which defectively describes premises the equitable title to which is in the vendee, his legal title relates back to its execution and delivery. *Id.*

3. Where the vendee has paid part of the purchase money and given his notes for the balance, before the vendor can rescind the contract he must return or offer to return the money paid, with legal interest, less reasonable rental value of the premises if the vendee has been in possession, and also all unpaid notes. *Frink v. Thomas* (Or.) 230

**VESTED ESTATE.** See PROPERTY.

**VIEW.** See EVIDENCE, 20, 21.

**VOTERS AND ELECTIONS.** See also COURTS, 10; ESTOPPEL, 6.

1. An election is not valid, although conducted fairly and honestly, if the statutory provisions and rules are not substantially observed. *State, Van Amringe, v. Taylor* (N. C.) 203

2. An election held by a mere usurper of the office of registrar, who had fraudulently obtained the books and set up his claim to the office for the first time on election day, when the lawful registrar publicly demanded the return of the books, is void. *Id.*

3. A statute providing that a tie vote may be determined by lot does not violate a constitutional provision that all elections shall be by ballot. *Johnston v. State, Sefton* (Ind.) 235

4. A candidate nominated independently by the requisite number of voters, under Md. Code Gen. Laws, § 181, who has also been nominated by a party convention, is entitled by implication to another place on the official ballot, in addition to that in the group of candidates of the political party which has nominated him in convention. *Fisher v. Dudley* (Md.) 538

5. A political party the name of which can be placed on ballots, under the Connecticut election law, is formed where a republican caucus votes to adjourn for the organization of a citizens' caucus, and thereupon some democrats unite with the republicans present and nominate a citizens' ticket which is voted at a town meeting, although no committees are appointed or any steps taken to effect a permanent organization. *Fields v. Osborne* (Conn.) 551

6. The use of the word "for," before the name of each office named in a ballot, does not invalidate the ballot, under Conn. Pub. Acts 1889, chap. 247, § 1, prohibiting any words thereon except the official indorsement, the names of candidates, the office voted for, and the name of the political party. *Id.*

7. Ballots cast at a town meeting, which include the name of a candidate for judge of probate, who can be legally elected only at a state election, or which have the words "and *ex officio* registrar of births, marriages, and deaths," added to the name of the office of town clerk, are invalid under Conn. Pub. Acts 1889, chap. 247, § 1, which provides that ballots shall contain, in addition to the official indorsement, only the "names of the candidates, the office voted for, and the name of the political party." *Id.*

8. An elector may lawfully vote for the same man as a candidate for two incompatible offices, at the same election. *Misch v. Russell* (Ill.) 125

9. The term "canvass," in Dak. Comp. Laws, § 1489, requiring notice of a contest of election within twenty days after canvass of the votes, includes a decision by lot of a tie vote, as provided by S. D. Laws 1890, chap. 84, § 26; and notice within twenty days after such 12 L. R. A.

decision is sufficient. *Bouler v. Eisenhood* (S. D.) 705

#### NOTES AND BRIEFS.

Voters and elections; voting for same person for incompatible offices. 125

Effect of irregularities. 202

Improper marks on ballots. 551

Election contests; notice to contestee; procedure. 705

**WATER COMPANIES.** See LINES, 2.

#### WATERS AND WATERCOURSES.

See also EMINENT DOMAIN, 1, 2; ION, 2.

1. Riparian rights in the several States are settled by the respective States for themselves. *Eisenbach v. Hatfield* (Wash.) 632

2. The soil under navigable waters up to high-water mark is, in the State of Washington, by express provisions of the Constitution, as well as by the common-law rule, the property of the State. *Id.*

3. There is no vested right to future accretions to land. *Id.*

4. One having valuable improvements on tide-lands in actual use for commerce, trade, and business, prior to Wash. Act March 26, 1890, has a right, as against the riparian proprietor, who has never erected any improvements on the shore, to maintain them as they were on the passage of that Act, but not to enlarge them prior to purchase of the lands from the State. *Id.*

#### NOTES AND BRIEFS.

See also NUIRANCES; WHARVES.

Waters; public right of navigation; state sovereignty over inland navigable waters. 673

Navigable as public highways; state sovereignty over; inland seas and lakes; Great Ponds; territorial jurisdiction of State; establishment of dock and harbor lines; right and title of littoral proprietors; ownership of tide-lands; qualified property in water front; title to islands in river; law of accretion; riparian rights. 633

Title to soil under navigable waters. 633, 677

**WELL.** See HIGHWAYS, 4.

#### WHARVES.

1. A riparian proprietor on the shore of the sea or its arm has no right, as against the State or its grantees, to extend wharves in front of his land below high-water mark. *Eisenbach v. Hatfield* (Wash.) 633

2. Under Wash. Const. art. 15, providing for the appointment of a commissioner to establish harbor lines, and the leasing of the right to build wharves, no right to build them beyond high-water mark can be claimed by a riparian proprietor, even if he would have such right at common law. *Id.*

3. The right to a dock between low-water mark and the channel of Acushnet River may be reserved under Mass. Acts 1806, chap. 18, authorizing owners to build and extend

wharves below low-water mark in said river, on conveyance by the owner of the adjacent land to low-water mark or a point below it. *Hastings v. Grimaliau* (Mass.) 617

## NOTES AND BRIEFS.

Wharves; right of riparian owners to dock to low-water mark. 617

**WILLS.** See also CONFLICT OF LAWS, 5, 6; DEFINITIONS, 2, 3; DESCENT AND DISTRIBUTION, 1, 8; ESTOPPEL, 5; EXECUTORS AND ADMINISTRATORS, 2, 3; PERPETUITIES; POWER.

1. The connection of a delusion with a will must be made manifest and shown to have influenced its provisions, before the will can be set aside and declared void because of it. *Potter v. Jones* (Or.) 161

2. An unworthy motive for disinheriting a child by will, whether pride or aversion, spite or prejudice, if it is not resolvable into mental perversion, will not affect the validity of a will. *Id.*

3. The lack of testatrix's signature at the end of an instrument written by her own hand and containing her own name at the beginning is not supplied by her statement that the instrument is her will, and a request to a subscribing witness to sign it. *Re Booth's Will* (N. Y.) 452

4. The "then heirs" of a person to whom an estate is given if he is not living on the death of another are to be ascertained as of the moment of the latter's death. *Proctor v. Clark* (Mass.) 731

5. A gift of the residue of testator's property to children of a sister and of a deceased brother, to be equally divided, limited by a codicil "to the children of the first generation," gives nothing to the children of a nephew who died before the will was made, under R. I. Pub. Stat. chap. 182, § 14, giving the share of a deceased devisee or legatee to his descendants. *Almy v. Jones* (R. I.) 414

6. A direction that the executor pay the debts of a testator out of his real or personal estate is a charge of debts upon lands, creating a trust which creditors can enforce by compelling the executor to execute the trust. *Morse v. Hackensack Sav. Bank* (N. J.) 62

7. The shares of children who are not mentioned in the will of their father, and who are entitled by statute to the same shares in his estate "as if he had died intestate," are not affected by a power of sale contained in the will. *Smith v. Olmstead* (Cal.) 46

8. The residuary estate must bear the whole loss caused to the beneficiaries by the widow's election to take against the will, and cannot share it with specific legacies if there remains enough to pay the latter, unless there is a plain intention in the will that the residuary legatee is a preferred object of testator's bounty. *Re Vane's Estate* (Pa.) 227

9. The election of a widow to take against 12 L. R. A.

the will is equivalent to her death, as respects the payment of legacies and the distribution of that part of the estate which is distributed under the will. *Id.*

10. A receipt for money advanced by a testatrix, to be deducted from a legacy in a will of a certain date, does not authorize any deduction from a legacy of the same amount in a subsequent will. *Jaques v. Swasey* (Mass.) 566

11. Legal incapacity of a legatee to perform a condition on which the gift is made will prevent it from taking effect, although the time for performance was subsequent thereto. *Bulard v. Shirley* (Mass.) 110

## NOTES AND BRIEFS.

Wills; testamentary capacity as affected by insane delusion. 161

Selection between inconsistent rights, how made; acts which determine; election by widow. 227

Sufficiency of signature. 452

Gift to heirs. 731

## WITNESSES.

1. The mother of an alleged illegitimate son has no "interest in the event" which makes her incompetent under N. Y. Code Civ. Proc. § 829, to testify to the fact of her marriage with his father, in an action by the son to enforce his claim as an heir of his father. *Enclord v. Olum* (N. Y.) 386

2. Cross-examination of a witness about coming on a pass need not be permitted without offering to connect the party who produces him with the pass if he had one. *Hobart v. Young* (Vt.) 698

3. An insurance agent's knowledge of an applicant's deafness, before the signing of the application, may be shown by cross-examination of the company's witnesses in a suit on the policy. *Follett v. United States Mut. Acci. Assn.* (N. C.) 815

## NOTES AND BRIEFS.

Witnesses; cross-examination of; extent and restrictions. 698

Exclusion of testimony against decedent on ground of interest. 836

## WRIT AND PROCESS.

Jurisdiction is not acquired of a nonresident defendant by publishing for four lunar months, but less than four calendar months, where the statute requires the publication to be made for four months without showing that lunar months were intended; and a decree rendered upon such publication is void. *Guaranty Trust & S. D. Co. v. Buddington* (Fla.) 770

**WRIT OF POSSESSION.** See APPEAL AND ERROR, 18; EJECTMENT, 2.





# L. R. A. CASES AS AUTHORITIES

SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN AP-  
PLIED, DEVELOPED, STRENGTHENED, LIMITED, OR IN ANY  
WAY AFFECTED BY LATER DECISIONS THAT HAVE  
CITED THESE CASES AS PRECEDENTS, WITH  
HOLDINGS OF CITING CASES; ALSO  
REFERENCES TO LATER AN-  
NOTATIONS CITING  
CASES OR NOTES



# L. R. A. CASES AS AUTHORITIES.

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## CASES IN 12 L. R. A.

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12 L. R. A. 33, *BOHN MFG. CO. v. KOUNTZE*, 30 Neb. 719, 46 N. W. 1123.

**Priority of mechanic's over antecedent liens.**

Followed in *Millsap v. Ball*, 30 Neb. 732, 46 N. W. 1125, and *Ragon v. Howard*, 97 Tenn. 343, 37 S. W. 136, upholding mechanic's lien as against vendor under contract requiring vendee to construct building.

Cited in *Shapleigh v. Hull*, 21 Colo. 425, 41 Pac. 1108; *Colorado Iron Works v. Taylor*, 12 Colo. App. 455, 55 Pac. 942; *Sheehy v. Fulton*, 38 Neb. 693, 41 Am. St. Rep. 767, 57 N. W. 395, holding vendor's interest subject to mechanics' liens where contract requires construction of building; *Pickens v. Plattsmouth Invest. Co.* 37 Neb. 280, 55 N. W. 947, holding lien of vendor contracting in conjunction with vendee, for improvements, subject to mechanic's lien; *Cummings v. Emslie*, 49 Neb. 489, 68 N. W. 621, holding mechanic's lien superior to lien of mortgage agreed to be subordinated to cost of building; *Shearer v. Wilder*, 56 Kan. 263, 43 Pac. 224, holding interest of vendor contracting with purchaser of lot to construct building, subject to mechanics' liens; *West v. Reeves*, 53 Neb. 474, 73 N. W. 935, holding lien of vendor not promoting improvement superior to mechanic's lien; *Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 655, 41 Am. St. Rep. 741, 57 N. W. 664 (dissenting opinion), majority holding mechanics' liens superior to mortgage given to company advancing money to construct railroad.

Cited in footnote to *Green v. Williams*, 19 L. R. A. 478, which holds that purchaser takes premises subject to lien subsequently filed within time allowed.

Distinguished in *Burlingim v. Warner*, 39 Neb. 497, 58 N. W. 132, holding vendor not chargeable with liens arising from construction of buildings by vendee taking possession without vendor's consent; *Anglo-American Sav. & L. Asso. v. Campbell*, 13 App. D. C. 598, 43 L. R. A. 626, holding purchase money mortgage superior to mechanic's lien; *Hoagland v. Lowe*, 39 Neb. 411, 58 N. W. 197, holding purchase money mortgage, subordinated by agreement to mortgage securing building loan, superior to mechanic's lien; *Holmes v. Hutchins*, 38 Neb. 607, 57 N. W. 514, holding grantor's knowledge of grantee's intention to build does not postpone purchase money mortgage to mechanic's lien.

**Mechanics' liens; liability of one making building loan.**

Distinguished in *Fuller v. Detroit Loan & Bldg. Asso.* 119 Mich. 73, 77 N. W. 642, holding vendor agreeing to advance money to complete building not liable for mechanics' liens; *Chappell v. Smith*, 40 Neb. 581, 59 N. W. 110, holding lender of money to erect building not liable for mechanic's liens; *Rogers v. Central*

Loan & T. Co. 49 Neb. 685, 68 N. W. 1048, holding lender of money to erect building not liable to mechanics' lienors for amount applied on prior mortgage.

12 L. R. A. 37, *BULL v. KENTUCKY NAT. BANK*, 90 Ky. 452, 14 S. W. 425.

**Rights of creditors of beneficiary of trust.**

Cited in *Re Luscombe*, 109 Wis. 199, 85 N. W. 341, raising, without deciding, question whether income of testamentary trust may be reached by creditors.

Cited in footnotes to *Roberts v. Stevens*, 17 L. R. A. 266, which authorizes establishment of spendthrift trust, free from rights of creditors; *Leigh v. Harrison*, 18 L. R. A. 49, which denies creditor's right to reach debtor's interest under spendthrift trust; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustee to pay certain portion of income absolutely to beneficiary; *Re Qua v. Graham*, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interest, accepted by husband, not trust beyond reach of creditors; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary.

Cited in note (13 L. R. A. 213) on limitation in trust estates.

12 L. R. A. 41, *KERNOHAN v. DURHAM*, 48 Ohio St. 1, 26 N. E. 982.

**Rights of indorsees.**

Cited in *Watson v. Wyman*, 161 Mass. 99, 36 N. E. 692, holding note and mortgage transferred before maturity good, although previously paid; *Bishop v. Chase*, 150 Mo. 174, 79 Am. St. Rep. 515, 56 S. W. 1080, holding note and mortgage assigned before maturity, as collateral, subject to equities.

Cited in note (46 L. R. A. 760) on rights of holder of negotiable paper transferred after maturity.

Distinguished in *Kernohan v. Manss*, 53 Ohio St. 135, 29 L. R. A. 320, 41 N. E. 258, holding bona fide indorsee of genuine note before maturity secured by recorded mortgage entitled to proceeds of mortgage over prior assignee of forged copy of note, accompanied by assignment and delivery of mortgage.

**Payment of written obligation to one not in possession.**

Cited in *Shelly v. Mikkelson*, 5 N. D. 44, 63 N. W. 210 (dissenting opinion), majority holding vendee under land contract giving notes protected by payment to subsequent transferee of land; *Storey v. Kerr*, 2 Herdman (Neb.) 571, 89 N. W. 601, holding no legal presumption of indorsement of payment on note arises from such payment.

Cited in footnotes to *Harrison Nat. Bank v. Austin*, 59 L. R. A. 294, which holds nonpossession of evidences of indebtedness by one to whom debt paid not conclusive as to lack of authority; *Kohl v. Beach*, 50 L. R. A. 600, which holds mortgagee not bound by collection of principal by subagent authorized to collect overdue interest.

12 L. R. A. 46, *SMITH v. OLMSTEAD*, 88 Cal. 582, 22 Am. St. Rep. 336, 26 Pac. 521.

**Omission to provide for child in will.**

Cited in footnotes to *Re Callaghan*, 39 L. R. A. 689, which holds inoperative devise of land not owned by testator not omission to provide for child; *Carpenter*

v. Snow, 41 L. R. A. 820, which holds that intention not to provide for child already born need not be shown by will itself.

**Rights of heirs to decedent's realty.**

Cited in *Re Packer*, 125 Cal. 397, 73 Am. St. Rep. 58, 58 Pac. 59, holding real estate vested in heirs cannot be sold by administrator for their benefit under subsequent statute.

**Administrator's lien on decedent's realty.**

Distinguished in *Murphy v. Clayton*, 113 Cal. 150, 45 Pac. 267, denying administrator's right to possession of lands held in trust by decedent.

12 L. R. A. 50, *STEWART v. VANDERVORT*, 34 W. Va. 524, 12 S. E. 736.

**Statutory construction.**

Cited in *Walker v. Burgess*, 44 W. Va. 400, 67 Am. St. Rep. 775, 30 S. E. 99, and *State v. Mines*, 32 W. Va. 133, 18 S. E. 470, holding statute of limitations operates prospectively, unless otherwise expressly stated or necessarily implied; *Casto v. Greer*, 44 W. Va. 334, 30 S. E. 100, holding statute limiting time to attack preferences does not apply to prior transfers; *Johnson v. Sanger*, 49 W. Va. 411, 38 S. E. 645, holding act prescribing mode of alienation of married women's estates not retrospective; *Walker v. Boggess*, 41 W. Va. 592, 23 S. E. 550, holding deed of trust not affected by subsequent statute changing terms of sale; *Fowler v. Lewis*, 36 W. Va. 133, 14 S. E. 447, holding remedial statute relating to sale under deed of trust operates prospectively; *Despard v. Despard*, 53 W. Va. 446, 44 S. E. 448, holding statute limiting time to complete appeal not retroactive.

Cited in footnote to *Dugger v. Mechanics' & T. Ins. Co.* 28 L. R. A. 796, which refuses to construe as retrospective, act making void, stipulations limiting liability on policy to less than full amount of loss.

12 L. R. A. 53, *POWELL v. BENTLEY & G. FURNITURE CO.* 34 W. Va. 804, 12 S. E. 1085.

**Operation of legitimate business as nuisance.**

Cited in *Davis v. Davis*, 40 W. Va. 474, 21 S. E. 906, holding merry-go-round, annoying to persons of ordinary sensibility, nuisance; *McGregor v. Camden*, 47 W. Va. 196, 34 S. E. 936, holding oil well, seriously interfering with ordinary comfort of nearby dwellers, nuisance; *Harper v. Standard Oil Co.* 78 Mo. App. 345, holding gasoline tank on adjoining property not nuisance in absence of evidence showing apprehension of danger by persons of normal sensibility; *McGregor v. Camden*, 47 W. Va. 200, 34 S. E. 936, holding court may direct question whether oil well a nuisance to be tried by jury; *Snyder v. Philadelphia Co.* (W. Va.) 63 L. R. A. 898, 46 S. E. 366, holding owner negligently "blowing out" gas well liable for frightening team on nearby highway.

Cited in footnotes to *Pfingst v. Senn*, 21 L. R. A. 569, which denies right to enjoin as nuisance prospective use of premises as beer garden; *Hill v. McBurney Oil & Fertilizer Co.* 52 L. R. A. 398, which authorizes injunction against blowing of loud factory whistle at unreasonable hours in populous community; *Froeliche v. Oswald Iron Works*, 64 L. R. A. 228, granting injunction against operation of machine shop, disturbing comfort of adjoining owner to injurious extent; *Louis-*

ville & N. Terminal Co. v. Jacobs, 61 L. R. A. 188, which holds construction of roundhouse for housing engines not render owner liable for nuisance created by tenant's improper manner of using.

Cited in note (20 L. R. A. 165) on power of equity to grant mandatory injunctions.

**Necessity of clearly proving nuisance.**

Cited in Chambers v. Cramer, 49 W. Va. 402, 54 L. R. A. 548, 38 S. E. 691, holding fact of nuisance must appear clearly to warrant injunction against blacksmith shop; Pope Bros. v. Bridgewater Gas Co. 52 W. Va. 254, 43 S. E. 87, holding possible danger of fire no ground for enjoining drilling of oil well near another producing well.

12 L. R. A. 57, CHILD v. BEMUS, 17 R. I. 230, 21 Atl. 539.

**Municipal power to license.**

Cited in footnote to State v. Finch, 46 L. R. A. 437, which sustains validity of license on express wagons greatly in excess of that imposed on hacks.

Cited in note (20 L. R. A. 724) on delegation of municipal power as to licenses.

**Power to revoke license.**

Cited in Wallace v. Reno (Neb.) 62 L. R. A. 342, 73 Pac. 528, sustaining statute empowering city board to revoke business licenses, without notice to licensee.

12 L. R. A. 58, CROUSE v. MURPHY, 140 Pa. 335, 23 Am. St. Rep. 232, 21 Atl. 358.

**Identity of name.**

Cited in Work v. Darby 13 Pa. Co. Ct. 272, holding record of judgment against Jane Thomas no notice to one relying on conveyance by Sarah Jane Thomas; Delaney v. Becker, 14 Pa. Super. Ct. 395, Reversing 29 Pittsb. L. J. N. S. 347, holding prior judgments against George A. Baker postponed to judgments against George A. Becker, debtor's correct name; Davis v. Steeps, 87 Wis. 477, 23 L. R. A. 821, 41 Am. St. Rep. 51, 58 N. W. 769, holding record of judgment against Edward Davis not notice of lien on real estate of E. A. or Edward A. Davis; Shaver's Case, 18 Pa. Co. Ct. 203, denying priority of judgment entered against A. C. Shaver over antecedent judgment against Mary Shaver, debtor's name being Anna Mary Shaver; Massey v. Noon, 1 Pa. Super. Ct. 203, 37 W. N. C. 525, holding writ of sci. fa. against Lewis R. Renshan to revive judgment not notice to remote grantee under Lewis S. Renshan.

Cited in footnotes to Beattie v. National Bank, 43 L. R. A. 654, holding middle initial letter not part of Christian name; Stuyvesant v. Weil, 53 L. R. A. 562, which holds that mistake in Christian name of defendant, duly served and notified that he is person intended, does not prevent jurisdiction.

Cited in notes (24 L. R. A. 544) on form of Christian name required by recording acts; (14 L. R. A. 394) on index as part of records of title; (17 L. R. A. 825) on presumption of identity of person from identity of name.

Distinguished in Butts v. Cruttenden, 14 Pa. Super. Ct. 456, holding judgment against William has priority over subsequent mortgage given by William J., designated in deed by both names; Fincher v. Hanegan, 59 Ark. 156, 24 L. R. A. 546, 26 S. W. 821, holding mistake in initial of chattel mortgagor's middle name does not defeat effect of record as notice.

**Protection of purchaser relying on official certificate.**

Cited in *Philadelphia v. Anderson*, 142 Pa. 364, 12 L. R. A. 751, 21 Atl. 976, holding purchaser on faith of certificate that no taxes are unpaid, protected thereby.

12 L. R. A. 60, *BAKER v. HART*, 123 N. Y. 470, 25 N. E. 948.

**Construction of grant of right to remove minerals.**

Cited in *Butler v. McGorrick*, 52 C. C. A. 214, 114 Fed. 302, construing deed as conveying only all coal mined before certain date; *Phelps v. Church of Our Lady Help of Christians*, 40 C. C. A. 74, 99 Fed. 684, holding lease for years, with "right to quarry and appropriate all marble," etc., passes right of property therein.

**License to take minerals as chattel interest.**

Cited in *Sanford's Appeal*, 75 Conn. 595, 54 Atl. 739, holding leased quarry not taxable as property of lessee.

**Right of lessee of mine to sue for conversion.**

Distinguished in *Hartford Iron Min. Co. v. Cambria Min. Co.* 93 Mich. 93, 32 Am. St. Rep. 488, 53 N. W. 4, holding lessee of mine, obligated to pay royalty on certain amount yearly, may maintain action for conversion of unmined ore.

**Damages recoverable by licensee for taking of ore.**

Cited in *Arnold v. Bennett*, 92 Mo. App. 161, holding value of ore removed by trespasser not recoverable by licensee of mine.

**Liability for waste.**

Cited in *Dix v. Jaquay*, 94 App. Div. 556, 88 N. Y. Supp. 228, holding life tenant may recover full damages for waste.

12 L. R. A. 62, *MORSE v. HACKENSACK SAV. BANK*, 47 N. J. Eq. 279, 20 Atl. 961.

**When deed acquired through judicial proceedings takes effect.**

Cited in *First Nat. Bank v. Thompson*, 61 N. J. Eq. 204, 48 Atl. 333, holding master's deed in partition takes effect from date of sale; *Wimpfheimer v. Prudential Ins. Co.* 56 N. J. Eq. 591, 39 Atl. 918, holding deed on confirmation of foreclosure relates back to time of sale; *Missouri Valley Land Co. v. Barwick*, 50 Kan. 61, 31 Pac. 685, holding sheriff's deed on foreclosure entitles purchaser to crops growing at time of sale.

**Right to income of land subject to power of sale.**

Cited in *Hatt v. Rich*, 59 N. J. Eq. 509, 45 Atl. 969, holding residuary devisees entitled to use of lands intermediate testator's death and execution of power of sale.

**Priority of creditors of heir and decedent.**

Distinguished in *First Nat. Bank v. Thompson*, 61 N. J. Eq. 204, 48 Atl. 333, holding attachment issued by creditor of heir more than year after decedent's death, superior to rights of decedent's creditors.

**Right of election under will.**

Cited in *Wooster v. Cooper*, 59 N. J. Eq. 229, 45 Atl. 381, and *Huber v. Donoghue*, 49 N. J. Eq. 128, 23 Atl. 495, holding devisees of proceeds of lands which executors have power to sell may elect to take lands.

**Effect of lapse of time on testamentary power of sale.**

Cited in *Hatt v. Rich*, 59 N. J. Eq. 507, 45 Atl. 969, holding lapse of time will not affect executor's power to sell realty, when testator's purpose may still be accomplished.

12 L. R. A. 67, *CHILDERS v. LEE*, 5 N. M. 576, 25 Pac. 781.

**Lease; statute of frauds.**

Cited in footnote to *Hand v. Osgood*, 30 L. R. A. 379, which holds oral lease of land for one year, with privilege of three, within statute of frauds.

12 L. R. A. 70, *DIBRELL v. LANIER*, 89 Tenn. 497, 15 S. W. 87.

**Private statutes.**

Cited in note (16 L. R. A. 252) on constitutionality of private statutes to authorize disposal of property.

**Right to transmit or transfer property.**

Cited in *Third Nat. Bank v. Divine Grocery Co.* 97 Tenn. 611, 34 L. R. A. 448, 37 S. W. 390, holding act forbidding transfers having effect to prefer creditors, not limited to cases of insolvency, unconstitutional.

**Class legislation.**

Cited in *Harbison v. Knoxville Iron Co.* 103 Tenn. 436, 56 L. R. A. 319, 76 Am. St. Rep. 682, 53 S. W. 955, holding general statute embracing all persons who are or may be in like situation and circumstances valid as "law of the land;" *Harbison v. Knoxville Iron Co.* 103 Tenn. 434, 56 L. R. A. 319, 76 Am. St. Rep. 682, 53 S. W. 955, holding statute requiring payment of wages in lawful money constitutional; *Fidelity & C. Co. v. Freeman*, 54 L. R. A. 686, 48 C. C. A. 702, 109 Fed. 856, holding basis of classification adopted by statute 'must be natural, not arbitrary; *Henley v. State*, 98 Tenn. 698, 39 L. R. A. 136, 41 S. W. 352, holding classification adopted by statute must be natural and reasonable, resting upon some sound legal ground; *Peters v. State*, 96 Tenn. 686, 33 L. R. A. 115, 36 S. W. 399, holding exemption of lakes of 15 square miles and over from operation of game law, valid classification; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 257, 28 L. R. A. 800, 32 S. W. 5, holding statute regulating liability on policies, excepting insurance upon cotton in bales, constitutional; *Condon v. Maloney*, 108 Tenn. 94, 65 S. W. 871, holding road law applying to counties having population of not less than 70,000 nor more than 90,000 under census of 1900, or any subsequent Federal census, constitutional; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 706, 53 L. R. A. 929, 43 S. W. 115, holding act imposing privilege tax on railroads not paying ad valorem tax constitutional; *Debardelaben v. State*, 99 Tenn. 652, 42 S. W. 684, holding act forbidding betting outside of race-track inclosure constitutional; *Breyer v. State*, 102 Tenn. 106, 50 S. W. 769, holding Sunday barbering law constitutional; *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 732, 78 Am. St. Rep. 941, 59 S. W. 1033, holding arbitrary and capricious classification renders statute unconstitutional; *School District v. School District*, 22 Pa. Co. Ct. 236, holding act providing for education of soldiers' children at public expense unconstitutional; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 156, 41 L. ed. 668, 17 Sup. Ct. Rep. 255, holding statute requiring railroad companies to pay attorney's fees to parties successfully maintaining stock-killing action unconstitutional; *Sutton v. State*, 96 Tenn. 709, 33 L. R. A. 592, 36 S. W. 697, holding statute prohibiting



stock from running at large in certain counties void as based on arbitrary classification; *Henley v. State*, 98 Tenn. 746, 39 L. R. A. 147, 41 S. W. 352, dissenting opinion by Snodgrass, Ch. J., who holds act based upon unnatural, arbitrary, and capricious classification not "law of the land."

**Scope of legislative power.**

Cited in *Henley v. State*, 98 Tenn. 681, 39 L. R. A. 132, 41 S. W. 352, holding scope of legislation limited only by state and Federal Constitutions; *Henley v. State*, 98 Tenn. 735, 39 L. R. A. 144, 41 S. W. 352, dissenting opinion by Snodgrass, Ch. J., who holds act authorized by one constitutional provision must be unobjectionable under every other.

**Necessity of clearly proving wherein statute is unconstitutional.**

Cited in *Leeper v. State*, 103 Tenn. 511, 48 L. R. A. 169, 53 S. W. 962, and *Henley v. State*, 98 Tenn. 682, 39 L. R. A. 132, 41 S. W. 352, holding act cannot be annulled upon general or vague interpretation of Constitution; *Dayton Coal & I. Co. v. Barton*, 103 Tenn. 613, 53 S. W. 970, holding opposition to natural equity or inherent rights no ground for annulling statute; *Reelfoot Lake Levee District v. Dawson*, 97 Tenn. 159, 34 L. R. A. 728, 36 S. W. 1041, holding statute constitutional unless clearly violating specific provision of state or Federal Constitution.

12 L. R. A. 81, *BOWAR v. CHICAGO WEST DIV. R. CO.* 136 Ill. 101, 26 N. E. 702.

**When writ of possession issuable.**

Cited in *Wilson v. Trustees of Schools*, 138 Ill. 290, 27 N. E. 1103, holding execution not issuable upon judgment in ejectment after seven years, without revival by scire facias.

12 L. R. A. 84, *CALUMET RIVER R. CO. v. BROWN*, 136 Ill. 322, 26 N. E. 501.

**Rights of lienor to award on condemnation.**

Cited in *Thompson v. Chicago, S. F. & C. R. Co.* 110 Mo. 163, 19 S. W. 77, holding award on condemnation applicable to mortgage; *Thomas v. St. Louis, B. & S. R. Co.* 164 Ill. 636, 46 N. E. 8, holding vendor's lien attaches to award for property condemned.

Cited in note (18 L. R. A. 115, 116) on rights of mortgagee of premises taken by eminent domain.

Distinguished in *Stopp v. Wilt*, 177 Ill. 623, 52 N. E. 1028, Affirming 76 Ill. App. 535, holding vendor relinquishing all claims to award on condemnation not entitled to have fund applied on purchase money mortgage.

**Right of owner against railroad lawfully in possession.**

Cited in *Chicago, P. & St. L. R. Co. v. Vaughn*, 99 Ill. App. 390, denying right of remainder-man to recover possession of land purchased by railroad from life tenant.

**Right of stranger to proceeding to question validity.**

Cited in *Payson v. People*. 175 Ill. 272, 51 N. E. 588, holding landowner, not party to drainage assessment proceedings, not concluded by judgment of confirmation.

**Power of court over money paid into court.**

Cited in footnotes to *Re Rochester*, 19 L. R. A. 161, which holds power of court over fund in court not divested by conditional transfer to one of parties; *Jones v. Merchants' Nat. Bank*, 35 L. R. A. 698, which holds money paid into court exempt from process of litigant, unless consent of court obtained.

12 L. R. A. 87, *DEMBY v. PARSE*, 53 Ark. 526, 14 S. W. 899.

**Remainderman's rights in buildings.**

Cited in footnote to *Melms v. Pabst Brewing Co.* 46 L. R. A. 478, which holds removal of worthless dwelling house by life tenant not waste.

**Fixtures.**

Cited in note (19 L. R. A. 443) on effect of agreement to prevent fixtures from becoming part of realty.

12 L. R. A. 89, *LONG v. STATE*, 73 Md. 527, 20 Am. St. Rep. 606, 21 Atl. 683.

**Lottery schemes.**

Second appeal in 74 Md. 565, 12 L. R. A. 425, 28 Am. St. Rep. 268, 22 Atl. 4, which holds gift enterprise not involving element of chance cannot be prohibited.

Cited in *Lansburgh v. District of Columbia*, 11 App. D. C. 529. holding distribution of "trading stamps" within statute prohibiting gift enterprise.

Cited in footnotes to *Meyer v. State*, 51 L. R. A. 496, which holds giving customers chance to operate slot machine and secure, in addition to purchase, article whose value determined by place where revolving wheel stops, a lottery; *Lynch v. Rosenthal*, 31 L. R. A. 835, which holds sale of lots to be drawn by lot, with one prize lot to be given to one of purchasers as result of chance, void; *State ex rel. Prout v. Nebraska Home Co.* 60 L. R. A. 448, which holds scheme by which common fund distributed among contributors, a valuable preference in distribution depending on chance, a lottery; *Thornhill v. O'Rear*, 31 L. R. A. 792, which holds agreement by one person to take all chances of raffle not unlawful.

**Right to lottery prize.**

Cited in footnote to *Martin v. Richardson*, 19 L. R. A. 692, which holds unlawful purchaser of lottery ticket entitled to recover proceeds from one fraudulently obtaining after prize drawn.

12 L. R. A. 90, *CORSON v. DUNLAP*, 83 Me. 32, 21 Atl. 173.

**Judgments on penal bonds.**

Cited in notes (62 L. R. A. 437, 443, 444) on form of judgment on penal bonds.

12 L. R. A. 93, *DUGAN v. LEWIS*, 79 Tex. 246, 23 Am. St. Rep. 332, 14 S. W. 1024.

**Interest on contracts between citizens of different states.**

Cited in *Jackson v. American Mortg. Co.* 88 Ga. 762, 15 S. E. 812; *Lanier v. Union Mortg. Bkg. & T. Co.* 64 Ark. 49, 40 S. W. 466; *New England Mortg. Secur. Co. v. McLaughlin*, 87 Ga. 4. 13 S. E. 81; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 174, 13 L. R. A. 302, 9 So. 143,—holding parties residing in different states may contract for either rate of interest, without regard to usury laws of place of payment; *Andruss v. People's Bldg. Loan & Sav. Asso.* 36 C. C. A.

341, 94 Fed. 580; *Manship v. New South Bldg. & L. Asso.* 110 Fed. 860; *United States Sav. & L. Co. v. Shain*, 8 N. D. 140, 77 N. W. 1006,—holding borrower and lender residing in different states may agree that laws of either shall govern.

Cited in notes (55 L. R. A. 936) on whether *lex rei sitæ* as to interest and usury necessarily control in action to foreclose mortgage on real property; (62 L. R. A. 51) on conflict of laws as to interest and usury.

**Stipulations as to maturity of loan.**

Cited in *Glover v. Equitable Mortg. Co.* 31 C. C. A. 107, 59 U. S. App. 151, 87 Fed. 520, holding provision giving mortgagee right to declare principal due if mortgage is taxed not usurious.

12 L. R. A. 97, *ELL v. NORTHERN P. R. CO.* 1 N. D. 336, 26 Am. St. Rep. 621, 48 N. W. 222.

**Liability for superior servant's negligence.**

Cited in *Barnicle v. Connor*, 110 Iowa, 240, 81 N. W. 452, denying master's liability to employee for negligence of foreman undertaking to keep column from rolling; *Atchison. T. & S. F. R. Co. v. Martin*, 7 N. M. 172, 34 Pac. 536, holding foreman fellow servant of section hand injured through former's failure to observe approaching train; *Southern Indiana R. Co. v. Martin*, 160 Ind. 289, 66 N. E. 886, denying railroad's liability for negligence of foreman engaged in stretching cable used in unloading stone.

Cited in notes (18 L. R. A. 825) on negligent superiors; (54 L. R. A. 39, 43, 61) on vice principalship as determined with reference to character of act which caused injury; (51 L. R. A. 519, 520, 529, 618) on vice principalship considered with reference to superior rank of negligent servant.

Distinguished in *Standard Cement Co. v. Minor*, 27 Ind. App. 483, 61 N. E. 684, holding complaint alleging injuries received by employee in regular line of employment through negligence of boss, insufficient.

**Who are fellow servants.**

Cited in *Bennett v. Northern R. Co.* 2 N. D. 116, 13 L. R. A. 468, 49 N. W. 408, holding car inspector not fellow servant of one coupling cars; *Northern P. R. Co. v. Hogan*, 11 C. C. A. 53, 27 U. S. App. 184, 63 Fed. 105, holding brakeman and conductor fellow servants; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 391, 46 L. R. A. 347, 27 S. E. 278, holding conductor assisting in coupling cars brakeman's fellow servant; *Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 405, 48 L. R. A. 408, 77 Am. St. Rep. 721, 55 S. W. 108, holding engineer and conductor of freight train fellow servants of fireman; *Missouri P. R. Co. v. Lyons*, 54 Neb. 640, 75 N. W. 13, holding members of two switching crews working in same yard fellow servants; *Jaques v. Great Falls Mfg. Co.* 66 N. H. 485, 13 L. R. A. 826, 22 Atl. 552, holding loom-fixer in cotton mill not fellow servant of weaver; *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 378, 18 L. R. A. 807, 19 S. W. 1119 (dissenting opinion), majority holding track repairer and crew of construction train not fellow servants.

Cited in footnotes to *Clarke v. Pennsylvania Co.* 17 L. R. A. 811, which holds section boss of one gang and member of another gang fellow servants; *Baltimore & O. R. Co. v. Andrews*, 17 L. R. A. 190, which holds conductor and engineer fellow servants of brakeman on other train; *Fisher v. Oregon Short Line & U. N. R. Co.* 16 L. R. A. 519, which holds section foreman and conductor not fellow serv-

ants; *Daniel v. Chesapeake & O. R. Co.* 16 L. R. A. 383, which holds conductor and brakeman on different trains not fellow servants; *Palmer v. Michigan C. R. Co.* 17 L. R. A. 637, which holds assistant roadmaster not fellow servant of gang of men working under him.

**Interest on damages in negligence actions.**

Cited in footnote to *Louisville & N. R. Co. v. Wallace*, 14 L. R. A. 548, which denies interest before judgment in action for personal injuries.

Cited in note (18 L. R. A. 449) on interest on sum allowed as damages.

12 L. R. A. 103, *TENNESSEE COAL, IRON & R. CO. v. KYLE*, 93 Ala. 1, 8 So. 764.

**Duty to furnish safe appliances.**

Cited in *Lutz v. Atlantic & P. R. Co.* 6 N. M. 528, 16 L. R. A. 833, 30 Pac. 912, upholding railroad's liability to conductor for failure to furnish suitable cabooses.

12 L. R. A. 104, *KELLOGG v. COCHRAN*, 87 Cal. 192, 25 Pac. 877.

**Effect of failure to consider point on rehearing.**

Cited in *Wilcox v. Luco*, 118 Cal. 643, 45 L. R. A. 584, 62 Am. St. Rep. 305, 50 Pac. 758, holding failure to reconsider opinion not decision adverse to point first raised on motion for rehearing.

12 L. R. A. 107, *NATIONAL PROGRESS BUNCHING MACH. CO. v. JOHN R. WILLIAMS CO.* 44 Fed. 190.

**Patent for combinations.**

Cited in *Fuller & J. Mfg. Co. v. Bender*, 69 Fed. 1001, holding patent on addition of fertilizer hopper to transplanting machine void; *Paul Boynton Co. v. Morris Chute Co.* 82 Fed. 445, holding combination of inclined railway, body of water, and boat-shaped car not patentable; *Merritt v. Middleton*, 55 Fed. 979, holding aggregation of old elements, not producing new result, not patentable; *Dunbar v. Eastern Elevating Co.* 75 Fed. 571, holding combination of movable elevator tower and storage warehouse patentable.

**Enlargement of patent by construction.**

Cited in *Parry Mfg. Co. v. Hitchcock Mfg. Co.* 58 Fed. 404, holding claim narrowed to precise mechanism of patent cannot be enlarged by construction.

12 L. R. A. 110, *BULLARD v. SHIRLEY*, 153 Mass. 559, 27 N. E. 766.

**Charitable bequests.**

Cited in *Teale v. Bishop of Derry*, 168 Mass. 342, 38 L. R. A. 630, 60 Am. St. Rep. 401, 47 N. E. 422, holding court will not frame scheme to carry out bequest of charitable nature, impossible of performance in manner provided.

Distinguished in *Sears v. Chapman*, 158 Mass. 401, 35 Am. St. Rep. 502, 33 N. E. 604, holding bequest for educational purposes "to be under control of inhabitants of Q." valid.

**Legacy on condition.**

Cited in footnote to *Re Jones*, 48 L. R. A. 580, which sustains legacy conditioned on legatee being declared reformed man at expiration of specified time.

**Effect of inability to perform condition of gift.**

Cited in footnote to *Ellicott v. Ellicott*, 48 L. R. A. 58, which holds gift conditioned on graduation from specified university not devested by death during college course.

**Municipal corporation as trustee of charity.**

Cited in note (14 L. R. A. 70) on municipal corporation as trustee of charity.

**Suspension of power of alienation.**

Cited in footnote to *Murphy v. Whitney*, 24 L. R. A. 123, which holds agreement that land descending to brothers and sisters shall, on death of last survivor, pass to child of only married one, not void as perpetuity.

**Instruments construed as written.**

Cited in *Jones v. Parker*, 163 Mass. 568, 40 N. E. 1044, construing covenant thereafter to heat and light demised premises as requiring presence of apparatus therefor at beginning of term.

Distinguished in *Quincy v. Atty. Gen.* 160 Mass. 434, 35 N. E. 1066, construing bequest to town, "to be kept as perpetual fund guaranteed by town with 6 per cent forever," as not requiring giving of guaranty.

12 L. R. A. 113, *PURCELL v. RICHMOND & D. R. CO.* 108 N. C. 414, 12 S. E. 954, 956.

**Actions in tort for breach of duty.**

Cited in *Pickens v. South Carolina & G. R. Co.* 54 S. C. 502, 32 S. E. 567, holding action against railroad for failure to carry passenger to destination sounds in tort; *Solomon v. Bates*, 118 N. C. 315, 54 Am. St. Rep. 725, 24 S. E. 478, holding action for damages for bank director's failure to discharge duties sounds in tort; *Richardson v. Wilmington & W. R. Co.* 126 N. C. 102, 35 S. E. 235, holding action for tort may grow out of breach of contract; *Hood v. Sudderth*, 111 N. C. 222, 16 S. E. 307, holding plaintiff may elect whether ambiguous complaint be construed as one in tort or on contract.

**Damages against carrier.**

Followed in *Thomas v. Southern R. Co.* 122 N. C. 1006, 30 S. E. 343, and *Cable v. Southern R. Co.* 122 N. C. 900, 29 S. E. 377, as to damages recoverable for breach of statutory duty to stop at regular station.

Cited in *Smith v. Wilmington & W. R. Co.* 130 N. C. 312, 41 S. E. 481 (dissenting opinion), majority denying railroad's liability for carrying passenger past destination, in absence of evidence of actual damage; *Story v. Norfolk & S. R. Co.* 133 N. C. 62, 45 S. E. 349, holding exemplary damages allowable for exclusion of passenger for alleged intoxication, made with malice, undue force, or insult; *Brooks v. Jamesville & W. R. Co.* 115 N. C. 625, 20 S. E. 535 (dissenting opinion), as to carrier's liability for exemplary damages, though not physically injured.

Cited in note (32 L. R. A. 545) on liability to passenger for default or delay in running train.

Distinguished, explained, and reinstated in *Hansley v. Jamesville & W. R. Co.* 117 N. C. 568, 32 L. R. A. 552, 53 Am. St. Rep. 600, 23 S. E. 443, Modifying on rehearing 115 N. C. 614, 32 L. R. A. 548, 44 Am. St. Rep. 474, 20 S. E. 528 (which overruled the main case), denying railroad's liability for punitive damages for failure, by reason of defective equipment, to return excursionist to starting point.

**Who may recover statutory penalty for railroad's breach of duty.**

Cited in *State ex rel. Carter v. Wilmington & W. R. Co.* 126 N. C. 442, 36 S. E. 14, holding penalties imposed on common carrier for refusal to receive freight recoverable by individuals.

**Construction of pleadings.**

Cited in *Wilson v. Brown*, 134 N. C. 407, 46 S. E. 762, dissenting opinion by Walker, J., who holds pleadings should be construed, so far as possible, as pleader intended.

12 L. R. A. 115, *SPENCER v. ANDREW*, 82 Iowa, 14, 47 N. W. 1007.

**Obstruction of highway as nuisance.**

Cited in footnote to *Costello v. State*, 35 L. R. A. 303, which holds permanent appropriation of part of sidewalk for fruit stand indictable nuisance.

Cited in notes (39 L. R. A. 660, 662) on municipal power over nuisances affecting highways and waters; (42 L. R. A. 824) on injunctions by municipalities against nuisances on highways and streets.

**Revocation of permission to use street.**

Cited in *Levis v. Newton*, 75 Fed. 897, holding mere license to use streets revocable.

Distinguished in *Laing v. Americus*, 86 Ga. 758, 13 S. E. 107, holding city not estopped from revoking permission to maintain structure in street, granted without authority.

**Municipalities; implied powers.**

Cited in *Levis v. Newton*, 75 Fed. 888, holding authority to light streets implies power to grant franchise to use streets for gas and electric plants.

12 L. R. A. 117, *PEOPLE ex rel. ATTY. GEN. v. DASHAWAY ASSO.* 84 Cal. 114, 24 Pac. 277.

**Forfeiture of corporate charter.**

Cited in *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 487, 53 L. R. A. 415, 74 Am. St. Rep. 314, 53 N. E. 1089, holding corporation's misconduct gives state right to declare franchise forfeited; *People v. Rosenstein-Cohn Cigar Co.* 131 Cal. 156, 63 Pac. 163, holding (*obiter*) corporation's charter forfeited by violation of its terms; *People ex rel. Skelton v. Los Angeles*, 133 Cal. 341, 65 Pac. 749, holding that complaint in action by state to exclude city from control over certain territory annexed, may charge usurpation of franchise in general terms or may set out specific grounds relied on.

Cited in note (9 L. R. A. 273) on proceedings to forfeit corporate franchise.

**Definiteness of charitable gifts.**

Cited in footnote to *Thompson v. Brown*, 62 L. R. A. 398, which sustains devise of fund to be distributed "to the poor" at executor's discretion.

12 L. R. A. 120, *AUSTIN v. DAVIS*, 128 Ind. 472, 25 Am. St. Rep. 456, 26 N. E. 890.

**Agreement to care for person during life.**

Cited in *Hershman v. Pascal*, 4 Ind. App. 333, 30 N. E. 932, holding parol

agreement to convey land if promisee would live with promisor during lifetime within statute of frauds.

Cited in notes (14 L. R. A. 862-863) on agreement to pay money or give property after death of promisor; (53 L. R. A. 368) on moral obligation as consideration for promise.

**Contract contained in more than one instrument.**

Cited in *Maris v. Masters*, 31 Ind. App. 243, 67 N. E. 699, upholding land contract in two parts, executed at different times, one containing terms, and other a receipt describing property.

**Effect of part performance of contract within statute of frauds.**

Cited in *Hamilton v. Thirston*, 93 Md. 219, 48 Atl. 709, holding performance by promisee of parol contract to devise property will not, in action at law, take case out of statute; *Swash v. Sharpstein*, 14 Wash. 436, 32 L. R. A. 799, 44 Pac. 862, holding oral agreement to devise property, in settlement of suit, not validated by promisee's surrender of rights; *Lake Erie & W. R. Co. v. Michigan C. R. Co.* 86 Fed. 845, holding possession in common with grantor insufficient to take verbal grant of lands out of statute of frauds.

Disapproved in *Bryson v. McShane*, 48 W. Va. 130, 49 L. R. A. 529, 35 S. E. 848, holding oral agreement to convey property to persons caring for promisor during lifetime enforceable.

**Effect of agreement to devise on power of disposition.**

Distinguished in *Whiton v. Whiton*, 76 Ill. App. 570, holding agreement to devise property prevents transfer in lifetime, which is in effect a testamentary disposal.

**Adoption of child as affecting previous will.**

Cited in *Re Gregory*, 15 Misc. 409, 37 N. Y. Supp. 925, holding adopted child's right of inheritance subject to parents' testamentary power.

**Contracts by women after disability removed.**

Distinguished in *Purviance v. Purviance*, 14 Ind. App. 273, 42 N. E. 364, holding widow's agreement to pay deceased husband's debt valid; *Lackey v. Boruff*, 152 Ind. 375, 53 N. E. 412, holding married woman's mortgage securing renewal of note signed as surety prior to enabling act of 1881 valid as to creditors.

12 L. R. A. 125, *MISCH v. RUSSELL*, 136 Ill. 22, 26 N. E. 528.

**Jurisdiction of election contests.**

Cited in *Murdock v. Weimer*, 55 Ill. App. 527, holding election of drainage commissioners contestable in county court; *Snowball v. People*, 147 Ill. 264, 35 N. E. 538, holding that county court's jurisdiction of contests of school elections does not exclude quo warranto proceedings in another court.

**"Ejusdem generis."**

Cited in *Ritchie v. People*, 155 Ill. 107, 29 L. R. A. 83, 46 Am. St. Rep. 315, 40 N. E. 454, construing act "to regulate manufacture of clothing, wearing apparel, and other articles," as embracing only manufacture of articles of kind expressly enumerated; *Union County v. Cassery*, 147 Ill. 208, 35 N. E. 618, holding words "or other public measure," following "constitutional amendment," not limited to measures affecting whole state; *Spalding v. People*, 172 Ill. 49, 49 N. E. 993, construing statute concerning "state, county, township, city, town, village, or other

officer," as applying to other like officers; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 520, 59 L. R. A. 644, 65 N. E. 451, construing general words "all others pursuing the occupations" as limited by specific words immediately preceding; *First Nat. Bank v. Adam*, 138 Ill. 500, 28 N. E. 955, restricting words "or other property" to meaning analogous to that of preceding words "goods" and "chattels;" *Cameron v. Sexton*, 110 Ill. App. 386, holding claims against land only, assumed by grantee taking deed "subject to mortgages, liens, taxes, and claims of any and every description."

Cited in footnote to *Capehart v. Burrus*, 42 L. R. A. 152, which holds live stock not included in bequest of "notes, bonds, stock, and money."

Distinguished in *Adams v. Akerlund*, 168 Ill. 637, 48 N. E. 454, holding maxim, *Ejusdem generis* not applicable to construction of phrase "goods and effects."

12 L. R. A. 129, *UPHAM v. DETROIT CITY R. CO.* 85 Mich. 12, 48 N. W. 199.

**Riding on car platform or step as negligence.**

Cited in *Bailey v. Tacoma Traction Co.* 16 Wash. 63, 47 Pac. 241; *Seymour v. Citizens' R. Co.* 114 Mo. 271, 21 S. W. 739; *Matz v. St. Paul City R. Co.* 52 Minn. 163, 53 N. W. 1071,—holding standing on street car platform not negligence *per se*, in absence of regulation to contrary; *Archer v. Ft. Wayne & E. R. Co.* 87 Mich. 106, 49 N. W. 488, and *East Omaha Street R. Co. v. Godola*, 50 Neb. 909, 70 N. W. 491, holding standing on platform of crowded car not negligence *per se*; *Pray v. Omaha Street R. Co.* 44 Neb. 173, 48 Am. St. Rep. 717, 62 N. W. 447, holding standing on step of crowded car not negligence *per se*; *Noble v. St. Joseph & B. Harbor R. Co.* 98 Mich. 255, 57 N. W. 126, holding (*obiter*) not negligence to ride on platform of crowded horse car; *North Chicago Street R. Co. v. Baur*, 179 Ill. 129, 45 L. R. A. 110, footnote p. 108, 53 N. E. 568, which holds standing on street car platform, with back against dashboard, not necessarily negligence.

Cited in footnotes to *Watson v. Portland & C. E. R. Co.* 44 L. R. A. 157, which holds riding on front platform of electric cars not negligence *per se*; *Fisher v. West Virginia & P. R. Co.* 33 L. R. A. 69, which holds riding on car platform, and refusing to go inside at request, negligence; *Sweetland v. Lynn & B. R. Co.* 51 L. R. A. 783, which sustains rule forbidding passengers to ride on front platform of electric car; *Third Ave. R. Co. v. Barton*, 52 L. R. A. 471, which denies right of passenger on running board of street car to recover for injuries by contact with pillar near track, while passing around conductor; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 34 L. R. A. 141, which holds it negligent to go on lower step of rapidly moving railroad car to vomit.

12 L. R. A. 131, *FALL RIVER NAT. BANK v. SLADE*, 153 Mass. 415, 26 N. E. 843.

**Application of collateral to several debts.**

Cited in footnote to *Hallowell v. Blackstone Nat. Bank*, 13 L. R. A. 315, which holds pledge of securities for certain note, with right to apply surplus to any other claims, entitles pledgee to apply it to such other claims regardless of whether or not principal note is paid.

12 L. R. A. 134, *Ex parte ALABAMA STATE BAR ASSO.* 92 Ala. 113, 8 So. 768. **Mandamus; when issuable.**

Cited in *State ex rel. Harmon v. Hamil*, 97 Ala. 109, 11 So. 892, holding mandamus does not lie to compel recanvass of votes by board of supervisors.



— To compel exercise of judicial functions.

Cited in *Montgomery County v. Cochran*, 116 Fed. 1002, holding performance of judicial duty compellable by mandamus; *Crook v. Newborg*, 124 Ala. 484, 82 Am. St. Rep. 190, 27 So. 432, holding mandamus proper to compel judge to certify his incompetency to try case; *State ex rel. Smith v. Pitts*, 139 Ala. 155, 36 So. 20, holding mandamus issuable to correct judge's erroneous adjustment of incompetency; *Schintz v. Morris*, 13 Tex. Civ. App. 594, 35 S. W. 516, holding mandamus issuable to compel court to retry issue after setting aside verdict; *Wilson v. Duncan*, 114 Ala. 672, 21 So. 1017, holding mandamus proper to correct rulings of judge failing to require proper bond from contestant in election case; *Ex parte Hurn*, 92 Ala. 104, 13 L. R. A. 122, 25 Am. St. Rep. 23, 9 So. 515, holding mandamus not issuable to compel court to hear motion already overruled; *Steele v. Donehoo*, 116 Ala. 567, 22 So. 896, holding (*obiter*) mandamus proper to compel court to exercise jurisdiction.

Distinguished in *State ex rel. Burbridge v. Call*, 41 Fla. 459, 26 So. 1016, holding mandamus improper to compel revocation of appealable decision.

**What disqualifies judge.**

Cited in *Montgomery County v. Cochran*, 116 Fed. 1001, holding citizen and taxpayer not disqualified to hear case to which county is party; *Medlin v. Taylor*, 101 Ala. 242, 13 So. 310, holding judge whose election contested incompetent to hear contest growing out of same election.

Cited in footnotes to *Meyer v. San Diego*, 41 L. R. A. 762, which holds judge owning land in city disqualified to sit in suit contesting validity of contract to issue city bonds; *First Nat. Bank v. McGuire*, 47 L. R. A. 413, which holds judge disqualified to try case in which plaintiff is corporation of which his wife is shareholder.

**Judge's adjudication of own disqualification.**

Cited in *Medlin v. Taylor*, 101 Ala. 241, 13 So. 310, holding adjudication by judge of own incompetency to hear cause not conclusive.

12 L. R. A. 136, *McCARTY v. WOODSTOCK IRON CO.* 92 Ala. 463, 8 So. 417.

**Disaffirmance of infant's contracts.**

Cited in *Pippen v. Mutual Ben. L. Ins. Co.* 130 N. C. 27, 57 L. R. A. 508, 40 S. E. 822, holding surrender of insurance policy not disaffirmable by insured's administrator on ground of infancy; *Shroyer v. Pittenger*, 31 Ind. App. 161, 67 N. E. 475, holding infant's deed may be disaffirmed by any act of positive dissent upon reaching majority.

Cited in footnote to *Bullock v. Sprowls*, 47 L. R. A. 327, which holds restoration of consideration unnecessary on infant's disaffirmance of deed after dissipating consideration.

**Legal title unaffected by estoppel.**

Cited in *Nashville, C. & St. L. R. Co. v. Hobbs*, 120 Ala. 610, 24 So. 933; *South & North Ala. R. Co. v. Alabama G. S. R. Co.* 102 Ala. 237, 14 So. 747 (*obiter*); *Hawkins v. Ross*, 100 Ala. 464, 14 So. 278,—holding that legal title to land does not pass by parol estoppel.

**Jurisdiction of equity to cancel written instruments.**

Cited in footnote to *Ada County v. Bullen Bridge Co.* 36 L. R. A. 367, which denies right to maintain equitable action to cancel county warrants.

12 L. R. A. 140, MONTGOMERY v. CROSTHWAIT, 90 Ala. 553, 24 Am. St. Rep. 832, 8 So. 498.

**Effect on negotiability of note of provision for collection costs.**

Cited in *Shenandoah Nat. Bank v. Marsh*, 89 Iowa, 276, 48 Am. St. Rep. 381, 56 N. W. 458, and *Second Nat. Bank v. Anglin*, 6 Wash. 407, 33 Pac. 1056, holding negotiability of note unaffected by stipulation to pay attorney's fees in case of suit; *Stapleton v. Louisville Bkg. Co.* 95 Ga. 804, 23 S. E. 81, holding stipulation to pay all costs and 10 per cent counsel fees if placed with attorney does not destroy negotiability; *First Nat. Bank v. Slaughter*, 98 Ala. 603, 39 Am. St. Rep. 88, 14 So. 545, holding note containing provision for paying attorney's fee on collection negotiable; *Lockwood v. Lindsey*, 6 App. D. C. 400, holding negotiability of note containing stipulation for payment of collection fees determined by law of place where payable; *Hanover Nat. Bank v. Johnson*, 90 Ala. 553, 8 So. 42, raising, without deciding, whether stipulation in note to pay costs of collection destroys negotiability; *Sylvester Blackley Co. v. Alewine*, 48 S. C. 311, 37 L. R. A. 88, 26 S. E. 609, holding (*obiter*) note rendered non-negotiable by provision for attorney's fees.

Cited in footnote to *Pattillo v. Alexander*, 29 L. R. A. 616, which sustains payee's guaranty of attorney's fees if note has to be collected by law.

**Material alteration of instrument.**

Cited in *Jordan v. Long*, 109 Ala. 418, 19 So. 843, holding unauthorized alteration of indorsement by holder by inserting waiver of exemptions releases indorser; *Green v. Sneed*, 101 Ala. 207, 36 Am. St. Rep. 119, 13 So. 277, holding filling blanks by party in excess of authority vitiates instrument; *White Sewing Mach. Co. v. Saxon*, 121 Ala. 409, 25 So. 784, holding unauthorized attestation after execution vitiates instrument; *Hollis v. Harris*, 96 Ala. 290, 11 So. 377, holding unauthorized substitution of name of another grantee invalidates deed; *Brown v. Johnson Bros.* 127 Ala. 295, 51 L. R. A. 404, footnote, p. 403, 85 Am. St. Rep. 134, 28 So. 579, which holds maker released by payee's addition of name of other person as comaker; *Payne v. Long*, 121 Ala. 390, 25 So. 780, holding (*obiter*) detachment of memorandum from note avoids it; *Lesser v. Scholze*, 93 Ala. 339, 9 So. 273, holding (*obiter*) unauthorized alteration of date vitiates note; *Rudolph v. Brewer*, 96 Ala. 193, 11 So. 314, holding (*obiter*) signature of another as joint maker after delivery of note releases surety.

Cited in footnotes to *Gleason v. Hamilton*, 21 L. R. A. 210, which holds mortgage not invalidated by alteration by attorney drawing same without mortgagee's knowledge; *Simmons v. Atkinson & L. Co.* 23 L. R. A. 599, which holds insertion of words "or bearer," and place of payment, a material alteration; *Rochford v. McGee*, 61 L. R. A. 335, which holds removal of note written below perforated line on application for insurance, material alteration rendering it void; *Foxworthy v. Colby*, 62 L. R. A. 393, which holds insertion of "gold" before "dollars," material alteration.

Distinguished in *Winter v. Pool*, 104 Ala. 582, 16 So. 543, Modifying 100 Ala. 504, 14 So. 411, holding maker negligently leaving blank, rendering possible alteration of note, liable to bona fide holder; *Alabama State Land Co. v. Thompson*, 104 Ala. 573, 53 Am. St. Rep. 80, 16 So. 440, holding unauthorized material alteration by grantee of deed does not divest title.

**Ratification of alteration.**

Cited in *Dickson Bros. v. Bamberger*, 107 Ala. 299, 18 So. 290, holding offer to pay and request for time, made with knowledge of alteration of bond, constitute ratification.

**Necessity of consideration for ratification.**

Cited in *State v. Paxton*, 65 Neb. 131, 90 N. W. 983, holding ratification by sureties of instrument as altered requires no new consideration.

**Burden of proof as to alteration.**

Cited in *Bouldin v. Barclay*, 121 Ala. 428, 25 So. 827, holding burden of proof on maker to show unauthorized alteration of note after execution, unless apparently tampered with; *Hart v. Sharpton*, 124 Ala. 642, 27 So. 450, holding burden of proof on mortgagee to explain suspicious alterations; *United States Fidelity & G. Co. v. Damskibsaktieselskabet Habi*, 138 Ala. 365, 35 So. 344, holding burden of proof on party alleging alteration not apparent on face of instrument.

**Construction of stipulation to pay costs of collecting note.**

Cited in *Laning v. Iron City Nat. Bank*, 89 Tex. 602, 35 S. W. 1048, and *Reeves v. Estes*, 124 Ala. 306, 26 So. 935, holding stipulation in note for paying costs of collection includes attorney's fees; *Tompkins v. Drennen*, 95 Ala. 466, 10 So. 638, holding stipulation in note to pay costs of collection, not less than 10 per cent, covers reasonable attorney's fees; *McGhee v. Importers & T. Nat. Bank*, 93 Ala. 195, 9 So. 734, holding guaranty of payment "with all legal or other expenses of or for collection" covers reasonable attorney's fees.

12 L. R. A. 146, *DURANT v. PIERSON*, 124 N. Y. 444, 21 Am. St. Rep. 686, 26 N. E. 1095.

Followed without discussion in *Miller v. Pierson*, 124 N. Y. 654, 27 N. E. 413.

**Powers of surviving partner.**

Cited in *Bell v. Hepworth*, 134 N. Y. 449, 47 N. Y. S. R. 812, 31 N. E. 918, holding surviving partner has power to mortgage firm assets in aid of business; *Burchinell v. Koon*, 8 Colo. App. 465, 46 Pac. 932, holding surviving partner may mortgage firm assets to secure firm debt; *First Nat. Bank v. Cody*, 93 Ga. 149, 19 S. E. 831, holding partnership assets liable for payment of renewal, by surviving partner, of firm note; *McCann v. Hazard*, 36 Misc. 11, 72 N. Y. Supp. 45, and *Dawson v. Parsons*, 46 N. Y. S. R. 724, 20 N. Y. Supp. 65, holding (*obiter*) surviving partner has sole control of assets for purpose of closing up business; *Rogers v. Flournoy*, 21 Tex. Civ. App. 558, 54 S. W. 386, holding (*obiter*) surviving partner may make assignment for benefit of creditors.

**Legal title to assets of partnership dissolved by death.**

Cited in *Willis v. McKinnon*, 37 Misc. 388, 75 N. Y. Supp. 770, holding devisees of deceased partner acquire no legal title to assets until final settlement of firm business.

**Equitable lien of firm creditors.**

Cited in *Citizens' Bank v. Williams*, 35 N. Y. S. R. 544, 12 N. Y. Supp. 678, holding firm note given for individual debt invalid as against firm creditors; *Schwab v. Kaughran*, 42 N. Y. S. R. 408, 17 N. Y. Supp. 926, holding partner's payment of individual debt out of firm assets invalidates general assignment.

Distinguished in *Dexter v. Dexter*, 43 App. Div. 275, 60 N. Y. Supp. 371, holding creditors of business carried on by surviving partner have no preference over individual creditors.

12 L. R. A. 150, *OLYMPIA v. MANN*, 1 Wash. 389, 25 Pac. 337.

**Municipal power to regulate erection of buildings.**

Cited in *Hubbard v. Medford*, 20 Or. 318, 25 Pac. 640, upholding city ordinance prohibiting erection of wooden buildings within fire limits.

Cited in footnotes to *Eichenlaub v. St. Joseph*, 18 L. R. A. 590, which holds ordinance prohibiting wooden buildings within fire limits cannot be suspended by simple resolution; *Bostock v. Sams*, 59 L. R. A. 282, which holds unauthorized, ordinance permitting refusal of permits for erecting buildings not conforming in size, appearance, etc., to existing buildings; *Sioux Falls v. Kirby*, 25 L. R. A. 621, which holds void, ordinance making owner's right to improve and use property depend on decision of city inspector.

Cited in note (38 L. R. A. 171, 174) on municipal power over buildings and other structures as nuisances.

**Reasonableness of municipal ordinances.**

Cited in footnotes to *Slaughter v. O'Berry*, 48 L. R. A. 442, which holds void, ordinance making city provide materials and make sewer connections to within 3 feet of building; *Beiling v. Evansville*, 35 L. R. A. 272, which refuses to hold void, ordinance prohibiting maintenance of slaughterhouse within city when authorized by statute.

12 L. R. A. 155, *LYONS v. PLANTERS' LOAN & SAV. BANK*, 86 Ga. 485, 12 S. E. 882.

**Effect of general demurrer.**

Cited in *Paulk v. Tanner*, 106 Ga. 220, 32 S. E. 99; *Southern R. Co. v. Cook*, 106 Ga. 453, 32 S. E. 585; *Savannah, F. & W. R. Co. v. Atkinson*, 94 Ga. 782, 21 S. E. 1010,—holding general demurrer precludes motion to dismiss for want of process.

**Necessity of exhibits to pleadings.**

Cited in *Harp v. Abbeville Invest. & Constr. Co.* 108 Ga. 179, 33 S. E. 998, holding exhibits unnecessary to accompany averment of termination of suit.

**Liability of church property for debts.**

Cited in *Josey v. Union Loan & T. Co.* 106 Ga. 612, 32 S. E. 628, holding church edifice and site liable for debt incurred by congregation.

Cited in note (38 L. R. A. 689) on liability for salary of pastor.

**Church property as private property.**

Cited in *Macon & A. R. Co. v. Riggs*, 87 Ga. 159, 13 S. E. 312, holding church property subject to railroad condemnation proceedings.

12 L. R. A. 157, *BAIRD v. BROOKIN*, 86 Ga. 709, 12 S. E. 981.

**Interest of afterborn children under deed or devise.**

Cited in *Davis v. Hollingsworth*, 113 Ga. 211, 84 Am. St. Rep. 233, 38 S. E. 827, holding deed to woman "and her children should any be born" conveys no interest to subsequently born children; *Hollis v. Lawton*, 107 Ga. 106, 73 Am. St. Rep. 114.

32 S. E. 846, holding conveyance in trust for woman and issue does not include subsequently born children; *McCord v. Whitehead*, 98 Ga. 385, 25 S. E. 767, holding devise to parent and children vests fee in parent and child living at date of will and at testator's death.

Distinguished in *Riggins v. Adair*, 105 Ga. 730, 31 S. E. 743, holding deed in trust for use of beneficiary "during natural life," and at death "then" to beneficiary's children, includes children subsequently born; *Sumpter v. Carter*, 115 Ga. 902, 60 L. R. A. 278, 42 S. E. 324, construing devise of estate to "daughters and their children" at termination of life tenancy as vesting interest in children living at life tenant's death.

**Rule of construction of Code.**

Cited in *Lamar v. McLaren*, 107 Ga. 599, 34 S. E. 116, holding, unless contrary manifestly appears, language of Code sections regarded as declaratory of existing law.

12 L. R. A. 160, *HOWARD v. WORCESTER*, 153 Mass. 426, 25 Am. St. Rep. 651, 27 N. E. 11.

**Liability of municipality for negligence.**

Cited in *Johnson County v. Reinier*, 18 Ind. App. 121, 47 N. E. 642, and *Jasper County v. Allman*, 142 Ind. 577, 39 L. R. A. 62, 42 N. E. 206, denying county's liability in absence of statute for negligence in failing to repair bridge; *Huges v. Monroe County*, 79 Hun, 126, 29 N. Y. Supp. 495, denying county's liability for negligence of persons in charge of lunatic asylum; *Russell v. Tacoma*, 8 Wash. 159, 40 Am. St. Rep. 895, 35 Pac. 605, denying city's liability for negligence of employees improving public park; *Ulrich v. St. Louis*, 112 Mo. 147, 34 Am. St. Rep. 372, 20 S. W. 466, denying city's liability for negligence of workhouse superintendent; *Brown v. New York*, 32 Misc. 574, 66 N. Y. Supp. 382, denying city's liability for defect in floor of school building; *Ernst v. West Covington*, 25 Ky. L. Rep. 1028, 63 L. R. A. 654, 76 S. W. 1089, denying municipal liability for injury to child falling from unfenced playground into street; *Freel v. Crawfordsville*, 142 Ind. 29, 37 L. R. A. 304, 41 N. E. 312, denying liability in absence of statute, of school corporation for negligence of agent; *McKay v. Reading*, 184 Mass. 142, 68 N. E. 43, denying municipality's liability to person injured by defect in walk on public common.

Cited in footnote to *Snider v. St. Paul*, 18 L. R. A. 151, which holds city not liable for negligence of agents in providing and maintaining city hall.

Cited in note (37 L. R. A. 301) on liability of school district or school corporation to action for damages from negligence.

Distinguished in *Butman v. Newton*, 179 Mass. 6, 88 Am. St. Rep. 349, 60 N. E. 401, holding city liable for negligence of agent making repairs on highway; *Miles v. Worcester*, 154 Mass. 513, 13 L. R. A. 842, 26 Am. St. Rep. 264, 28 N. E. 676, holding city liable for encroachment of retaining wall on adjoining premises; *Buchanan v. Barre*, 66 Vt. 132, 23 L. R. A. 489, 44 Am. St. Rep. 829, 28 Atl. 878, denying liability of town renting town hall for private use, for defective sidewalk for which village responsible.

**Distinction between public and private municipal enterprises.**

Cited in *Mt. Hope Cemetery v. Boston*, 158 Mass. 513, 35 Am. St. Rep. 515, 33 N. E. 695, holding city's title to cemetery not subject to legislative control.

12 L. R. A. 161, *POTTER v. JONES*, 20 Or. 239, 25 Pac. 769.

**Insane delusions.**

Cited in *Skinner's Will*, 40 Or. 579, 67 Pac. 951, holding idea based upon untrue statements of others not insane delusion; *Re Cline*, 24 Or. 177, 41 Am. St. Rep. 851, 33 Pac. 542, holding erroneous belief as to feelings of children toward testator, having basis in fact, not insane delusion; *McClary v. Stull*, 44 Neb. 189, 62 N. W. 501, holding belief in spiritualism, not engendering delusion respecting facts connected with will, no evidence of want of testamentary capacity; *Re Scott*, 128 Cal. 63, 60 Pac. 527, holding wife's unjust suspicion that husband wished to poison her not insane delusion; *Laver v. Laver*, 110 Ky. 552, 62 S. W. 15, holding that instruction that testator's unfounded belief that contestant was not his son, affecting disposition of property, invalidates will, should have been given.

Cited in note (37 L. R. A. 262) on what are insane delusions.

**Testamentary capacity.**

Cited in *Re Gorkow*, 20 Wash. 570, 56 Pac. 385, holding clear comprehension of property and intended disposition sufficiently shows testamentary capacity.

**Validity of will; how determined.**

Cited in *Richardson v. Green*, 9 C. C. A. 569, 15 U. S. App. 488, 61 Fed. 426, holding, under Oregon laws, validity of will must be determined upon formal suit.

**Absolute right as to disposition of property.**

Cited in *Holman's Will*, 42 Or. 357, 70 Pac. 908, holding unnatural disposition of property does not invalidate will.

12 L. R. A. 168, *WOOD v. CORRY WATERWORKS CO.* 44 Fed. 146.

**Acquiescence of stockholders in action irregularly taken.**

Cited in *Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co.* 67 Fed. 58, holding stockholders acquiescing in increase of indebtedness cannot deny validity on ground of failure to give statutory notice of meeting; *Nelson v. Hubbard*, 96 Ala. 253, 17 L. R. A. 381, 11 So. 428, holding bond issue authorized at meeting not called as required by statute, ratified by all stockholders, valid; *Riesterer v. Horton Land & Lumber Co.* 160 Mo. 152, 61 S. W. 238, holding valid bonds issued upon resolution signed by all stockholders, waiving statutory notice of meeting; *First Nat. Bank v. G. V. B. Min. Co.* 89 Fed. 447, upholding validity of corporation mortgage assented to by stockholders, although not in statutory manner; *Bishop v. Kent & S. Co.* 20 R. I. 688, 41 Atl. 255, upholding validity of mortgage acquiesced in by stockholders, although authorized by less number than required by charter; *Bridgeport Electric & Ice Co. v. Meader*, 18 C. C. A. 456, 30 U. S. App. 580, 72 Fed. 115, upholding equitable lien created by promotor's agreement to give mortgage, acquiesced in by stockholders.

**Estoppel to set up defense of ultra vires.**

Cited in *Beach v. Wakefield*, 107 Iowa, 586, 76 N. W. 688, holding railway corporation exceeding statutory limit of indebtedness liable for loan of which it received benefit; *G. V. B. Min. Co. v. First Nat. Bank*, 36 C. C. A. 640, 95 Fed. 30, holding corporation receiving proceeds cannot deny validity of mortgage.

**Who may set up defense of ultra vires.**

Cited in *G. B. V. Min. Co. v. First Nat. Bank*, 36 C. C. A. 644, 95 Fed. 34, hold-

ing plea of *ultra vires* not available where stockholders and directors are same persons; *Steger v. Davis*, 8 Tex. Civ. App. 29, 27 S. W. 1068, holding purchase acquiesced in by stockholders cannot be repudiated; *Central Trust Co. v. Columbus, H. V. & T. R. Co.* 87 Fed. 828, holding indebtedness in excess of statutory limit valid as to subsequent mortgagee with notice; *Campbell v. Argenta Gold & Silver Min. Co.* 51 Fed. 6, holding junior lienors cannot assert invalidity of mortgage authorized by all stockholders at meeting convened without observing statutory requirements; *Galbraith v. Shasta Iron Co.* 143 Cal. 99, 76 Pac. 901, holding that none but stockholders can attack corporate deed unratified by stockholders.

Cited in footnote to *Bath Gaslight Co. v. Claffy*, 36 L. R. A. 664, which denies right of lessee of corporation to escape payment of rent on ground that law *ultra vires*.

12 L. R. A. 171. *LEE v. FLETCHER*, 46 Minn. 49, 48 N. W. 456.

**Deeds; sufficiency of delivery.**

Cited in *Barnard v. Thurston*, 86 Minn. 347, 90 N. W. 574, and *Cummings v. Newell*, 86 Minn. 133, 90 N. W. 311, holding delivery of deed to third person for grantee sufficient.

Cited in footnotes to *Martin v. Flaharty*, 19 L. R. A. 242, which holds manual delivery of deed not essential; *Robbins v. Rascoe*, 38 L. R. A. 238, which holds delivery of deed to natural child to deputy clerk of court, with instructions for proving it, passes title; *Parrot v. Avery*, 22 L. R. A. 153, which holds execution of deed in presence of witness not sufficient delivery.

Cited in note (54 L. R. A. 886) on delivery of deed to third person or delivery for record by grantor.

**Describing condition of indebtedness in mortgage.**

Cited in *Cable v. Minneapolis Stock-Yards & Packing Co.* 47 Minn. 420, 50 N. W. 528, holding sheriff's certificate of sale on foreclosure not invalidated by error in stating amount secured.

**Right to enter judgment against part of defendants.**

Cited in *Illinois C. R. Co. v. Foulks*, 191 Ill. 70, 60 N. E. 890, holding court may enter judgment against part of defendants in tort action, upon verdict against all.

12 L. R. A. 178. *WETZLER v. DUFFY*, 78 Wis. 170, 47 N. W. 184.

**Who must bear loss by fire on premises sold.**

Cited in footnote to *Phinizy v. Guernsey*, 50 L. R. A. 680, which holds vendor entitled to insurance on buildings destroyed while in his possession during investigation of title.

**Failure to find; when available on appeal.**

Cited in *Darling v. Neumeister*, 99 Wis. 428, 75 N. W. 175, holding neglect of court to make unrequested finding, not required by law, not available on appeal.

Distinguished in *Grunert v. Speich*, 114 Wis. 367, 89 N. W. 496, holding failure to except to omissions to find does not preclude consideration on appeal, to prevent injustice.

12 L. R. A. 180, *STATE ex rel. GRADY v. CHICAGO, M. & N. R. CO.* 79 Wis. 259, 48 N. W. 243.

**Mandamus to compel performance of corporate duty.**

Cited in *State ex rel. Elmendorf v. San Antonio Street R. Co.* 10 Tex. Civ. App. 14, 30 S. W. 266, holding mandamus proper to compel operation of street railway; *State ex rel. Wisconsin Teleph. Co. v. Janesville Street R. Co.* 87 Wis. 80, 22 L. R. A. 763, 41 Am. St. Rep. 23, 57 N. W. 970, holding mandamus proper to compel electric railway company to place wires guarding contact with telephone wires, required by ordinance; *Evans v. Chicago, St. P. M. & O. R. Co.* 86 Wis. 604, 39 Am. St. Rep. 908, 57 N. W. 354, holding statutory duty to restore highway by railroad using it enforceable by courts; *Swinney v. Chicago, R. I. & P. R. Co.* 123 Iowa, 221, 98 N. W. 635, holding mandamus lies to compel construction of farm crossing, without recourse to railroad commissioners.

**To whom mandamus directed.**

Cited in *State ex rel. Lamar v. Jacksonville Terminal Co.* 41 Fla. 397, 27 So. 225, holding writ of mandamus to compel performance of corporate duty properly directed to corporation.

**Duty to fence railroad tracks.**

Cited in footnotes to *Atchison, T. & S. F. R. Co. v. Reesman*, 23 L. R. A. 768, which holds company liable to brakeman for failure to maintain fences, causing derailment; *Gould v. Great Northern R. Co.* 30 L. R. A. 590, which requires railroad fences to be on outside margin of right of way.

Cited in note (25 L. R. A. 163) on constitutionality of statutes making railroad companies absolutely liable for damage by fires set out by them, or for stock killed by them, irrespective of negligence.

12 L. R. A. 184, *PATTON v. EAST TENNESSEE, V. & G. R. CO.* 89 Tenn. 370, 15 S. W. 919.

**Proximate cause.**

Cited in footnote to *Schreiner v. Great Northern R. Co.* 58 L. R. A. 76, which holds failure to build fence not proximate cause of injury to one pushed on track by cow.

**Duty to station lookout on train.**

Cited in *Katzenberger v. Lawo*, 90 Tenn. 237, 13 L. R. A. 185, 25 Am. St. Rep. 681, 16 S. W. 611, holding railroad must observe statutory precautions while running trains on streets; *Knoxville, C. G. & L. R. Co. v. Acuff*, 92 Tenn. 34, 20 S. W. 348, sustaining charge that railroad must have person on lookout on moving train; *Felton v. Newport*, 34 C. C. A. 473, 92 Fed. 473, holding railroad liable to trespasser for failure to keep lookout on engine as required by statute; *Towles v. Southern R. Co.* 103 Fed. 409, holding common-law, not statutory, duty to keep lookout on trains, prevails where cars precede engine.

Cited in note (25 L. R. A. 292) on duty to maintain lookout on railroad train. Distinguished in *Mobile & O. R. Co. v. House*, 96 Tenn. 555, 35 S. W. 561, holding railroad required to observe statutory precautions within station grounds.

**Duty of railroad to trespassers.**

Cited in *Smith v. Norfolk & S. R. Co.* 114 N. C. 747, 25 L. R. A. 295, 19 S. E. 863, holding (*obiter*) it railroad's duty to keep reasonable lookout for trespassers.



Cited in footnotes to *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 98, which denies duty towards trespassers on track before discovery; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping to enable trespasser discovered on railroad bridge to escape.

**Contributory negligence of person on track.**

Cited in footnote to *Neal v. Carolina C. R. Co.* 49 L. R. A. 684, which denies liability for death of person on track by train running at excessive speed without ringing bell.

Distinguished in *Kansas City, Ft. S. & M. R. Co. v. Cook*, 28 L. R. A. 186, 13 C. C. A. 371, 31 U. S. App. 277, 66 Fed. 123, holding failure of licensee passing through railroad yard, to keep watch to rear, contributory negligence.

**Doctrine of "last clear chance."**

Cited in *Baltimore & O. R. Co. v. Hellenthal*, 31 C. C. A. 418, 60 U. S. App. 156, 88 Fed. 120, holding contributory negligence no bar to recovery where injury avoidable by defendant's exercise of reasonable care; *Florida C. & P. R. Co. v. Foxworth*, 41 Fla. 66, 79 Am. St. Rep. 149, 25 So. 338, holding contributory negligence of person crossing track not bar to recovery for injury avoidable by railroad's exercise of reasonable care.

**Question of contributory negligence for jury.**

Cited in *Wilson v. Citizens' Street R. Co.* 105 Tenn. 84, 58 S. W. 334, holding contributory negligence of person injured in darkness at unfamiliar crossing, in failing to look and listen, question for jury.

**Mitigation of damages in case of contributory negligence.**

Cited in *Artenberry v. Southern R. Co.* 103 Tenn. 269, 52 S. W. 878; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 700, 9 C. C. A. 675, 22 U. S. App. 220, 61 Fed. 605; *Knoxville, C. G. & L. R. Co. v. Acuff*, 92 Tenn. 33, 20 S. W. 348; *Cincinnati, N. & T. P. R. Co. v. Davis*, 62 C. C. A. 568, 127 Fed. 936, holding contributory negligence mitigates damages in action against railroad for failure to observe statutory precautions; *Saunders v. City & Suburban R. Co.* 99 Tenn. 136, 41 S. W. 1031, holding rule that contributory negligence only mitigates damages not apply in common-law action against electric road.

Cited in note (25 L. R. A. 573) on how far statutes will be regarded as having abrogated maxim that one cannot profit by his own wrong.

**Liability as to detached moving cars.**

Cited in footnote to *West Virginia C. & P. R. Co. v. State*, 61 L. R. A. 574, which holds company liable for injury to bystander by car broken loose from train and thrown from track by collision with other car at foot of decline.

Cited in notes (18 L. R. A. 64, 66) on negligence of railroad company as to flying switches or detached cars moving by their own momentum.

12 L. R. A. 187, *ROZELLE v. HARMON*, 103 Mo. 339, 15 S. W. 432.

**Liability of person receiving assets of estate.**

Cited in *Richardson v. Dreyfus*, 64 Mo. App. 603, holding one collecting debt due decedent, applying it on decedent's indebtedness, liable to administrator.

**Statutory construction.**

Cited in *State ex rel. Crow v. Bland*, 144 Mo. 555, 41 L. R. A. 303, 46 S. W. 440, holding "corrupt practices act" must be strictly construed; *Heman v. Mc-*

L. R. A. AU.—VOL. II.—35.

Namara, 77 Mo. App. 11, holding statute regulating practice should be liberally construed; State *ex rel.* Wheeler v. Adams, 101 Mo. App. 476, 74 S. W. 497, holding statutory penalty of double damages imposed on county treasurer refusing in good faith, to pay warrant.

12 L. R. A. 189, ST. LOUIS, I. M. & S. R. CO. v. HOPKINS, 54 Ark. 209, 15 S. W. 610.

**Accident as prima facie evidence of negligence.**

Cited in Arkansas Teleph. Co. v. Ratteree, 57 Ark. 436, 21 S. W. 1059, holding proof of fall of telephone wire, frightening horse, raises presumption of negligence; St. Louis & S. F. R. Co. v. Mitchell, 57 Ark. 421, 21 S. W. 883, holding proof of derailment of car raises presumption of negligence; Fordyce v. Jackson, 56 Ark. 598, 20 S. W. 528, holding prima facie case made by proof of accident due to train running into bull.

**Liability for fall of object.**

Cited in Southwestern Teleg. & Teleph. Co. v. Beatty, 63 Ark. 80, 37 S. W. 570, denying liability, in absence of negligence of telephone company, for fall of brick to which wire fastened.

Cited in footnotes to Wolf v. Downey, 51 L. R. A. 241, which denies liability of contractor for either carpenter or mason work for injury from fall of brick from unknown cause; Detzur v. B. Stroh Brewing Co. 44 L. R. A. 500, which holds it negligent to leave broken pane in window above sidewalk; Cork v. Blossom, 26 L. R. A. 256, which holds one maintaining high chimney liable for fall on adjoining building.

**Act of God.**

Cited in footnotes to Libby v. Maine C. R. Co. 20 L. R. A. 812, which holds unprecedented flood, causing washout of railroad culvert, act of God; Lang v. Pennsylvania R. Co. 20 L. R. A. 360, which holds theft or destruction of whiskey after train wrecked by flood not due to inevitable accident.

12 L. R. A. 192, RYMER v. LUZERNE COUNTY, 142 Pa. 108, 21 Atl. 794.

**Repeal of statute by implication.**

Cited in *Re* Reynolds Street, 6 Kulp, 481, 9 Lanc. L. Rev. 335, 2 Pa. Dist. R. 66, holding general law, applying in terms to all municipalities, not repeal law applying to boroughs only; Com. use of Cambria County v. Lloyd, 2 Pa. Super. Ct. 17, 38 W. N. C. 295, holding general statute without negative words does not repeal previous local statute; Moore v. Lancaster County, 19 Lanc. L. Rev. 187, holding local act fixing jailer's salary not repealed upon increase of population bringing county within provisions of general act; Com. v. Vetterlein, 21 Pa. Super. Ct. 591, holding act limiting time to appeal in certain cases not repealed by act affirming right without limiting time.

Distinguished in Jadwin v. Hurley, 10 Pa. Super. Ct. 110, holding special statute repealed by general where legislature discloses purpose to bring about uniformity.

12 L. R. A. 193, CASEY v. CINCINNATI TYPOGRAPHICAL UNION, NO. 3, 45 Fed. 135.

**Illegal conspiracies.**

Cited in Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep.

797, 62 Fed. 821, holding combination of railway employees to compel railroads to cease using Pullman cars unlawful conspiracy; *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 699, holding boycott by members of trade unions of articles manufactured by certain party unlawful; *National Protective Asso. v. Cumming*, 170 N. Y. 348, 58 L. R. A. 148, footnote p. 135, 88 Am. St. Rep. 648, 63 N. E. 369 (dissenting opinion), majority denying liability of members of labor union for causing discharge of nonmembers by threatening to strike unless latter discharged.

Cited in footnotes to *Lucke v. Clothing Cutters' & T. Assembly No. 7507*, K. of L. 19 L. R. A. 408, which holds incorporated labor union liable for causing discharge of nonunion man; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 395, which holds criminal, combination of railroad employees to quit employment; *Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, which holds valid, voluntary agreement to refrain from dealing with certain persons; *Cote v. Murphy*, 23 L. R. A. 135, which holds lawful, combination of employers to prevent advance in wages; *Waterhouse v. Comer*, 19 L. R. A. 403, which holds illegal, rule against handling property of railroad against which labor organization has grievance; *United States v. Workingmen's Amalgamated Council*, 26 L. R. A. 158, which holds stopping of transportation between states by strike in certain city unlawful restraint of commerce.

Distinguished in *Master Builders' Asso. v. Domascio*, 16 Colo. App. 33, 63 Pac. 782, holding members of builders' association may lawfully decline to bid in competition with certain other person; *Ætna Ins. Co. v. Com.* 106 Ky. 889, 45 L. R. A. 361, 51 S. W. 624, holding combination to maintain insurance rates not indictable; *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. 320, holding combination of fire underwriters to prevent representation by agents of companies not members lawful.

#### **Injunctions against boycotts, strikes, etc.**

Cited in *Coeur D'Alene Consol. Min. Co. v. Miners' Union*, 19 L. R. A. 386, footnote p. 382, 51 Fed. 266, refusing to dissolve injunction against workmen interfering with employer's property on ground of his duplicity; *Matthews v. Shankland*, 25 Misc. 612, 56 N. Y. Supp. 123, holding circulation of placards and circulars for carrying out conspiracy to boycott enjoined; *Barr v. Essex Trades Council*, 53 N. J. Eq. 128, 30 Atl. 881, granting injunction against boycott of newspaper; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 524, 42 L. R. A. 418, footnote p. 407, 74 Am. St. Rep. 421, 77 N. W. 13, sustaining injunction against boycott by picketing of premises and distribution of circulars; *Hopkins v. Oxley Stave Co.* 28 C. C. A. 106, 49 U. S. App. 709, 83 Fed. 919, sustaining injunction against boycott of machine-made barrels by inducing persons not to purchase goods packed therein; *Blindell v. Hagan*, 54 Fed. 42, granting injunction against interference with, and preventing ship owners from shipping, crew; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 392, footnote p. 387, 5 Inters. Com. Rep. 534, 54 Fed. 738, which grants injunction against labor organization putting into operation rule against handling cars of certain company.

Cited in notes (28 L. R. A. 465) on injunction against strikes; (20 L. R. A. 342) on injunctions against blacklisting.

Distinguished in *Longshore Printing Co. v. Howell*, 26 Or. 548, 28 L. R. A.

474, 46 Am. St. Rep. 640, 38 Pac. 547, denying injunction to restrain continuance of strike and boycott in absence of evidence of impending irreparable injury.

— **Against violence and intimidation.**

Cited in *Arthur v. Oakes*, 25 L. R. A. 428, 4 Inters. Com. Rep. 758, 11 C. C. A. 220, 24 U. S. App. 239, 63 Fed. 321, sustaining injunction against combination of railroad employees to quit, with object of interfering with operation of road by violence and intimidation; *Davis v. Zimmerman*, 91 Hun, 492, 36 N. Y. Supp. 303, granting injunction against execution of conspiracy by union, to injure property and intimidate employees; *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 825, sustaining injunction against gatherings of union men near works, for purpose of intimidating workmen; *American Steel & Wire Co. v. Wire Drawers' & D. M. Unions Nos. 1 & 3*, 90 Fed. 615, enjoining patrol of strikers in front of mill; *Union P. R. Co. v. Ruef*, 120 Fed. 105, granting injunction against picketing, accompanied by violence and intimidation.

Cited in footnotes to *Vegelahn v. Guntner*, 35 L. R. A. 722, which holds patrol of strikers in front of factory unlawful; *Plant v. Woods*, 51 L. R. A. 339, which sustains injunction against threats by labor union to make employers induce employees to leave other union and rejoin former; *O'Neil v. Behanna*, 38 L. R. A. 382, which holds actual use of force unnecessary to constitute intimidation by strikers making display of force.

— **Of publications.**

Cited in *A. B. Farquhar Co. v. National Harrow Co.* 49 L. R. A. 756, 42 C. C. A. 601, 102 Fed. 715, sustaining right to injunction against sending out notices, in bad faith, threatening agents and customers with suits for infringing patent.

Cited in footnote to *Marx & H. Jeans Clothing Co. v. Watson*, 56 L. R. A. 951, which denies power to enjoin publication of circular letter and solicitation of merchants not to deal with boycotted firm.

Distinguished in *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 395, 59 L. R. A. 314, 64 N. E. 163, Reversing 68 App. Div. 91, 74 N. Y. Supp. 84, holding publication of unjust and malicious criticism of manufactured article not enjoinable; *Everett Piano Co. v. Bent*, 60 Ill. App. 378, denying injunction against publication of claim that certain article infringes patent.

— **To protect property rights.**

Cited in *Grand Rapids School Furniture Co. v. Haney School Furniture Co.* 92 Mich. 562, 16 L. R. A. 722, 31 Am. St. Rep. 611, 52 N. W. 1009, granting injunction against use of decree collusively obtained in patent case, to influence any person from purchasing from complainant; *Milwaukee Electric R. & Light Co. v. Bradley*, 108 Wis. 489, 84 N. W. 870, sustaining injunction against prosecution of criminal actions pending appeal of civil case involving same questions.

Distinguished in *Computing Scale Co. v. National Computing Scale Co.* 79 Fed. 963, denying injunction, pending suit to determine validity of patent, against suing or warning users of alleged infringing machine.

12 L. R. A. 202, *STATE ex rel. VAN AMRINGE v. TAYLOR*, 108 N. C. 196, 23 Am. St. Rep. 51, 12 S. E. 1005.

**Effect of failure to comply with election law.**

Cited in *State ex rel. Brown v. McMillan*, 108 Mo. 161 18 S. W. 784, holding

failure to comply with provisions of election law invalidates election; *Atty. Gen. v. McQuade*, 94 Mich. 443, 53 N. W. 944, holding failure to comply with mandatory provisions of election law as to rejection of votes of unregistered persons and of persons whose marked ballots are exposed to view vitiates vote of entire election district; *Dial v. Hollandsworth*, 39 W. Va. 9, 19 S. E. 557 (dissenting opinion), majority holding appointment by commissioners of election of additional ballot clerks does not invalidate poll.

Distinguished in *Deaver v. State*, 27 Tex. Civ. App. 455, 66 S. W. 256, holding election conducted by persons without legal authority in absence of proper officers, without objection from voters, valid.

**Public officers de facto.**

Cited in *Waite v. Santa Cruz*, 184 U. S. 323, 46 L. ed. 566, 22 Sup. Ct. Rep. 327, Affirming 89 Fed. 627, holding whether person is *de facto* officer when assuming to perform duties of public office, mixed question of law and fact.

12 L. R. A. 205, *DEVEREUX v. McMAHON*, 108 N. C. 134, 12 S. E. 902.

**Competency of copy of record of deed.**

Cited in *Ratliff v. Ratliff*, 131 N. C. 427, 63 L. R. A. 966, 42 S. E. 887, holding copy of record of deed competent evidence, where no rule obtained for production of original.

**What signature sufficient.**

Cited in note (22 L. R. A. 372) on signature by mark.

**Evidence of delivery of deed.**

Cited in *Whitman v. Shingleton*, 108 N. C. 194, 12 S. E. 1027, holding signing of deed by grantor and possession by grantee prima facie evidence of delivery; *Herndon v. Imperial F. Ins. Co.* 110 N. C. 284, 14 S. E. 742, holding (*obiter*) registration of deed creates rebuttable presumption of actual delivery.

12 L. R. A. 209, *BRACE v. CHARTRAND*, 16 Colo. 19, 25 Am. St. Rep. 235, 26 Pac. 152.

**Legal status of mutual benefit associations.**

Cited in *National Council, K. & L. of S. v. Phillips*, 63 Kan. 807, 66 Pac. 1011, holding mutual benefit association not exempt from taxation as benevolent association.

Cited in footnote to *State ex rel. Covenant Mut. Ben. Asso. v. Root*, 19 L. R. A. 271, which holds foreign assessment insurance company entitled to license to do business.

Cited in notes (38 L. R. A. 34, 55) on whether benefit association is an insurance company; (24 L. R. A. 303) on restrictions on business of foreign insurance companies.

**Rights under mutual benefit certificates.**

Cited in *Overhiser v. Overhiser*, 14 Colo. App. 6, 59 Pac. 75, and *Brown v. Iowa L. of H.* 107 Iowa, 442, 78 N. W. 73, holding mutual benefit association certificate construable as written contract fixing rights of parties; *Fischer v. Fischer*, 99 Tenn. 635, 42 S. W. 448, holding rights of beneficiary of mutual benefit certificate determinable by laws, charter, and membership certificates of order.

**Testamentary nature of life insurance policy.**

Cited in *Knights Templars & M. Mut. Aid 'Asso. v. Greene*, 79 Fed. 465, and *McNally v. Metropolitan L. Ins. Co.* 16 Pa. Super. Ct. 116, holding life insurance policy construable in analogy to will; *Masonic Benev. Asso. v. Bunch*, 109 Mo. 580, 19 S. W. 25, sustaining right of holder of mutual benefit certificate to change beneficiary without latter's consent.

12 L. R. A. 216, *RODGERS v. LEES*, 140 Pa. 475, 23 Am. St. Rep. 250, 21 Atl. 399.

**Liability for injury to trespassers.**

Cited in *Newark Electric Light & P. Co. v. Garden*, 37 L. R. A. 728, 23 C. C. A. 653, 39 U. S. App. 416, 78 Fed. 78, denying liability of electric light company for defective insulation of wire touched by trespasser.

**— To trespassing children.**

Cited in *Baltimore & O. S. W. R. Co. v. Bradford*, 20 Ind. App. 355, 67 Am. St. Rep. 252, 49 N. E. 388, holding child two years old a trespasser on railroad, subject to consequences; *Feehan v. Dobson*, 10 Pa. Super. Ct. 9, 44 W. N. C. 67, denying right of child burned by hot ashes while trespassing on inclosed lot, to recover; *Buch v. Amory Mfg. Co.* 69 N. H. 262, 76 Am. St. Rep. 163, 44 Atl. 809, denying obligation of owner of dangerous machinery in operation, to actively intervene to protect infant trespasser; *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 465, 38 Am. St. Rep. 254, 21 S. W. 1062, denying liability of railroad to boy stealing ride; *Jefferson v. Birmingham R. & Electric Co.* 116 Ala. 301, 38 L. R. A. 459, 67 Am. St. Rep. 116, 22 So. 546, denying liability for injuries to child trespassing upon dummy train in street; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 413, 54 L. R. A. 321, 39 S. E. 82, denying liability of owner of premises for injury to children attracted by unguarded excavation.

Cited in footnotes to *Brinkley Car Works Mfg. Co. v. Cooper*, 57 L. R. A. 724, which denies liability for injury to six-year-old boy from carelessly walking into pool of hot water; *Paolino v. McKendall*, 60 L. R. A. 133, which denies duty of occupier of land burning rubbish, to guard young children accustomed to play there from fire; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything; *Ryan v. Towar*, 55 L. R. A. 310, which denies landowner's duty to make premises safe for attempting to rescue trespassing child caught in waterwheel in unused building; *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *Uttermohlen v. Bogg's Run Min. & Mfg. Co.* 55 L. R. A. 911, which denies liability of mine owner for injury to trespassing child by cable and pulleys hauling coal cars.

**Contributory negligence of children.**

Cited in footnotes to *Gleason v. Smith*, 55 L. R. A. 622, which denies liability for injury by collision with team, to twelve-year-old boy using street as playground; *Graney v. St. Louis, I. M. & S. R. Co.* 38 L. R. A. 633, which denies negligence *per se* of twelve-year-old boy in standing so near passing train as to be drawn under by current of air.

12 L. R. A. 219, *JOHNSON v. ASH*, 142 Pa. 45, 21 Atl. 754.

12 L. R. A. 220, WILLIAMSPORT & N. B. R. CO. v. PHILADELPHIA & E. R. CO. 141 Pa. 407, 21 Atl. 645.

**Location in taking by eminent domain.**

Cited in *Peiffer v. Harrisburg*, P. M. I. & L. R. Co. 12 Lanc. L. Rev. 274, holding act of location of railroad also act of appropriation; *Kanawha, G. J. & E. R. Co. v. Glen Jean*, L. L. & D. W. R. Co. 45 W. Va. 125, 30 S. E. 86, holding priority of location of railroad gives priority of title; *Biddle v. Wayne Waterworks Co.* 190 Pa. 96, 42 Atl. 380, holding equity will not undertake to control discretion of waterworks corporation in locating right of way.

**— How effected.**

Cited in *Utah, N. & C. R. Co. v. Utah*, & C. R. Co. 110 Fed. 892, holding priority of corporate adoption of route determines right of railroad to contested location; *Schaadt v. Ironton R. Co.* 6 Northampton Co. Rep. 336, 22 Pa. Co. Ct. 104, holding land cannot be appropriated by railroad by act of president alone; *Weidenfeld v. Sugar Run R. Co.* 48 Fed. 617, holding location of railroad made by executive committee void; *Southern P. R. Co. v. United States*, 48 C. C. A. 720, 109 Fed. 921, holding survey for railroad does not effect location giving title; *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.* 116 Iowa, 690, 88 N. W. 1082, holding preliminary survey does not give prior right as against another railroad; *Lehigh Valley Coal Co. v. United States Pipe-Line Co.* 7 Kulp, 82, 3 Pa. Dist. R. 74, holding preliminary survey for pipe line, in absence of corporate action, not a location; *Kanawha, G. J. & E. R. Co. v. Glen Jean, L. L. & D. W. R. Co.* 45 W. Va. 128, 30 S. E. 86 (dissenting opinion by Brannon, Pres.), who holds survey alone cannot effect location of railroad; *Delabole Slate Co. v. Bangor & P. R. Co.* 6 Northampton Co. Rep. 343, raising, without deciding, question whether corporate action of location, incident to appropriation, must be by formal resolution.

Distinguished in *Standard Plate Glass Co. v. Butler Water Co.* 5 Pa. Super. Ct. 578, 28 Pittsb. L. J. N. S. 167, 41 W. N. C. 197, holding taking by water company of part of stream without formal appropriation does not divest rights of lower riparian owner; *Lake Shore & M. S. R. Co. v. Baltimore & O. & C. R. Co.* 149 Ill. 286, 37 N. E. 91, holding petition for condemnation for switch need not contain averment of corporate direction of location.

**Adoption of survey.**

Cited in *Johnston v. Callery*, 184 Pa. 151, 39 Atl. 73, S. C. on prior appeal, 173 Pa. 137, 33 Atl. 1036, holding servitude fastened upon land by railroad's survey and adoption of line by directors.

**Effect of filing bond or making compensation to divest title.**

Cited in *Mack v. Easton & N. R. Co.* 7 Northampton Co. Rep. 320, holding purchaser on foreclosure cannot recover possession of premises taken by railroad compensating mortgagor; *Fischer v. Catawissa R. Co.* 175 Pa. 558, 38 W. N. C. 559, 34 Atl. 860, holding owner's title to land appropriated by railroad divested by filing of bond for damages; *Shevalier v. Postal Teleg. Co.* 22 Pa. Super. Ct. 511, holding damages for previously constructed telegraph line belong to owner at, and are assessable as of, date of filing petition for condemnation; *Re Franklin Street* 14 Pa. Super. Ct. 417 (dissenting opinion), majority holding that filing of bond by city for damages on taking property for street does not divest title.

**Grant of right to construct street railway before incorporation.**

Cited in *Homestead Street R. Co. v. Pittsburg & H. Electric Street R. Co.* 166 Pa. 174, 27 L. R. A. 387, 30 Atl. 950, holding municipal consent obtained prior to incorporation of street railway company ineffective to exclude company obtaining consent after incorporation.

12 L. R. A. 223, *THIRD NAT. BANK'S APPEAL*, 141 Pa. 214, 21 Atl. 598, 773.

12 L. R. A. 227, *Re VANCE*, 141 Pa. 201, 23 Am. St. Rep. 267, 21 Atl. 643.

**Widow's election to take against will.**

Cited in *Beebe's Estate*, 24 Pa. Co. Ct. 272, 9 Pa. Dist. R. 296; *Griffin's Estate*, 11 Pa. Co. Ct. 446, 1 Pa. Dist. R. 317; *McIntosh's Estate*, 158 Pa. 534, 27 Atl. 1044, holding widow's election to take against husband's will renders legacies payable to her distributable as though she were dead; *Sawyer v. Freeman*, 161 Mass. 547, 37 N. E. 942, holding widow's election not to take under will devising income to her for life does not entitle legatee of principal sum if living at widow's death to such principal during widow's lifetime.

Cited in note (14 L. R. A. 295) on effect on third persons of widow's election to take against will.

Distinguished in *Portuondo's Estate*, 185 Pa. 473, 39 Atl. 1105, Affirming 7 Pa. Dist. R. 92, holding widow's election does not affect bequest to another of one third of income of residuary estate during widow's life; *Re Ballantine*, 25 Pittsb. L. J. N. S. 416, holding widow's election does not affect bequest of maintenance of another out of income during her life.

**Compensation of devisees disappointed by election against will.**

Cited in *Lyon's Estate*, 15 Pa. Co. Ct. 353, 3 Pa. Dist. R. 740, holding legacy to husband electing to take against will sequestered in favor of devisee of realty to extent of loss resulting from election; *Re McCombs*, 32 Pittsb. L. J. N. S. 219, holding, where widow elects against will, testamentary provision for her will be sequestered to compensate disappointed legatees; *Re Borland*, 34 Pittsb. L. J. N. S. 228, holding administrator's expenses payable out of residuary estate.

Distinguished in *Latta v. Brown*, 96 Tenn. 352, 31 L. R. A. 843, 34 S. W. 417, holding other devisees must contribute toward deficit in devise occasioned by widow's election against will; *Re Kerr*, 27 Pittsb. L. J. N. S. 122, holding specific legacy payable out of fund given widow for life not payable out of specific devise of residue upon widow's election against will.

12 L. R. A. 232, *HOLLAND v. TENNESSEE COAL, IRON & R. CO.* 91 Ala. 444, 8 So. 524.

**Master's duty as to employment of servants.**

Cited in *Weeks v. Scharer*, 49 C. C. A. 374, 111 Fed. 332, holding it master's duty to use reasonable care in selecting competent and careful servants.

Cited in notes (48 L. R. A. 372, 377, 381) on master's duty as to employment of servants; (25 L. R. A. 711) on master's liability for injuries caused to one servant by incompetency of fellow servant; (41 L. R. A. 91) on knowledge as element of employer's liability to injured servant.

**Master's duty to furnish safe appliances.**

Cited in *Louisville & N. R. Co. v. Campbell*, 97 Ala. 152, 12 So. 574, denying lia-



bility of railroad to brakeman for defect in brake-rod not discoverable by most careful inspection.

**Evidence of custom as bearing on negligence.**

Limited in *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 251, 12 So. 88, holding similar usage by other railroads not justify leaving car on switch in dangerous proximity to track.

**Construction of contract according to common usage.**

Cited in *Gaines v. Virginia & A. Coal Co.* 124 Ala. 400, 27 So. 477, construing contract to mine such coal "as can be reasonably mined out" as requiring operation customary with persons performing same kind of work.

**Master's duty to warn servants as to perils of employment.**

Cited in *Worthington v. Goforth*, 124 Ala. 661, 26 So. 531, holding employer not bound to warn employee of obvious danger incident to climbing upon moving cars; *Louisville & N. R. Co. v. Banks*, 104 Ala. 516, 16 So. 547, holding railroad not bound to advise employee how to avoid danger from low bridge; *Louisville & N. R. Co. v. Stutts*, 105 Ala. 376, 53 Am. St. Rep. 127, 17 So. 29, denying railroad's liability to engineer for obvious defects in trestle and engine; *Louisville & N. R. Co. v. Boland*, 96 Ala. 632, 18 L. R. A. 263, 11 So. 667, holding brakeman sufficiently warned of increased danger in coupling cars of different patterns by general caution; *Robinson Min. Co. v. Tolbert*, 132 Ala. 466, 31 So. 519, holding employer liable for failure to warn inexperienced employee of presence of dangerous explosive; *Alabama Steel & Wire Co. v. Wrenn*, 136 Ala. 493, 34 So. 970, sustaining instruction imposing on master duty of warning inexperienced employee of dangers of service.

Cited in notes (44 L. R. A. 38, 76) on master's duty to instruct and warn servants as to perils of employment.

**Explosive nature of molten iron as latent danger.**

Cited in *Hall v. United States Radiator Co.* 52 App. Div. 94, 64 N. Y. Supp. 1002, holding employer liable for failure to instruct inexperienced molder that contact of molten iron with rust causes explosion.

**Degree of care required in face of danger.**

Cited in *Louisville & N. R. Co. v. Stewart*, 128 Ala. 331, 29 So. 562, and *Richmond & D. R. Co. v. Farmer*, 97 Ala. 145, 12 So. 86, holding one brought into sudden danger by another's wrong bound only to exercise prudence of reasonable person in like circumstances.

Limited in *Bessemer Land & Improv. Co. v. Campbell*, 121 Ala. 61, 77 Am. St. Rep. 17, 25 So. 793, holding excitability of defendant's superintendent does not excuse failure to act with ordinary care and prudence.

**Correctness of charge, how determined.**

Cited in *McDonald v. Montgomery Street R. Co.* 110 Ala. 178, 20 So. 317, and *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 51, 30 Am. St. Rep. 28, 9 So. 303, holding correctness of charge tested by evidence with respect to which given.

**Master's liability for coemployee's negligence.**

Cited in *Sheffield v. Harris*, 101 Ala. 570, 14 So. 357, holding charge that defendant is liable for negligence of coemployee not exercising superintendence erroneous; *Northern Alabama R. Co. v. Mansell*, 138 Ala. 560, 36 So. 459, hold-

ing complaint in administrator's action against intestate's employer, not imputing negligence to fellow servants, not demurrable.

12 L. R. A. 235, *JOHNSTON v. STATE*, 128 Ind. 16, 25 Am. St. Rep. 412, 27 N. E. 422.

**Mandamus to election board.**

Followed in *State ex rel. Hadfield v. Grace*, 83 Wis. 298, 53 N. W. 444; *Kimerer v. State*, 129 Ind. 590, 29 N. E. 178; *Wills v. State*, 128 Ind. 359, 27 N. E. 423, holding that mandamus lies to compel determination of tie vote by lot; *Smith v. Lawrence*, 2 S. D. 197, 49 S. W. 7, holding mandamus issuable to compel adjourned board of canvassers to canvass omitted returns; *State ex rel. Bennett v. Barber*, 4 Wyo. 73, 32 Pac. 14, holding mandamus issuable to compel state board to canvass entire vote.

**Construction of Constitution or statute.**

Cited in *Van Walters v. Children's Guardians*, 132 Ind. 569, 18 L. R. A. 432, 32 N. E. 568, holding constitutional provisions construable in light of established principle of state's right to guardianship of children; *Townsend v. State*, 147 Ind. 634, 37 L. R. A. 299, 62 Am. St. Rep. 477, 47 N. E. 19, holding courts cannot overthrow statute as encroaching upon citizen's natural rights.

**Constitutionality of statute providing for decision of tie vote.**

Cited in *State ex rel. Crow v. Kramer*, 150 Mo. 93, 47 L. R. A. 553, 51 S. W. 716, holding statute authorizing determination of tie vote, in absence of constitutional provision, unconstitutional.

Cited in notes (47 L. R. A. 555, 560) on decision of tie vote at election; (17 L. R. A. 842) on implied restrictions on power of legislatures.

12 L. R. A. 237, *HOPPER v. HOPPER*, 125 N. Y. 400, 26 N. E. 457.

**Powers of ancillary administrator.**

Cited in *Smith v. Second Nat. Bank*, 169 N. Y. 472, 62 N. E. 577, holding ancillary administrator may pledge estate assets for estate purposes.

**Status of foreign personal representative.**

Cited in *Ferguson v. Harrison*, 27 Misc. 381, 58 N. Y. Supp. 850, holding foreign administrator cannot be sued in state courts; *Flandrow v. Hammond*, 13 App. Div. 326, 43 N. Y. Supp. 143, holding foreign executor not entitled to be substituted as defendant.

**Foreign judgments against executor.**

Cited in *Jefferson v. Beall*, 117 Ala. 439, 67 Am. St. Rep. 177, 23 So. 44, holding foreign judgment against executor void.

Cited in note (27 L. R. A. 102) on judgments of another state or country rendered against executor or administrator.

12 L. R. A. 239, *FRINK v. THOMAS*, 20 Or. 265, 25 Pac. 717.

**When time of essence of contract.**

Cited in footnotes to *Garrison v. Cooke*, 61 L. R. A. 342, which holds time of essence of subscription for cost of railroad, in consideration of running of trains by specified date; *Glock v. Howard & W. Colony Co.* 43 L. R. A. 199, which

denies right of vendee making default in contract of which time is of the essence, to recover money paid without excusing default.

Cited in note (15 L. R. A. 737) on making time of essence of contract by demand or notice.

**Readiness to perform concurrent act as working default.**

Cited in *Lewis v. Craft*, 39 Or. 310, 64 Pac. 809, holding offer to deliver goods on payment therefor puts other party in default; *Sayre v. Mohnney*, 30 Or. 246, 47 Pac. 197, holding failure to make title defense to action on note for purchase price.

**Rescission of contract for default.**

Cited in *Holbrook v. Investment Co.* 30 Or. 265, 47 Pac. 920, holding in action at law vendor may enforce contract provisions for forfeiture against defaulting purchaser; *Graham v. Merchant*, 43 Or. 304, 72 Pac. 1088, sustaining provision in land contract giving vendor right of forfeiture upon default in payment.

Cited in note (30 L. R. A. 44) on right to rescind or abandon contract because of other party's default.

**Restoration of status quo on rescission of contract.**

Cited in *Dundee Mortg. Co. v. Goodman*, 36 Or. 456, 60 Pac. 3; *Vaughn v. Smith*, 34 Or. 57, 55 Pac. 99; *Crossen v. Murphy*, 31 Or. 118, 49 Pac. 858,—holding defrauded party rescinding sale must account for consideration; *State v. Blize*, 37 Or. 408, 61 Pac. 735, holding party cannot rescind land contract while retaining consideration; *Sievers v. Brown*, 36 Or. 221, 56 Pac. 170, holding vendee under land contract cannot rescind and sue for payments before returning possession.

**Effect of pending controversy in Land Department.**

Reaffirmed on second appeal in *Frink v. Hoke*, 35 Or. 22, 56 Pac. 1093, holding statute of limitations does not begin to run against right to recover lands until termination of controversy in United States Land Department.

Cited in *Robertson v. State Land Board*, 42 Or. 189, 70 Pac. 614, holding courts cannot control decision of state land board.

**Purchase of superior title by vendee under land contract.**

Reaffirmed on second appeal in *Frink v. Hoke*, 35 Or. 17, 56 Pac. 1093, holding purchaser rescinding land contract cannot assert outstanding superior title against vendor.

**Specific performance.**

Cited in footnotes to *Atchison, T. & S. F. R. Co. v. Chicago & W. I. R. Co.* 35 L. R. A. 167, which refuses to require payment of interest not provided for as condition of specific performance of contract; *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.* 26 L. R. A. 610, which authorizes specific enforcement of contract to run street cars over other company's track to depot.

12 L. R. A. 247, *CONSOLIDATED COAL CO. v. BAKER*, 135 Ill. 545, 26 N. E. 651.

**Tax; burden of proof as to validity.**

Cited in *People ex rel. Funk v. Keener*, 194 Ill. 18, 61 N. E. 1069, holding party objecting to tax has burden of showing invalidity.

**What taxable as real estate.**

Cited in note (15 L. R. A. 297) on what constitutes real estate for process of taxation.

12 L. R. A. 249, *HAYES v. HYDE PARK*, 158 Mass. 514, 27 N. E. 522.

**Injuries from electric wires.**

Cited in footnotes to *Haynes v. Raleigh Gas Co.* 26 L. R. A. 810, which holds negligence shown by guy wire charged with deadly current hanging to ground from tree; *Jackson v. Wisconsin Teleph. Co.* 26 L. R. A. 101, which holds connection of barn with flag-staff on other building by telephone wire renders company liable for loss of barn by lightning striking flag-staff; *Ahern v. Oregon Teleph. & Teleg. Co.* 22 L. R. A. 635, which holds telephone company liable for injury from electric wire left hanging on electric light company's pole; *Illingsworth v. Boston Electric Light Co.* 25 L. R. A. 552, which holds reasonable care required to keep electric wires safe towards persons licensed to approach them.

Distinguished in *Frauenthal v. Laclede Gaslight Co.* 67 Mo. App. 8, holding boy of seventeen guilty of contributory negligence in touching electric wire.

**Effect of co-operating cause on liability for negligence.**

Cited in *Pomeroy v. Westfield*, 154 Mass. 464, 28 N. E. 899, holding endeavor to avoid mudhole does not prevent recovery for injuries received in consequence; *McCauley v. Norcross*, 155 Mass. 587, 30 N. E. 464, holding employer liable for fall of beams left near hole in floor above, carelessly toppled over by third person; *Denver v. Johnson*, 8 Colo. App. 391, 46 Pac. 621, holding city liable for defect in highway co-operating with fright of horse and collision with street car to produce injury; *Glynn v. Central R. Co.* 175 Mass. 511, 78 Am. St. Rep. 507, 56 N. E. 698, holding railroad's liability for defect in car ceases after opportunity for inspection by connecting road on which accident occurs.

**Proximate cause.**

Cited in *Stone v. Boston & A. R. Co.* 171 Mass. 540, 41 L. R. A. 797, 51 N. E. 1, holding railroad negligently storing oil not liable for fire started by match carelessly dropped.

**Charging remote effect to original wrongdoer.**

Cited in *Graves v. Johnson*, 156 Mass. 213, 15 L. R. A. 838, 32 Am. St. Rep. 446, 30 N. E. 818, holding sale of liquor with view to illegal resale by purchaser in another state illegal; *Burt v. Advertiser Newspaper Co.* 154 Mass. 247, 13 L. R. A. 102, 28 N. E. 1, holding publisher of libel not liable for republication by others; *Zinn v. Rice*, 161 Mass. 574, 37 N. E. 747, raising, without deciding question whether one levying excessive attachment liable for injury to trade from wrongful acts of others resulting therefrom; *May v. Wood*, 172 Mass. 15, 51 N. E. 191, dissenting opinion by Holmes, J., who holds action lies for inducing master to break contract with servant.

**Duty to anticipate another's wrongful act.**

Cited in *Chenery v. Fitchburg R. Co.* 160 Mass. 213, 22 L. R. A. 577, 35 N. E. 554, holding railroad not bound to anticipate presence of trespassers; *Davis v. New York, N. H. & H. R. Co.* 159 Mass. 536, 34 N. E. 1070, holding failure to anticipate foreman's failure to give warning of approaching train not contributory negligence.

**Liability for defects in highway.**

Cited in *Griffin v. Boston*, 182 Mass. 411, 65 N. E. 811, holding city may be liable to traveler injured by falling of handle of gravel heater standing unused in street.

12 L. R. A. 251, *PEOPLE ex rel. WESTERN U. TELEG. CO. v. DOLAN*, 126 N. Y. 166, 27 N. E. 269.

**Assessment of railroads.**

Cited in *People ex rel. Manhattan R. Co. v. Barker*, 165 N. Y. 325, 59 N. E. 151, dissenting opinion by O'Brien, J., who holds railroad's real estate must be assessed at not to exceed cost to produce it in condition at date of assessment.

Distinguished in *Newark v. State Bd. of Taxation*, 66 N. J. L. 469, 49 Atl. 525, holding street railway's interest in highways taxable as real estate.

**Effect on certiorari proceedings of failure to appear before assessors.**

Distinguished in *People ex rel. Buffalo, R. & P. R. Co. v. Duguid*, 68 Hun, 244, 22 N. Y. Supp. 988, holding omission to appear before assessors on grievance day not essential to entitle person to certiorari to review; *Re Cathedral of Incarnation*, 91 App. Div. 546, 86 N. Y. Supp. 900, refusing to quash writ of certiorari, where petitioner appeared before assessors on day following designated "first day" for hearing objections.

**Right to costs.**

Cited in *People ex rel. Oak Hill Cemetery Asso v. Pratt*, 66 Hun, 579, 21 N. Y. Supp. 853, holding costs in certiorari to review assessments governed by act, and not by Code.

**Construction of telegraph and telephone lines along highway.**

Cited in *Utica v. Utica Teleph. Co.* 24 App. Div. 373, 48 N. Y. Supp. 916 (dissenting opinion), majority holding act authorizing construction of telephone line upon public streets or other lands, subject to owner's right to compensation, does not authorize erection of poles in street without city's consent.

**Power of state over interstate telephone or telegraph companies.**

Cited in notes (24 L. R. A. 162) on power of states to control or impose burdens on interstate telegraph or telephone companies; (60 L. R. A. 669) on corporate taxation and the commerce clause.

12 L. R. A. 254, *HUNDLEY v. FARRIS*, 103 Mo. 78, 23 Am. St. Rep. 863, 15 S. W. 312.

**Relative rights of individual and firm creditors.**

Cited in *Freedman v. Holberg*, 89 Mo. App. 346, sustaining preference of firm to individual creditors in distribution of partnership assets; *Re Edwards*, 122 Mo. 431, 29 L. R. A. 686, 25 S. W. 904, Reversing 47 Mo. App. 307, holding owners of firm notes given in satisfaction of individual debts, in absence of fraud, entitled to participate in distribution of partnership assets; *Talbott v. Great Western Plaster Co.* 86 Mo. App. 567, holding partner cannot without firm's consent apply firm assets to individual debt; *Mansur-Tebbetts Implement Co. v. Ritchie*, 159 Mo. 225, 60 S. W. 87, holding partner may, with consent of others, mortgage partnership property to secure individual debt; *Re Wilcox*, 94 Fed. 102, holding firm creditors postponed to individual in distributing assets of bankrupt partner,

though no partnership assets; *Funk v. Seehorn*, 99 Mo. App. 598, 74 S. W. 445, holding lien of one tenant in common against another for contribution to purchase price superior to judgments of individual creditors.

Cited in footnotes to *Kincaid v. National Wall Paper Co.* 54 L. R. A. 412, which sustains right of partners to appropriate, with other partners' consent, interest in firm to pay individual in preference to firm debts; *Re Baldwin*, 58 L. R. A. 122, which sustains individual liability of member of banking firm, signing name to certificate of deposit, enforceable against estate in preference to claims against firm.

Limited in *McDonald v. Cash*, 57 Mo. App. 543, holding partnership creditor's priority over individual does not prevail in case of bona fide sale of firm assets to one partner.

12 L. R. A. 257, *SCHUMAKER v. ST. PAUL & D. R. CO.* 46 Minn. 39, 48 N. W. 559.

**Proximate cause.**

Cited in footnote to *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform of heavy doors blown on track by severe gale, not proximate cause of derailment of engine.

**Duty to transport employee.**

Distinguished in *King v. Interstate Consol. R. Co.* 23 R. I. 590, 51 Atl. 301, holding declaration alleging railroad's refusal to carry snow shoveller home, not showing express or implied promise, demurrable.

12 L. R. A. 259, *LOSTUTTER v. AURORA*, 126 Ind. 436, 26 N. E. 184.

**Nuisance.**

Cited in *Savage v. Salem*, 23 Or. 385, 24 L. R. A. 789, 37 Am. St. Rep. 688, 31 Pac. 832, holding street tanks to supply contractor's street sprinklers not nuisances *per se*.

**Ownership of fee in highways.**

Cited in *Hamilton County v. Indianapolis Natural Gas Co.* 134 Ind. 213, 33 N. E. 972, holding abutting owners presumptively entitled to all rights in highway not inconsistent with public easement; *Egbert v. Lake Shore & M. S. R. Co.* 6 Ind. App. 354, 33 N. E. 659, holding railroad liable to abutting owner for changing grade of street under statutory authority; *Haslett v. New Albany Belt & Terminal R. Co.* 7 Ind. App. 607, 34 N. E. 845, holding abutting owner entitled to damages for additional burden of railroad constructed in street by municipal permission; *Consumers' Gas Trust Co. v. Huntsinger*, 14 Ind. App. 162, 39 N. E. 423, holding abutting owner entitled to compensation for pipe line in highway.

12 L. R. A. 261, *WALLER v. BOWLING*, 108 N. C. 289, 12 S. E. 990.

**Trial practice; submission of issues.**

Cited in *Smith v. Norfolk & S. R. Co.* 114 N. C. 763, 19 S. E. 923, holding trial judge may submit all or portion of issues raised by pleadings, if sufficient basis for court to proceed to judgment.

**Liability of cotenant for use of common property.**

Cited in footnote to *Gage v. Gage*, 28 L. R. A. 829, holding cotenant accountable for use of common lands occupied without attempt to exclude other.

Cited in note (32-L. R. A. 422) on title by accession to crops, fruit, and timber wrongfully severed.

**Sale of property by cotenant.**

Cited in footnote to *Nevels v. Kentucky Lumber Co.* 49 L. R. A. 416, holding cotenant cannot without authority convey good title to timber standing on common land.

12 L. R. A. 268, *BUNTING v. HOGSETT*, 139 Pa. 363, 23 Am. St. Rep. 192, 21 Atl. 31, 33, 34.

**Proximate cause of injury.**

Cited in *Quigley v. Delaware & H. Canal Co.* 142 Pa. 397, 24 Am. St. Rep. 504, 21 Atl. 827, holding engineer's failure to signal approach proximate cause of injury to horse resulting from entanglement in wheel of lines dropped by driver; *Williams v. Woodward Iron Co.* 106 Ala. 258, 17 So. 517, holding closing of switch proximate cause of collision between runaway car and train on main line; *Gudfelder v. Pittsburg, C. C. & St. L. R. Co.* 207 Pa. 634, 57 Atl. 70, sustaining jury's finding that negligence in moving leaking car of naphtha near switch-light was proximate cause of injury by explosion of naphtha at sewer outlet.

Cited in footnote to *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform of heavy doors blown on track by severe gale not proximate cause of derailment of engine.

**Imputing driver's negligence to passenger.**

Cited in *Jones v. Lehigh & N. E. R. Co.* 202 Pa. 83, 51 Atl. 590, holding negligence of omnibus driver not imputable to passengers; *Duval v. Atlantic Coast Line R. Co.* 134 N. C. 345, 65 L. R. A. 728, 101 Am. St. Rep. 830, 46 S. E. 750, and *Farley v. Wilmington & N. C. Electric R. Co.* 3 Penn. (Del.) 586, 52 Atl. 543, holding negligence of driver not imputable to gratuitous passengers.

Cited in footnote to *East Tennessee, V. & G. R. Co. v. Markens*, 14 L. R. A. 281, which holds hack driver's negligence in colliding with train not imputable to passenger.

**Proximate cause; when question for jury.**

Cited in *Van Houten v. Fleischman*, 1 Misc. 135, 20 N. Y. Supp. 643, holding proximate cause question for jury where accident attributable to either cause.

**Liability for concurrent negligence.**

Cited in *Washington & G. R. Co. v. Hickey*, 5 App. D. C. 470, holding railroad and street car companies jointly and severally liable for concurrent negligence; *Downey v. Philadelphia Traction Co.* 14 Pa. Co. Ct. 252, 3 Pa. Dist. R. 82, holding railroad and street car companies jointly and severally liable for collision caused by negligence of both; *Brown v. Cox Bros. & Co.* 75 Fed. 691, holding steamboat and coal companies jointly and severally liable for falling of bucket on steamboat employee during delivery of coal; *Pugh v. Chesapeake & O. R. Co.* 101 Ky. 83, 72 Am. St. Rep. 392, 39 S. W. 695, holding railroad company and its employees jointly and severally liable for injury resulting from defective equipment and negligent management of train.

12 L. R. A. 270, *LEMMON v. STRONG*, 59 Conn. 448, 21 Am. St. Rep. 123, 22 Atl. 293.

**Guaranty follows assigned instrument.**

Cited in *Wooley v. Moore*, 61 N. J. L. 18, 38 Atl. 758, holding assignment of bond carries with it collateral guaranty.

**Rights of assignee of guaranty.**

Cited in *Weir v. Anthony*, 35 Neb. 399, 53 N. W. 206, upholding right of assignee of contract of guaranty to maintain action in own name.

12 L. R. A. 273, *BUTLER v. BARNES*, 60 Conn. 170, 21 Atl. 419.

Report of second appeal in 61 Conn. 399, 24 Atl. 328.

**Mutual mistake as ground for equitable relief.**

Cited in *Ezell v. Peyton*, 134 Mo. 490, 36 S. W. 35, reforming deed so as to embrace all land pointed out by grantor.

Cited in footnotes to *Bigham v. Madison*, 47 L. R. A. 267, which authorizes rescission for mutual mistake as to location of boundary lines pointed out by vendor; *Decker v. Schulze*, 27 L. R. A. 335, which holds mere breach of covenant as to title not ground for rescinding executed sale of land.

**Joinder of causes of action.**

Cited in *Thresher v. Stonington Sav. Bank*, 68 Conn. 205, 36 Atl. 38, holding legal and equitable relief demandable in one complaint; *West v. Suda*, 69 Conn. 63, 36 Atl. 1015, holding reformation of contract and damages for breach as reformed may be demanded in same action.

**Covenants running with land.**

Cited in *Hall v. Allis*, 73 Conn. 245, 47 Atl. 362, holding covenant to save grantee harmless from all encumbrances runs with land.

**Effect of grant of new trial.**

Distinguished in *Fritts v. New York & N. E. R. Co.* 63 Conn. 458, 28 Atl. 529, holding unqualified grant by supreme court of new trial means new trial of entire cause.

12 L. R. A. 279, *SMITHWICK v. HALL & U. CO.* 59 Conn. 261, 21 Am. St. Rep. 104, 21 Atl. 924.

**Proximate cause.**

Cited in *Nugent v. New Haven Street R. Co.* 73 Conn. 141, 46 Atl. 875, holding standing on footboard of car not proximate cause of injury to passenger struck by pole; *Lake Erie & W. R. Co. v. Craig*, 19 C. C. A. 635, 37 U. S. App. 654, 73 Fed. 645, holding proximate cause of injury to switchman negligently going between moving cars, catching foot in unblocked frog, question for jury.

Cited in footnotes to *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, as to proximate cause of injury to shipper while stepping from stock car to caboose; *McKenna v. Baessler*, 17 L. R. A. 310, which holds original fire cause of destruction of property by back fire; *Herr v. Lebanon*, 16 L. R. A. 106, which holds want of barrier not proximate cause of omnibus going over wall while horse attempting to rise; *Vallo v. United States Exp. Co.* 14 L. R. A. 743, which holds throwing trunk from de-



livery wagon in highway proximate cause of traveler falling over another trunk; *Bunting v. Hogsett*, 12 L. R. A. 268, which holds negligence of engineer of donkey engine on circular track, in causing collision with passenger train at one crossing, proximate cause of injury by second collision on other crossing; *Schumaker v. St. Paul & D. R. Co.* 12 L. R. A. 257, which holds master's neglect to furnish transportation proximate cause of injury received while walking to find shelter; *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform of heavy doors, blown on track by severe gale, not proximate cause of derailment of engine.

Cited in note (43 L. R. A. 354) on duties of master and servant as to rules promulgated for safe conduct of business.

#### **Intervening of co-operating causes.**

Cited in footnotes to *Southern R. Co. v. Webb*, 59 L. R. A. 109, which holds negligent jolting of train, hurling passenger through door on track insensible, cause of death by train of other company; *Hayes v. Hyde Park*, 12 L. R. A. 249, which holds town guilty of negligence not relieved from liability by third person's co-operation; *Daniels v. New York, N. H. & H. R. Co.* 62 L. R. A. 751, denying liability of one causing negligent injury, for suicide of one rendered insane thereby; *Cole v. German Sav. & L. Soc.* 63 L. R. A. 416, which denies liability of owner of building to visitor falling down elevator shaft, unfastened door of which was thrown open by stranger.

Cited in note (17 L. R. A. 38) on effect of concurring negligence of third person on liability of one sued for negligently causing injury.

#### **Effect of omission increasing loss from another's negligence.**

Cited in *Belcher v. Missouri, K. & T. R. Co.* 92 Tex. 597, 50 S. W. 559, holding neglect to procure other feed for cattle does not defeat, but reduces, recovery in action against railroad for delay in transporting feed.

#### **Contributory negligence.**

Cited in *McElligott v. Randolph*, 61 Conn. 165, 29 Am. St. Rep. 181, 22 Atl. 1094, holding employee's remaining late at work, although requested by superintendent to go home early, not contributory negligence; *Julian v. Stony Creek Red Granite Co.* 71 Conn. 638, 42 Atl. 994, holding employee not knowing derrick likely to fall not guilty of contributory negligence in working beneath it.

12 L. R. A. 285, *MANSFIELD v. LYNCH*, 59 Conn. 320, 22 Atl. 313.

#### **Right to recover payment made under mistake.**

Cited in *Tarplee v. Capp*, 25 Ind. App. 61, 56 N. E. 270, holding overpayment to creditor by executor in mistaken belief of solvency of estate recoverable; *Bristol v. New Britain*, 71 Conn. 206, 41 Atl. 548, upholding town's right to recover from another town payment mistakenly made for support of paupers.

Cited in footnote to *Behring v. Somerville*, 49 L. R. A. 578, which denies right of mortgagor, compelled to pay first assignee, to recover amount previously paid second assignee who surrendered mortgage.

Distinguished in *First Nat. Bank v. Alton*, 60 Conn. 409, 22 Atl. 1010, denying right of bank discounting supposed negotiable note to recover amount advanced from accommodation indorser.

#### **Right of administrator de bonis non to recover administered assets.**

Cited in *Mills v. Britton*, 64 Conn. 25, 24 L. R. A. 542, 29 Atl. 231, upholding L. R. A. AU.—VOL. II.—36.

right of administrator *de bonis non* to recover stock erroneously transferred by executor in payment of debt; Chamberlin's Appeal, 70 Conn. 376, 41 L. R. A. 207, 39 Atl. 734, sustaining right of administrator *de bonis non* to recover property placed by executor in hands of trustee of invalid trust.

12 L. R. A. 288, ZINN v. RICE, 154 Mass. 1, 27 N. E. 772.

**Malicious prosecution.**

Cited in footnote to Luby v. Bennett, 56 L. R. A. 261, which holds suit for malicious prosecution maintainable if material issues of prosecution decided in defendant's favor before suit commenced.

**Excessive attachment.**

Cited in Tamblyn v. Johnston, 62 C. C. A. 605, 126 Fed. 271, holding malicious excessive attachment actionable.

12 L. R. A. 290, RAY v. WESTERN PENNSYLVANIA NATURAL GAS CO. 138 Pa. 576, 21 Am. St. Rep. 922, 20 Atl. 1065.

**Occupancy of lessor as re-entry.**

Cited in Wilson v. Goldstein, 12 Pa. Co. Ct. 338, holding occupancy of lessor at and after breach of covenant in gas lease will not work forfeiture against his will.

**Re-entry as essential to forfeiture.**

Cited in Johnson v. Lehigh Valley Traction Co. 130 Fed. 942, holding forfeiture of lease for default in payment, lessor not resuming possession, will not be enforced where payment was subsequently accepted.

**Default creating forfeiture as defense.**

Cited in Verdolite Co. v. Richards, 7 Northampton Co. Rep. 119, holding provision for forfeiture of lease for nonperformance by lessee, for benefit of lessor alone; Chambers v. Anderson, 51 Kan. 392, 32 Pac. 1098, holding provision avoiding land contract on default in payments available to vendor only.

**— Oil and gas leases.**

Followed in Edmonds v. Mounsey, 15 Ind. App. 404, 44 N. E. 196; Diamond Plate Glass Co. v. Echelbarger, 24 Ind. App. 128, 55 N. E. 233; Diamond Plate Glass Co. v. Curless, 22 Ind. App. 353, 52 N. E. 182; Woodland Oil Co. v. Crawford, 55 Ohio St. 178, 34 L. R. A. 67, 44 N. E. 1093; Wheeling v. Phillips, 10 Pa. Super. Ct. 637; Miller v. Logan, 31 Pittsb. L. J. N. S. 217; Cochran v. Pew, 159 Pa. 187, 33 W. N. C. 548, 28 Atl. 219; Gibson v. Oliver, 158 Pa. 280, 27 Atl. 961; Jones v. Western Pennsylvania Natural Gas Co. 146 Pa. 211, 29 W. N. C. 268, 23 Atl. 386; Ogden v. Hatry, 145 Pa. 641, 23 Atl. 334; Springer v. Citizens' Natural Gas Co. 145 Pa. 435, 22 Atl. 986,—holding forfeiture clause in oil lease inures to benefit of lessor only.

Cited in note (31 L. R. A. 675) on forfeiture of oil and gas lease.

Distinguished in Glasgow v. Chartiers Oil Co. 152 Pa. 52, 31 W. N. C. 209, 25 Atl. 232, denying liability of lessee after forfeiture where lease provides for forfeiture unless well is completed within certain time, or payment is made for each additional month.

**— Leases by married women.**

Followed in Agerton v. Vandergrift, 138 Pa. 593, 21 Atl. 202, holding fact that

gas lease by married woman was not acknowledged so as to bind her, no defense to action for rentals after performance on her part.

**Provision ending lessees' liability on surrender.**

Cited in *Bettman v. Shadle*, 22 Ind. App. 548, 53 N. E. 662, and *Aderhold v. Oil Well Supply Co.* 33 W. N. C. 338, holding lessee liable on oil lease providing that surrender terminates liability, for rent previously accruing; *Douthett v. Gibson*, 11 Pa. Super. Ct. 546, raising, without deciding, question of liability of lessee surrendering lease providing that surrender releases him from moneys due, after rent accrued.

**— Implied covenant to develop.**

Cited in *Foster v. Elk Fork Oil & Gas Co.* 32 C. C. A. 563, 61 U. S. App. 576, 90 Fed. 181, and *Aye v. Philadelphia Co.* 193 Pa. 455, 74 Am. St. Rep. 696, 44 Atl. 555, holding lessee under oil lease providing for test well, which proves dry, impliedly bound to proceed with exploration with reasonable diligence; *Parish Fork Oil Co. v. Bridgewater Gas Co.* 51 W. Va. 593, 59 L. R. A. 570, 40 S. E. 655, holding oil lease forfeited by failure to proceed with development, though lessor completed well agreed upon; *Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co. (Ind.)* 62 L. R. A. 899, 67 N. E. 259, holding condition subsequent to develop property implied in oil lease providing penalty for delay in completing test well; *Barnsdall v. Boley*, 119 Fed. 201, holding lessee completing only one well cannot enforce agreement for extension for "so long as oil or gas is found in paying quantities;" *Sharp v. Behr*, 117 Fed. 872, 8 Del. Co. Rep. 474, holding lessee on royalty impliedly bound to operate mine with reasonable diligence.

**Effect of change in law on existing contracts or vested rights.**

Cited in *Harlow v. Beaver Falls*, 188 Pa. 266, 41 Atl. 533, holding subsequent decision altering construction of statute granting municipal powers does not affect validity of contract made in reliance on former construction; *Weston v. Ralston*, 48 W. Va. 190, 36 S. E. 446 (concurring opinion), as to change in course of judicial decisions relating to real property not impairment of vested rights; *Middletown Drainage Co. v. Middletown*, 1 Dauphin Co. Rep. 113, holding contract between borough and drainage company not alterable by amendment of ordinance without latter's consent; *Falconer v. Simmons*, 51 W. Va. 175, 41 S. E. 193, holding change in judicial construction of statute not affect existing contract rights.

Cited in note (16 L. R. A. 647) on change of decision of state court as unconstitutional impairment of contract.

**Adoption of judicial construction.**

Cited in *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 33, 13 L. R. A. 244, 27 N. E. 849, holding judicial exposition in another state of common law applicable to commercial transactions not binding on courts; *Shaw v. Postal Teleg. & Cable Co.* 79 Miss. 694, 56 L. R. A. 493, 89 Am. St. Rep. 666, 31 So. 222 (dissenting opinion), majority holding that contract will be interpreted by statutes of state where made, as construed by its courts, although conflicting with construction in forum.

12 L. R. A. 293, *GRAHAM v. PENNSYLVANIA CO.* 139 Pa. 149, 21 Atl. 151.

**Admissibility of witness's opinion.**

Cited in *McNerney v. Reading City*, 150 Pa. 616, 30 W. N. C. 535, 25 Atl. 57, holding witness's opinion that unguarded areaway in sidewalk is dangerous admissible; *Ryan v. Bristol*, 63 Conn. 38, 27 Atl. 309, holding opinions as to dangerous condition of bridge admissible; *Edwards v. Worcester*, 172 Mass. 105, 51 N. E. 447, holding opinion as to safety of described highway inadmissible; *Beardslee v. Columbia Twp.* 5 Lack. Legal News, 293, holding opinion as to safety of clearly described road inadmissible; *Siegler v. Mellinger*, 203 Pa. 259, 93 Am. St. Rep. 768, 52 Atl. 175, holding opinions as to safety of footpath inadmissible; *Closser v. Washington Twp.* 11 Pa. Super. Ct. 124, holding opinion as to safety of road described by plans and photographs inadmissible; *Salsberg v. Dallas*, 10 Kulp, 48, holding opinion of witnesses not testifying to actual condition, as to safety of highway, improperly admitted; *Platz v. McKean Twp.* 178 Pa. 611, 39 W. N. C. 481, 36 Atl. 136, holding opinion evidence as to condition of sluice in highway inadmissible; *Auberle v. McKeesport*, 179 Pa. 324, 39 W. N. C. 424, 36 Atl. 212, holding opinions as to whether absence of guard rail rendered bridge dangerous inadmissible; *Louisville & N. R. Co. v. Tegner*, 125 Ala. 600, 28 So. 510, holding opinion as to dangerous condition of worn track inadmissible. (Reversed on rehearing in 125 Ala. 602, 28 So. 513); *Dooner v. Delaware & H. Canal Co.* 164 Pa. 33, 30 Atl. 269, holding opinion evidence that freight car without handles, grab-irons, or ladders, dangerous, inadmissible; *Woekner v. Erie Electric Motor Co.* 187 Pa. 208, 43 W. N. C. 52, 41 Atl. 28, holding opinion that motorman exercised good judgment in releasing brake inadmissible; *Reese v. Clark*, 198 Pa. 320, 47 Atl. 994, holding opinion as to whether watchman could give sufficient notice to permit person to escape from falling plate inadmissible; *Beardslee v. Columbia Twp.* 188 Pa. 503, 44 W. N. C. 338, 68 Am. St. Rep. 883, 41 Atl. 617, holding opinion of nonexpert as to contributory negligence in highway, based on hypothetical case, as to horses, harness, wagon and load, inadmissible; *Com. v. Hufnal*, 4 Pa. Super. Ct. 327, 40 W. N. C. 367, holding opinion evidence as to meaning of term "skimmed milk" inadmissible; *Motey v. Pickle Marble & Granite Co.* 20 C. C. A. 371, 36 U. S. App. 682, 74 Fed. 159, holding opinion as to safety of drawing marble slabs vertically placed, with man standing between, inadmissible; *Bruce v. Beall*, 99 Tenn. 313, 41 S. W. 445, holding opinion of expert that keeping elevator cable running for more than six or seven years would be imprudent, inadmissible; *Easler v. Southern R. Co.* 59 S. C. 314, 37 S. E. 938, holding opinion of passenger whether fellow passenger had time to get off train at station admissible; *State v. Barrett*, 33 Or. 196, 54 Pac. 807, holding witness's opinion that body of person shot was not, when he saw it, in original position, admissible; *First Nat. Bank v. Fire Asso.* 33 Or. 181, 53 Pac. 8, holding evidence of skilled firemen as to whether fire burned naturally, or as if accelerated by inflammable substance, admissible; *Com. v. Gibbons*, 3 Pa. Super. Ct. 411, 39 W. N. C. 567, holding opinion of witness in abortion case as to cause of soiled bedclothing admissible; *Whitaker v. Campbell*, 187 Pa. 117, 41 Atl. 38, holding opinion evidence as to safety of cleaning machine in motion admissible; *Cookson v. Pittsburg & W. R. Co.* 179 Pa. 193, 40 W. N. C. 106, 36 Atl. 194, holding opinions as to relative advantages of places to look and listen for approaching train admissible; *Shapter v. Pillar*, 28 Colo. 215, 63 Pac. 302, holding opinions as to incapacity of alleged insane person to manage business inadmissible.

Cited in footnote to *Tullis v. Rankin*, 35 L. R. A. 449, which holds opinion of surgeon as to cause of fully described condition of limb admissible.

12 L. R. A. 297, *WILLIAMSON v. NEWPORT NEWS & M. VALLEY CO.* 34 W. Va. 657, 26 Am. St. Rep. 927, 12 S. E. 824.

**Servant's assumption of risk.**

Cited in *Woodell v. West Virginia Improv. Co.* 38 W. Va. 44, 17 S. E. 386, holding employee on construction train continuing in employment with knowledge of dangerous overhanging limb assumes risk.

Cited in footnotes to *McKee v. Chicago, R. I. & P. R. Co.* 13 L. R. A. 817, which holds risk from wing fences at cattle guards assumed by brakemen; *Coyle v. Griffing Iron Co.* 47 L. R. A. 147, which holds servant assumes obvious risk from using machine from which bolt missing.

**Demurring to evidence.**

Cited in *Hopkins v. Nashville, C. & St. L. R. Co.* 96 Tenn. 431, 32 L. R. A. 361, 34 S. W. 1029, holding practice of demurring to evidence prevails in Tennessee.

12 L. R. A. 301, *SMITH v. CARROLL*, 17 R. I. 125, 20 Atl. 227, 21 Atl. 343.

**Sufficiency of amended plea, how raised.**

Cited in *Griswold v. Hazard*, 141 U. S. 289, 35 L. ed. 690, 11 Sup. Ct. Rep. 972, holding demurrer appropriate to raise questions arising upon amended pleas, filed after demurrer to original pleas.

12 L. R. A. 302, *BERNARD v. WHITNEY NAT. BANK*, 43 La. Ann. 50, 8 So. 702.

**Liability of bank on unrepresented check.**

Cited in *State ex rel. St. Amand v. Bank of Commerce*, 49 La. Ann. 1079, 22 So. 207, denying bank's liability on unrepresented check.

**Effect of drawer's death on payment of check.**

Cited in footnote to *Raesser v. National Exch. Bank*, 56 L. R. A. 174, which holds bank's authority to pay check working assignment *pro tanto* of fund not revoked by depositor's death.

12 L. R. A. 307, *ELYTON LAND CO. v. BIRMINGHAM WAREHOUSE & ELEVATOR CO.* 92 Ala. 407, 25 Am. St. Rep. 65, 9 So. 129.

**Liability on stock issued for overvalued property.**

Followed without special discussion in *Montgomery Iron Works v. Capital City Ins. Co.* 137 Ala. 146, 34 So. 210.

Cited in *Van Cleve v. Berkey*, 143 Mo. 126, 42 L. R. A. 601, 44 S. W. 743; *Gilkie & A. Co. v. Dawson Town & Gas Co.* 46 Neb. 349, 64 N. W. 978; *Roman v. Dimmick*, 123 Ala. 374, 26 So. 214 (*obiter*); *Pickering v. Townsend*, 118 Ala. 359, 23 So. 703; *Roman v. Dimmick*, 115 Ala. 238, 22 So. 109,—holding stockholder liable to corporate creditors for difference between amount of stock and fair value of consideration, irrespective of fraud; *Manhattan Trust Co. v. Seattle Coal & I. Co.* 16 Wash. 520, 48 Pac. 333, holding issue of stock for grossly overvalued property fraudulent as matter of law; *Kelly v. Clark*, 21 Mont. 325, 42 L. R. A. 629, 69 Am. St. Rep. 668, 53 Pac. 959, and *McClure v. Paducah Iron*

Co. 90 Mo. App. 578, holding owners of shares issued for property knowingly overvalued liable to creditors for difference between fictitious and real value; State Trust Co. v. Turner, 111 Iowa, 669, 53 L. R. A. 138, 82 N. W. 1029, holding owner of stock issued for patent at speculation value liable to creditors for difference between fictitious and real value; Kelley Bros. v. Fletcher, 94 Tenn. 14, 28 S. W. 1099, and Jones v. Whitworth, 94 Tenn. 608, 30 S. W. 736, holding creditors must show fraud in issue of stock for overvalued property; Jones v. Whitworth, 94 Tenn. 614, 30 S. W. 736, raising, without deciding, question whether, in creditor's action against owners of stock issued for fraudulently overvalued property, recovery of difference or rescission of contract proper remedy; Shields v. Clifton Hill Land Co. 94 Tenn. 172, 26 L. R. A. 523, 45 Am. St. Rep. 700, 28 S. W. 668 (dissenting opinion), majority holding corporate creditors in action against owners of stock issued for property or services must prove fraud.

Cited in note (42 L. R. A. 600, 618) on how far payment of stock in corporation by transfer of property will protect shareholder against corporate creditors.

Distinguished in effect in Nicrosi v. Irvine, 102 Ala. 654, 48 Am. St. Rep. 92, 15 So. 429, holding owner of stock issued for overvalued property not liable as garnishees to judgment creditor.

**Pleading in action against holder of fictitious stock.**

Cited in Lea v. Iron Belt Mercantile Co. 119 Ala. 276, 24 So. 28, holding averment in corporation creditor's bill that stock issued for grossly overvalued property sufficiently charges fraud.

**Fraudulent representation.**

Distinguished in Griel v. Lomax, 94 Ala. 645, 10 So. 232, holding expression of opinion as to legal effect of contract not fraudulent representation.

**Corporate capital as trust fund.**

Cited in Corey v. Wadsworth, 99 Ala. 75, 23 L. R. A. 620, 42 Am. St. Rep. 29, 11 So. 350, holding director of insolvent corporation cannot be made preferred creditor.

**Limitation on issue of stock and bonds.**

Cited in Coe v. East & West R. Co. 52 Fed. 538, holding stock and bonds issued for construction of railroad at fair valuation valid; Grant v. East & West R. Co. 4 C. C. A. 518, 13 U. S. App. 1, 54 Fed. 576, holding stock and bonds issued for railroad property at fair valuation valid; Williams v. Searcy, 94 Ala. 363, 10 So. 632, excluding parol evidence to show contract to issue stock to certain amount for property purchased meant double amount; Kolsky v. Enslen, 103 Ala. 102, 15 So. 558, holding (*obiter*) only stock issued for money, labor, or property at reasonable value, valid.

Distinguished in effect in Nelson v. Hubbard, 96 Ala. 250, 17 L. R. A. 379, 11 So. 428, holding limitation on issue of corporate bonds, except for full value in money or property, does not prevent pledge in excess of indebtedness.

**Right of stockholders in insolvent corporation.**

Cited in Birmingham Min. & Mfg. Co. v. Mutual Loan & T. Co. 96 Ala. 369, 11 So. 368, sustaining right of stockholders of insolvent corporation to enjoin suits brought by collusion with directors.

12 L. R. A. 315, FOLLETT v. UNITED STATES MUT. ACCI. ASSO. 107 N. C. 240, 22 Am. St. Rep. 878, 12 S. E. 370.

**False statements in application known to insurer's agent.**

Reaffirmed on second appeal in 110 N. C. 377, 15 L. R. A. 668, 28 Am. St. Rep. 693, 14 S. E. 923, holding false statement in insurance application, known to local agent, will not avoid policy.

Cited in New York L. Ins. Co. v. Russell, 23 C. C. A. 52, 40 U. S. App. 530, 77 Fed. 104, holding information communicated to agent writing answers in insurance application attributable to company.

Cited in note (16 L. R. A. 34) on effect of knowledge by insurer's agent of falsity of statements in application.

**Waiver of conditions in policy by agent.**

Cited in Dibrell v. Georgia Home Ins. Co. 110 N. C. 209, 28 Am. St. Rep. 678, 14 S. E. 783, holding insurance adjuster may waive stipulation in policy limiting time to sue; Bergeron v. Pamlico Ins. & Bkg. Co. 111 N. C. 47, 15 S. E. 883, holding insurance company bound by waiver of condition in policy by agent's clerk; Horton v. Home Ins. Co. 122 N. C. 504, 65 Am. St. Rep. 717, 29 S. E. 944, holding failure of agent knowing of pending foreclosure, to cancel policy, waives condition avoiding it if foreclosure commenced.

**Insurance company bound by agent's agreement.**

Cited in Bresee v. Crumpton, 121 N. C. 125, 28 S. E. 351, holding premium note assigned by local to general agent of insurance company subject to equities.

12 L. R. A. 318, OAKES v. NORTHERN P. R. CO. 20 Or. 392, 23 Am. St. Rep. 126, 26 Pac. 230.

**Carrier's duty as to baggage.**

Cited in Chicago, B. & Q. R. Co. v. Steear, 53 Neb. 99, 73 N. W. 466, holding check prima facie evidence of receipt and nondelivery of baggage; Cleveland, C. C. & St. L. R. Co. v. Tyler, 9 Ind. App. 690, 35 N. E. 523, holding carrier's duty as to baggage arises from contract to carry passenger; hence, presentation of check unnecessary; Illinois C. R. Co. v. Matthews, 114 Ky. 978, 60 L. R. A. 847, 72 S. W. 302, holding statute requiring carrier to check baggage applies only to articles carried for personal use and convenience; Saunders v. Southern R. Co. 62 C. C. A. 529, 128 Fed. 21, holding carrier's implied contract to carry passenger's baggage without additional compensation does not cover theatrical paraphernalia.

**Carrier's liability for articles transported as baggage.**

Cited in Kansas City, Ft. S. & M. R. Co. v. McGahey, 63 Ark. 348, 36 L. R. A. 784, 58 Am. St. Rep. 111, 38 S. W. 659, holding carrier knowingly receiving as baggage packages containing more than ordinary baggage liable therefor; Armory v. Wabash R. Co. 130 Mich. 406, 90 N. W. 22, holding railroad company with knowledge or notice of contents of trunks liable for merchandise carried as baggage.

Cited in note (14 L. R. A. 516) on liability of passenger carrier in transporting merchandise intrusted to it by passenger.

12 L. R. A. 321, *GLENNON v. LEBANON MFG. CO.* 140 Pa. 594, 21 Atl. 429.

**Set-off for damage by negligence in performing services.**

Cited in *The Tom Lysle*, 48 Fed. 692, holding loss sustained through pilot's negligence defense to action for wages.

Distinguished in effect in *Clark v. Cook*, 14 Pa. Super. Ct. 321, denying set-off for damage caused by strikers against sheriff's claim for expense of special deputies; *Jenkins v. Rushbrook Coal Co.* 8 Northampton Co. Rep. 336, 8 Lack. Legal News, 277, holding claim for secret profit made in transacting corporation business cannot be set off against officer's claim for salary.

**Right to offset damages for tort growing out of contract.**

Cited in *Cornelius v. Lincoln Nat. Bank*, 15 Pa. Super. Ct. 86, holding bank discounting note with forged indorsement may set off amount advanced in action to recover bank balance.

12 L. R. A. 322, *CURTIN v. SOMERSET*, 140 Pa. 70, 23 Am. St. Rep. 220, 21 Atl. 244.

**Liability for negligent injury.**

Cited in *Western Maryland R. Co. v. Kehoe*, 83 Md. 450, 35 Atl. 90, denying liability of railroad for failure to anticipate presence of person wrongfully on track; *Glynn v. Central R. Co.* 175 Mass. 512, 78 Am. St. Rep. 507, 56 N. E. 698, denying liability of railroad company to brakeman of other company for injury by defective car delivered to latter company.

Cited in notes (46 L. R. A. 44, 108) on right of servant to recover damages from persons other than his master for injuries received in performance of his duties.

Distinguished in *Glenn v. Winters*, 17 Misc. 600, 40 N. Y. Supp. 659, holding lessor of unsafe coach liable to lessee's guest.

**— Of contractors.**

Cited in *Daugherty v. Herzog*, 145 Ind. 259, 32 L. R. A. 838, 44 N. E. 457, denying liability of contractor negligently remodeling building, to third person subsequently injured by falling wall; *Fitzmaurice v. Fabian*, 147 Pa. 201, 29 W. N. C. 339, 23 Atl. 444, holding contractor not liable for board falling on tenant's child, after property delivered to owner; *Anderson v. Pittsburgh & L. E. R. Co.* 5 Pa. Dist. R. 402, 26 Pittsb. L. J. N. S. 471, holding contractor not liable to third person for negligence in placing cars with defective brakes on gravity switch; *First Presby. Congregation v. Smith*, 163 Pa. 576, 26 L. R. A. 508, 43 Am. St. Rep. 808, 30 Atl. 279, holding contractor negligently constructing city sewer not liable to property owner for injury after acceptance; *Field v. French*, 80 Ill. App. 88, denying liability of builder of elevator to passengers; *Dawson v. St. Louis Expanded Metal Fireproofing Co.* 94 Tex. 427, 61 S. W. 118, denying liability of subcontractor to contractor's employee for defective floor; *Salliotte v. King Bridge Co.* 65 L. R. A. 632, 58 C. C. A. 469, 122 Fed. 381, denying contractor's liability for injury resulting from defective construction of bridge, after town's acceptance.

Cited in note (26 L. R. A. 504) on liability of contractor to third persons for defects in his work after completion and acceptance.

**— Of manufacturer.**

Cited in *Bragdon v. Perkins-Campbell Co.* 30 C. C. A. 570, 58 U. S. App. 91,



87 Fed. 111, Affirming 28 Pittsb. L. J. N. S. 388, denying right of noncontracting party to recover from maker and seller for injury resulting from defective saddle; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 611, 15 L. R. A. 823, 33 Am. St. Rep. 482, 19 S. W. 630, denying liability of manufacturer, not knowing of defect, to vendee's employee injured by explosion of threshing-machine cylinder; *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 387, 55 L. R. A. 825, 91 Am. St. Rep. 637, 50 Atl. 651, denying liability of manufacturer to purchaser's employee for defect in press; *Moriarty v. Porter*, 22 Misc. 538, 49 N. Y. Supp. 1107, holding (*obiter*) manufacturer of bicycle not liable to lessee from third person.

Distinguished in *Empire Laundry Machinery Co. v. Brady*, 164 Ill. 62, 45 N. E. 486, holding manufacturer repairing customer's machine liable to customer's employee injured through improper construction; *Huset v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 306, 57 C. C. A. 240, 120 Fed. 868, holding manufacturer of threshing machine liable to purchaser's employee for giving way of insufficient cylinder cover, intended to be walked on.

#### **Proximate cause.**

Cited in *Stone v. Boston & A. R. Co.* 171 Mass. 540, 41 L. R. A. 797, 51 N. E. 1, holding negligence in storing oil not proximate cause of fire started by match dropped by third person; *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 586, 11 C. C. A. 257, 24 U. S. App. 7, 63 Fed. 404, holding negligence in not having proper valve not proximate cause of fire from oil escaping from tank car, flowing into furnace room of mill; *Lake Shore & M. S. R. Co. v. Wilson*, 11 Ind. App. 501, 38 N. E. 343 (dissenting opinion), majority holding open switch, not engineer's violation of rule requiring stop on failing to observe signal, proximate cause of collision.

12 L. R. A. 324, *GUEST v. LOWER MERION WATER CO.* 142 Pa. 610, 21 Atl. 1001.

#### **Validity of liens on property of public or quasi-public corporations.**

Cited in *Atascosa County v. Angus*, 83 Tex. 203, 29 Am. St. Rep. 637, 18 S. W. 563, holding builder's lien not enforceable against public buildings unless expressly provided by statute; *Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co.* 110 Wis. 642, 84 Am. St. Rep. 948, 86 N. W. 592, upholding mechanic's lien against street railway power-house, not essential to operation of road; *Phoenix Iron Works Co. v. Lancaster City Street R. Co.* 10 Lanc. L. Rev. 73, holding mechanic's lien may be filed against street railway power-house; *Oberholtzer v. Norristown Pass. R. Co.* 16 Pa. Co. Ct. 14, 12 Lanc. L. Rev. 60, holding street railway power-house not subject to mechanic's lien.

Distinguished in *Badger Lumber Co. v. Marion Water Supply Electric Light & P. Co.* 48 Kan. 189, 30 Am. St. Rep. 306, 30 Pac. 117, holding property of electric light company subject to mechanic's lien; *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 53, holding water company's plant subject to material man's lien; *Philadelphia use of Pugh v. Philadelphia & R. R. Co.* 1 Pa. Super. Ct. 248, 38 W. N. C. 20, holding railroad lands, not essential to exercise of franchise, salable under lien for municipal assessment.

#### **Sale of corporate property on a. fa.**

Cited in *Smith v. Altoona & P. Connecting R. Co.* 182 Pa. 147, 41 W. N. C. 5, 37 Atl. 930, holding sheriff must make demand at company's principal office

before selling property on fl. fa.; *Bell v. Wood*, 181 Pa. 178, 37 Atl. 201, holding land forming part of water company's plant salable on fl. fa.

Distinguished in *East Side Bank v. Columbus Tanning Co.* 170 Pa. 6. 32 Atl. 539, Affirming 15 Pa. Co. Ct. 361, and *Reynolds v. Reynolds Lumber Co.* 169 Pa. 629, 36 W. N. C. 539, 47 Am. St. Rep. 935, 32 Atl. 537, holding property of private corporation may be sold under writ of fl. fa.

12 L. R. A. 326, *UNION COAL CO. v. LA SALLE*, 136 Ill. 119, 26 N. E. 506.

**Title to minerals under streets.**

Distinguished in *Snoddy v. Bolen*, 122 Mo. 490, 24 L. R. A. 512, footnote p. 507, 24 S. W. 142, which holds minerals reserved on dedicating street pass by conveyance of abutting lots.

**Necessity of recording plat.**

Cited in *People ex rel. Kochersperger v. Clifford*, 166 Ill. 170, 46 N. E. 770, holding acknowledging and recording of plat necessary to vest fee of streets in municipality.

12 L. R. A. 328, *REPUBLIC L. INS. CO. v. SWIGERT*, 135 Ill. 150, 25 N. E. 680.

Prayer of creditors to be substituted as parties complainant denied in *Fairbanks v. Farwell*, 141 Ill. 363, 30 N. E. 1056.

**Stockholders' liability to creditors.**

Cited in *Pullman v. Railway Equipment Co.* 73 Ill. App. 319, denying liability of purchaser from corporation below par of stock once fully paid for; *First Nat. Bank v. Peoria Watch Co.* 191 Ill. 134, 60 N. E. 859, denying liability to corporation creditors of stockholder surrendering unpaid stock in good faith; *Chrisman-Sawyer Bkg. Co. v. Independence Wool Mfg. Co.* 168 Mo. 641, 68 S. W. 1026, holding shareholder not relieved of liability to creditors, existing or subsequent, by surrender of unpaid stock to company.

**Right of corporation to purchase its own stock.**

Cited in note (18 L. R. A. 254) on power of corporation to deal in stock of other corporation or in its own.

**Rights of receivers and assignees.**

Cited in *Young v. Stevenson*, 180 Ill. 614, 72 Am. St. Rep. 236, 54 N. E. 562, Affirming 81 Ill. App. 47, denying right of receiver of loan association to compel member to refund withdrawal; *Gottlieb v. Miller*, 154 Ill. 56, 39 N. E. 992, holding receiver of insolvent firm estopped to assert fraudulent transfer of goods by principals; *Weill v. Zacher*, 92 Ill. App. 299, holding receiver cannot set aside fraudulent transfer by insolvent; *Cohn v. Waters*, 83 Ill. App. 390, holding receiver winding up insolvent corporation cannot have fraudulent conveyance set aside; *Ross v. Sayler*, 104 Ill. App. 24, holding assignee of insolvent corporation cannot set aside fraudulent executed contract; *Peabody v. United Waterworks Co.* 184 Ill. 629, 75 Am. St. Rep. 195, 56 N. E. 957, Reversing 80 Ill. App. 461, holding receiver to wind up corporation may have collusive judgment opened; *Christie v. Burns*, 83 Ill. App. 516, holding receiver in foreclosure powerless as to persons not parties or privies; *First Nat. Bank v. Baker*, 62 Ill. App. 163 (dissenting opinion), majority holding defectively acknowledged chattel mortgage invalid against receiver.

— **To enforce stockholders' liability.**

Cited in footnotes to *Colton v. Mayer*, 47 L. R. A. 617, which denies receiver's right to enforce stockholders' liability; *Howarth v. Lombard*, 49 L. R. A. 301, which authorizes suit to enforce stockholders' liability in foreign jurisdiction.

Distinguished in *Cole v. Satsop R. Co.* 9 Wash. 494, 43 Am. St. Rep. 858, 37 Pac. 700, holding receiver appointed in creditor's proceeding may maintain action on stock subscription; *Smith v. Johnson*, 57 Ohio St. 489, 49 N. E. 693, holding receiver succeeds to corporation's right to enforce unpaid stock subscriptions; *Wyman v. Bowman*, 62 C. C. A. 197, 127 Fed. 265, holding receiver may enforce stockholders' liability for debts to amount of unpaid subscriptions.

12 L. R. A. 337, *LAFITTE v. NEW ORLEANS CITY & LAKE R. CO.* 43 La. Ann. 34, 8 So. 701.

**Master's liability for insults or violence of servants.**

Cited in *Cole v. Atlanta & W. P. R. Co.* 102 Ga. 477, 31 S. E. 107, holding railroad liable for conductor's unprovoked use of abusive language to passengers; *Knoxville Traction Co. v. Lane*, 103 Tenn. 383, 46 L. R. A. 551, 53 S. W. 557, holding street car company liable for motorman's insulting and indecent language to passengers; *Davis v. Houghtellin*, 33 Neb. 585, 14 L. R. A. 740, 50 N. W. 765, denying master's liability for shooting of trespasser by servant employed to guard property; *McDermott v. American Brewing Co.* 105 La. 127, 52 L. R. A. 686, 83 Am. St. Rep. 225, 29 So. 498, denying employer's liability for violence of servant collecting account for which personally liable, through failure to deliver for cash.

Cited in footnote to *Farber v. Missouri P. R. Co.* 20 L. R. A. 350, which holds driving of trespasser from freight train by brakeman not to be within scope of employment.

Cited in notes (14 L. R. A. 796) on master's liability for false arrest, imprisonment, or malicious prosecution by servant; (14 L. R. A. 739) on master's liability for assaults by servant.

**Measure of damages.**

Cited in *Graham v. Western U. Teleg. Co.* 109 La. 1075, 34 So. 91, holding mental anguish, without material injury, resulting from negligence in transmitting telegram, ground for damages.

12 L. R. A. 340, *FONSECA v. CUNARD S. S. CO.* 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665.

**Acceptance of terms of contract.**

Cited in *Reinstein v. Watts*, 84 Me. 142, 24 Atl. 719, holding reception of merchandise by bailee under invoice deemed acceptance of its terms; *Cox v. Central Vermont R. Co.* 170 Mass. 137, 49 N. E. 97, holding receipt of bill of lading without objection equivalent to assent, so far as provisions are lawful; *Wood v. Massachusetts Mut. Acci. Asso.* 174 Mass. 221, 54 N. E. 541, holding signer presumed to have read and understood release of liability.

— **Railway and steamship tickets.**

Cited in *Crary v. Lehigh Valley R. Co.* 203 Pa. 528, 59 L. R. A. 815, 93 Am. St. Rep. 778, 53 Atl. 363; *New York, L. E. & W. R. Co. v. Bennett*, 1 C. C. A. 549, 6 U. S. App. 95, 50 Fed. 501; *Walker v. Price*, 62 Kan. 331, 84 Am. St. Rep.

392, 62 Pac. 1001,—holding passenger accepting ticket bound by contract printed on face; *Jacobs v. Central R. Co.* 208 Pa. 539, 57 Atl. 982, and *Aiken v. Wabash R. Co.* 80 Mo. App. 15, holding passenger bound by limitation of liability as to baggage, printed on face and as part of ticket; *Louisville, N. A. & C. R. Co. v. Nicholai*, 4 Ind. App. 123, 51 Am. St. Rep. 206, 30 N. E. 424, holding acceptance of ticket containing limitation of liability as to baggage binding on passenger, though not read; *Ketcheson v. Southern P. Co.* 19 Tex. Civ. App. 291, 46 S. W. 907, holding purchaser of ticket bound by condition that he would sign name when requested by conductor; *Wheeler v. Oceanic Steam Nav. Co.* 72 Hun, 8. 25 N. Y. Supp. 578, holding acceptance of steamship passenger's contract ticket, not read by passenger, equivalent to assent thereto; *Rogers v. Kennebec S. B. Co.* 86 Me. 269, 25 L. R. A. 496, 29 Atl. 1069, holding person traveling on invitation of friend having pass, not knowing contents, bound by conditions thereon; *Holden v. Rutland R. Co.* 73 Vt. 320, 50 Atl. 1096, holding purchaser of mileage book bound by signed contract.

Cited in footnote to *Gulf, C. & S. F. R. Co. v. Henry*, 16 L. R. A. 318, which holds ticket good for continuous passage only not give right to carriage after leaving train at intermediate point.

Cited in note (23 L. R. A. 746) on notice to passenger of conditions on ticket.

Limited in *Krueger v. Chicago, St. P. M. & O. R. Co.* 68 Minn. 449, 64 Am. St. Rep. 487, 71 N. W. 683, holding passenger not bound by erroneous limitation of mileage book to day of issue.

#### **When law of place of contract governs.**

Cited in *Baxter Nat. Bank v. Talbot*, 154 Mass. 216, 13 L. R. A. 55, 28 N. E. 163, holding liability of indorser of note depends on *lex loci contractus*; *Mitten-thal v. Mascagni*, 183 Mass. 22, 60 L. R. A. 813, 97 Am. St. Rep. 404, 66 N. E. 425, sustaining provision in foreign contract that suits thereon may be brought only in country where executed.

#### **— Contracts of carriage.**

Cited in *Palmer v. Atchison, T. & S. F. R. Co.* 101 Cal. 195, 35 Pac. 630, and *Southern R. Co. v. Harrison*, 119 Ala. 545, 43 L. R. A. 387, 72 Am. St. Rep. 936, 24 So. 552, holding contract of shipment from one state to another governed by law of place where made, unless otherwise agreed; *Brockway v. American Exp. Co.* 168 Mass. 258, 47 N. E. 87, same case on second appeal, 171 Mass. 160, 50 N. E. 626, holding contract for transportation of animals through several states governed by law of state where made; *Potter v. The Majestic*, 23 L. R. A. 750, 9 C. C. A. 164, 20 U. S. App. 503, 60 Fed. 627, holding contract for transportation from Liverpool to New York governed by law of place of making, in absence of contrary intention; *O'Regan v. Cunard S. S. Co.* 160 Mass. 361, 39 Am. St. Rep. 484, 35 N. E. 1070, and *Pitman v. Pacific Exp. Co.* 24 Tex. Civ. App. 598, 59 S. W. 949, holding validity of provision in contract limiting carrier's liability determined by law of place of making; *Chicago B. & Q. R. Co. v. Gardiner*, 51 Neb. 78, 70 N. W. 508, holding limitation of carrier's liability, valid where made, not enforceable in state where illegal and against public policy.

Cited in footnote to *Tecumseh Mills v. Louisville & N. R. Co.* 49 L. R. A. 557, which holds prohibition against carriers limiting liability inapplicable to contract in other state by domestic corporation for transportation entirely outside of state.

Cited in notes (63 L. R. A. 527, 528) on conflict of laws as to carrier's contracts.

**Right of carrier to limit liability.**

Cited in *Doyle v. Fitchburg R. Co.* 166 Mass. 496, 33 L. R. A. 846, 55 Am. St. Rep. 417, 44 N. E. 611, holding railroad cannot contract to exempt itself from liability to passenger for negligence.

12 L. R. A. 342, *GEORGIA P. R. CO. v. DOOLY*, 86 Ga. 294, 12 S. E. 923.

**Rules for safe conduct of business.**

Cited in footnote to *Ford v. Lake Shore & M. S. R. Co.* 12 L. R. A. 454, which holds general rule that freight shall be safely loaded insufficient as to timber piled above sides of car without stakes.

Cited in note (43 L. R. A. 361) on duties of master and servant as to rules promulgated for safe conduct of business.

**Master's duty to secure servant's safety.**

Cited in footnote to *McKee v. Chicago, R. I. & P. R. Co.* 13 L. R. A. 817, which holds placing wing fences at cattle guard almost 4 feet from track not negligence.

**Servant's assumption of risk.**

Cited in footnotes to *Mensch v. Pennsylvania R. Co.* 17 L. R. A. 450, which holds danger from projection of bolt from end of car assumed by brakeman; *Stager v. Troy Laundry Co.* 53 L. R. A. 459, which holds risk of hand passing under guard rails into rollers not assumed, as matter of law, by servant operating mangle in laundry.

**Allowing jury to see former verdict.**

Cited in *Fulton County v. Phillips*, 91 Ga. 65, 16 S. E. 260, holding court's refusal to conceal former verdict from jury, not affecting verdict, not reversible error; *Smalls v. State*, 105 Ga. 675, 31 S. E. 571, holding, in absence of request, failure to conceal previous verdict from jury no error.

12 L. R. A. 346, *FARMERS' CO-OP. TRUST CO. v. FLOYD*, 47 Ohio St. 525, 21 Am. St. Rep. 846, 26 N. E. 110.

**Liability of person misrepresenting authority to act.**

Distinguished in *Raudabaugh v. Hart*, 61 Ohio St. 85, 76 Am. St. Rep. 361, 55 N. E. 214, holding one contracting in own name, with representations of authority to sell joint property, not regarded as agent of co-owners.

**Agent's responsibility on contracts.**

Cited in *Anderson v. Adams*, 43 Or. 626, 74 Pac. 215, and *Conant v. Alvord*, 166 Mass. 315, 44 N. E. 250, holding agent misrepresenting authority liable for damages, irrespective of fraud; *Campbell v. Muller*, 19 Misc. 192, 43 N. Y. Supp. 233, holding one acting as agent without authority liable for all resulting damages; *Dexter Sav. Bank v. Friend*, 90 Fed. 705, holding officer executing corporation notes without authority liable to bona fide holder for damages; *Kent v. Addicks*, 60 C. C. A. 662, 126 Fed. 114, holding officer executing contract in name of corporation liable on implied warranty of authority.

Cited in footnotes to *Citizens' Bank v. Millett*, 44 L. R. A. 664, which holds drawer personally liable on draft drawn to payee's knowledge for payment of drawee's debt; *Reeve v. First Nat. Bank*, 16 L. R. A. 143, which holds note signed by corporate name with officer's name following, corporate obligation.

12 L. R. A. 353, *GALLUP v. SMITH*, 59 Conn. 354, 22 Atl. 334.

**Decrees of probate court, how assailable.**

Cited in *State v. Blake*, 69 Conn. 78, 36 Atl. 1019, holding that decrees of probate court can be attacked only by appeal; *Plant v. Harrison*, 36 Misc. 690, 74 N. Y. Supp. 411, holding Connecticut decree probating will may be collaterally attacked as to testator's residence.

**Statutes conferring remedies mandatory.**

Cited in *Casey & H. Mfg. Co. v. Weatherly*, 101 Tenn. 321, 47 S. W. 432, holding failure to make demand required by statute defense to enforcement of lien against steamboat.

12 L. R. A. 359, *PRICE v. PRICE*, 124 N. Y. 589, 27 N. E. 383.

**Rights on annulment of marriage because former marriage in force.**

Cited in *Safford v. Safford*, 31 Abb. N. C. 74, 27 N. Y. Supp. 641, holding, upon annulment of marriage in good faith because woman's former marriage in force, neither party entitled of right to custody of children.

**Effect of divorce on dower.**

Cited in *Wood v. Wood*, 59 Ark. 451, 28 L. R. A. 160, 43 Am. St. Rep. 42, 27 S. W. 641, holding statute denying dower to wife divorced for misconduct does not impliedly reserve dower to innocent wife.

Cited in footnote to *Land v. Shipp*, 50 L. R. A. 560, which holds wife's right of dower not affected by release made directly to husband in deed of separation.

12 L. R. A. 362, *RUCKS v. RENFROW*, 54 Ark. 409, 16 S. W. 6.

**Declarations of voters as evidence of disqualification.**

Cited in *Sharp v. McIntire*, 23 Colo. 103, 46 Pac. 115, holding unsworn declarations of elector at time of voting admissible to show disqualification.

12 L. R. A. 364, *STEUSOFF v. STATE*, 80 Tex. 428, 15 S. W. 1100.

**Residence or inability to vote as affecting eligibility to office.**

Cited in *Harkreader v. State*, 35 Tex. Crim. Rep. 252, 60 Am. St. Rep. 40, 33 S. W. 117, holding, in absence of statute prescribing qualifications, minor eligible to office of deputy county clerk.

Cited in footnote to *Gibson v. Wood*, 43 L. R. A. 699, which holds residence in suburb before annexation, residence within city for purpose of determining eligibility to city office.

12 L. R. A. 366, *EMPIRE MILLS v. ALSTON GROCERY CO.* (Tex. App.) 15 S. W. 505.

**Recognition of foreign corporation.**

Cited in *Cleaton v. Emery*, 49 Mo. App. 353, holding comity does not require recognition of corporation chartered in one state for sole purpose of doing business in another; *Demarest v. Flack*, 128 N. Y. 220, 13 L. R. A. 858, footnote p. 854, 28 N. E. 645, which holds foreign corporation void as evasion of laws of state in which all incorporators reside and where principal place of business is.

Cited in footnote to *Oakdale Mfg. Co. v. Garst*, 23 L. R. A. 639, which holds

that recognition will not be denied foreign corporation by courts of state because it is composed exclusively of its own citizens.

Cited in note (24 L. R. A. 292, 293, 297) on recognition or exclusion of foreign corporation.

Distinguished in *Wright v. Lee*, 4 S. D. 249, 55 N. W. 931, holding foreign corporation failing to comply with domestic statutory requirements, corporation *de facto*.

**Prohibition by implication from grant of powers.**

Cited in *Van Steuben v. Central R. Co.* 178 Pa. 373, 34 L. R. A. 579, 35 Atl. 992, holding that statute conferring leasing powers on railroads does not authorize domestic corporation to lease railroad held by it in other state, contrary to policy of that state.

**Estoppel by dealing to deny legal corporate existence.**

Cited in footnote to *Washington Nat. Bldg., Loan & Invest. Asso. v. Stanley*, 58 L. R. A. 816, which holds borrower from foreign loan association estopped to defeat foreclosure of mortgage on ground that corporate articles not properly acknowledged.

**Stockholders of defective corporation as copartners.**

Cited in *Jones v. Aspen Hardware Co.* 21 Colo. 271, 29 L. R. A. 145, 52 Am. St. Rep. 220, 40 Pac. 457, holding members of company failing in attempt to acquire corporate existence may sue as copartners.

Cited in note (17 L. R. A. 550) on partnership liability of stockholders in case of defective or illegal incorporation.

12 L. R. A. 370, *MAINE TRUST & BKG. CO. v. BUTLER*, 45 Minn. 506, 48 N. W. 333.

**Assignor of note as indorser.**

Cited in *Citizens Nat. Bank v. Walton*, 96 Va. 438, 31 S. E. 890, holding signed assignment on back of note equivalent to blank indorsement.

Cited in footnote to *De Hass v. Dibert*, 30 L. R. A. 189, which holds liability as indorser not prevented by preceding assignment without recourse.

Cited in note (36 L. R. A. 117) on assignor of promissory note as indorser.

12 L. R. A. 373, *BROWN v. BALFOUR*, 46 Minn. 68, 48 N. W. 604.

**Exemption of insurance money.**

Cited in *Re How*, 59 Minn. 418, 61 N. W. 456, holding statute exempting mutual insurance money from seizure for debts of insured or beneficiary, without limiting amount, void for unreasonableness; *First Nat. Bank v. How*, 65 Minn. 189, 67 N. W. 994, holding proceeds of co-operative life insurance exempt from execution while in beneficiary's hands.

Cited in footnotes to *Re Heilbron*, 35 L. R. A. 602, which holds act exempting proceeds of life policies from debts not retroactive; *Williams v. Donough*, 56 L. R. A. 766, which holds void, statute exempting proceeds of fraternal benefit certificate from liability for debts.

**Creditor's rights in proceeds of life insurance.**

Cited in footnotes to *Morris v. Georgia Loan, Sav. & Bkg. Co.* 46 L. R. A. 506, which holds creditor taking assignment of policy entitled to retain from proceeds

sufficient to pay debt and advances only; *Boisseau v. Penn*, 57 L. R. A. 380, which holds execution not lien on interest of debtor in twenty-year distribution policy on his life, which ceases on failure to pay premiums.

**What is an insurance company.**

Cited in footnote to *Com. ex rel. Hensel v. Provident Bicycle Asso.* 36 L. R. A. 589, which holds association guaranteeing to clean and repair bicycles and replace when stolen not an insurance company.

Cited in note (38 L. R. A. 49, 55) on whether benefit association is insurance company.

12 L. R. A. 375, *CRAWFORD v. OMAN & S. STONE CO.* 34 S. C. 90, 12 S. E. 929.

12 L. R. A. 379, *SCOTT v. ELDRIDGE*, 154 Mass. 25, 27 N. E. 677.

**Right to arrest without warrant.**

Cited in *Palmer v. Maine C. R. Co.* 92 Me. 409, 44 L. R. A. 675, 69 Am. St. Rep. 513, 42 Atl. 800, denying authority of constable to arrest without warrant on information of misdemeanor; *Com. v. Wright*, 158 Mass. 159, 19 L. R. A. 210, 35 Am. St. Rep. 475, 33 N. E. 82, denying authority of officer to arrest without warrant for statutory misdemeanor not amounting to breach of peace; *Jackson v. Knowlton*, 173 Mass. 97, 53 N. E. 134, holding (*obiter*) peace officer may arrest without warrant on reasonable suspicion of felony.

Cited in footnote to *McCullough v. Greenfield*, 62 L. R. A. 906, which holds arrest under telephonic direction from officer holding warrant illegal.

Cited in note (51 L. R. A. 211) on liability of officer for making arrest.

12 L. R. A. 382, *GLENN v. JACKSON*, 93 Ala. 342, 9 So. 259.

**Innkeepers' liability.**

Cited in footnotes to *Cunningham v. Buckey*, 35 L. R. A. 850, which holds innkeeper liable for theft of servants from guests while asleep; *Cohen v. Manuel*, 40 L. R. A. 491, which sustains innkeeper's liability for goods stolen from unlicensed peddler's cart; *Amey v. Winchester*, 39 L. R. A. 760, which denies hotel-keeper's liability for loss of hats left on racks by persons attending club banquet at hotel; *Bradley Livery Co. v. Snook*, 55 L. R. A. 208, which denies innkeeper's liability for team tied under shed without his attention being called to fact.

**Who is guest.**

Cited in footnote to *Fay v. Pacific Improv. Co.* 16 L. R. A. 188, which holds character as guest at hotel not lost by merely inquiring as to price of room and board.

12 L. R. A. 384, *RITCHIE v. GRIFFITHS*, 1 Wash. 429, 22 Am. St. Rep. 155, 25 Pac. 341.

Followed without discussion in *Andressen v. Griffiths*, 1 Wash. 445, 25 Pac. 346; *Derrickson v. Griffiths*, 1 Wash. 446, 25 Pac. 346.

**Protection of bona fide purchaser from holder of record title.**

Cited in *Sadler v. Niesz*, 5 Wash. 192, 31 Pac. 630, holding wife living in



distant part of country cannot assert community rights against bona fide purchaser from husband.

Cited in note (13 L. R. A. 238) on recording acts.

**Indexing of records.**

Cited in note (14 L. R. A. 395, 396) on index as part of record of title.

Limited in *McPherson v. Smith*, 14 Wash. 229, 44 Pac. 255, holding affirmative proof of proper indexing of notice of logging lien not essential to recovery; *Malbon v. Grow*, 15 Wash. 303, 46 Pac. 330, holding index to mortgage records, giving names of mortgagor and mortgagee and general description of land, sufficient.

12 L. R. A. 393, *PERRY v. JENSEN*, 142 Pa. 125, 21 Atl. 866.

12 L. R. A. 395, *CANNELL v. SMITH*, 142 Pa. 25, 21 Atl. 793.

**Breach of fiduciary relation affecting agent's right to compensation.**

Cited in *Wilkinson v. McCullough*, 196 Pa. 209, 79 Am. St. Rep. 702, 46 Atl. 357, holding real estate broker concealing material facts from principal to prevent raising price cannot recover commissions; *Borie v. Satterthwaite*, 12 Montg. Co. L. Rep. 207, holding (*obiter*) commissions paid broker before discovering failure to reveal material facts recoverable.

Cited in footnote to *Strong v. Brennan*, 47 L. R. A. 792, which denies right of attorney to recover for services to association employing him, when also engaged and paid by adverse party.

**Brokers acting for both parties.**

Cited in *Campbell v. Baxter*, 41 Neb. 736, 60 N. W. 90, upholding vendor's right to recover commissions ignorantly paid broker in vendee's employ; *Addison v. Wanamaker*, 185 Pa. 543, 42 W. N. C. 129, 39 Atl. 1111, holding real estate broker cannot act for vendor and vendee unless with knowledge of both; *Maxwell v. West*, 23 Pa. Co. Ct. 303, 30 Pittsb. L. J. N. S. 340, holding commissions recoverable from vendor and vendee knowing agent represented both.

Cited in note (45 L. R. A. 47, 49) on fraud and secret dealings or interest of real estate brokers as affecting their commissions.

**Purchase by agent of subject of agency.**

Cited in footnote to *Kimball v. Ranney*, 46 L. R. A. 403, which denies right of agent employed to sell mortgaged property for owner, to purchase at sale.

**Contracts against public policy.**

Distinguished in *Kauffman v. Keiper*, 18 Pa. Co. Ct. 184, 5 Pa. Dist. R. 622, holding note given to effect withdrawal of director's opposition to proposed purchase by corporation invalid.

12 L. R. A. 397, *FARKAS v. POWELL*, 86 Ga. 800, 13 S. E. 200.

**Liability for one driving horse beyond place fixed in hiring.**

Cited in *Spencer v. Shelburne*, 11 Tex. Civ. App. 522, 33 S. W. 260, holding hirer using horse on longer journey not liable for loss, if extra journey did not materially contribute to injury; *Doolittle v. Shaw*, 92 Iowa, 352, 26 L. R. A. 369, 54 Am. St. Rep. 562, 60 N. W. 621, holding mere going beyond point fixed in hiring horse not conversion.

Cited in note (26 L. R. A. 367) on liability of hirer for driving team to places where it was not hired to go.

12 L. R. A. 399, *JONES v. McEWAN*, 91 Ky. 373, 16 S. W. 81.

**Effect of acceptance of goods sold under contract.**

Cited in *Florida Athletic Club v. Hope Lumber Co.* 18 Tex. Civ. App. 168, 44 S. W. 10, holding acceptance after opportunity to examine lumber waives visible defects.

Cited in footnotes to *Morse v. Moore*, 13 L. R. A. 224, which holds vendor's obligation not terminated by acceptance of goods; *Ontario Deciduous Fruit Growers' Asso. v. Cutting Fruit Packing Co.* 53 L. R. A. 681, which requires buyer to pay for fruit received under contract, knowing full amount cannot be delivered.

Cited in note (17 L. R. A. 209) on promise to give full satisfaction, subject to judgment of promisee.

Distinguished in *Munford v. Kevil*, 109 Ky. 250, 58 S. W. 703, holding buyer taking bill of lading does not waive right to damages for nonconformity to description by receiving wheat on arrival.

12 L. R. A. 401, *Re ROMAINÉ*, 127 N. Y. 80, 27 N. E. 759.

**What subject to succession tax.**

Cited in *Re Burr*, 16 Misc. 90, 38 N. Y. Supp. 811, holding nonresident decedent's savings bank deposit, money in hands of attorney, and bonds secured by mortgage in state, subject to transfer tax; *Re Blackstone*, 69 App. Div. 129, 74 N. Y. Supp. 508, and *Re Houdayer*, 150 N. Y. 40, 34 L. R. A. 237, 55 Am. St. Rep. 642, 44 N. E. 718, Reversing 3 App. Div. 479, 38 N. Y. Supp. 323, holding nonresident decedent's bank deposit in state subject to transfer tax; *Blackstone v. Miller*, 188 U. S. 204, 47 L. ed. 444, 23 Sup. Ct. Rep. 277, sustaining state's right to subject to collateral inheritance tax debts due nonresident decedent; *Re Whiting*, 150 N. Y. 29, 34 L. R. A. 233, 55 Am. St. Rep. 640, 44 N. E. 715. Modifying 2 App. Div. 590, 38 N. Y. Supp. 131, holding foreign and domestic bonds, and stock of domestic corporations, owned by nonresident decedent, deposited within state, subject to transfer tax; *Re Crerar*, 31 Misc. 482, 65 N. Y. Supp. 573, holding nonresident decedent's stock in domestic corporations and interest in firm doing business in state subject to transfer tax; *Re King*, 30 Misc. 577, 63 N. Y. Supp. 1100, holding nonresident decedent's interest in firm doing business in state subject to transfer tax; *Eidman v. Martinez*, 184 U. S. 587, 46 L. ed. 703, 22 Sup. Ct. Rep. 515, holding bonds of nonresident alien passing to nonresident alien son by will and intestate laws of foreign country not subject to Federal transfer tax; *Moore v. Ruckgaber*, 184 U. S. 597, 46 L. ed. 707, 22 Sup. Ct. Rep. 521, holding intangible personalty of nonresident alien passing to nonresident alien under will executed in United States not subject to transfer tax; *Lewis's Estate*, 203 Pa. 218, 52 Atl. 205, Affirming 10 Kulp, 448, holding intangible property on nonresident decedent in state subject to collateral inheritance tax; *Re Phipps*, 77 Hun, 327, 28 N. Y. Supp. 330, holding nonresident decedent's right to legacy under will of resident not subject to collateral inheritance tax; *Re Swift*, 137 N. Y. 83, 18 L. R. A. 711, 32 N. E. 1096, Same Case in Surrogate's Court, 2 Connolly, 651, 16 N. Y. Supp. 193, holding personalty of resident decedent without state subject to collateral inheritance tax; *Re*

Sutton, 15 Misc. 659, 38 N. Y. Supp. 102, holding equitable conversion under will does not subject real estate to transfer tax; *Re Bronson*, 150 N. Y. 11, 34 L. R. A. 243, 55 Am. St. Rep. 632, 44 N. E. 707, Modifying 1 App. Div. 548, 37 N. Y. Supp. 476 (dissenting opinion), majority holding bonds of domestic corporations held by nonresident decedent at domicile not subject, and stocks subject, to transfer tax.

Cited in footnotes to *Re Swift*, 18 L. R. A. 709, as to what is subject to succession tax; *Howe v. Howe*, 55 L. R. A. 626, which authorizes transfer tax on contingent interests although they do not vest within fixed time for paying tax; *Re Stewart*, 14 L. R. A. 836, which authorizes succession tax on contingent interests under power of appointment after vesting of same; *Re Pell*, 57 L. R. A. 540, which holds void, tax on all remainders vesting prior to certain date, but not coming into possession till after passage of act; *Re Roosevelt*, 25 L. R. A. 695, which holds life annuities contingent on survivorship not subject to succession tax until they vest; *People v. McCormick*, 64 L. R. A. 775, which holds present succession tax not imposable upon property to be divided at termination of trust among persons not at present ascertainable; *Re Dows*, 52 L. R. A. 433, which holds real property subject to power of appointment converted into personalty, subject to transfer tax on personalty.

Distinguished in *Re Leopold*, 35 Misc. 370, 71 N. Y. Supp. 1032, holding temporary deposit of nonresident decedent not subject to transfer tax; *Re Preston*, 37 Misc. 236, 75 N. Y. Supp. 251, holding bonds held by nonresident decedent at domicile, secured by mortgage on lands in state, not subject to transfer tax; *Re James*, 144 N. Y. 12, 43 Am. St. Rep. 725, 38 N. E. 961, Affirming 77 Hun, 213, 28 N. Y. Supp. 351, Which Reverses 6 Misc. 207, 1 Power, 604, 27 N. Y. Supp. 288, holding nonresident decedent's certificates of stock of foreign corporation not subject to collateral inheritance tax; *Re Gibbes*, 84 App. Div. 512, 83 N. Y. Supp. 53, Reversing 40 Misc. 582, 83 N. Y. Supp. 56, holding nonresident's foreign bonds, on deposit in state, which pass to nonresidents, not subject to inheritance tax.

#### **Validity of succession and collateral inheritance taxes.**

Cited in *State v. Alston*, 94 Tenn. 682, 28 L. R. A. 180, 30 S. W. 750, and *Callahan v. Woodbridge*, 171 Mass. 597, 51 N. E. 176, holding collateral inheritance tax law constitutional.

Cited in footnotes to *State v. Hamlin*, 25 L. R. A. 632, which holds succession tax valid; *State ex rel. Schwartz v. Ferris*, 30 L. R. A. 218, which holds void, for lack of uniformity, statute exempting estates less than \$20,000 in value; *State ex rel. Gelsthorpe v. Furnell*, 39 L. R. A. 170, which sustains exemption from succession tax of estate less than \$7,500.

#### **Collateral inheritance tax; jurisdiction of surrogate's court.**

Cited in *Re Embury*, 19 App. Div. 215, 79 N. Y. S. R. 882, 45 N. Y. Supp. 881, holding surrogate's court without jurisdiction to enforce collateral inheritance tax where nonresident decedent had no realty in state; *Re Ullmann*, 137 N. Y. 408, 33 N. E. 480, holding surrogate may determine validity of devise in assessing collateral inheritance tax.

12 L. R. A. 409, *BURBAGE v. WINDLEY*, 108 N. C. 357, 12 S. E. 839.

#### **Wager policies.**

Cited in *Powell v. Dewey*, 123 N. C. 106, 68 Am. St. Rep. 818, 31 S. E. 381,

holding life insurance void on which premium paid by beneficiary who has no insurable interest; *Cisna v. Sheibley*, 88 Ill. App. 389, holding life insurance obtained by parties without insurable interest, as speculation, void; *Hinton v. Mutual Reserve Fund Life Asso.* 135 N. C. 321, 65 L. R. A. 165, 47 S. E. 474, holding life insurance taken under agreement that one without insurable interest should pay premiums and have benefits void; *Maynard v. Life Ins. Co.* 132 N. C. 713, 44 S. E. 405, holding debtor's administrator cannot contest validity of creditor's insurance on decedent's life.

Distinguished in *Albert v. Mutual L. Ins. Co.* 122 N. C. 94, 65 Am. St. Rep. 693, 30 S. E. 327, sustaining validity of policy payable to one without insurable interest in insured's life, where insured paid premiums.

**Rights of party to illegal contract.**

Cited in *McNeill v. Durham & C. R. Co.* 135 N. C. 733, 47 S. E. 765 (dissenting opinion), majority holding passenger on pass illegally issued may recover for railroad's negligence.

12 L. R. A. 412, *STATE v. NEIS*, 108 N. C. 787, 13 S. E. 225.

**Sale of liquors by social club.**

Cited in *State v. Shumate*, 44 W. Va. 491, 29 S. E. 1001, holding unlicensed sale of liquors by social club illegal; *People ex rel. Stevenson v. Law & Order Club*, 203 Ill. 132, 62 L. R. A. 887, 67 N. E. 855, holding unlicensed furnishing of liquors at cost, out of common stock, to members of social club, illegal; *Mohrman v. State*, 105 Ga. 715, 43 L. R. A. 401, 70 Am. St. Rep. 74, 32 S. E. 143, holding social clubhouse where liquor dispensed to members, within statute prohibiting open tippling house on Sabbath; *People v. Adelphi Club*, 149 N. Y. 13, 31 L. R. A. 513, footnote p. 510, 52 Am. St. Rep. 700, 43 N. E. 410, which holds distribution of liquor by social club to members not illegal sale; *State v. Boston Club*, 45 La. Ann. 592, 20 L. R. A. 187, footnote p. 185, 12 So. 895, which holds incorporated clubs selling liquor to members owe license; *State ex rel. Bell v. St. Louis Club*, 125 Mo. 328, 26 L. R. A. 580, footnote p. 573, 28 S. W. 604, which holds valid, distribution of liquor among members by social club.

12 L. R. A. 414, *ALMY v. JONES*, 17 R. I. 265, 21 Atl. 616.

**Charitable bequests.**

Cited in *Palmer v. Union Bank*, 17 R. I. 631, 24 Atl. 109, holding bequest in trust, income to be used as prizes for medical essays, valid; *Wood v. Paine*, 66 Fed. 809, holding devise to town council in trust for support of town poor valid; *Kelly v. Nichols*, 18 R. I. 83, 19 L. R. A. 432, 25 Atl. 840 (dissenting opinion), majority holding devise for hospitable entertainment of ministers and others invalid.

Cited in footnotes to *Johnson v. Johnson*, 22 L. R. A. 179, which holds devise to trustees for some charitable purpose, with preference for something of educational nature, bad for indefiniteness; *Gambel v. Trippe*, 15 L. R. A. 235, which holds bequest to trustees, to be paid over "to some Presbyterian institution" in specified city, void for indefiniteness; *Thompson v. Brown*, 62 L. R. A. 398, which sustains devise of fund to be distributed "to the poor" in executor's discretion; *Crerar v. Williams*, 21 L. R. A. 454, which holds arbitrary powers invalidating gift not given trustees of charity by authority to set aside amount of income to pay expenses.

**Distinction between useful and fine arts.**

Cited in *Bleistein v. Donaldson Lithographing Co.* 98 Fed. 611, denying copyright to engravings designed for use as circus show bills.

**Application of statute giving share of deceased devisee to descendants.**

Cited in *Nicholson v. Nicholson*, 115 Iowa, 497, 91 Am. St. Rep. 175, 88 N. W. 1064, holding child of niece dying before will executed does not share in devise to nephews and nieces; *Murphy v. McKeon*, 53 N. J. Eq. 409, 32 Atl. 374, holding statute vesting devise to brother dying before testator, in children, does not apply where devisee dies before enactment.

12 L. R. A. 417, *Re KINGMAN*, 153 Mass. 566, 27 N. E. 778.

Appeal from commissioners' award in 156 Mass. 365, 30 N. E. 820.

**Legislative control of municipal property.**

Cited in *South Portland v. Cape Elizabeth*, 92 Me. 334, 69 Am. St. Rep. 502, 42 Atl. 503, holding legislature dividing town may apportion town property; *Re De Las Casas*, 178 Mass. 218, 59 N. E. 664, same case on appeal from supplemental award, 180 Mass. 472, 62 N. E. 738, holding legislature may impose expense of metropolitan parks upon towns and cities in district; *Prince v. Crocker*, 166 Mass. 359, 32 L. R. A. 611, 44 N. E. 446, holding legislature may authorize construction and impose on city expense of subway without consent of city council; *Browne v. Turner*, 176 Mass. 14, 56 N. E. 969, sustaining act requiring leasing of subway constructed at city's expense to certain company at specified rental; *Gooch v. Exeter*, 70 N. H. 416, 85 Am. St. Rep. 637, 48 Atl. 1100, sustaining statute creating board of commissioners, with authority to control and fix pay of police; *Reynolds v. Waterville*, 92 Me. 320, 42 Atl. 553, dissenting opinion by Savage, J., who holds legislature can control use and disposition of municipal property applied to public municipal uses; *Williams v. Parker*, 188 U. S. 504, 47 L. ed. 563, 23 Sup. Ct. Rep. 440, Affirming 174 Mass. 481, 47 L. R. A. 317, 55 N. E. 77, sustaining statute imposing on city liability for damages sustained by persons constructing buildings, through enactment limiting height.

Distinguished in effect in *Mt. Hope Cemetery v. Boston*, 158 Mass. 511, 35 Am. St. Rep. 515, 33 N. E. 695, holding legislature cannot require transfer of municipal property to private corporation without compensation.

**Purposes for which taxes assessable.**

Cited in *Re Adams*, 165 Mass. 499, 43 N. E. 682, holding taxes leviable for specific object yet to be accomplished; *State ex rel. Bulkeley v. Williams*, 68 Conn. 151, 48 L. R. A. 494, 35 Atl. 24, holding legislature may require town tax for moneys to be paid to treasurer of bridge or highway district including town.

Cited in note (14 L. R. A. 474) on public purposes for which money may be appropriated or raised by taxation.

**Delegation of power as to local improvement.**

Cited in *Re Northampton*, 158 Mass. 301, 33 N. E. 568, and *Boston & L. R. Corp. v. Winchester*, 156 Mass. 219, 30 N. E. 439, holding legislature may, without prescribing definite rule, delegate apportionment between town and railroad of expense of grade crossings; *Re De Las Casas*, 178 Mass. 219, 59 N. E. 664, holding legislature may delegate to commissioners power to apportion expense of metropolitan parks, subject to sanction of court; *Masonic Bldg. Asso. v. Brownell*, 164 Mass. 311, 41 N. E. 306, holding legislature may delegate to board appointed by

courts power to apportion expense of public improvement; *Brodbyne v. Revere*, 182 Mass. 602, 66 N. E. 607, sustaining statute empowering park commissioners to make regulations breaches of which punishable as breaches of peace.

Cited in notes (61 L. R. A. 674) on duty and liability of municipality with respect to drainage; (60 L. R. A. 227) on procedure for the establishment of drains and sewers.

**Power of court to review decision of commissioners.**

Cited in *Re Old Colony R. Co.* 163 Mass. 357, 40 N. E. 198, holding provision that decree confirming decision of grade-crossing commissioners shall be final empowers court to confirm or reject report; *Newburyport Water Co. v. Newburyport*, 168 Mass. 552, 47 N. E. 533, holding commissioners' interpretation of statutory rule for determining fair value of water plant to city, reviewable by courts.

**Apportionment by commission of expense of local improvement.**

Cited in *Re Kingman*, 170 Mass. 112, 48 N. E. 1075, upholding apportionment of cost of constructing metropolitan sewerage system upon basis of real and personal valuation.

**Necessity of special benefit to sustain local assessment.**

Cited in *Smith v. Worcester*, 182 Mass. 234, 59 L. R. A. 730, 65 N. E. 40, upholding power of legislature to impose cost of sewers on particular district, irrespective of benefits to individual landowners; *Rolph v. Fargo*, 7 N. D. 662, 42 L. R. A. 655, 76 N. W. 242, sustaining front-foot paving assessment, irrespective of increase in value; *Martin v. Tyler*, 4 N. D. 304, 25 L. R. A. 848, 60 N. W. 392, raising, without passing upon, question of constitutionality of statute charging property with special assessments for improvements in excess of actual benefits.

Cited in notes (14 L. R. A. 756, 757) on necessity of special benefit to sustain assessments for local improvements.

Limited in *Sears v. Boston*, 173 Mass. 78, 43 L. R. A. 837, 53 N. E. 138, sustaining front-foot assessments for street-sprinkling.

12 L. R. A. 425, *LONG v. STATE*, 74 Md. 565, 28 Am. St. Rep. 268, 22 Atl. 4.

**What constitutes lottery.**

Cited in *Com. v. Sisson*, 178 Mass. 581, 60 N. E. 385, and *State v. Dalton*, 22 R. I. 87, 48 L. R. A. 781, 84 Am. St. Rep. 818, 46 Atl. 234, holding distribution of trading stamps not lottery; *Horner v. United States*, 147 U. S. 462, 37 L. ed. 242, 13 Sup. Ct. Rep. 409, holding Australian bonds giving holders opportunity of determining prize by lot, lottery scheme; *Winston v. Beeson*, 135 N. C. 285, 47 S. E. 457, holding trading-stamp business not taxable as "gift enterprise."

Cited in footnotes to *State ex rel. Sheets v. Interstate Sav. Invest. Co.* 52 L. R. A. 530, which holds unlawful, investment securities, etc., incapable of accumulating reserve fund required within period fixed, without aid from lapses on appropriations from premiums on new business; *State ex rel. Prout v. Nebraska, Home Co.* 60 L. R. A. 448, which holds scheme by which common fund is distributed among contributors and a valuable preference in distribution is made to depend on chance, a lottery.

Distinguished in *Lansburgh v. District of Columbia*, 11 App. D. C. 529, holding distribution of "trading stamps" within statute prohibiting gift enterprise; tory negligence.

*State v. Hawkins*, 95 Md. 142, 93 Am. St. Rep. 328, 51 Atl. 850, sustaining statute prohibiting giving trading stamps.

**Legislative power to prohibit gambling.**

Cited in *Ford v. State*, 85 Md. 475, 41 L. R. A. 552, 60 Am. St. Rep. 337, 37 Atl. 172, sustaining constitutionality of statute prohibiting possession of lottery or policy slips.

12 L. R. A. 428, *CHAPLIN v. BROWN*, 83 Iowa, 156, 32 Am. St. Rep. 297, 48 N. W. 1074.

**Contracts tending to restrain trade.**

Cited in *Downing v. Lewis*, 56 Neb. 388, 76 N. W. 900, holding contract by person selling business not to engage therein in city for limited time, valid; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 119, 50 L. R. A. 178, 85 Am. St. Rep. 125, 28 So. 669, holding contract, without sale of business to discontinue manufacture of ice in certain town for fixed period, void; *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 14, holding employee's contract not to engage in manufacture or sale of articles manufactured by employer, within United States, for six years after leaving service, invalid; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 135, 29 C. C. A. 158, 54 U. S. App. 723, 85 Fed. 271, holding agreement restricting competition between iron-pipe companies, unlawful; *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 388, 61 L. R. A. 473, 96 Am. St. Rep. 515, 73 S. W. 645, holding combination to control price of meat illegal; *State v. Smiley*, 65 Kan. 264, 69 Pac. 199, holding grain-buyers' agreement limiting competition among themselves, contrary to public policy; *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 70, 71 S. W. 691, holding brewer's agreement not to sell to persons indebted to any of them, illegal; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 47, 45 L. R. A. 377, 52 S. W. 595, sustaining constitutionality of statute prohibiting insurance companies from contracting with each other for maintenance of rates.

Distinguished in *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.* 114 Iowa, 576, 87 N. W. 496, upholding validity of agreement not to sell paving material to city for certain period; *Swigert v. Tilden*, 121 Iowa, 658, 63 L. R. A. 612, 100 Am. St. Rep. 374, 97 N. W. 82, holding agreement by vendor of business not to engage therein within certain territory, valid.

12 L. R. A. 429, *HUNTER v. COOPERSTOWN & S. VALLEY R. CO.* 126 N. Y. 18, 26 N. E. 958.

**Contributory negligence.**

Cited in *Sias v. Rochester R. Co.* 92 Hun, 148, 36 N. Y. Supp. 378 (by Hardin, J., dissenting) majority holding negligence of passenger unnecessarily standing on platform and leaning over side of street car, question for jury.

**— In getting on or off moving train.**

Followed in *Myers v. New York C. & H. R. R. Co.* 88 Hun, 620, 34 N. Y. Supp. 807, same case on former appeal, 82 Hun, 38, 31 N. Y. Supp. 153, holding one attempting to board train moving at rate of 2 miles per hour negligent *per se* though conductor told him to do so.

Cited in *Heaton v. Kansas City P. & G. R. Co.* 65 Mo. App. 484, holding boarding train moving at 6 miles per hour, conductor saying "jump on," negligence

*per se*; *Connaughton v. Brooklyn & B. B. R. Co.* 13 Misc. 403, 34 N. Y. Supp. 243, holding person attempting to board moving train guilty of negligence; *Fahr v. Manhattan R. Co.* 9 Misc. 60, 29 N. Y. Supp. 1, and *Robinson v. Manhattan R. Co.* 5 Misc. 211, 25 N. Y. Supp. 91, holding boarding moving elevated train while gate closing, negligence *per se*; *Mearns v. Central R. Co.* 103 N. Y. 114, 57 N. E. 292, holding person alighting from moving train erroneously supposing it had stopped, guilty of negligence *per se*; *Louisville, N. A. & C. R. Co. v. Johnson*, 44 Ill. App. 58, and *Scully v. New York, L. E. & W. R. Co.* 80 Hun, 199, 30 N. Y. Supp. 61, holding jumping from moving train negligence; *Geogagn v. New York, N. H. & H. R. Co.* 10 App. Div. 455, 42 N. Y. Supp. 205, holding negligence of passengers jumping from slowly moving train, question for jury; *Geiler v. Manhattan R. Co.* 11 Misc. 416, 32 N. Y. Supp. 254, holding negligence of passenger directed to jump from moving train, question for jury.

Cited in note (21 L. R. A. 356) on injuries in getting on and off railroad trains.

Limited and distinguished in *Distler v. Long Island R. Co.* 151 N. Y. 426, 35 L. R. A. 764, 45 N. E. 937, Reversing 78 Hun, 253, 28 N. Y. Supp. 865, holding boarding slowly moving train by conductor's direction, where no unusual or peculiar danger appears, not negligence *per se*.

Distinguished in *Lewis v. Delaware & H. Canal Co.* 145 N. Y. 516, 40 N. E. 248, Reversing 80 Hun, 195, 30 N. Y. Supp. 28, holding negligence of person getting off slowly moving train at conductor's suggestion, question for jury; *Mahar v. New York C. & H. R. R. Co.* 5 App. Div. 29, 30 N. Y. Supp. 63, holding contributory negligence of passenger about to alight when train starts and passenger attempts to return to car, for jury; *Reid v. New York*, 68 Hun, 112, 22 N. Y. Supp. 623, holding negligence of passenger alighting from car just starting, for jury.

**When testimony on former trial may be considered on appeal.**

Cited in *Williams v. Delaware, L. & W. R. Co.* 92 Hun, 222, 36 N. Y. Supp. 274, following former decision of court of appeals where plaintiff apparently attempted to change testimony to avoid former decision.

12 L. R. A. 433, *GILL v. STATE*, 86 Ga. 751, 13 S. E. 86.

**Sale of liquor to minor.**

Followed in *Dixon v. State*, 86 Ga. 755, 13 S. E. 87, holding written order from parent to dealer requesting him to supply liquors to minor whenever he wanted them, void.

Cited in *Hamer v. People*, 104 Ill. App. 556, holding parent's order to liquor seller to let son "have what he wants" until further notice, insufficient.

Cited in footnote to *State v. Neelly*, 27 L. R. A. 503, which holds sale of liquor to minor claiming to buy as agent illegal.

Disapproved in *Smith v. State*, 132 Ala. 40, 31 So. 352, sustaining validity of parent's consent to sale of liquor to minor "whenever he wants it."

12 L. R. A. 434, *HAMER v. BRAINARD*, 7 Utah, 245, 26 Pac. 299.

**Necessity of demand on negotiable instrument.**

Cited in footnote to *Leonard v. Olson*, 35 L. R. A. 381, which requires notice to indorser of inability to make demand because of maker's removal from state.



12 L. R. A. 436, *BURLINGTON, C. R. & N. R. CO. v. DEY*, 82 Iowa, 312, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98.

**State regulation of carrier's rates.**

Reaffirmed on second appeal, in 89 Iowa, 14, 56 N. W. 267, holding statutes involved constitutional.

Cited in *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 264, 46 L. ed. 1156, 22 Sup. Ct. Rep. 900, sustaining act providing for establishment of joint rates over lines of independent connecting railroads; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 496, 42 L. ed. 252, 17 Sup. Ct. Rep. 896, denying power of Interstate Commerce Commission to prescribe rates; *Jacobson v. Wisconsin, M. & P. R. Co.* 71 Minn. 532, 40 L. R. A. 392, footnote p. 389, 70 Am. St. Rep. 358, 74 N. W. 893, which sustains interchange of loaded cars and making of joint rates for through shipments over connecting railroads.

Cited in footnote to *Chicago, B. & Q. R. Co. v. Jones*, 24 L. R. A. 141, which holds interstate commerce not affected by statute as to transportation within state.

Cited in notes (33 L. R. A. 179) on legislative power to fix tolls, rates or prices; (33 L. R. A. 209) as to when rates fixed by penal statute are sufficiently definite and certain.

**"Joint rate" defined.**

Cited in *State v. Chicago, B. & Q. R. Co.* 90 Iowa, 603, 58 N. W. 1060, holding rate for shipment over more than one road, joint, though order fixes charge for each road.

**Railroad's obligation to accept shipment.**

Cited in *Inman v. St. Louis Southwestern R. Co.* 14 Tex. Civ. App. 52, 37 S. W. 37, holding railway bound to accept goods consigned to point on connecting line on tender of through joint rate.

**Authority of railroad commissioners.**

Cited in footnote to *State ex rel. Tompkins v. Chicago, M. & St. P. R. Co.* 47 L. R. A. 569, which sustains railroad commissioner's authority to require building of depot.

**Carrier's liability for exacting unreasonable charges.**

Cited in *Winsor Coal Co. v. Chicago & A. R. Co.* 52 Fed. 722, denying liability of carrier for exacting unreasonable charges where not exceeding maximum permitted by statute.

**Equal rights of connecting carriers.**

Cited in footnote to *Little Rock & M. R. Co. v. St. Louis, & S. W. R. Co.* 26 L. R. A. 192, which holds others connecting carriers not entitled to through billing, rating, use of tracks, and terminals conceded to one.

**Constitutionality of statute prescribing rules of evidence.**

Cited in *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 384, 24 L. R. A. 147, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247, sustaining statute making rates fixed by railroad commissioners *prima facie* reasonable.

Cited in footnotes to *Missouri, K. & T. R. Co. v. Simonson*, 57 L. R. A. 765, which holds void, statute making specifications of weights in bills of lading, conclusive; *Baltimore & O. S. W. R. Co. v. Read*, 56 L. R. A. 468, which holds

void, statute preventing railroad company from setting up in defense of suit for injury to employee, decisions of state where injury occurred.

**Statutes permitting recovery of attorney's fee.**

Cited in *Gano v. Minneapolis & St. L. R. Co.* 114 Iowa, 716, 55 L. R. A. 265, 86 Am. St. Rep. 393, 87 N. W. 714, sustaining statute requiring railroad to pay to landowner reasonable attorney's fees in condemnation proceedings; *Farmers & M. Ins. Co. v. Dobney*, 62 Neb. 222, 97 Am. St. Rep. 624, 86 N. W. 1070, and *Lancashire Ins. Co. v. Bush*, 60 Neb. 124, 82 N. W. 313, sustaining statute permitting recovery of attorney's fee from insurance company in action on real-estate policy; *Liquidating Comrs. v. Marrero*, 106 La. 135, 30 So. 305, sustaining statute permitting recovery of attorney's fee in proceeding to collect taxes; *Dell v. Marvin*, 41 Fla. 228, 45 L. R. A. 203, 79 Am. St. Rep. 171, 26 So. 188, sustaining statute permitting recovery of attorney's fee in enforcing liens on mechanics, laborers, and materialmen; *Duckwall v. Jones*, 156 Ind. 685, 58 N. E. 1055, and *Wortman v. Kleinschmidt*, 12 Mont. 332, 30 Pac. 280 (distinguished in dissenting opinion) sustaining statute allowing recovery of reasonable attorney's fee on foreclosure of mechanic's lien; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 168, 41 L. ed. 672, 17 Sup. Ct. Rep. 255 (dissenting opinion) majority holding statute permitting recovery of attorney's fee in action against railroad, unconstitutional.

Cited in note (14 L. R. A. 586) on constitutional equality of privileges, immunities, and protection.

Distinguished in *Davidson v. Jennings*, 27 Colo. 192, 48 L. R. A. 341, 83 Am. St. Rep. 49, 60 Pac. 354, holding statute permitting recovery of attorney's fee on foreclosing mechanic's lien unconstitutional.

**Penalties.**

Cited in note (35 L. R. A. 567) on cruel and unusual punishments.

**When statute held unconstitutional.**

Cited in *Page v. Millerton*, 114 Iowa, 382, 86 N. W. 440, holding unconstitutionality of statute must clearly appear.

12 L. R. A. 446, *TUFTS v. D'ARCAMBAL*, 85 Mich. 185, 24 Am. St. Rep. 79, 48 N. W. 497.

**Conditional sales.**

Cited in *Lippincott v. Rich*, 22 Utah, 202, 61 Pac. 526, holding return of unpaid notes not condition precedent to replevin of property conditionally sold; *Tufts v. Brace*, 103 Wis. 345, 79 N. W. 414, upholding vendor's right to resume possession under contract provision for retaking on default in payment of instalment; *Wiggins v. Snow*, 89 Mich. 478, 50 N. W. 991, holding vendor in contract of sale reserving title, without provision for retaking possession on default, may replevy property; *Maxwell v. Tufts*, 8 N. M. 400, 33 L. R. A. 856, 45 Pac. 979, upholding right of vendor retaining title to property conditionally sold to maintain replevin against vendee's creditor, though instrument unrecorded; *Ryan v. Wayson*, 108 Mich. 522, 66 N. W. 370, holding in replevin by vendor under contract of conditional sale, judgment in vendee's favor for excess of value over unpaid purchase price, error.

Cited in footnote to *Crompton v. Beach*, 18 L. R. A. 187, which holds that

conditional vendor's exercise of option to enforce payment of note defeats right to retake property.

Cited in note (32 L. R. A. 466) on rights and liabilities of vendor and purchaser by conditional sale on default of payment.

12 L. R. A. 449, *BENNETT v. STATE*, 86 Ga. 401, 22 Am. St. Rep. 465, 12 S. E. 806.

**Prosecutor's comment on extraneous facts as error.**

Cited in *Ivey v. State*, 113 Ga. 1064, 54 L. R. A. 960, 39 S. E. 423, holding prosecutor's use of improper language not authorized by evidence or any fair deduction therefrom, error; *Washington v. State*, 87 Ga. 16, 13 S. E. 131, holding prosecutor's urging jury to strictly enforce law in arson case on trial because of frequent burnings, error; *Western & A. R. Co. v. Morrison*, 102 Ga. 340, 40 L. R. A. 91, 66 Am. St. Rep. 173, 29 S. E. 104, by Simmons, Ch. J. dissenting, who holds improper remarks by counsel will not justify improper remarks by opposing counsel.

Cited in note (46 L. R. A. 666, 672) on reversal of conviction because of unfair or irrelevant argument or statements of facts by prosecuting attorney.

**Prosecutor's comments on absence of testimony.**

Cited in *Thompson v. State*, 92 Ga. 448, 17 S. E. 265, holding prosecutor's comment on defendant's failure to offer proof of good character, error.

Cited in note (20 L. R. A. 609) on evidence and instructions as to character of accused.

12 L. R. A. 452, *Re BOOTH*, 127 N. Y. 109, 24 Am. St. Rep. 429, 27 N. E. 826.  
**Sufficiency of signature to will.**

Cited in footnotes to *Re Andrews*, 48 L. R. A. 662, which holds signature to will on second page, without anything to connect portions contained on third page, insufficient; *Shaw v. Camp*, 36 L. R. A. 112, which holds unsigned, unattested sheet attached to will made effective by subsequent codicil.

12 L. R. A. 454, *FORD v. LAKE SHORE & M. S. R. CO.* 124 N. Y. 493, 26 N. E. 1101.

**Master's liability for fellow servant's negligence.**

Cited in footnote to *Dewey v. Detroit*, G. H. & M. R. Co. 22 L. R. A. 292, which holds railroad company not liable for injury to brakeman by load projecting beyond end of flat car.

Cited in notes (18 L. R. A. 827) on superior employees; (54 L. R. A. 44, 86, 161) on vice principalship as determined with reference to character of act which caused injury.

Distinguished in *Corcoran v. New York*, N. H. & H. R. Co. 46 App. Div. 203, 61 N. Y. Supp. 672, denying railroad's liability for brakeman's failure to warn yardman of approaching car; *Bailey v. Delaware & H. Canal Co.* 27 App. Div. 307, 50 N. Y. Supp. 87, denying railroad's liability to employee injured by projecting timber while coupling cars.

**Assumption of risk by employee.**

Cited in *Felice v. New York C. & H. R. R. Co.* 14 App. Div. 350, 43 N. Y. Supp. 922, holding employee bound only to look out for dangers not avoidable by

master's exercise of reasonable care; *Albert v. New York C. & H. R. R. Co.* 80 Hun, 155, 29 N. Y. Supp. 1126, and *Witkowski v. George W. Carter & Sons Co.* 60 App. Div. 582, 70 N. Y. Supp. 232, holding master's duty to protect servant from incidental risks avoidable by reasonable care; *McLeod v. Chicago & N. W. R. Co.* 104 Iowa, 146, 73 N. W. 614, holding brakeman bound only to exercise care sufficient to protect him if required warning given of approaching engine; *Phinney v. Illinois C. R. Co.* 122 Iowa, 491, 98 N. W. 358, holding brakeman does not assume risk of train-despatcher's negligence; *Simmons v. Peters*, 85 Hun, 97, 32 N. Y. Supp. 680, holding employee does not assume unknown risks occasioned by defects in elevator; *Dowd v. New York, O. & W. R. Co.* 170 N. Y. 471, 63 N. E. 541, holding burden of proving servant's assumption of risk rests on employer.

**Duty to promulgate rules.**

Cited in *Mulvaney v. Brooklyn City R. Co.* 1 Misc. 426, 21 N. Y. Supp. 427, holding failure to make rules as to trains passing on dangerous curve, negligence; *Rutledge v. Missouri P. R. Co.* 110 Mo. 319, 19 S. W. 38, holding rules adopted by employees will not excuse railroad's failure to promulgate rules; *Rutledge v. Missouri P. R. Co.* 123 Mo. 139, 24 S. W. 1053, by McFarlane, J., dissenting, who holds to same effect; *Devoe v. New York C. & H. R. R. Co.* 174 N. Y. 10, 66 N. E. 568, holding sufficiency and proper promulgation of verbal rule for protection of car inspectors, for jury; *Van Tassell v. New York, L. E. & W. R. Co.* 1 Misc. 303, 48 N. Y. S. R. 769, 20 N. Y. Supp. 708, holding (*obiter*) railroad may perform duty to employees by adopting rules for inspection and repairing of appliances; *Shields v. Kansas City Suburban Belt R. Co.* 87 Mo. App. 645, holding (*obiter*,) master liable for failure to make proper rules for conducting business; *Gerrish v. New Haven Ice Co.* 63 Conn. 17, 27 Atl. 235, holding employer liable for failure of superintendent to observe rule.

Cited in note (43 L. R. A. 307, 308, 313, 331, 342) on duties of master and servant as to rules promulgated for safe conduct of business.

Distinguished in *Shepard v. New York C. & H. R. R. Co.* 44 N. Y. S. R. 819, 18 N. Y. Supp. 665 and *Larow v. New York, L. E. & W. R. Co.* 61 Hun, 14, 15 N. Y. Supp. 384, holding it error to permit jury to decide whether specific rule should have been promulgated.

**Duty to exercise ordinary care.**

Cited in *Dutton v. Greenwood Cemetery Co.* 80 App. Div. 356, 80 N. Y. Supp. 780, holding it cemetery association's duty to persons visiting cemetery to render premises reasonably safe.

12 L. R. A. 456, *DRESLER v. HARD*, 127 N. Y. 235, 27 N. E. 823.

**Comparison of handwriting.**

Cited in *Tucker v. Hyatt*, 144 Ind. 644, 41 N. E. 1047, holding comparison of signature in record, with disputed signature, proper; *People v. Molineux*, 168 N. Y. 325, 62 L. R. A. 284, 61 N. E. 286, holding under statute any writing sought to be proved genuine may be compared with any writing proved genuine; *People v. Flechter*, 44 App. Div. 211, 60 N. Y. Supp. 777, holding experts may testify from comparison that two instruments are in same handwriting.

Cited in note (62 L. R. A. 852) on comparison of handwriting.

12 L. R. A. 463, *HAMER v. SIDWAY*, 124 N. Y. 538, 21 Am. St. Rep. 693, 27 N. E. 256.

**Sufficiency of consideration.**

Cited in *Melville v. Kruse*, 174 N. Y. 309, 66 N. E. 965, holding surrender of right of withdrawal good consideration for modification of copartnership articles; *Gescheidt v. Drier*, 44 N. Y. S. R. 481, 17 N. Y. Supp. 741, upholding agreement by mortgagee to give mortgage to mortgagor or mortgagee's death, in consideration of care of latter in sickness; *Scruggs v. Cotterill*, 67 App. Div. 587, 73 N. Y. Supp. 882, sustaining agreement between stockholders giving each first right to purchase other's stock in event of desire to sell or of death; *Harlan v. Harlan*, 102 Iowa, 705, 72 N. W. 286, holding promise to board third person valid consideration for promise to pay for board; *Stovall v. McCutchen*, 107 Ky. 580, 47 L. R. A. 288, 92 Am. St. Rep. 373, 54 S. W. 969, sustaining contract by merchants to close stores during evening of summer months; *Babcock v. Chase*, 92 Hun, 267, 36 N. Y. Supp. 879, holding change of name sufficient consideration for promise to leave legacy; *McKay v. Buffalo Bill's Wild West Co.* 17 Misc. 399, 39 N. Y. Supp. 1041, holding undertaking to look after trunk if owner would continue journey based on good consideration; *Sickles v. Herold*, 11 Misc. 584, 32 N. Y. Supp. 1083, holding forbearance of banking department to close insolvent bank good consideration for shareholder's promise to replace capital; *Burke v. Dillin*, 92 Iowa, 564, 61 N. W. 370, holding forbearance of third mortgagee to foreclose valid consideration for second mortgagee's promise to pay interest on first; *Honsinger v. Mulford*, 90 Hun, 591, 35 N. Y. Supp. 986, upholding president's agreement to become personally liable upon corporation notes, if time extended; *Dempsey v. Horner*, 17 Misc. 618, 40 N. Y. Supp. 608, holding agreement to pay tenant's rent if landlord would institute summary proceedings enabling tenant's conditional vendor to sell property, valid; *Groff v. Bliss*, 19 Misc. 18, 42 N. Y. Supp. 843, upholding agreement to credit on debt, proceeds of notes of third persons owned by creditor which debtor procured to be discounted for him; *Grimm v. Taylor*, 96 Mich. 7, 55 N. W. 447, holding minor son's remaining at home to aid divorced mother sufficient consideration for uncle's promise to pay; *Furber v. Fogler*, 97 Me. 589, 55 Atl. 514, holding inadequacy of consideration no defense to note; *Yarwood v. Trusts & Guarantee Co.* 94 App. Div. 52, 87 N. Y. Supp. 947, sustaining recovery on note payable at maker's death, given to payees for securing his admission to their house when nearly frozen; *Kaufman Advertising Agency v. Snellenburgh*, 43 Misc. 324, 88 N. Y. Supp. 199, by Giegerich, J., concurring, who holds prestige to be secured from handling advertising sufficient consideration for contract to procure "write-ups."

Cited in footnotes to *Wright v. Wright*, 55 L. R. A. 261, which holds marriage sufficient to support promise by groom's father to maintain bride and child if groom fails to; *Lanahan v. Heaver*, 20 L. R. A. 759, which holds reciprocal promise to relinquish right to jury consideration for agreement to submit case to court; *Mutual Reserve Fund Life Assn. v. Hurst*, 20 L. R. A. 761, which holds moral obligation sufficient consideration for promise.

**Trust, how created.**

Cited in *Lucas v. Coe*, 86 Fed. 973, holding trust may be created without formal action; *Neresheimer v. Smyth*, 167 N. Y. 207, 60 N. E. 449, sustaining trust created by oral promise to apply to specified debts proceeds of property trans-

ferred by bill of sale in consideration of payment of debts; *Butler v. Weeks*, 12 Misc. 195, 33 N. Y. Supp. 1090, holding mortgage acknowledged by nominal mortgagee in writing to belong to trust estate impressed with trust; *Central Trust Co. v. Weeks*, 15 App. Div. 600, 44 N. Y. Supp. 828, holding letter stating mortgages of trust estate held in own name impresses mortgage with trust; *Ransdel v. Moore*, 153 Ind. 401, 53 L. R. A. 756, footnote p. 753, 53 N. E. 767, which holds letter from one taking title to land under parol promise to carry out trust sufficient to authorize carrying it out after his death.

Distinguished in *Millard v. Clark*, 7 Misc. 370, 27 N. Y. Supp. 631, holding deposit of money in another's name without surrendering control does not create trust.

— **Necessity of subject.**

Cited in *Hickok v. Bunting*, 67 App. Div. 562, 73 N. Y. Supp. 967, holding no trust created by written statement that sum held "in trust," where no *res* exists.

— **Statute of limitations.**

Cited in *Davis v. Davis*, 86 Hun, 402, 33 N. Y. Supp. 477, holding statute of limitations does not begin to run against beneficiary until open repudiation of trust.

**When statute of frauds must be pleaded.**

Cited in *Honsinger v. Mulford*, 90 Hun, 591, 35 N. Y. Supp. 986; *Lupean v. Brainard*, 20 App. Div. 214, 46 N. Y. Supp. 1044; *Smith v. Slosson*, 89 Hun, 568, 35 N. Y. Supp. 547; *Patterson v. Powell*, 31 Misc. 252, 64 N. Y. Supp. 43, 31 Misc. 21, 62 N. Y. Supp. 1035 (*obiter*); *Crane v. Powell*, 139 N. Y. 387, 34 N. E. 911, Affirming 46 N. Y. S. R. 669, 19 N. Y. Supp. 220. — holding defense of statute of frauds must be presented by demurrer or answer; *Post v. Butler Bros.* 11 Misc. 106, 31 N. Y. Supp. 995, holding defense of statute of frauds unavailable unless presented by averments of pleadings; *Dearing v. McKinnon Dash & Hardware Co.* 33 App. Div. 41, 53 N. Y. Supp. 513, holding that statute need not be pleaded to complaint incorporating instrument not complying with statute of frauds; *Griffin v. Condon*, 18 Misc. 238, 41 N. Y. Supp. 380; *Pohl v. Pontier*, 2 Misc. 145, 21 N. Y. Supp. 634; *Doyle v. Beaupre*, 43 N. Y. S. R. 743, 17 N. Y. Supp. 287, — holding that defense of statute of frauds is not available unless set up in answer; *Bannatyne v. Florence Mill. & Min. Co.* 77 Hun, 295, 28 N. Y. Supp. 334 (dissenting opinion), majority holding that statute of frauds as defense is not available when not presented by averments of complaint or answer.

Distinguished in *Traver v. Purdy*, 30 Abb. N. C. 449, 55 N. Y. S. R. 297, 25 N. Y. Supp. 452, holding statute of frauds need not be pleaded where answer denies existence of contract.

12 L. R. A. 473, *RUDD v. ROBINSON*, 126 N. Y. 113, 22 Am. St. Rep. 816, 26 N. E. 1046.

**Imputing knowledge of corporate transactions.**

Cited in *Powell v. Conover*, 75 Hun, 13, 26 N. Y. Supp. 1028, holding corporation trustee not chargeable with actual knowledge of entries on its books; *Garden City Sand Co. v. American Refuse Crematory Co.* 105 Ill. App. 347, holding purchaser of stock which certificate states is fully paid not chargeable with knowledge of entries in corporation books showing contrary.

**Books of account as evidence.**

Cited in footnote to *Re Fulton*, 35 L. R. A. 133, which holds book containing charges against one person only inadmissible.

Cited in note (53 L. R. A. 537) on use of person's books of account as evidence upon issues of other parties.

**— Books of corporation.**

Cited in *Sigua Iron Co. v. Brown*, 171 N. Y. 496, 64 N. E. 194, holding books of corporation admissible, without authentication, to prove corporate acts, in action against transferee of stock for unpaid calls; *St. George Vineyard Co. v. Fritz*, 48 App. Div. 236, 62 N. Y. Supp. 775, holding corporation books admissible to show defendant a director in action to enforce director's liability; *Minor v. Crosby*, 76 App. Div. 563, 78 N. Y. Supp. 594, and *Leonard v. Faber*, 52 App. Div. 499, 65 N. Y. Supp. 391, holding credits on corporation books for goods delivered inadmissible in action to enforce directors' liability; *National Exp. & Transp. Co. v. Morris*, 15 App. D. C. 281, holding, in action on stock subscription, corporate books inadmissible *per se* to show membership; *Carey v. Williams*, 25 C. C. A. 232, 51 U. S. App. 204, 79 Fed. 912, holding corporation books inadmissible to establish person's liability as stockholder; *Hayden v. Williams*, 37 C. C. A. 482, 96 Fed. 282, holding books of bank inadmissible as to dealings between bank and stockholder; *Trainor v. German-American Sav. Loan & Bldg. Asso.* 204, Ill. 623, 68 N. E. 650, holding books of loan association not evidence *per se* of indebtedness in foreclosure proceeding against member; *Re Dittman*, 65 App. Div. 345, 72 N. Y. Supp. 886, holding corporate books of account inadmissible to show profits, in stockholder's action for dissolution; *Stokes v. Stokes*, 91 Hun. 609, 36 N. Y. Supp. 350, raising, without deciding, question whether knowledge of existence of accounts makes corporation books competent to establish officer's liability.

Distinguished in *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 83, 53 Pac. 410, holding corporate books of account kept under his supervision admissible against officer to show incorrect bookkeeping; *Bacon v. United States*, 38 C. C. A. 43, 97 Fed. 41, holding unauthenticated bank books admissible in criminal suit against bank president for making false reports.

12 L. R. A. 476, *CONSOLIDATED TANK LINE CO. v. HUNT*, 83 Iowa, 6, 32 Am. St. Rep. 285, 48 N. W. 1057.

**Exemption from execution.**

Cited in *Re Hindman*, 43 C. C. A. 560, 104 Fed. 333, holding horse and wagon of painter and paper-hanger exempt; *Roberts v. Parker*, 117 Iowa, 390, 57 L. R. A. 764, 94 Am. St. Rep. 316, 90 N. W. 744, holding bicycle of painter, paper-hanger, and bill-poster used in business exempt; *Krebs v. Nicholson*, 118 Iowa, 135, 96 Am. St. Rep. 370, 91 N. W. 923, holding harness and cart used as means of conveyance by owner of breeding stallion exempt; *Equitable Life Assur. Soc. v. Goode*, 101 Iowa, 163, 35 L. R. A. 691, footnote p. 690, 63 Am. St. Rep. 378, 70 N. W. 113, which holds law library of attorney occupying part of time in legal business exempt.

Cited in footnotes to *Davidson v. Hannon*, 34 L. R. A. 718, which holds photograph lens used by photographer exempt from attachment; *Re Klemp*, 39 L. R. A. 340, which holds combined harvester of farmer exempt from execution.

12 L. R. A. 477, CASS COUNTY BANK v. WEBER, 83 Iowa, 63, 32 Am. St. Rep. 288, 48 N. W. 1067.

**Extent of homestead exemption.**

Cited in Groneweg v. Beck, 93 Iowa, 719, 62 N. W. 31, holding homestead exemption extends to whole building, though ground floor used for grocery.

Cited in footnote to De Ford v. Painter, 30 L. R. A. 722, which holds, as homestead, building in city partly rented for business and rest occupied as residence; Ford v. Forsgard, 25 L. R. A. 155, which denies removal of exemption, on ground of abandonment, of rooms in house on homestead lot.

12 L. R. A. 482, McCLAIN v. GARDEN GROVE, 83 Iowa, 235, 48 N. W. 1031.

**Proximate cause.**

Cited in Walrod v. Webster County, 110 Iowa, 352, 47 L. R. A. 482, 81 N. W. 598, holding defect in railway proximate cause of accident due to horse breaking through, preventable by sufficient railing; Parmenter v. Marion, 113 Iowa, 303, 85 N. W. 90, holding negligence of person dropping bale from platform over sidewalk proximate cause of injury to passer-by.

Distinguished in Miller v. Boone County, 95 Iowa, 12, 63 N. W. 352, holding county liable for horse backing off approach to bridge, where injury preventable by ordinary railing; Harvey v. Clarinda, 111 Iowa, 532, 82 N. W. 994, holding city liable for accident where frightened horse backed down unrailed embankment; Faulk v. Iowa County, 103 Iowa, 446, 72 N. W. 757, holding city liable for horses backing through defective railing to bridge.

12 L. R. A. 483, GORDON v. ANDERSON, 83 Iowa, 224, 32 Am. St. Rep. 302, 49 N. W. 86.

**Negotiability of commercial paper.**

Cited in Sawyer v. Campbell, 107 Iowa, 402, 78 N. W. 56, holding negotiable note must be certain as to payor, payee, amount, time, and place of payment; Culbertson v. Nelson, 93 Iowa, 197, 27 L. R. A. 228, 57 Am. St. Rep. 266, 61 N. W. 854, holding draft for stated sum "with exchange" not negotiable.

Distinguished in Central State Bank v. Spurlin, 111 Iowa, 189, 49 L. R. A. 661, 82 Am. St. Rep. 511, 82 N. W. 493, holding describing payee as "trustee" does not destroy negotiability of note.

12 L. R. A. 484, MUSCH v. BURKHART, 83 Iowa, 301, 32 Am. St. Rep. 305, 48 N. W. 1025.

**Trees on boundary line.**

Cited in Kinney v. Kinney, 104 Iowa, 706, 40 L. R. A. 627, 74 N. W. 688, denying liability of owner for failure to trim hedge on boundary.

Cited in note (21 L. R. A. 729) on property rights in trees on boundary line.

**Injunction where legal remedy inadequate.**

Cited in Lemmon v. Guthrie Center, 113 Iowa, 41, 86 Am. St. Rep. 361, 84 N. W. 986, sustaining injunction against removal of building as alleged violation of fire-limit ordinance; Camp v. Dixon, 112 Ga. 881, 52 L. R. A. 759, 38 S. E. 71, sustaining injunction against trespass to cut timber.

Cited in note (22 L. R. A. 235) on injunction against trespass to cut timber.



Distinguished in *Ewing v. Webster City*, 103 Iowa, 230, 72 N. W. 511, denying injunction against enforcing ordinance pending appeal from conviction.

12 L. R. A. 487, *FT. SMITH & V. B. BRIDGE CO. v. HAWKINS*, 54 Ark. 509, 16 S. W. 565.

**Navigable stream as boundary.**

Cited in note (23 L. R. A. 520) on boundary of municipality on navigable stream.

**Taxation of bridge.**

Cited in note (29 L. R. A. 70) on jurisdiction as to taxation of bridge over river forming boundary of state or its divisions.

12 L. R. A. 492, *METROPOLITAN NAT. BANK v. JONES*, 137 Ill. 634, 31 Am. St. Rep. 403, 27 N. E. 533.

**Effect of certification of checks.**

Cited in *Oyster & Fish Co. v. National Lafayette Bank*, 51 Ohio St. 114, 46 Am. St. Rep. 560, 36 N. E. 833; *Voltz v. National Bank*, 158 Ill. 539, 30 L. R. A. 157, 42 N. E. 69, Affirming 57 Ill. App. 364, holding drawer procuring certification of check before delivery primarily liable; *Minot v. Russ*, 156 Mass. 461, 16 L. R. A. 512, 32 Am. St. Rep. 472, 31 N. E. 489, holding certification of check on payee's application releases drawer; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 161, 59 L. R. A. 662, 93 Am. St. Rep. 113, 65 N. E. 136, holding certification of check renders drawee absolutely liable.

Cited in note (16 L. R. A. 511) on effect of certification of check on liability of drawer.

Distinguished in *Dillaway v. Northwestern Nat. Bank*, 82 Ill. App. 74, upholding right of bank to cancel erroneous certification, where no rights of others intervene and holder's situation unchanged.

**Check as assignment of deposit.**

Cited in *Staninger v. Tabor*, 103 Ill. App. 336, holding delivery of check assignment of deposit, as between parties; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 535, 39 L. R. A. 481, 63 Am. St. Rep. 270, 49 N. E. 420, Reversing 69 Ill. App. 683, holding bank having sufficient funds at time of presentment liable to bona-fide holder of stopped check; *Wyman v. Ft. Dearborn Nat. Bank*, 181 Ill. 283, 48 L. R. A. 566, 72 Am. St. Rep. 259, 54 N. E. 946; *Merchants' Nat. Bank v. Maple*, 65 Ill. App. 487; *Bank of Antigo v. Union Trust Co.* 149 Ill. 352, 23 L. R. A. 615, 36 N. E. 1029,—holding bank not chargeable in favor of payee of check until presentment.

Distinguished in *First Nat. Bank v. Selden*, 62 L. R. A. 561, 56 C. C. A. 534, 120 Fed. 214, denying right of payee to maintain action on check against insolvent national bank.

12 L. R. A. 496, *SLOAN v. WILLIAMS*, 138 Ill. 43, 27 N. E. 531.

Specific performance of contract denied in *Depuy v. Williams*, 152 Ill. 103, 37 N. E. 48.

**Contracts, when assignable.**

Cited in *Zetterlund v. Texas Land & Cattle Co.* 55 Neb. 360, 75 N. W. 860, holding contract involving personal services and forbidding transfer of interest, not L. R. A. Au.—VOL. II.—38.

assignable; *Cleveland, C. C. & St. L. R. Co. v. Wood*, 189 Ill. 354, 59 N. E. 619, holding contract for personal services assignable by consent of other party; *Edison v. Babka*, 111 Mich. 238, 69 N. W. 409, holding contract to plant and care for fruit trees not assignable without other party's consent; *American Bonding & T. Co. v. Baltimore & O. S. W. R. Co.* 60 C. C. A. 59, 124 Fed. 873, holding receiver's contract for betterments assignable to purchaser of railroad.

Cited in footnote to *Erickson v. Brookings County*, 18 L. R. A. 347, which holds assignable right of purchaser as unlawful tax sale to have money refunded.

12 L. R. A. 498. *CITIZENS STREET R. CO. v. ROBBINS*, 128 Ind. 449, 25 Am. St. Rep. 445, 26 N. E. 116.

Second appeal in 144 Ind. 672, 42 N. E. 916, 43 N. E. 649.

**Statute regulating administrator's sales.**

Distinguished in *Jones v. Mayne*, 154 Ind. 409, 55 N. E. 956, holding administrator acting for distributees in compromising litigation need not strictly follow statute.

**Duty of corporation permitting transfer of decedent's stock.**

Cited in footnote to *Wooten v. Wilmington & W. R. Co.* 56 L. R. A. 615, which holds corporation permitting transfer of stock on books by executor, bound to see that provisions of will carried out.

**Liability of decedent's debtor after final settlement.**

Cited in *Barnett v. Vanmeter*, 7 Ind. App. 53, 33 N. E. 666, holding final settlement of estate does not extinguish liability of debtor of decedent.

**Appellate procedure — Partial reversal.**

Cited in *Louisville, N. A. & C. R. Co. v. Treadway*, 142 Ind. 488, 143 Ind. 704, 41 N. E. 794, holding judgment on special verdict may be reversed as to one joint defendant and affirmed as to another.

12 L. R. A. 502. *GIBSON COUNTY v. CINCINNATI STEAM HEATING CO.* 128 Ind. 240, 27 N. E. 612.

**Necessity of advertising for proposals.**

Cited in *Fulton County v. Gibson*, 158 Ind. 480, 63 N. E. 982, holding contract for extra work in constructing courthouse, necessitated by unforeseen emergency, made without advertising for proposals, valid.

**What contracts within statute of frauds.**

Cited in *Voris v. Star City Bldg. & L. Asso.* 20 Ind. App. 640, 50 N. E. 779, holding guaranty of payment of warrants, proceeds of which went to guarantor, original promise; *Spencer v. McLean*, 20 Ind. App. 629, 67 Am. St. Rep. 271, 50 N. E. 769, holding stockholder's bond to secure directors as sureties of corporation, original promise; *Hyatt v. Bonham*, 19 Ind. App. 260, 49 N. E. 361, holding promise to pay debt of another, where promisee substituted for debtor, not within statute; *Carskaddon v. South Bend*, 141 Ind. 600, 39 N. E. 667, holding contract created by oral acceptance of terms of council resolution directing purchase of land, within statute of frauds.

Cited in note (17 L. R. A. 274) on parol evidence to add to, vary, or alter written contract.

12 L. R. A. 506, *GAMMON THEOLOGICAL SEMINARY v. ROBBINS*, 128 Ind. 85, 27 N. E. 341.

**Delivery as essential to gift.**

Cited in *Martin v. McCollough*, 136 Ind. 339, 34 N. E. 819, holding delivery of personal property to one beneficiary, of gift to be distributed among donees, valid gift; *Slade v. Mutrie*, 156 Mass. 21, 30 N. E. 168, holding delivery of note to maker with intent to transfer title, valid gift; *McCollough v. Martin*, 12 Ind. App. 168, 39 N. E. 905, holding note executed as gift revoked by maker's death; *Jacobs v. Jolley*, 29 Ind. App. 34, 62 N. E. 1028, holding assignment of portion of savings-bank deposit, payable at donor's death, with delivery of bank book, valid gift; *Waite v. Grubbe*, 43 Or. 412, 73 Pac. 206, holding pointing out places where money was buried, with declaration of gift, valid gift.

Cited in notes (21 L. R. A. 693-695) on undelivered written transfer or assignment of property as gift; (26 L. R. A. 307) on gift by promissory note.

Distinguished in *Barnett v. Franklin College*, 10 Ind. App. 108, 37 N. E. 427, holding delivery of instrument promising to pay money after death, valid gift.

12 L. R. A. 508, *DUNSMOOR v. FURSTENFELDT*, 38 Cal. 522, 22 Am. St. Rep. 331, 26 Pac. 518.

**Garnishment of property in custody of court.**

Cited in *Smith v. People*, 93 Ill. App. 137, holding money in receiver's hands subject to garnishment after final order for disbursement.

Cited in footnotes to *Allen v. Gerard*, 49 L. R. A. 351, which denies liability to garnishment of balance in hands of clerk of court of proceeds of sale of perishable property attached; *Jones v. Merchants' Nat. Bank*, 35 L. R. A. 698, which holds money paid into court, exempt from process of litigant unless consent of court obtained; *McAlmond v. Bevington*, 53 L. R. A. 597, which holds money deposited with justice by third person as bail, not subject to garnishment for prisoner's debt; *Holker v. Hennessey*, 39 L. R. A. 165, which holds property unlawfully taken from prisoner under arrest not subject to garnishment.

Limited in *Swinerton v. Oregon P. R. Co.* 123 Cal. 424, 56 Pac. 40, holding funds in custody of Federal court not subject to garnishment out of state courts.

Disapproved in *Corbitt v. Farmers' Bank*, 114 Fed. 604, and *Dale v. Brumbly* (Md.) 64 L. R. A. 114, footnote p. 112, 56 Atl. 807, holding money in court not subject to attachment after final decree for disbursement.

**— Practice.**

Cited in *Wilson v. Harris*, 21 Mont. 306, 54 Pac. 46, holding lien not acquired by service of garnishment on transferee of personal property not taken into custody.

**Debt, what is.**

Cited in *Melvin v. State*, 121 Cal. 24, 53 Pac. 416, holding liability for negligence "debt" within act exempting state from debts created by agricultural society.

**Title of voluntary assignee for creditors.**

Cited in *Colbert v. Baetjer*, 4 App. D. C. 426, holding unrecorded bill of sale good as against voluntary assignee for benefit of creditors.

12 L. R. A. 511, *CASHMAN v. ROOT*, 80 Cal. 373, 23 Am. St. Rep. 482, 26 Pac. 883.

**Constitutional provision relative to sales of stock on margin.**

Cited in *Parker v. Otis*, 130 Cal. 326, 92 Am. St. Rep. 56, 62 Pac. 571, holding undisclosed principal may recover money paid by agent upon contract for stock on margin; *Wetmore v. Barrett*, 103 Cal. 248, 37 Pac. 140, holding money paid brokers in consideration of purchases of stock on margins recoverable; *Parker v. Otis*, 130 Cal. 329, 92 Am. St. Rep. 56, 62 Pac. 571, upholding constitutional provision for recovery of money paid for purchase and sale of stocks on margin; *Otis v. Parker*, 187 U. S. 610, 47 L. ed. 328, 23 Sup. Ct. Rep. 168, holding state constitutional provision invalidating margin sales, not in conflict with Constitution.

**What is margin contract.**

Distinguished in *Maurer v. King*, 127 Cal. 118, 59 Pac. 290, holding guaranty of cash value of, and agreement to take back, stock on request after certain time, valid.

**Voting stock involved in margin contracts.**

Cited in *Fox v. Hale & N. Silver Min. Co.* 108 Cal. 385, 41 Pac. 308, holding stock held by broker on margin should be voted in purchaser's interest.

12 L. R. A. 514, *SHELTON v. ORR*, 89 Tenn. 82, 16 S. W. 142.

**Homestead exemption.**

Cited in *Chambers v. Chambers*, 92 Tenn. 713, 23 S. W. 67, holding widow's homestead not assignable out of lands held by entireties; *Loftis v. Loftis*, 94 Tenn. 241, 28 S. W. 1091, holding widow's homestead prevails over husband's mortgage securing loan to pay purchase price; *Howell v. Jones*, 91 Tenn. 404, 19 S. W. 757, holding homestead does not attach to reversionary interest; *J. I. Case Co. v. Joyce*, 89 Tenn. 345, 12 L. R. A. 521, 16 S. W. 147, holding tenant in common has no homestead in joint estate.

Cited in note (23 L. R. A. 240) on effect of divorce on homestead rights.

**Exemption of life insurance.**

Cited in *Rose v. Wortham*, 95 Tenn. 511 30 L. R. A. 611, 32 S. W. 458, holding life insurance taken before marriage, payable to "legal representatives," goes to widow and children to exclusion of creditors.

**Tenancy by entirety.**

Cited in note (30 L. R. A. 313) on tenancy by entireties.

Distinguished in *Cole Mfg. Co. v. Collier*, 95 Tenn. 120, 30 L. R. A. 318, 49 Am. St. Rep. 921, 31 S. W. 1000, holding purchaser on execution against husband cannot obtain possession of estate by entirety until wife's death nor unless husband survives.

12 L. R. A. 519, *JOYCE v. J. I. CASE THRESHING MACH. CO.* 89 Tenn. 337, 16 S. W. 147.

**Homestead rights.**

Cited in *Adcock v. Adcock*, 104 Tenn. 155, 56 S. W. 844, holding widow not entitled to homestead out of undivided interest in land; *Meacham v. Meacham*, 91 Tenn. 534, 19 S. W. 757, holding homestead attaches to lands partitioned by parol;

McBroom v. Whitefield, 108 Tenn. 422, 67 S. W. 794, holding deed joined in by infant wife passes title to vendee subject to homestead right.

12 L. R. A. 524, WILSON v. WILSON, 154 Mass. 194, 26 Am. St. Rep. 237, 28 N. E. 167.

**Connivance at adultery.**

Cited in Lee v. Hammond, 114 Wis. 559, 90 N. W. 1073, holding that husband suspecting wife's infidelity is not guilty of connivance in leaving open existing opportunities, without inviting wrong.

Cited in note (25 L. R. A. 565) on how far statutes will be regarded as having abrogated maxim that one cannot profit by his own wrong.

Distinguished in Torlotting v. Torlotting, 82 Mo. App. 203, holding husband permitting adultery of wife with detective hired to furnish proof of infidelity guilty of connivance.

12 L. R. A. 528, KOSCIUSKO v. SLOMBERG, 68 Miss. 469, 24 Am. St. Rep. 281, 9 So. 297.

**Validity of health regulations.**

Cited in Wilson v. Alabama G. S. R. Co. 77 Miss. 718, 52 L. R. A. 358, 78 Am. St. Rep. 543, 28 So. 567, holding order prohibiting all persons from getting off trains anywhere in state, because fever exists at certain places, void; State *ex rel.* Adams v. Burdge, 95 Wis. 405, 37 L. R. A. 162, 60 Am. St. Rep. 123, 70 N. W. 347, holding rule of health board excluding unvaccinated children from schools, in absence of smallpox epidemic, void; Pierce v. Dillingham, 203 Ill. 164, 62 L. R. A. 894, 67 N. E. 846, holding live stock commissioners' rule authorizing testing and slaughter of diseased imported "dairy and breeding cattle," unreasonable; *Re* Smith, 143 Cal. 373, 77 Pac. 180, holding conditions and circumstances may be considered in determining reasonableness of ordinance.

12 L. R. A. 529, AMERICAN MORTG. CO. v. TENNILLE, 87 Ga. 28, 13 S. E. 158.

**Right to contest corporation's right to hold property.**

Cited in Oregon Mortg. Co. v. Carstens, 16 Wash. 170, 35 L. R. A. 843, footnote p. 841, 47 Pac. 421, holding state only may question title to land acquired by foreign corporation contrary to constitutional provision; Brown v. Atlanta R. & Power Co. 113 Ga. 476, 39 S. E. 71, holding state only can question corporation's title to property acquired in unlawful manner; Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 483, 90 Am. St. Rep. 705, 65 Pac. 735, holding legal existence of *de facto* corporation questionable only by state.

Cited in notes (32 L. R. A. 294) on right of private persons to contest power of corporation to take or hold property; (24 L. R. A. 330) on right of foreign corporations to own real estate.

**Right to enforce forfeiture of realty.**

Cited in Jones v. Oemler, 110 Ga. 213, 35 S. E. 375, holding right to have lease of public domain forfeited for failure to comply with law vests in state alone.

**Alien's interest in real estate.**

Cited in footnote to Wunderle v. Wunderle, 19 L. R. A. 84, which denies right of aliens incapable of inheriting to hold by descent until title assailed.

Cited in notes (31 L. R. A. 177) on alien's right to inherit; (31 L. R. A. 85) on effect of state Constitutions and statutes on question of inheritance by or from alien; (31 L. R. A. 146) on effect of state statutes and constitutions on inheritance through alien; (32 L. R. A. 177) on effect of treaties on alien's right to inherit.

12 L. R. A. 534, CINCINNATI INCLINED PLANE R. CO. v. CITY & SUBURBAN TELEG. ASSO. 48 Ohio St. 390, 29 Am. St. Rep. 559, 27 N. E. 890.

**Conflicting rights of telephone and street railway companies.**

Cited in Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 503, 27 L. R. A. 239, footnote, p. 236, 29 S. W. 104, which holds electric street car company liable to telephone company by charging earth so as to destroy use of latter's ground circuit.

Cited in footnotes to Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co. 17 L. R. A. 674, which denies injunction against discharge of electricity by street railroad interfering with operation of telephone; Rutland Electric Light Co. v. Marble City Electric Light Co. 20 L. R. A. 821, which holds electric light company entitled to injunction against erection of wires carrying dangerous current.

Cited in note (50 L. R. A. 147) on privilege of using streets as a contract within constitutional provision against impairing obligation of contracts.

**Rights of electric companies in highways.**

Cited in Daily v. State, 51 Ohio St. 358, 24 L. R. A. 728, 46 Am. St. Rep. 578, 37 N. E. 710, holding telegraph company cannot trim trees in highway to make place for line without compensating abutting owner; Callen v. Columbus Edison Electric Light Co. 66 Ohio St. 178, 58 L. R. A. 786, 64 N. E. 141, holding electric light poles and wires cannot be placed in street without compensating abutting owners; State *ex rel.* Spokane & B. C. Teleph. & Teleg. Co. v. Spokane, 24 Wash. 59, 63 Pac. 1116, holding use of highways for lines subordinate to primary use for travel.

Cited in note (13 L. R. A. 454) on telegraph company subject to police powers of municipalities.

**Rights of street railroads in highways.**

Cited in La Crosse City R. Co. v. Higbee, 107 Wis. 402, 51 L. R. A. 929, 83 N. W. 701, holding electric street railways, with poles and wires, not additional burden to fee; San Antonio Rapid Transit Street R. Co. v. Limburger, 88 Tex. 85, 53 Am. St. Rep. 730, 30 S. W. 533, holding electric, have same right as horse, street cars to use of public streets; Sanfleet v. Toledo, 10 Ohio C. C. 471, denying right of abutting owner to compensation for interference with electrical appliances by electric railway in street; Toledo Consol. Street R. Co. v. Toledo Electric Street R. Co. 6 Ohio C. C. 377, sustaining street railway company's right to use in common tracks of another company, but not to appropriate such tracks absolutely; State v. Dayton Traction Co. 18 Ohio C. C. 494, sustaining power of street railroad to transport freight; Hamilton & L. Electric Transit Co. v. Hamilton, 1 Ohio N. P. 369, denying street railroad's right to construct transfer house in street; Dietz v. C. & M. V. Traction Co. 4 Ohio N. P. 402, upholding law authorizing construction of electric railways on country roads.

Distinguished in McMaken v. Cincinnati & H. Electric Street R. Co. 5 Ohio N. P. 373, denying right of street railroad to construct track not conforming to grade, interfering with abutter's access to highway.

**Right of street railway to change motive power.**

Cited in *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 342, 47 U. S. App. 36, 76 Fed. 314, sustaining right of Cincinnati Inclined Plane Railroad Company to operate road with electricity.

Cited in footnote to *Hudson River Teleph. Co. v. Watervliet Turnp. Co.* 17 L. R. A. 674, which authorizes substitution of electricity for horses as motive power for street railway.

**Statutory construction.**

Cited in *State ex rel. Sheets v. Aetna L. Ins. Co.* 69 Ohio St. 325, 69 N. E. 608, construing statute authorizing life insurance companies to insure against accidents as permitting employer's liability insurance, unknown at its enactment.

12 L. R. A. 544, *CUMBERLAND TELEPH. & TELEG. CO. v. UNITED ELECTRIC R. CO.* 42 Fed. 273.

**Conflicting rights of electric companies.**

Cited in *Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co.* 135 N. Y. 405, 17 L. R. A. 678 footnote p. 674, 31 Am. St. Rep. 838, 32 N. E. 148, denying injunction against discharge of electricity by street railroad interfering with operation of telephone company; *Birmingham Traction Co. v. Southern Bell Teleph. & Teleg. Co.* 119 Ala. 151, 24 So. 731, sustaining injunction against placing trolley poles and wires touching and crossing telephone wires; *Central Pennsylvania Teleph. & Supply Co. v. Wilkes Barre & W. S. R. Co.* 1 Pa. Dist. R. 634, 6 Kulp, 393, 11 Pa. Co. Ct. 425, holding prior occupation by telephone company cannot preclude use of highway by electric railway; *Western U. Teleg. Co. v. Guernsey & S. Electric Light Co.* 46 Mo. App. 158 (dissenting opinion) majority sustaining injunction against transmitting electric currents within certain distance of telegraph wires.

Cited in footnote to *Rutland Electric Light Co. v. Marble City Electric Light Co.* 20 L. R. A. 821, which holds electric light company entitled to injunction against erection of wires carrying dangerous current.

Disapproved in *Cumberland Teleg. & Teleph. Co. v. United Electric R. Co.* 93 Tenn. 523, 27 L. R. A. 244, footnote p. 236, 29 S. W. 104, which holds electric street car company liable to telephone company by charging earth so as to destroy use of latter's ground circuit.

**Conflicting rights of telephone lines.**

Cited in *Louisville Home Teleph. Co. v. Cumberland Teleph. & Teleg. Co.* 49 C. C. A. 529, 111 Fed. 668, holding telephone company not entitled to exclusive right in street by prior occupation; *Chicago Teleph. Co. v. Northwestern Teleph. Co.* 199 Ill. 352, 65 N. E. 329, sustaining right of new telephone company to parallel and overbuild existing lines.

**Application to telephone companies of statutes relating to telegraph companies.**

Cited in *Central Pennsylvania Teleph. & Supply Co. v. Wilkes Barre & W. S. R. Co.* 11 Pa. Co. Ct. 418, 6 Kulp, 384, 1 Pa. Dist. R. 629, holding telephone regarded as telegraph company within meaning of corporation statutes; *Northwestern Teleph. Exchange Co. v. Chicago, M. & St. P. R. Co.* 76 Minn. 345, 79 N. W. 315, and *Gulf, C. & S. F. R. Co. v. Southwestern Teleg. & Teleph. Co.* 18 Tex. Civ. App. 501, 45 S. W. 151, holding statute conferring power of eminent domain upon telegraph companies available to telephone companies; *State ex rel. Wis-*

consin Teleph. Co. v. Sheboygan, 111 Wis. 32, 86 N. W. 657, holding statute authorizing telegraph companies to use highways applies to telephone companies.

Distinguished in Richmond v. Southern Bell Teleph. & Teleg. Co. 174 U. S. 773, 43 L. ed. 1167, 19 Sup. Ct. Rep. 778, Modifying 28 C. C. A. 664, 42 U. S. App. 686, 85 Fed. 24, Affirming 78 Fed. 860, holding act authorizing construction of telegraph lines on post-roads does not apply to telephone lines.

12 L. R. A. 551, *FIELDS v. OSBORNE*, 60 Conn. 544, 21 Atl. 1070.

**Validity of ballots.**

Cited in State *ex rel.* Law v. Saxton, 30 Fla. 686, 18 L. R. A. 725, 32 Am. St. Rep. 46, 12 So. 218, holding ballots containing words "National Republican Ticket" and "Free Suffrage Ticket," legal; State *ex rel.* Phelan v. Walsh, 62 Conn. 293, 17 L. R. A. 369, 25 Atl. 1, holding word "for" prefixed to name of office does not necessarily invalidate ballot; Bowers v. Smith, 111 Mo. 82, 16 L. R. A. 766, 33 Am. St. Rep. 491, 20 S. W. 101 (dissenting opinion) majority holding erroneous printing of names of additional candidates on official ballots will not nullify election.

Distinguished in State *ex rel.* Phelan v. Walsh, 62 Conn. 295, 17 L. R. A. 369, 52 Atl. 1, holding using ballots sent to wrong towns does not vitiate ballot.

**— Distinguishing marks.**

Cited in Taylor v. Bleakley, 55 Kan. 9, 28 L. R. A. 686, 49 Am. St. Rep. 233, 39 Pac. 1045, holding ballots not marked with cross within designated circle or square, void; People *ex rel.* Nichols v. County Canvassers, 129 N. Y. 414, 14 L. R. A. 631, 29 N. E. 327, holding ballots indorsed for polling place other than where cast cannot be counted.

Cited in footnotes to State *ex rel.* Mize v. McElroy, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted; State *ex rel.* Phelan v. Walsh, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Cited in note (13 L. R. A. 762) on marks or devices to distinguish ballots.

Disapproved in State *ex rel.* Waggoner v. Russell, 34 Neb. 122, 15 L. R. A. 742, 33 Am. St. Rep. 625, 51 N. W. 465, holding election law provision for marking ballots with ink directory.

12 L. R. A. 554, *SHINNERS v. LOCKS & CANALS*, 154 Mass. 168, 26 Am. St. Rep. 226, 28 N. E. 10.

**Exceptions to exclusion of evidence.**

Cited in Com. v. Bingham, 158 Mass. 171, 33 N. E. 341, holding exception to exclusion of question not maintainable where evidence expected does not appear; Gunn v. Ohio River R. Co. 36 W. Va. 179, 32 Am. St. Rep. 842, 14 S. E. 465, holding where form of question indicates intention to elicit statement part of *res gestæ*, refusal without hearing answer, error.

Distinguished in Daley v. People's Bldg. Loan & Sav. Asso. 172 Mass. 534, 52 N. E. 1090, holding formal tender of proof unnecessary to make exception to exclusion of evidence available where questions show expectation.

**Objection, when not available.**

Cited in Cassidy v. Com. 173 Mass. 535, 54 N. E. 249, holding objection to question unavailable where answer does not appear.



**Admissibility of evidence.**

Distinguished in *Stevens v. Boston Elev. R. Co.* 184 Mass. 478, 69 N. E. 338, holding evidence of violation of rule as to sounding gong admissible in negligence action against street railway.

**— Of precautions subsequent to accident.**

Cited in *Anson v. Evans*, 19 Colo. 279, 35 Pac. 47, holding subsequent precautions cannot be shown to establish antecedent negligence; *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 207, 36 L. ed. 406, 12 Sup. Ct. Rep. 591; *Atchison, T. & S. F. R. Co. v. Parker*, 5 C. C. A. 222, 12 U. S. App. 132, 55 Fed. 597; *Bell v. Washington Cedar Shingle Co.* 8 Wash. 29, 35 Pac. 405,—holding evidence of charges in machinery incompetent; *McGuerty v. Hale*, 161 Mass. 53, 36 N. E. 682, holding evidence of covering gearing subsequent to accident inadmissible; *Downey v. Sawyer*, 157 Mass. 421, 32 N. E. 654, holding changes in apparatus subsequent to accident not evidence of negligence; *Dacey v. New York, N. H. & H. R. Co.* 168 Mass. 481, 47 N. E. 418, and *Aldrich v. Concord & M. R. Co.* 67 N. H. 253, 29 Atl. 408, holding evidence of substitution of different kind of switch inadmissible; *Alcorn v. Chicago & A. R. Co.* 108 Mo. 108, 18 S. W. 188, holding evidence of replacing worn switch-block incompetent; *Anderson v. Chicago, St. P. M. & O. R. Co.* 87 Wis. 202, 23 L. R. A. 205, 58 N. W. 79, holding evidence that trains ran at reduced speed after accident inadmissible; *Wabash County v. Pearson*, 129 Ind. 457, 28 N. E. 1120, holding evidence of subsequent repairs to bridge inadmissible; *Illinois C. R. Co. v. Wyatt*, 104 Tenn. 434, 78 Am. St. Rep. 926, 58 S. W. 308, holding evidence of subsequent repairs to depot platform inadmissible; *Hewitt v. Taunton Street R. Co.* 167 Mass. 486, 46 N. E. 106, holding evidence of virtual discharge of motorman after accident inadmissible; *Motey v. Pickle Marble & Granite Co.* 20 C. C. A. 371, 36 U. S. App. 682, 74 Fed. 159, holding evidence of change in conduct of business subsequent to accident, inadmissible.

Cited in footnote to *Georgia Southern & F. R. Co. v. Cartledge*, 59 L. R. A. 118, which holds incompetent, evidence of additional precautions after injury.

12 L. R. A. 561, *FREELAND v. RITZ*, 154 Mass. 257, 26 Am. St. Rep. 244, 28 N. E. 226.

**Sufficiency of memorandum within statute of frauds.**

Cited in *Hibbard v. Hatch Storage Battery Co.* 174 Mass. 298, 54 N. E. 658, holding written offer and acceptance and agreement referring to deed describing lands, sufficient memorandum; *White v. Bigelow*, 154 Mass. 595, 28 N. E. 904, holding memorandum of contract within statute of frauds not expressing in terms or by reference to other writing essential elements, insufficient; *John Fowkes Mfg. Co. v. Metcalf*, 169 Mass. 599, 48 N. E. 848, holding series of writings showing contract to loan money on land not definitely described, insufficient memorandum; *Hayes v. Jackson*, 159 Mass. 457, 34 N. E. 683 (dissenting opinion) majority holding memorandum showing receipt on account of sale of certain property sufficient, though consideration inaccurately stated.

**Parol evidence to identify writings.**

Cited in *Lee v. Butler*, 167 Mass. 429, 57 Am. St. Rep. 466, 46 N. E. 52, holding parol evidence admissible to show connection of different writings constituting contract.

**Actions on incomplete contracts.**

Cited in *Callanan v. Chapin*, 158 Mass. 117, 32 N. E. 941, holding action not maintainable upon preliminary agreement showing essential terms still to be agreed upon; *Sibley v. Felton*, 156 Mass. 277, 31 N. E. 10, holding action not maintainable on preliminary agreement looking to adoption of complete plan; *Speirs v. Union Drop Forge Co.* 180 Mass. 94, 61 N. E. 825, by Knowlton, J., dissenting, who holds contract to manufacture forgings at price thereafter to be agreed upon, unenforceable.

**Necessity of pleading waiver of performance.**

Cited in *Rasmussen v. Levin*, 28 Colo. 452, 65 Pac. 94, holding waiver of default in mortgage not appearing in complaint must be pleaded.

12 L. R. A. 563, *GLOUCESTER ISINGLASS & GLUE CO. v. RUSSIA CEMENT CO.* 154 Mass. 92, 26 Am. St. Rep. 214, 27 N. E. 1005.

**Validity of contracts restricting competition.**

Cited in *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 254, 23 Atl. 287, holding agreement by vendor not to engage in business for certain time, nor in certain territory, valid.

Cited in footnote to *Clark v. Needham*, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years.

Distinguished in *Gamewell Fire Alarm Teleg. Co. v. Crane*, 166 Mass. 53, 22 L. R. A. 675, 39 Am. St. Rep. 458, 35 N. E. 98, holding agreement by vendor of business and patents not to manufacture fire-alarms for ten years, void.

**Validity of combinations to control prices.**

Cited in *Garst v. Harris*, 177 Mass. 74, 58 N. E. 174, holding agreement not to sell proprietary medicine below stipulated price, valid; *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 84, 4 Inters. Com. Rep. 454, 7 C. C. A. 76, 19 U. S. App. 36, 58 Fed. 72, Affirming 53 Fed. 450, holding association of railroads to maintain just and reasonable rates, legal; *Queen Ins. Co. v. State*, 86 Tex. 270, 22 L. R. A. 494, 24 S. W. 397, holding combination of insurance companies to establish uniform rates and agent's commissions, legal.

Cited in footnotes to *Cummings v. Union Blue Stone Co.* 52 L. R. A. 262, which holds void, agreement by persons controlling 90 per cent of sale of blue stone to sell through common agent and maintain agreed prices; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 62 L. R. A. 632, which holds arrangement for rebates by manufacturers of medicines to dealers maintaining selling price, not unlawful combination.

Disapproved in *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 133, 29 C. C. A. 156, 54 U. S. App. 723, 85 Fed. 286, holding combination of cast-iron pipe manufacturers to restrict competition and maintain prices, illegal.

12 L. R. A. 566, *JAQUES v. SWASEY*, 153 Mass. 596, 27 N. E. 771.

**Payment to legatee as advancement.**

Distinguished in *Robbins v. Swain*, 7 Ind. App. 491, 34 N. E. 670, holding advancements to expectant legatee converted into absolute gifts where testator's intention clearly appeared.

12 L. R. A. 571, *BUTTERFIELD v. BYRON*, 153 Mass. 517, 25 Am. St. Rep. 654, 27 N. E. 667.

**Nonperformance of contract excused by intervening impossibility.**

Cited in *Marvel v. Phillips*, 162 Mass. 401, 26 L. R. A. 417, 44 Am. St. Rep. 370, 38 N. E. 1117, holding undertaking involving personal skill as well as advance of funds, discharged by death.

Cited in note (14 L. R. A. 217) on effect of intervening impossibility to perform contract as relief from obligation.

Distinguished in *Chapman v. J. W. Beltz & Sons Co.* 48 W. Va. 16, 35 S. E. 1013, holding destruction of building does not excuse performance of contract to remodel where owner restores to original condition; *Darlington v. Missouri P. R. Co.* 99 Mo. App. 19, 72 S. W. 122, holding consignee not excused by severity of weather from unloading freight within time stipulated in bill of lading.

**Recovery for services when complete performance becomes impossible.**

Cited in *Dolan v. Rodgers*, 149 N. Y. 494, 44 N. E. 167, holding contractor may recover for work done under contract rendered impossible of performance; *Rhodes v. Hinds*, 79 App. Div. 383, 79 N. Y. Supp. 437, holding one contracting to saw and deliver lumber may recover for services in sawing lumber destroyed before delivery; *Angus v. Scully*, 176 Mass. 358, 49 L. R. A. 563, 79 Am. St. Rep. 318, 57 N. E. 674, permitting recovery for work done under contract to move building rendered impossible to perform by its destruction; *Wolf v. Altmeyer*, 8 Pa. Dist. 409, 30 Pittsb. L. J. N. S. 28, holding architect employed to remodel may recover value of services rendered prior to burning of building; *Hayes v. Gross*, 9 App. Div. 17, 40 N. Y. Supp. 1098, sustaining recovery for work and materials on contract to do inside carpenter work on building destroyed before completion; *Charleston Ice Mfg. Co. v. Joyce*, 11 C. C. A. 502, 25 U. S. App. 89, 63 Fed. 921, sustaining right of conductor to recover for work performed upon rescission of contract.

Distinguished in *Vogt v. Hecker*, 118 Wis. 309, 95 N. W. 90, holding contractor cannot recover for work on building destroyed when partially erected; *Teakle v. Moore*, 131 Mich. 436, 91 N. W. 636, holding contractor for carpenter work may recover for injury caused by fall of roof through negligence of owner's agent.

**Effect of advances to contractor.**

Cited in *Bartlett v. Bisbey*, 27 Tex. Civ. App. 409, 66 S. W. 70, holding payments as stipulated at different stages of work do not affect acceptance *pro tanto*.

**Recovery of advance where performance of contract becomes impossible.**

Distinguished in *Pinkham v. Libbey*, 93 Me. 578, 49 L. R. A. 695, 45 Atl. 823, holding money paid for service of stallion not recoverable, though death precludes exercise of privilege of return.

**When set-off may be interposed.**

Cited in *Hall v. Rosenfeld*, 177 Mass. 398, 59 N. E. 68, holding set-off may be filed as amendment to answer.

12 L. R. A. 574, *RAND v. HANSON*, 154 Mass. 87, 26 Am. St. Rep. 210, 28 N. E. 6.

**Conclusiveness of judgments.**

Cited in *Bishop v. Donnell*, 171 Mass. 565, 50 N. E. 170, holding judgment conclusive on defendant not misled by mistake in date of original summons:

*Belcher v. Sheehan*, 171 Mass. 514, 68 Am. St. Rep. 445, 51 N. E. 19, holding judgment against nonresident without attachment, service of process, or appearance, void.

**What reviewable on appeal of case submitted.**

Cited in *Davis v. Harrington*, 160 Mass. 279, 35 N. E. 771, and *Ingalls v. Hobbs*, 156 Mass. 349, 16 L. R. A. 52, 32 Am. St. Rep. 460, 31 N. E. 286, holding only whether judgment warranted by evidence can be considered on appeal of case submitted on agreed facts; *Jaquith v. Winnisimmet Nat. Bank*, 182 Mass. 59, 64 N. E. 723, holding appellate court cannot draw inferences of fact from agreed facts, unless necessarily inferable as matter of law.

12 L. R. A. 577, *COLUMBUS & H. COAL & I. CO. v. TUCKER*, 48 Ohio St. 41, 29 Am. St. Rep. 528, 26 N. E. 630.

**Pollution of waters.**

Cited in *Grey ex rel. Simmons v. Paterson*, 58 N. J. Eq. 10, 42 Atl. 749, holding discharge of city sewage into river not natural and reasonable use; *People v. Hulbert*, 131 Mich. 165, 64 L. R. A. 271, 91 N. W. 211, 100 Am. St. Rep. 588, sustaining riparian owner's right to bathe in source of city's water supply; *Strobel v. Kerr Salt Co.* 164 N. Y. 321, 51 L. R. A. 694, footnote p. 687, 79 Am. St. Rep. 643, 58 N. E. 142, which authorizes injunction against diversion of stream for use in salt works and pollution of stream by return of part.

Cited in footnotes to *Price v. Oakfield Highland Creamery Co.* 24 L. R. A. 333, which authorizes injunction against allowing filth to flow from creamery to adjoining premises; *Weston Paper Co. v. Pope*, 56 L. R. A. 899, which sustains liability for pollution of stream by discharge from strawboard works though business skilfully conducted.

Cited in note (13 L. R. A. 117) on pollution of waters.

**— By mining operations.**

Cited in *Carson v. Hayes*, 39 Or. 106, 65 Pac. 814, denying right of miner to dump *débris* into stream; *Suffolk Gold Min. & Mill. Co. v. San Miguel Consol. Min. & Mill. Co.* 9 Colo. App. 419, 48 Pac. 828, holding custom does not justify discharge of tailings from stamp mill into stream to prejudice of lower proprietors; *Fitzpatrick v. Montgomery*, 20 Mont. 188, 63 Am. St. Rep. 622, 50 Pac. 416, holding necessity does not justify discharge of tailings into stream to injury of lower proprietors; *Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 73, 33 Atl. 286, denying right to pollute stream as natural and necessary result of mining operations.

Cited in note (24 L. R. A. 64) on how far stream may be polluted for mining purposes.

**Riparian rights.**

Cited in *Canton v. Shock*, 66 Ohio St. 33, 58 L. R. A. 641, 90 Am. St. Rep. 557, 63 N. E. 600, sustaining right of municipality situated on stream to take water for domestic use of inhabitants.

**Rights of adjoining owners of oil lands.**

Distinguished in *Kelley v. Ohio Oil Co.* 57 Ohio St. 329, 39 L. R. A. 768, 63 Am. St. Rep. 721, 49 N. E. 399, denying injunction against drilling oil wells near adjoining owner's line.

**Liability for dangerous object.**

Distinguished in *Cleveland Terminal & Valley R. Co. v. Marsh*, 63 Ohio St. 249, 52 L. R. A. 147, 58 N. E. 821, denying liability of railroad to boy exploding torpedo found on track.

**Usage or custom.**

Cited in *Pennsylvania R. Co. v. Naive* (Tenn.) 64 L. R. A. 447, 79 S. W. 124, sustaining custom to suspend business on 4th of July as applied to carrier's delivery of perishable freight.

12 L. R. A. 583, *BROWN v. CUNNINGHAM*, 82 Iowa, 512, 48 N. W. 1042.

**Power of court to disregard prior ruling.**

Cited in *Littleton v. People's Bank*, 95 Iowa, 324, 63 N. W. 666, holding court overruling demurrer may reverse decision by directing verdict; *Van Werden v. Equitable Life Assur. Soc.* 99 Iowa, 623, 68 N. W. 892, holding court may rule on demurrer to amended petition regardless of holdings on demurrer to original.

**Right to cut ice.**

Cited in *Gehlen Bros. v. Knorr*, 101 Iowa, 710, 36 L. R. A. 700, 63 Am. St. Rep. 416, 70 N. W. 757, sustaining right of riparian owner on non-navigable stream to build pond and harvest ice; *Marsh v. McNider*, 88 Iowa, 395, 20 L. R. A. 335, footnote p. 333, 45 Am. St. Rep. 240, 55 N. W. 469, which authorizes sale by tenant of right to cut ice on running stream.

Cited in footnotes to *Wright v. Woodcock*, 25 L. R. A. 499, which holds ice on water flowing land condemned by water company belongs to such company; *Eidemiller Ice Co. v. Guthrie*, 28 L. R. A. 581, which holds owner of land under pond in non-navigable stream entitled to ice as against owner of pond; *Mansfield v. Place*, 18 L. R. A. 39, which holds prescriptive right to entire ice on pond acquired by cutting from any points desired; *Allen v. Weber*, 14 L. R. A. 361, which holds boundary by low-water mark not extended because land purchased for building ice-houses.

**— On public waters.**

Cited in *Rossmiller v. State*, 114 Wis. 184, 58 L. R. A. 98, footnote p. 93, 91 Am. St. Rep. 910, 89 N. W. 839, which holds void, exacting money as consideration for right to take ice from public waters of state; *Becker v. Hall*, 116 Iowa, 590, 56 L. R. A. 574, footnote p. 573, 88 N. W. 324, which holds marking, staking, or cleaning ice not thick enough for harvesting, insufficient appropriation; *Sanborn v. People's Ice Co.* 82 Minn. 59, 51 L. R. A. 835, footnote p. 829, 83 Am. St. Rep. 401, 84 N. W. 641 (dissenting opinion), majority holding taking of ice in large quantities from public lake not exercise of common right in its waters; *Barrett v. Rockport Ice Co.* 84 Me. 158, 16 L. R. A. 775, footnote p. 774, 26 Atl. 802, which holds ice on great pond not appropriated by digging ditch for floating, staking out part of pond, and serving notice of claim.

Cited in footnote to *Concord Mfg. Co. v. Robertson*, 18 L. R. A. 679, which holds littoral proprietor's right to cut ice on great pond not exclusive.

**Riparian rights.**

Cited in note (13 L. R. A. 117) on pollution of waters.

**Title to submerged land.**

Cited in note (42 L. R. A. 174) on title to land under water.

12 L. R. A. 586, *FISHER v. DUDLEY*, 74 Md. 242, 22 Atl. 2.

**Right to have name on official ballot more than once.**

Cited in State *ex rel.* Crawford v. Norris, 37 Neb. 311, 55 N. W. 1086, sustaining right to have name on ballot as candidate of each party nominating.

Cited in footnote to State *ex rel.* Blydenburgh v. Burdick, 34 L. R. A. 845, which denies right to have name of candidate for elector of president appear on ballot more than once.

Distinguished in State *ex rel.* Bateman v. Bode, 55 Ohio St. 232, 34 L. R. A. 500, 60 Am. St. Rep. 696, 45 N. E. 195, holding act prohibiting placing candidate's name on ballot more than once, valid; State *ex rel.* Sturdevant v. Allen, 43 Neb. 657, 62 N. W. 35 and State *ex rel.* Runge v. Anderson, 100 Wis. 531, 42 L. R. A. 242, 76 N. W. 482, denying right to have name of nominee of two parties appear on ballot more than once.

**Obligation to use official ballot.**

Cited in footnote to State *ex rel.* Mize v. McElroy, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted.

12 L. R. A. 588, *HOPPER v. LOVEJOY*, 47 N. J. Eq. 573, 21 Atl. 298.

**Sufficiency of corporate acknowledgment.**

Cited in General Electric Co. v Transit Equipment Co. 57 N. J. Eq. 466, 42 Atl. 101, holding affidavit proving signature of corporation's president and affixing of seal, sufficient acknowledgment.

**Right of receiver to avoid defective chattel mortgage.**

Cited in Graham Button Co v. Spielmann, 50 N. J. Eq. 130, 24 Atl. 571, sustaining right of receiver of insolvent corporation to maintain action to set aside defective chattel mortgage; Franklin Nat. Bank v. Whitehead, 149 Ind. 584, 39 L. R. A. 733, 63 Am. St. Rep. 302, 49 N. E. 592, sustaining right of receiver to avoid chattel mortgage not recorded in time limited by law.

**Title of assignee for creditors.**

Cited in Martin v. Bowen, 51 N. J. Eq. 459, 26 Atl. 823, holding transfer of title deed to creditor as security creates equitable lien enforceable against assignee for creditors.

**Equity jurisdiction over suits involving validity of chattel mortgages.**

Distinguished in Jersey City Mill. Co. v. Blackwell, 58 N. J. Eq. 124, 44 Atl. 153, holding creditor acquiring title to mortgaged chattels cannot enjoin foreclosure of defective mortgage.

12 L. R. A. 580, *Ex parte McCABE*, 46 Fed. 363.

12 L. R. A. 600, *WHEELER v. SELDEN*, 63 Vt. 429, 25 Am. St. Rep. 771, 21 Atl. 615.

**Transactions between husband and wife.**

Cited in Caswell v. Jones, 65 Vt. 462, 20 L. R. A. 508, 36 Am. St. Rep. 879, 26 Atl. 529, holding husband's cow purchased by wife at invalid sheriff's sale, remaining in his possession, attachable for his debts.

Cited in footnote to Dempster Mill Mfg. Co. v. Bundy, 56 L. R. A. 739, which holds void, contract that product of joint labor of husband and wife shall belong to wife.

**Necessity of change of possession.**

Cited in *Baldwin v. Thayer*, 71 N. H. 259, 93 Am. St. Rep. 510, 52 Atl. 852, holding sale of lumber loaded upon car by vendor directing issuance of shipping receipt to vendee, invalid as to attaching creditor.

12 L. R. A. 601, *HARVEY v. CRANE*, 85 Mich. 316, 48 N. W. 582.

12 L. R. A. 605, *FINNEY v. HARDING*, 136 Ill. 573, 27 N. E. 289.

**Liability of purchaser from tenant to landlord having lien.**

Cited in *Bowers v. Davis*, 79 Ill. App. 349, and *Faith v. Taylor*, 69 Ill. App. 419, holding purchaser not liable to landlord authorizing tenant to sell crop.

Distinguished in *Carter v. Andrews*, 56 Ill. App. 648, holding purchaser of grain with constructive notice of lien liable to landlord.

Disapproved in *Shelby v. Moore*, 22 Ind. App. 373, 53 N. E. 842, holding purchaser of grain without notice of landlord's lien, liable for value.

**Nature of landlord's lien.**

Cited in *Travers v. Cook*, 42 Ill. App. 582, holding landlord having mere lien, without levy of distress warrant, cannot replevy crop.

12 L. R. A. 609, *SPRINGER v. CHICAGO*, 135 Ill. 552, 20 N. E. 514.

**Offer to sell as admission of value.**

Cited in *Sanitary District v. Pearce*, 110 Ill. App. 595, holding consideration in deed after overflowing of land prima facie evidence of price paid.

Distinguished in *Danville v. Mabin*, 57 Ill. App. 26, holding exclusion of evidence of agent to sell, as to asking price, in action for damage to abutting property, proper.

**Measure of damages.**

Distinguished in *Dady v. Condit*, 209 Ill. 500, 70 N. E. 1088, holding measure of damages for breach of contract to convey, increase of market value on day of breach, over contract price.

**— To land by public improvement or in condemnation.**

Cited in *Osgood v. Chicago*, 44 Ill. App. 534, denying recovery where benefits to property by construction of public improvements equal damage; *Stewart v. Ohio River R. Co.* 38 W. Va. 449, 18 S. E. 604, denying recovery where fair market value of abutting property is as much immediately after as before construction of railroad; *Metropolitan West Side Elev. R. Co. v. Stickney*, 150 Ill. 380, 26 L. R. A. 778, 37 N. E. 1098, denying damages for injury to property not taken in condemnation proceedings where value not depreciated; *Chicago, P. & St. L. R. Co. v. Leah*, 41 Ill. App. 590, holding measure of damages by construction of railroad difference between market value of property before and after; *Chicago, P. & St. L. R. Co. v. Leah*, 152 Ill. 252, 38 N. E. 556, holding proof of annoyances from passing trains proper in action for damages from construction of railroad; *Rockford v. Doughty*, 103 Ill. App. 49; *North Alton v. Dorsett*, 59 Ill. 613; *Springfield v. Griffith*, 46 Ill. App. 249, — holding measure of damages depreciation in value occasioned by change of street grade; *Chicago v. Webb*, 102 Ill. App. 237, holding entire improvement must be taken into consideration in determining damage to abutting property.

Limited in *Herrmann v. East St. Louis*, 58 Ill. App. 173, holding general benefit received by property in common with neighboring lands by erection of public work cannot be offset against damages.

Distinguished in *Bloomington v. Pollock*, 141 Ill. 353, 31 N. E. 146, holding measure of damages to abutting property by construction of street improvement depreciation in value plus special tax.

**Value of land taken by eminent domain.**

Cited in footnote to *Philadelphia Ball Club v. Philadelphia*, 46 L. R. A. 724, which requires damages from taking of property in eminent domain estimated as of the time when injury done, without considering future profits of business or subsequent change of circumstances.

**When view by jury allowable.**

Cited in *Osgood v. Chicago*, 154 Ill. 197, 41 N. E. 40, holding jury may view premises in action for damages to abutting property by constructing viaduct; *Atchison, T. & S. F. R. Co. v. Pratt*, 53 Ill. App. 266, and *Savanna v. Loop*, 47 Ill. App. 215, holding view proper in action for damages to abutting property by street improvement; *Sanitary District v. McGuirl*, 86 Ill. App. 399, holding view in action for damages to property by public improvement within court's discretion; *Pike v. Chicago*, 155 Ill. 663, 40 N. E. 567, and *Vane v. Evanston*, 150 Ill. 621, 37 N. E. 901, holding view by jury in proceeding to confirm special assessment for local improvement, within court's discretion; *Petzel v. Chicago & N. W. R. Co.* 103 Ill. App. 210, and *Chicago, P. & St. L. R. Co. v. Leah*, 41 Ill. App. 587, holding view of premises in action for damages by construction of railroad, proper; *Lake Erie & W. R. Co. v. Purcell*, 75 Ill. App. 578, holding view by jury in action for damages occasioned by nuisance, within court's discretion; *Dady v. Condit*, 87 Ill. App. 253, holding location and surroundings of premises viewed may be considered by jury in determining value; *Chicago v. Le Moyne*, 56 C. C. A. 284, 119 Fed. 668, holding exclusion of sketch showing building which might be constructed conforming to change grade, within court's discretion; *Springfield v. McCarthy*, 79 Ill. App. 390, holding view by jury of *locus in quo* in action for injury from falling on sidewalk, discretionary with court; *Lanark v. Dougherty*, 153 Ill. 165, 38 N. E. 892, holding in negligence case examination of injured limb by physician in jury's presence within court's discretion; *Swift & Co. v. O'Neill*, 88 Ill. App. 168, and *Chicago & A. R. Co. v. Clausen*, 70 Ill. App. 556, holding exhibition of injured person to jury within discretion of trial court; *Painter v. People*, 147 Ill. 467, 35 N. E. 64, holding exhibition to jury of clothing in murder case, proper; *Keating v. People*, 160 Ill. 487, 43 N. E. 724, holding roll of paper substituted by thief for money may be exhibited to jury.

Cited in note (42 L. R. A. 368, 371, 374, 375) on view by jury.

**View by jury as basis for finding.**

Cited in *Cleveland, C. C. & St L. R. Co. v. Trimmell*, 75 Ill. App. 589, and *Chicago, R. I. & P. R. Co. v. Farwell*, 60 Neb. 325, 83 N. W. 71, holding verdict may be based on view, in connection with other evidence; *Metropolitan West Side Elev. R. Co. v. Goll*, 100 Ill. App. 327, holding view unsupported by evidence will not sustain verdict; *Gauggel v. Ainley*, 83 Ill. App. 587, holding finding as to character of fixture sustained by jury's view.



**When party cannot complain of erroneous instruction.**

Cited in *Illinois C. R. Co. v. Creighton*, 63 Ill. App. 167; *Keeler v. Herr*, 54 Ill. App. 469, holding party cannot complain of instruction on adversary's behalf like one given at his request.

12 L. R. A. 617, *HASTINGS v. GRIMSHAW*, 153 Mass. 497, 27 N. E. 521.

**Riparian rights respecting water fronts.**

Cited in footnotes to *Sage v. New York*, 38 L. R. A. 606, which denies riparian owner's right to compensation for cutting off access to water by municipal improvement of water front; *Slingerland v. International Contracting Co.* 56 L. R. A. 494, which denies riparian owner's right to damages for injuries to right of access by one dredging under government authority; *Lewis v. Portland*, 22 L. R. A. 736, which upholds riparian owner's right to build wharves.

Cited in notes (40 L. R. A. 639) on right to erect wharves; (45 L. R. A. 240) on title to land between high and low water mark; (40 L. R. A. 393) on separation of riparian rights from upland.

12 L. R. A. 618, *CLAPP v. PINEGROVE TWP.* 138 Pa. 35, 20 Atl. 836.

**When statute of limitations begins to run.**

Cited in *Merchants' Nat. Bank v. Spates*, 41 W. Va. 33, 56 Am. St. Rep. 828, 23 S. E. 681, holding in action for breach of implied warranty arising from assignment of county warrant, statute runs from date of assignment.

**Recovery of voluntary payment of municipal assessment.**

Cited in *Murtland v. Pittsburg*, 189 Pa. 378, 43 W. N. C. 441, 41 Atl. 1113, sustaining right to recover amount of liens deposited to clear title pending appeal from special assessment.

12 L. R. A. 620, *Re HUSS*, 126 N. Y. 537, 27 N. E. 784.

**Presumption of continuance.**

Cited in *Sowles v. Carr*, 69 Vt. 417, 34 Atl. 77, holding proof of possession at prior date raises presumption of continuance; *Bonham v. Citizens Street R. Co.* 158 Ind. 110, 62 N. E. 996, holding continued existence of proved municipal ordinance presumed.

**Validity of bequests to foreign legatees, how determined.**

Cited in *Hope v. Brewer*, 136 N. Y. 142, 18 L. R. A. 464, 48 N. Y. S. R. 842, 32 N. E. 558, Affirming 40 N. Y. S. R. 298, 15 N. Y. Supp. 849, holding bequest to trustees of foreign charity valid under laws of that country, valid, though contravening state laws relating to trusts and perpetuities; *Re Lang*, 9 Misc. 529, 30 N. Y. Supp. 388, sustaining bequest to legatee entitled to take under law of domicil, though illegal where made; *Re Leo-Wolf*, 25 Misc. 470, 55 N. Y. Supp. 650, sustaining bequest to religious society able to administer trust under laws of state where domiciled; *Kurzman v. Lowy*, 23 Misc. 383, 52 N. Y. Supp. 83, sustaining legacy in trust to establish stipendium in school in foreign country; *Re Sturges*, 28 Misc. 111, 59 N. Y. Supp. 783, holding bequest good under law of other state void where no one presently able to receive fund.

Cited in footnote to *Meunier's Succession*, 48 L. R. A. 77, which sustains legacy to commune in foreign country.

Cited in notes (14 L. R. A. 70) on municipal corporation as trustee of a charity; (24 L. R. A. 325) on right of foreign corporations to own real estate.

12 L. R. A. 624, *Re WILSON*, 8 Mackey, 341.

**Who is peddler.**

Cited in footnotes to *State v. Wells*, 48 L. R. A. 99, which holds one soliciting orders for goods and carrying goods to fill previous sales, not a peddler; *Hewson v. Englewood*, 21 L. R. A. 736, which holds agent delivering from wagon goods previously ordered and taking other orders not a peddler; *Stuart v. Cunningham*, 20 L. R. A. 430, which holds one delivering goods previously sold not a peddler.

**Peddlers' tax as regulation of interstate commerce.**

Cited in *People v. Sawyer*, 106 Mich. 431, 64 N. W. 333, holding license tax on peddler not invalid regulation of interstate commerce in case of resident selling from general stock within state.

Cited in notes (14 L. R. A. 98) on peddlers and drummers as related to interstate commerce; (60 L. R. A. 692) on corporate taxation and the commerce clause.

12 L. R. A. 632, *EISENBACH v. HATFIELD*, 2 Wash. 236, 26 Pac. 539.

**Riparian rights.**

Cited in *New Whatcom v. Fairhaven Land Co.* 24 Wash. 501, 54 L. R. A. 195, 64 Pac. 735, denying right of municipality to appropriate waters of navigable lake to injury of riparian owner on outlet, whose rights vested before adoption of constitution; *Sage v. New York*, 154 N. Y. 78, 38 L. R. A. 613, footnote p. 606, 61 Am. St. Rep. 592, 47 N. E. 1096, which denies riparian owner's right to compensation for cutting off access to water by municipal improvement of water front.

Cited in footnotes to *Slingerland v. International Contracting Co.* 56 L. R. A. 494, which denies riparian owner's right to damages for injuries to right of access by one dredging under government authority; *Lewis v. Portland*, 22 L. R. A. 736, which upholds riparian owner's right to build wharves; *Prior v. Swartz*, 18 L. R. A. 668, which holds riparian right to build wharves not destroyed by designating land for planting oysters; *Farist Steel Co. v. Bridgeport*, 13 L. R. A. 590, which requires compensation to riparian owner on appropriation of land by city in establishing harbor lines; *Carr v. Carpenter*, 53 L. R. A. 333, which sustains upland owner's right to take seaweed stranded on beach; *Allen v. Allen*, 30 L. R. A. 497, which holds public right of fishery paramount to riparian right to cut grass or sedge.

Cited in notes (14 L. R. A. 498) on establishment of dock lines; (40 L. R. A. 602) on right of owner of upland to access to navigable water; (40 L. R. A. 643) on right to erect wharves; (58 L. R. A. 210) on law of accretion to shore lands.

**Ownership of lands below high-water mark.**

Followed in *Pierce v. Kennedy*, 2 Wash. 325, 26 Pac. 554, and *Harbor Line v. State*, 2 Wash. 533, 27 Pac. 550, holding soil under navigable waters up to high-water mark owned by state; *State ex rel. McKenzie v. Forrest*, 11 Wash. 233, 39

Pac. 684, construing tide lands subject to sale as lands between inner harbor areas and high-tide mark; *Allen v. Forrest*, 8 Wash. 703, 24 L. R. A. 608, 36 Pac. 971, and *Shively v. Bowlby*, 152 U. S. 56, 38 L. ed. 351, 14 Sup. Ct. Rep. 548, Affirming 22 Or. 421, 30 Pac. 154, holding title to tide lands vested in state; *McCue v. Bellingham Bay Water Co.* 5 Wash. 159, 31 Pac. 461, holding land below ordinary high-water mark of lake belongs to state; *Sullivan v. Callvert*, 27 Wash. 605, 68 Pac. 363, holding improver of tide lands acquires no title.

Cited in footnotes to *McBurney v. Young*, 29 L. R. A. 539, which defines low-water mark as ordinary low-water mark; *Webb v. Demopolis*, 21 L. R. A. 62, which holds riparian owner's title extends to low-water mark on navigable river.

Cited in notes (45 L. R. A. 239) on title to land between high and low water mark; (16 L. R. A. 354) on ownership of flats or land below high-water mark.

#### **Rights of upland owner to tide lands.**

Cited in *West Coast Improv. Co. v. Winsor*, 8 Wash. 492, 36 Pac. 441, holding uplands owner with preference right to purchase tide lands may enjoin interference with possession; *Morse v. O'Connell*, 7 Wash. 119, 34 Pac. 426, denying right of occupying claimant to enjoin occupation of tide lands in front not materially interfering with access to water; *Dearborn v. Moran*, 2 Wash. 406, 27 Pac. 230 (dissenting opinion), and *Kenyon v. Knipe*, 2 Wash. 399, 13 L. R. A. 145, 27 Pac. 227 (dissenting opinion), majority holding purchaser of lots according to plat showing other lots in rear under tide water acquires no riparian rights. Distinguished in *Seattle & M. R. Co. v. Carraher*, 21 Wash. 494, 58 Pac. 570, holding purchaser of upland "with appurtenances" has preference right to purchase as against subsequent grantee of tide lands.

12 L. R. A. 652, *JAMIESON v. INDIANA NATURAL GAS & OIL CO.* 3 Inters. Com. Rep. 613, 128 Ind. 555, 28 N. E. 76.

Minority stockholder's action to enjoin proceeding with contract in *Benedict v. Columbus Constr. Co.* 49 N. J. Eq. 31, 23 Atl. 485.

Action for breach of warranty of gas pipe in *Crane Co. v. Columbus Constr. Co.* 20 C. C. A. 240, 46 U. S. App. 52, 73 Fed. 990.

#### **Judicial notice.**

Cited in *Indiana Natural Gas & Oil Co. v. Jones*, 14 Ind. App. 57, 42 N. E. 487, and *Lewisville Natural Gas Co. v. State*. 135 Ind. 52, 21 L. R. A. 735, 34 N. E. 702, holding courts judicially notice dangerous nature of natural gas; *Poor v. Watson*, 92 Mo. App. 99, holding courts will judicially notice that coal mines generate gas; *Racer v. State*, 131 Ind. 402, 31 N. E. 81, holding averment contradicting matter of which judicial notice taken, unavailing.

#### **Pumping gas.**

Cited in *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 156 Ind. 680, 59 N. E. 165, and *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 568, 58 N. E. 851, holding plaintiff not suffering special injury cannot enjoin pumping gas at unlawful pressure; *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 475, 50 L. R. A. 774, 57 N. E. 912, upholding right of landowners to enjoin increase of natural flow of gas by pumping; *Richmond Natural Gas Co. v. Enterprise Natural Gas Co.* 31 Ind.

App. 230, 66 N. E. 782, sustaining right to use pumps in transporting natural gas.

**Natural gas as dangerous agency.**

Cited in *Mississinewa Min. Co. v. Patton*, 129 Ind. 474, 28 Am. St. Rep. 203, 28 N. E. 1113, holding gas company liable for failure to use reasonable care to prevent escape of gas from main; *Richmond Gas Co. v. Baker*, 146 Ind. 606, 36 L. R. A. 688, 45 N. E. 1049, holding company liable for explosion of gas from defective pipe.

**Police power.**

Cited in *Townsend v. State*, 147 Ind. 628, 37 L. R. A. 298, 62 Am. St. Rep. 477, 47 N. E. 19, sustaining statute forbidding wasteful use of natural gas in flambeau lights; *Ohio Oil Co. v. Indiana*, 177 U. S. 206, 44 L. ed. 738, 20 Sup. Ct. Rep. 676, sustaining statute forbidding escape of gas or oil from well into open air longer than two days after striking; *State ex rel. Duensing v. Roby*, 142 Ind. 192, 33 L. R. A. 221, 51 Am. St. Rep. 174, 41 N. E. 145, sustaining statute regulating horse racing; *State v. Lewis*, 134 Ind. 254, 20 L. R. A. 54, 33 N. E. 1024, sustaining statute making possession of gill net or seine misdemeanor; *Williams v. Citizens' R. Co.* 130 Ind. 73, 15 L. R. A. 67, 30 Am. St. Rep. 201, 29 N. E. 408, holding contract rights subordinate to police power; *Noblesville v. Lake Erie & W. R. Co.* 130 Ind. 4, 29 N. E. 484, holding, *obiter*, condition attached to dedication of street impairing police power, void; *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 546, 53 L. R. A. 135, footnote p. 134, 58 N. E. 706, which holds void, prohibition of transportation of natural gas out of state.

Cited in note (16 L. R. A. 444) on natural gas.

**Impossibility of performance as affecting validity of contracts.**

Cited in note (14 L. R. A. 215) on effect of intervening impossibility to perform contracts as relief from obligation.

**Special legislation.**

Cited in *State v. Loomis*, opinion not given in 115 Mo. 307, 21 L. R. A. 795, 22 S. W. 350, holding unconstitutional law regulating mode of paying employees by mining and manufacturing concerns.

**Burden of showing statute unconstitutional.**

Cited in *State ex rel. Smith v. McClelland*, 138 Ind. 401, 37 N. E. 799, and *State ex rel. Harrison v. Menaugh*, 151 Ind. 267, 43 L. R. A. 411, 51 N. E. 117, holding burden of showing unconstitutionality rests on party asserting invalidity of statute.

**Scope of legislative functions.**

Cited in *Townsend v. State*, 147 Ind. 634, 37 L. R. A. 299, 62 Am. St. Rep. 477, 47 N. E. 19, holding courts cannot pronounce statute invalid because encroaching upon natural rights; *Townsend v. State*, 147 Ind. 635, 37 L. R. A. 300, 62 Am. St. Rep. 477, 47 N. E. 19, holding legislative determination of what constitutes waste of gas not usurpation of judicial power; *State ex rel. Geake v. Fox*, 158 Ind. 129, 56 L. R. A. 895, 63 N. E. 19, holding policy, expediency, necessity, or wisdom, question for legislature.

12 L. R. A. 664, *DOWNING v. INDIANA STATE BD. OF AGRICULTURE*, 129 Ind. 443, 28 N. E. 123, 614.

**What corporations private.**

Cited in State *ex rel. White v. Neff*, 52 Ohio St. 404, 28 L. R. A. 413, 40 N. E. 720, holding eleemosynary corporation charged with maintenance of college, private.

Cited in note (29 L. R. A. 381) on nature of incorporated institutions belonging to state.

12 L. R. A. 667, *McARTHUR v. GORDON*, 126 N. Y. 597, 27 N. E. 1033.

**Trust unaffected by trustee's acts.**

Cited in *Nelson v. Ratliff*, 72 Miss. 664, 18 So. 407, holding trustee cannot by act or default determine trust.

**Trusts, how established.**

Cited in *Hutchins v. Van Vechten*, 140 N. Y. 119, 35 N. E. 446, holding letters and informal memoranda sufficient to prove trust; *Locke v. Rings*, 66 Hun, 440, 50 N. Y. S. R. 296, 21 N. Y. Supp. 524 (dissenting opinion), majority holding no trust created by testamentary direction to carry out provisions of unauthenticated trust deed.

**Place of support of beneficiary of trust or contract.**

Cited in *Sherman v. Skuse*, 166 N. Y. 351, 59 N. E. 990, Affirming 45 App. Div. 338, 60 N. Y. Supp. 1030, sustaining right of beneficiary of trust to claim support at any reasonable place; *Empie v. Empie*, 35 App. Div. 55, 54 N. Y. Supp. 402, holding grantor of farm in consideration of agreement to support may choose place of residence; *Tuttle v. Burgett*, 53 Ohio St. 503, 30 L. R. A. 216, footnote p. 214, 53 Am. St. Rep. 649, 42 N. E. 427, which upholds mortgagee's right to claim support under mortgage at any reasonable place.

12 L. R. A. 673, *MILLS v. UNITED STATES*, 46 Fed. 738.

**Riparian owner's right to compensation for damages resulting from public improvement.**

Cited in *Salliotte v. King Bridge Co.* 65 L. R. A. 636, 58 C. C. A. 470, 122 Fed. 382, holding riparian owner cannot recover damages resulting from lawfully erected bridge turning current against his land.

Cited in note (59 L. R. A. 827) on liability for damming back water of stream. Distinguished in *United States v. Lynah*, 188 U. S. 473, 47 L. ed. 550, 23 Sup. Ct. Rep. 349, holding flooding lands so as to totally destroy value, by improvements in navigable river, a taking requiring compensation.

**Low-water mark defined.**

Cited in footnote to *McBurney v. Young*, 29 L. R. A. 539, which defines low-water mark as ordinary low-water mark.

12 L. R. A. 681, *AMERICAN FREEHOLD LAND & MORTG. CO. v. THOMAS*, 47 Fed. 550.

Denial of motion to set aside decree against mortgage company held erroneous in 18 C. C. A. 327, 30 U. S. App. 690, 71 Fed. 782.

**Powers of court derived from statute.**

Cited in *Long v. Superior Court*, 102 Cal. 453, 36 Pac. 807, holding court's powers in statutory proceeding limited by statute.

Cited in note (18 L. R. A. 269) on adoption by Federal courts of remedies created by state statutes.

**When judgment collaterally assailable.**

Cited in *Alexander v. Mortgage Co.* 47 Fed. 134, holding judgment beyond court's powers subject to collateral attack at any time.

Cited in footnote to *Wonderly v. Lafayette County*, 45 L. R. A. 386, which sustains suit in state court to set aside Federal judgment obtained by fraudulent pretense of diverse citizenship.

**Trusts, statute of limitations.**

Cited in *Jones v. Henderson*, 149 Ind. 463, 49 N. E. 443, holding continuing trust not within statute of limitations.

12 L. R. A. 690, *SALENTINE v. MUTUAL BEN. L. INS. CO.* 79 Wis. 580, 48 N. W. 855.

12 L. R. A. 693, *HOBART v. YOUNG*, 63 Vt. 363, 21 Atl. 612

**Restrictions on cross-examination.**

Cited in footnote to *Kolb v. Union R. Co.* 54 L. R. A. 646, which denies right to cross-examine plaintiff in suit for husband's death as to birth of illegitimate child since his death.

**Prior agreement as part of contract.**

Cited in *Beverwick Brewing Co. v. Oliver*, 69 Vt. 324, 37 Atl. 1110, holding orders given pursuant to previous understanding governed thereby.

**Oral warranty accompanying written contract.**

Cited in *Worland v. Secrest*, 106 Ky. 715, 51 S. W. 445, holding oral warranty cannot be grafted on written transfer of territorial right to handle article.

Cited in footnote to *Diebold Safe & Lock Co. v. Huston*, 28 L. R. A. 53, which holds inadmissible oral evidence of warranty at time of written order for a No. 4 fire-proof safe.

**Warranty.**

Cited in *Reese v. Bates*, 94 Va. 331, 26 S. E. 865, holding affirmation of quality by seller relied on by buyer, warranty; *Crossman v. Johnson*, 63 Vt. 335, 13 L. R. A. 679, 22 Atl. 608, holding private representations prior to public sale of horse, warranty; *Norris v. Parker*, 15 Tex. Civ. App. 121, 38 S. W. 259, holding special warranty of animal covers obvious defects, where purchaser relies thereon.

Cited in footnotes to *Holmes v. Tyson*, 15 L. R. A. 209, which holds statement, horse kind, sound, and gentle not a warranty; *Olson v. Port Huron Live-Stock Asso.* 33 L. R. A. 557, which holds pregnancy of ewes in October not breach of contract to deliver in "healthy condition."

Cited in notes (13 L. R. A. 678) on warranty before or after sale; (15 L. R. A. 795) on effect of representing things sold to be "good."

12 L. R. A. 698, *SPAULDING v. PENNSYLVANIA CO.* 142 Pa. 503, 21 Atl. 979.

**Measure of damages for pain and suffering.**

Followed in *Goodhart v. Pennsylvania R. Co.* 177 Pa. 14, 38 W. N. C. 548, 55 Am. St. Rep. 705, 35 Atl. 191, and *Schenkel v. Pittsburg & B. Traction Co.* 194 Pa.

185, 44 Atl. 1072; holding price for which one would voluntarily submit to similar personal injury, not proper measure of damages.

Cited in *Dooner v. Delaware & H. Canal Co.* 164 Pa. 34, 30 Atl. 269, holding judge's charge that no sane man would lose leg for any compensation, "but you are not to be guided by such consideration in fixing damages," improper; *Closser v. Washington Twp.* 11 Pa. Super. Ct. 122, holding statement of injured person that he "would not take any money to go through it again," improper.

**Measure of recovery for death.**

Cited in note (17 L. R. A. 72) on measure of recovery for death caused by negligence.

12 L. R. A. 700, *WEINSTEIN v. FREYER*, 93 Ala. 257, 9 So. 285.

**Extra-territorial application of statutes regulating conditional sales.**

Cited in *Public Parks Amusement Co. v. Embree-McLean Carriage Co.* 64 Ark. 33, 40 S. W. 582, holding statute requiring record of conditional sale as against bona fide purchasers has no application, where property resold in another state.

Cited in notes (13 L. R. A. 741) on lien of chattel mortgage; removal of property to another state; (64 L. R. A. 836) on conflict of laws as to sales of personal property.

**Conditional sales, vendor's rights.**

Cited in *Adams Mach. Co. v. Interstate Bldg. & L. Asso.* 119 Ala. 98, 24 So. 857, holding conditional vendor of chattels to be annexed to freehold can assert title against subsequent bona fide mortgagee; *Ensley Lumber Co. v. Lewis*, 121 Ala. 97, 25 So. 729, and *Warren v. Liddell*, 110 Ala. 245, 20 So. 89, holding bona fide purchaser from conditional vendee cannot defeat recovery by original vendor; *Thomason v. Lewis*, 103 Ala. 429, 15 So. 830, holding trover maintainable by conditional vendor against purchaser under vendee's mortgage.

Cited in footnote to *Chafey v. Mathews*, 27 L. R. A. 558, which holds vendee's interest in goods by conditional sale passes under mortgage of all his stock.

**— Election of remedies.**

Cited in *Montgomery Iron Works v. Smith*, 98 Ala. 645, 13 So. 525, holding foreclosure of mortgage on other property securing purchase price of article conditionally sold does not estop vendor asserting title.

Cited in footnote to *Crompton v. Beach*, 18 L. R. A. 187, which holds conditional vendor's exercise of option to enforce payment of note defeats right to retake property.

12 L. R. A. 705, *BOWLER v. EISENHOOB*, 1 S. D. 577, 48 N. W. 136.

**Election contests.**

Cited in *Batterton v. Fuller*, 6 S. D. 267, 60 N. W. 1071, holding amendment changing grounds of contest not allowable after time limited by statute for filing notice.

Cited in footnote to *Gillespie v. Dion*, 33 L. R. A. 703, which holds failure to allege election contestant's qualification to maintain proceeding, fatal.

Distinguished in *Smith v. Lawrence*, 2 S. D. 198, 49 N. W. 7, holding mandamus proper to compel recanvass of votes where notice of contest not served within twenty days after canvass.

**Assumption of office before declaration of result.**

Cited in *Re Moore*, 4 Wyo. 114, 31 Pac. 980, holding assumption of duties of office prior to canvass of vote, invalid.

**Decision of the vote.**

Cited in note (47 L. R. A. 560) on decision of the vote at election.

12 L. R. A. 712, *BLAKE v. SAWYER*, 83 Me. 129, 23 Am. St. Rep. 762, 21 Atl. 834.

**Revival of barred debt by general payment.**

Cited in *Wilden v. McAllister*, 91 Mo. App. 453, holding part payment not appropriated by debtor will not remove bar of statute.

Cited in note (14 L. R. A. 208) on revival of barred debt by application of general payment.

12 L. R. A. 714, *SPARKS v. DESPATCH TRANSFER CO.* 104 Mo. 531, 24 Am. St. Rep. 351, 15 S. W. 417.

**When corporation bound by officer's acts.**

Cited in *Roe v. Bank of Versailles*, 167 Mo. 424, 67 S. W. 303, holding bank president may agree to loan its money; *Jones v. Williams*, 139 Mo. 26, 37 L. R. A. 688, 61 Am. St. Rep. 436, 39 S. W. 486, holding management of corporation business may be intrusted to president; *G. V. B. Min. Co. v. First Nat. Bank*, 36 C. C. A. 640, 95 Fed. 30, holding corporation bound by contract of president managing its business; *Meating v. Tigerton Lumber Co.* 113 Wis. 387, 89 N. W. 152, holding president may bind corporation by contract when expressly authorized or when impliedly authorized by usage; *Smith v. Richardson*, 77 Mo. App. 432, holding president's contract unauthorized by directors voidable only; *Ferguson v. Venice Transp. Co.* 79 Mo. App. 358, denying inherent authority of president to assign corporate asset in payment of debt; *Degnan v. Thoroughman*, 88 Mo. App. 65, denying power of president without authority from directors to make assignment for creditors; *Cox v. Robinson*, 27 C. C. A. 127, 48 U. S. App. 388, 82 Fed. 284, holding bank bound by assignment of judgment by vice president in general control; *State v. Silva*, 130 Mo. 460, 32 S. W. 1007, holding evidence of custom admissible to show corporation secretary's duties; *Moore v. H. Gaus & Sons Mfg. Co.* 113 Mo. 107, 20 S. W. 975, sustaining assignment of claim by managing officer of corporation without formal action of directors; *Kaes v. St. Louis Lime Co.* 71 Mo. App. 109, holding manager of company presumptively authorized to buy wood required in business; *Hill v. Bank of Seneca*, 87 Mo. App. 601, holding cashier's contract warranted by usage to effect collection of notes, binding on bank; *Parsons v. Guarantee Invest. Co.* 64 Mo. App. 35, holding note ratified by corporation binding though executed by officer contrary to by-laws; *Jones v. Williams*, 139 Mo. 23, 37 L. R. A. 688, 61 Am. St. Rep. 436, 39 S. W. 486, holding corporation may be bound by agent without reciting authority, signing corporate name, or adding official designation to signature.

Distinguished in *Trent v. Sherlock*, 24 Mont. 264, 61 Pac. 650, denying authority of superintendent to pledge company's property for corporate debt; *Mathias v. White Sulphur Springs Asso.* 19 Mont. 362, 48 Pac. 624, holding contract of president not in active control of business and without actual authority, not binding on corporation.



**When principal bound by acts of agent.**

Cited in *Butler County v. Boatmen's Bank*, 143 Mo. 30, 44 S. W. 1047, holding that acts of financial agent of county within apparent scope of authority bind county; *Meier v. Proctor & G. Co.* 81 Mo. App. 418, holding salesman's contract within scope of apparent authority binding on principal; *Clack v. Southern Electrical Supply Co.* 72 Mo. App. 512, holding employer liable for act of salesman in taking customer down dangerous stairway.

**Who liable on note.**

Cited in *Duncan v. Kirtley*, 54 Mo. App. 658, holding maker of note cannot shift liability to corporation not mentioned therein; *Sharp v. Garnet*, 54 Mo. App. 415, holding maker of note not discharged from liability by third person's agreement to assume.

Cited in note (20 L. R. A. 707) on admissibility of extrinsic evidence to show who is liable as maker of note.

**Appeal, reversal in part.**

Cited in *Reichenbach v. United Masonic Ben. Asso.* 112 Mo. 24, 20 S. W. 317, holding findings on distinct causes of action severable on appeal.

12 L. R. A. 721, *PROCTOR v. CLARK*, 154 Mass. 45, 27 N. E. 673.

**Construction of executory devises.**

Cited in *Bigelow v. Clap*, 166 Mass. 91, 43 N. E. 1037, holding executory devise to persons "then living" refers to persons living at time of distribution; *Eager v. Whitney*, 163 Mass. 466, 40 N. E. 1046, holding will providing for payment at future date to testator's then legal representatives creates contingent remainder; *Hale v. Hobson*, 167 Mass. 401, 45 N. E. 913, holding provision for distribution of trust fund to grandchildren upon termination of trust creates contingent interests; *Welch v. Brimmer*, 169 Mass. 212, 47 N. E. 699, holding devise if son die without issue "then" to heirs goes to heirs living at son's death; *Codman v. Brooks*, 167 Mass. 504, 46 N. E. 102, holding "next of kin" to be determined as of date of act of Congress appropriating money for French spoliation claims; *Taylor v. Taylor*, 118 Iowa, 413, 92 N. W. 71, holding under executory devise to children "or their heirs as the law directs," heirs take by substitution, and not by descent; *International Trust Co. v. Williams*, 183 Mass. 174, 66 N. E. 798, holding husband takes statutory proportion under devise to heirs of wife.

**Who are heirs.**

Cited in *Butrick v. Tilton*, 155 Mass. 463, 29 N. E. 1088, and *Brownell v. Briggs*, 173 Mass. 531, 54 N. E. 251, holding widow of intestate leaving no issue takes fee of realty up to \$5,000.

Cited in footnotes to *Mullen v. Reed*, 24 L. R. A. 664, which holds widow not an heir at law; *Hindry v. Holt*, 39 L. R. A. 351, which holds right of action for death limited to lineal descendants by words "heir or heirs" in statute.

**— Meaning as used in wills or deeds of trust.**

Cited in *Re Smith*, 156 Mass. 411, 31 N. E. 387, holding husband of woman leaving no issue entitled to \$5,000 in trust property divisible among her heirs; *Olney v. Lovering*, 167 Mass. 448, 45 N. E. 766, holding widow of intestate takes \$5,000 out of devise to heirs; *Holmes v. Hancock*, 158 Mass. 399, 33 N. E. 608,

holding widow entitled to remainder of trust fund devised to beneficiary's heirs; *Lawrence v. Crane*, 158 Mass. 393, 33 N. E. 605, holding wife entitled to share in residue of estate directed to be turned into personalty and divided among heirs.

Cited in footnotes to *Grainger v. Grainger*, 36 L. R. A. 186, which holds rule in *Shelley's Case* not applicable to devise to one for life and after his death to heirs of his body, if any survive him, with devise over otherwise; *MacLean v. Williams*, 59 L. R. A. 125, which requires distribution *per stirpes* under will giving two thirds of estate in equal shares to heirs at law of deceased husband living at testatrix's death and the other third to her heirs at law then living.

12 L. R. A. 725, *COPP v. LOUISVILLE & N. R. CO.* 43 La. Ann. 511, 26 Am. St. Rep. 198, 9 So. 441.

**Administration of Federal laws in state courts.**

Cited in note (48 L. R. A. 37) on administration of Federal laws in state courts.

**Restriction of remedy for violation of Interstate Commerce Law.**

Cited in *State ex rel. Crow v. Atchison*, T. & S. F. R. Co. 176 Mo. 715, 63 L. R. A. 777, 75 S. W. 776, holding state cannot deprive railroad of franchise for making unlawful charges upon interstate traffic.

12 L. R. A. 727, *ROSSON v. CARROL*, 90 Tenn. 90, 16 S. W. 66.

**Necessity and sufficiency of demand on negotiable instruments.**

Cited in footnotes to *Hutchison v. Crutcher*, 37 L. R. A. 89, which requires presentation of note payable at insolvent bank to bank receiver administering at other place in same city; *Leonard v. Olson*, 35 L. R. A. 381, which requires notice to indorser of inability to make demand because of maker's removal from state.

Distinguished in *Bank of Jamaica v. Jefferson*, 92 Tenn. 539, 36 Am. St. Rep. 100, 22 S. W. 211, holding accommodation indorsers of note before delivery liable without demand, protest, or notice.

**Sufficiency of notice of dishonor.**

Cited in footnote to *Oakley v. Carr*, 60 L. R. A. 431, which holds notice of dishonor sufficient if sent to last indorser, who is agent for collection only, by first mail of day following dishonor.

**Liability for failure to protest.**

Cited in footnote to *Williams v. Parks*, 56 L. R. A. 759, which sustains notary's liability on bond for neglecting to give notice of dishonor.

**Waiver of failure to present or protest note.**

Cited in footnote to *Greeley v. Whitehead*, 28 L. R. A. 286, which holds failure to properly present note for payment waived by paying interest after maturity.

Cited in note (29 L. R. A. 311) on necessity of new consideration to support waiver of failure to give notice of dishonor or subsequent promise by indorser.

**Rights of transferees of negotiable paper after maturity.**

Cited in note (46 L. R. A. 753, 760, 803-805) on rights of holder of negotiable paper transferred after maturity.

**Notary's certificate as evidence.**

Cited in *Douglas v. Bank of Commerce*, 97 Tenn. 149, 36 S. W. 874, holding certificate of foreign notary under seal prima facie evidence of facts stated.

12 L. R. A. 741, *ATWATER v. MANCHESTER SAV. BANK*, 45 Minn. 341, 48 N. W. 187.

**Lien of judgment on equitable estate.**

Cited in *Fryberger v. Berven*, 88 Minn. 318, 92 N. W. 1125, holding judgment a lien on interest of vendor reserving lien for payment of certain sum when stated quantity of ore should be mined.

**Who are creditors.**

Cited in *Kalkhoff v. Nelson*, 60 Minn. 200, 62 N. W. 332, holding lessor having cause of action for breach of lease entitled as creditor to share assets of lessee corporation.

**Sufficiency of statement on which judgment confessed.**

Cited in *J. H. Teasdale Commission Co. v. Van Hardenberg*, 53 Mo. App. 330, holding statement on which judgment confessed enabling creditors to investigate transaction, sufficient.

12 L. R. A. 746, *RODDY v. MISSOURI P. R. CO.* 104 Mo. 234, 24 Am. St. Rep. 338, 15 S. W. 1112.

**Liability to third persons for negligence in performing contract.**

Cited in *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 71 N. H. 532, 60 L. R. A. 120, 53 Atl. 807, holding action in form for tort not maintainable on breach of contract between defendant and third person; *Buckley v. Gray*, 110 Cal. 343, 31 L. R. A. 862, 52 Am. St. Rep. 88, 42 Pac. 900, denying liability, to legatee, of attorney negligently drawing will; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 611, 15 L. R. A. 823, 33 Am. St. Rep. 482, 19 S. W. 630, holding manufacturer not liable for injury to vendee's employee from defective machine.

Distinguished in effect in *Huset v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 308, 57 C. C. A. 243, 120 Fed. 865, holding vendor supplying machine knowing it imminently dangerous, liable to person injured while using.

**Liability for breach of duty assumed in contract with third person.**

Cited in *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 71 N. H. 532, 60 L. R. A. 120, 53 Atl. 807, holding action maintainable for negligent performance of contract with third person to operate heating plant; *McCall v. Pacific Mail S. S. Co.* 123 Cal. 44, 55 Pac. 706, holding principal agreeing to furnish appliances liable for injury to contractor's servant for negligent performance; *Green v. Sansom*, 41 Fla. 103, 25 So. 332, holding principal liable to contractor's servant for defective appliance furnished; *Sheltrawn v. Michigan C. R. Co.* 128 Mich. 671, 87 N. W. 893; *Savannah F. & W. R. Co. v. Booth*, 98 Ga. 24, 25 S. E. 928, holding railroad furnishing car liable to shipper's servant injured by defect; *Feedback v. Missouri P. R. Co.* 167 Mo. 215, 66 S. W. 965, denying liability of railroad for death of trespasser on train wrecked by negligence of engineer of another.

Cited in note (46 L. R. A. 35, 105, 118) on right of servant to recover damages from persons other than his master for injuries received in performance of his duties.

Distinguished in *Fowles v. Briggs*, 116 Mich. 428, 40 L. R. A. 530, 72 Am. St. Rep. 537, 74 N. W. 1046, denying liability of shipper for injury to brakeman from negligent loading of lumber, which railroad fails to inspect.

**Rights in contract of person not party.**

Distinguished in *Rothwell v. Skinker*, 84 Mo. App. 177, sustaining right of subcontractor to sue on original contract.

**Who an independent contractor.**

Cited in *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 93, 24 L. R. A. 52, 19 S. E. 571, holding right to control conduct of person negligently performing work determines whether such person independent contractor.

**Master's duty in furnishing appliances.**

Cited in *Watts v. Hart*, 7 Wash. 185, 34 Pac. 423, holding employer furnish reasonably safe and adequate appliances, not liable to accident to servant.

Distinguished in *Sykes v. St. Louis & S. F. R. Co.* 88 Mo. App. 201, holding instruction that railroad and consignee liable to consignee's servant injured in unloading defective car, erroneous.

**Joint enterprises.**

Cited in *Richard v. Detroit, R. R. & L. O. R. Co.* 129 Mich. 464, 89 N. W. 52, holding street railroad company operating car and company having control thereof while on its track, jointly and severally liable for negligence.

Distinguished in *Sykes v. St. Louis & S. F. R. Co.* 178 Mo. 698, 77 S. W. 723, holding instruction in action against railroad by consignee's employee injured while unloading car, based upon theory of mutual interest of railroad and employer, improper where railroad was an intermediate carrier.

**Imminently dangerous objects.**

Cited in *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 586, 11 C. C. A. 257, 24 U. S. App. 7, 63 Fed. 404, holding shipper providing suitable vehicle not liable for fire resulting from leaving car of petroleum on track; *Missouri, K. & T. R. Co. v. Merrill*, 65 Kan. 450, 59 L. R. A. 716, 93 Am. St. Rep. 287, 70 Pac. 358, holding railroad delivering defective car to connecting line liable to latter's employee after inspection.

Cited in footnotes to *George v. Los Angeles R. Co.* 46 L. R. A. 829, which denies company's liability to boys hurt while playing with trolley car left in street after loosening brake; *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, which denies liability of railroad company for injuries to child playing on bridge ties in fenced railroad yard; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything.

Cited in note (13 L. R. A. 765) on trespass and unwarrantable interference in its relation to negligence.

**Assumption that duty performed.**

Cited in *Brannock v. Elmore*, 114 Mo. 65, 21 S. W. 451, holding exclusion of evidence showing plaintiff knew blasting negligently done, error.

**When jury question arises on facts.**

Cited in *Huth v. Dohle*, 76 Mo. App. 675; *Berry v. Missouri P. R. Co.* 124 Mo. 245, 25 S. W. 229, holding facts admitting of different constructions and

inferences present question for jury; *Kreis v. Missouri P. R. Co.* 131 Mo. 545, 30 S. W. 310; *Church v. Chicago & A. R. Co.* 119 Mo. 214, 23 S. W. 1056, holding contributory negligence, where undisputed facts admit of different inferences, question for jury; *Zellars v. Missouri Water & Light Co.* 92 Mo. App. 120, holding negligence question for jury where different conclusions deducible from disputed facts.

12 L. R. A. 751, *PHILADELPHIA v. BAXTER*, 142 Pa. 357, 21 Atl. 976.

**Tax as lien.**

Cited in *Wetzel v. Goodyear*, 2 Lack. L. News, 189, 13 Lanc. L. Rev. 220, 310, 5 Pa. Dist. R. 12, 17 Pa. Co. Ct. 111, holding taxes against occupied lands not lien in absence of statute.

**Mistake of tax officers as affecting validity of sales.**

Cited in note (20 L. R. A. 487) on validity of tax sales where nonpayment is due to mistake or negligence of tax officers.

12 L. R. A. 753, *UNITED STATES v. JELICO MOUNTAIN COKE & COAL CO.* 3 Inters. Com. Rep. 626, 46 Fed. 432.

**Combinations in restraint of interstate commerce.**

Cited in *Lowry v. Tile, Mantel & Grate Asso.* 98 Fed. 825, holding complaint alleging combination with intent to monopolize commerce in regard to tiles, etc., between states, and arbitrarily fix prices, sufficient; *United States v. Coal Dealers' Asso.* 85 Fed. 267, holding combination of importers of coal from other states with local dealer's association, regulating price arbitrarily, illegal; *Whitwell v. Continental Tobacco Co.* 64 L. R. A. 694, 60 C. C. A. 294, 125 Fed. 458, holding refusal to sell to dealers handling competitors' goods except at unprofitably high price, no violation of Federal anti-trust act; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 141, footnote p. 122, 29 C. C. A. 170, 54 U. S. App. 723. 85 Fed. 300, which holds void, combination of manufacturers to control sales and prices in large number of states.

Cited in footnote to *Gibbs v. McNeeley*, 60 L. R. A. 152, which holds anti-trust act violated by combination of manufacturers of product of state, market for four fifths of which in other states, to limit production and raise price.

Cited in note (64 L. R. A. 709) on illegal trusts under modern anti-trust laws.

Distinguished in *United States v. E. C. Knight Co.* 60 Fed. 310, holding combination to buy up competing sugar refineries not within anti-trust act of 1890; *Anderson v. United States*, 171 U. S. 617, 43 L. ed. 306, 19 Sup. Ct. Rep. 50, holding association of live-stock dealers to regulate transaction of business, not recognizing nonmembers, not combination in restraint of trade.

**Combination to control prices.**

Cited in *Walsh v. Association of Master Plumbers*, 97 Mo. App. 294, 71 S. W. 455, holding agreement between plumbers' association and manufacturers, restricting sales to members only, unlawful; *John D. Park & Sons Co. v. National Wholesale Druggists Asso.* 175 N. Y. 36, 62 L. R. A. 647, 96 Am. St. Rep. 578, 67 N. E. 136 (dissenting opinion), majority holding arrangement for rebates by manufacturers of medicines to dealers maintaining selling price, not unlawful combination.

Cited in footnotes to *State v. Phipps*, 18 L. R. A. 658, which holds combination

by foreign companies to increase rates of insurance unlawful; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices; *Com. v. Grinstead*, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price, not within statute for suppression of conspiracies; *State ex rel. Crow v. Armour Packing Co.* 61 L. R. A. 464, which holds unlawful combination to fix prices, shown by acts of competing dealers; *Hawarden v. Youghiogheny & L. Coal Co.* 55 L. R. A. 828, which sustains retail coal dealer's right of action against wholesalers and favored retailers combining to drive other retailers out of business.

Distinguished in *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 83, 4 Inters. Com. Rep. 453, 7 C. C. A. 27, 19 U. S. App. 36, 58 Fed. 70, holding association of railroad companies to maintain reasonable rates not illegal combination; *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. 319, denying injunction against association of insurance companies to regulate rates and shut out nonmembers.

**Application of anti-trust laws.**

Cited in footnote to *Fuqua v. Pabst Brewing Co.* 35 L. R. A. 241, which holds beer brought from other state under invalid trust agreement subject to anti-trust law of state on arrival.

**Injunction against unlawful combinations.**

Cited in *Walsh v. Association of Master Plumbers*, 97 Mo. App. 295, 71 S. W. 455, holding injunction lies to dissolve agreement whereby manufacturers agree to sell to members only, and association agrees to boycott manufacturers selling to nonmembers.

**Injunction against nuisance.**

Cited in footnote to *Pfingst v. Senn*, 21 L. R. A. 569, which denies right to enjoin as nuisance prospective use of premises as beer garden.

12 L. R. A. 760, *ROSS v. HIXON*, 46 Kan. 550, 26 Am. St. Rep. 123, 26 Pac. 955.

**Malicious prosecution; probable cause.**

Cited in *Bechel v. Pacific Exp. Co.* 65 Neb. 828, 91 N. W. 853; *Darnell v. Sallee*, 7 Ind. App. 583, 34 N. E. 1020; *Louisville, N. A. & C. R. Co. v. Hendricks*, 13 Ind. App. 12, 40 N. E. 82, holding finding of examining court only prima facie evidence of probable cause; *Root v. Rose*, 6 N. D. 581, 72 N. W. 1022, holding decision of lower court though reversed on appeal, conclusive on question of probable cause; *Blackman v. West Jersey & S. S. R. Co.* 126 Fed. 253, holding unimpeached conviction conclusive as to probable cause for prosecution; *Tavener v. Morehead*, 41 W. Va. 124, 23 S. E. 673, holding dismissal of rule for contempt because made in wrong court no foundation for action for malicious prosecution; *Marks v. Hastings*, 101 Ala. 178, 13 So. 297 (dissenting opinion), majority holding advice of justice issuing warrant, though practising attorney, no defense to action for malicious prosecution.

12 L. R. A. 762, *PEOPLE ex rel. UNION TRUST CO. v. COLEMAN*, 126 N. Y. 433, 27 N. E. 818.

**Taxation of "capital stock."**

Cited in *People ex rel. Railway Advertising Co. v. Roberts*, 4 App. Div. 289,

39 N. Y. Supp. 448, holding assessment of capital stock cannot exceed amount authorized by charter; *People ex rel. German Looking Glass Plate Co. v. Barker*, 75 Hun, 8, 26 N. Y. Supp. 971, holding statement that capital worth par justifies assessment equal to amount paid in; *People ex rel. Consolidated Teleg. & Elec. Sub. Co. v. Barker*, 16 Misc. 259, 39 N. Y. Supp. 106, holding assessed value of realty not conclusive in estimating corporate assets taxable as personalty; *Allen v. Com.* 98 Va. 84, 34 S. E. 981; *Durham County v. Blackwell Durham Tobacco Co.* 116 N. C. 446, 21 S. E. 423, holding simultaneous tax leviable on capital stock and on shares.

— **Basis of assessment.**

Cited in *People ex rel. New York Clearing House Bldg. Co. v. Barker*, 31 App. Div. 317, 53 N. Y. Supp. 1111, Affirming 23 Misc. 194, 51 N. Y. Supp. 1102; *People ex rel. Wiebusch & H. Co. v. Roberts*, 19 App. Div. 577, 46 N. Y. Supp. 570; *People ex rel. Delaware & H. Canal Co. v. Feitner*, 32 Misc. 34, 66 N. Y. Supp. 91; *People ex rel. Equitable Gaslight Co. v. Barker*, 144 N. Y. 100, 39 N. E. 13,—holding basis of assessment valuation of real and personal property less assessed value of realty, debts, and exemptions; *People ex rel. Brooklyn Union Gas Co. v. Feitner*, 82 App. Div. 372, 81 N. Y. Supp. 898; *People ex rel. Equitable Gaslight Co. v. Barker*, 66 Hun, 23, 20 N. Y. Supp. 797; *People ex rel. Manhattan R. Co. v. Barker*, 28 Misc. 17, 59 N. Y. Supp. 926; *People ex rel. National Surety Co. v. Feitner*, 31 Misc. 434, 65 N. Y. Supp. 523,—holding capital, not value of shares, basis of taxation; *People ex rel. Edison Electric Illuminating Co. v. Barker*, 139 N. Y. 61, 34 N. E. 722; *Re L. Adler Bros. & Co.* 76 App. Div. 576, 78 N. Y. Supp. 690, holding actual value of capital and surplus basis of corporate taxation; *People ex rel. Bleecker Street & F. Ferry R. Co. v. Barker*, 85 Hun, 212, 32 N. Y. Supp. 990; *People ex rel. New York Mut. Gaslight Co. v. Wells*, 42 Misc. 608, 87 N. Y. Supp. 595; *People ex rel. Twenty-Third Street R. Co. v. Feitner*, 92 App. Div. 521, 87 N. Y. Supp. 304; *People ex rel. Equitable Gaslight Co. v. Barker*, 66 Hun, 23, 20 N. Y. Supp. 797,—holding market value of shares erroneous basis for assessing capital stock; *People ex rel. Consolidated Gas Co. v. Feitner*, 38 Misc. 180, 77 N. Y. Supp. 745, holding assessment based on market value of stock, without evidence, erroneous; *People ex rel. Manhattan R. Co. v. Barker*, 146 N. Y. 312, 40 N. E. 996, holding actual value of capital not market value of share stock, assessable; *People ex rel. Manhattan R. Co. v. Barker*, 165 N. Y. 324, 59 N. E. 151, by O'Brien, J., dissenting, holding basis of assessment valuation of real and personal property, less assessed value of realty, debts, and exemptions.

Distinguished in *People ex rel. Colonial Trust Co. v. Morgan*, 47 App. Div. 129, 62 N. Y. Supp. 191, sustaining assessment of capital stock on basis of average selling price of shares.

— **Deduction of debts.**

Cited in *People ex rel. Second Ave. R. Co. v. Barker*, 141 N. Y. 197, 56 N. Y. S. R. 834, 36 N. E. 184; *People ex rel. Cornell S. B. Co. v. Dederick*, 161 N. Y. 204, 55 N. E. 927; *People ex rel. Second Ave. R. Co. v. Barker*, 72 Hun, 129, 25 N. Y. Supp. 340; *People ex rel. John A. Roebling's Sons' Co. v. Wemple*, 138 N. Y. 588, 34 N. E. 386; *People ex rel. Rochester R. Co. v. Pond*, 37 App. Div. 337, 57 N. Y. Supp. 490,—holding corporate debts should be deducted from assets in assessing capital stock; *People ex rel. Keppler & Schwarzmann v. Barker*,

22 App. Div. 123, 47 N. Y. Supp. 958, holding domestic corporation entitled to deduct from assessed capital debt incurred in purchase of stock of taxable corporation; *People ex rel. Cornell S. B. Co. v. Dederick*, 161 N. Y. 210, 55 N. E. 927, holding debts contracted in purchase of good will not deductible from personal property in assessing local tax; *People ex rel. National Surety Co. v. Feitner*, 166 N. Y. 137, 59 N. E. 731, holding in assessing surety company outstanding contingent liabilities on contracts of suretyship not deductible from assets.

— **Exclusion of foreign real estate.**

Cited in *People ex rel. Delaware & H. Canal Co. v. Barker*, 23 Misc. 191, 51 N. Y. Supp. 1105, holding foreign real estate must be excluded in assessing corporate capital.

— **Exclusion of franchise.**

Cited in *People ex rel. Brooklyn City R. Co. v. Neff*, 10 App. Div. 591, 46 N. Y. Supp. 385; *People ex rel. Coney Island & B. R. Co. v. Neff*, 15 App. Div. 587, 44 N. Y. Supp. 810; *People ex rel. Consolidated Teleg. & Electrical Subway Co. v. Barker*, 16 Misc. 262, 39 N. Y. Supp. 106,—holding franchise not assessable as capital stock; *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 439, 46 N. E. 875, holding cost of leases of railroads operated by corporation without deducting value of franchises, erroneous basis of assessment.

— **Taxation of capital of foreign corporations.**

Cited in *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 328, 31 N. E. 238, holding basis of taxation of foreign corporation portion of capital employed within state; *People ex rel. Singer Mfg. Co. v. Wemple*, 150 N. Y. 50, 44 N. E. 787, holding surplus invested in real estate not used in business not taxable as capital stock; *People ex rel. North American Co. v. Miller*, 90 App. Div. 562, 86 N. Y. Supp. 386, holding franchise tax imposable upon foreign investment company transacting entire business, and having bank balances and securities in state; *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 76, 45 L. R. A. 131, 53 N. E. 685 (dissenting opinion), majority holding good will of corporation carrying on business wholly in state, taxable as capital; *People ex rel. Chicago Junction R. & Union Stockyards Co. v. Roberts*, 154 N. Y. 13, 47 N. E. 974 (dissenting opinion), majority holding capital of foreign corporation having headquarters in state wholly invested in stock of corporation doing business outside of state not taxable.

— **"Capital stock" defined.**

Cited in *People ex rel. Wiebusch & H. Co. v. Roberts*, 154 N. Y. 105, 47 N. E. 980, holding capital stock of corporation value of assets, less liabilities; *People ex rel. Trust & D. Co. v. Norton*, 53 App. Div. 559, 65 N. Y. Supp. 992; *People ex rel. National Surety Co. v. Feitner*, 31 Misc. 434, 65 N. Y. Supp. 523, holding "capital stock" synonymous with "capital;" *Hamor v. Taylor-Rice Engineering Co.* 84 Fed. 396, holding capital stock distinguishable from aggregate shares; *Wells v. Green Bay & M. Canal Co.* 90 Wis. 452, 64 N. W. 69, defining capital stock as interests of stockholders; *Henderson Bridge Co. v. Com.* 99 Ky. 635, 29 L. R. A. 76, 31 S. W. 486, defining "capital stock" as used in franchise tax law as including assets and franchise.

— **"Gross assets" of corporation.**

Cited in *New York v. Barker*, 179 U. S. 280, 45 L. ed. 192, 21 Sup. Ct. Rep.



121, defining "gross assets" assessed as actual value of corporate capital and surplus, excluding franchise.

**Taxation of franchises.**

Cited in *Buffalo Gas Co. v. Volz*, 31 Misc. 163, 64 N. Y. Supp. 534, holding franchises not taxable except under special law.

Cited in note (57 L. R. A. 42, 100) on taxation of corporate franchise in the United States.

**Franchise as corporate property.**

Distinguished in effect in *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 698, 53 L. R. A. 927, 43 S. W. 115, holding exemption of certain corporate property does not include privilege tax.

**Value of corporate shares.**

Cited in *Re Jones*, 172 N. Y. 586, 60 L. R. A. 480, 65 N. E. 570, holding value of corporate shares ascertainable from assets of corporation; *Great Western Min. & Mfg. Co. v. Harris*, 128 Fed. 326, holding stockholders receiving part of proceeds and additional stock upon contributing *pro rata* to stock bonus to purchaser of bonds, not liable as for assets withdrawn.

**Assessment of bank stock.**

Cited in *People ex rel. Jenkins v. Neff*, 29 Misc. 62, 60 N. Y. Supp. 582, holding in assessing bank stock, assessed, not actual, value deductible from total value of capital.

**Recovery of taxes erroneously assessed.**

Distinguished in *United States Trust Co. v. New York*, 144 N. Y. 491, 39 N. E. 383, Affirming 77 Hun, 185, 28 N. Y. Supp. 344, holding action not maintainable to recover taxes erroneously assessed by commissioners with jurisdiction of person and subject-matter.

**Conclusiveness of information furnished assessors.**

Cited in *People ex rel. Edison Electric Illuminating Co. v. Barker*, 139 N. Y. 62, 34 N. E. 722, holding information given to tax commissioners should be taken as true, unless otherwise established by competent evidence; *People v. Consolidated Gas Co. v. Feitner*, 78 App. Div. 315, 79 N. Y. Supp. 975, holding assessors bound to accept verified statement and testimony regarding corporation's finances in absence of contrary evidence; *People ex rel. Manhattan R. Co. v. Barker*, 146 N. Y. 314, 40 N. E. 996, holding tax commissioners not bound by contradicted statements where good reasons exist for disbelief.

Distinguished in *People ex rel. Trowbridge v. McNamara*, 18 App. Div. 21, 79 S. R. 458, 45 N. Y. Supp. 456, holding assessors may fix value of realty according to own judgment against owner's evidence.

Cited in footnote to *State, Singer Mfg. Co., Prosecutor, v. Heppenheimer*, 32 L. R. A. 643, which holds company exempt from taxation under exemption of its shares.

Cited in notes (58 L. R. A. 518, 528, 545, 565, 567, 574, 575, 589, 597) on taxation of capital stock of corporations in the United States; (13 L. R. A. 515) on taxation of shares of capital stock.

12 L. R. A. 770, GUARANTY TRUST & S. D. CO. v. BUDDINGTON, 27 Fla. 215, 9 So. 246.

**Calendar month defined.**

Cited in footnote to McGinn v. State, 30 L. R. A. 450, which defines calendar month as period terminating with day of succeeding month corresponding to day of beginning less one.

12 L. R. A. 776, BUMGARDNER v. LEAVITT, 35 W. Va. 194, 13 S. E. 67.

**Specific performance.**

Cited in Manton v. Ray, 18 R. I. 674, 49 Am. St. Rep. 811, 29 Atl. 998, holding equity will decree specific performance of contract to convey stock not obtainable elsewhere; McKay v. Ripley & M. C. Valley R. Co. 42 W. Va. 27, 24 S. E. 685, sustaining right of vendor of right of way to railroad company to specific performance.

Cited in note (50 L. R. A. 503, 506) on specific performance of contract for sale of stock in corporation.

Distinguished in Gage v. Fisher, 5 N. D. 304, 31 L. R. A. 562, 65 N. W. 809, holding contract to give minority stockholder right to control stock not specifically enforceable.

12 L. R. A. 781, *Re* ARGUS PRINTING CO. 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. 347.

**Pledge of stock.**

Cited in footnotes to May v. Cleland, 44 L. R. A. 163, which holds purchaser of stock at execution sale takes subject to pledge of which he knows, though not entered on corporate books; Spreckels v. Nevada Bank, 33 L. R. A. 459, which sustains pledgee's right to have entry made on corporate books to protect his rights.

**Rights of transferees of stock.**

Cited in footnote to Doty v. First Nat. Bank, 17 L. R. A. 259, which holds right of transferee of national bank stock under unrecorded transfer superior to subsequent attachment.

**Who are stockholders.**

Cited in McMullan v. Dickinson Co. 63 Minn. 410, 65 N. W. 661, holding pledgee of stock not stockholder; Smith v. San Francisco & N. P. R. Co. 115 Cal. 594, 35 L. R. A. 312, 56 Am. St. Rep. 119, 47 Pac. 582, holding person holding stock as dummy for real owner not bona fide stockholder.

**Election of directors.**

Cited in footnote to Maynard *ex rel.* Dusenbury v. Looker, 56 L. R. A. 947, which denies vested right of majority of stockholders to elect directors.

**Stockholders' meetings.**

Cited in notes (21 L. R. A. 175) on what constitutes quorum for meeting of stockholders; (29 L. R. A. 849) on right to vote by proxy in private corporations.

12 L. R. A. 791, SHIPMAN v. BANK OF THE STATE, 126 N. Y. 318, 22 Am. St. Rep. 821, 27 N. E. 371.

**Liability of drawee paying on forged signature.**

Cited in Janin v. London & S. F. Bank, 92 Cal. 23, 14 L. R. A. 322, 27 Am. St.

Rep. 82, 27 Pac. 1100, holding bank paying forged check liable; *J. M. Houston Grocer Co. v. Farmers Bank*, 71 Mo. App. 139 (*obiter*); *Adler v. Broadway Bank*, 30 Misc. 383, 62 N. Y. Supp. 402, holding bank paying check with indorsement forged by payee's collector, liable to drawer; *Fifth Nat. Bank v. Central Nat. Bank*, 82 Hun, 561, 31 N. Y. Supp. 541, holding bank cashing check with forged indorsement liable to bank of deposit; *Harter v. Mechanics Nat. Bank*, 63 N. J. L. 580, 76 Am. St. Rep. 224, 44 Atl. 715, holding bank liable to depositor for check paid on forged indorsement; *Kress v. East Side Sav. Bank*, 50 N. Y. S. R. 274, 21 N. Y. Supp. 652, holding savings bank liable for deposit paid out upon presentation of stolen pass book and forged check; *Bloomington v. National Butchers & Drovers' Bank*, 33 Misc. 595, 68 N. Y. Supp. 35, holding bank cashing stolen checks, payee's indorsement being forged, not protected; *Rossi v. National Bank of Commerce*, 71 Mo. App. 161, holding drawee bank liable for draft paid on forged indorsement; *Western U. Teleg. Co. v. Bi-Metallic Bank*, 17 Colo. App. 233, 68 Pac. 115, holding bank liable for check payable to W. H. Daily, erroneously delivered by drawer's agent to W. H. Daley; *Chism v. First Nat. Bank*, 96 Tenn. 644, 32 L. R. A. 780, footnote p. 778, 54 Am. St. Rep. 863, 36 S. W. 387, which holds drawee bank liable to payee notwithstanding forged indorsement of fictitious person's name.

Cited in footnotes to *First Nat. Bank v. Northwestern Nat. Bank*, 26 L. R. A. 289, which holds genuineness of indorsement not admitted by drawee accepting or paying check; *Ramsey County v. Nelson*, 51 Minn. 85, 38 Am. St. Rep. 492, 52 N. W. 991, holding county treasurer paying warrants with forged indorsement not protected; *Iron City Nat. Bank v. Ft. Pitt Nat. Bank*, 23 L. R. A. 615, which denies right of recovery by payer of forged check.

Distinguished in *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 561, 23 L. R. A. 587, footnote p. 584, 37 Am. St. Rep. 596, 35 N. E. 892. Affirming 67 Hun, 382, 22 N. Y. Supp. 254, holding payment by drawee of cashier's checks on forged indorsements by cashier of payees' names good as against his bank.

**Negotiable paper innocently made payable to fictitious payee.**

Cited in *Anderson v. Dundee State Bank*, 47 N. Y. S. R. 450, 20 N. Y. Supp. 511, denying liability of drawer of draft not knowing payee fictitious person to bona fide holder for value.

**Liability for payment to wrong person.**

Cited in *Egner v. Corn Exchange Bank*, 42 Misc. 554, 86 N. Y. Supp. 107, denying liability of drawer of check obtained by one fraudulently representing named payee's right thereto.

Cited in notes (26 L. R. A. 570) on negotiability of check; (39 L. R. A. 426) on use of fictitious name as affecting validity of instrument; (50 L. R. A. 83) on who must bear loss on check or bill issued or indorsed to impostor.

**Depositor's duty as to checks returned.**

Cited in *Harlem Co-op. Bldg. & L. Asso. v. Mercantile Trust Co.* 10 Misc. 682, 31 N. Y. Supp. 790, holding depositor may assume genuineness of indorsements of returned checks ascertained by bank; *Critten v. Chemical Nat. Bank*, 171 N. Y. 228, 57 L. R. A. 533, 63 N. E. 969, Modifying 60 App. Div. 245, 70 N. Y. Supp. 246, holding it depositor's duty to compare returned vouchers with record of checks issued, to detect forgeries or alterations; *Clark v. National Shoe & Leather Bank*, 32 App. Div. 319, 52 N. Y. Supp. 1064, holding depositor not negligent in intrust-

ing examination of paid checks and bank statements to employee; *First Nat. Bank v. Allen*, 100 Ala. 481, 27 L. R. A. 430, 46 Am. St. Rep. 80, 14 So. 335, denying right of depositor intrusting duty of examining vouchers to clerk who forged checks to recover from bank.

Cited in note (27 L. R. A. 429) on duty of depositor as to forged checks charged to him by bank.

**When agent's knowledge imputable to principal.**

Cited in *Henry v. Allen*, 151 N. Y. 11, 36 L. R. A. 662, footnote p. 658, 45 N. E. 355, which holds notice of agreement by bank with person depositing another's money, that cashier's checks given shall be returned without delivery, not imputable to principal.

Cited in footnote to *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 20 L. R. A. 600, which holds cashier's notice imputable to savings company.

**Account stated.**

Cited in *Wachsmann v. Columbia Bank*, 6 Misc. 63, 26 N. Y. Supp. 885, holding account stated impeachable by evidence of fraud or mistake; *National Bd. Marine Underwriters v. National Bank*, 9 Misc. 365, 29 N. Y. Supp. 698, holding possession of vouchers and accounts from bank by clerk committing forgeries overcomes presumption of acquiescence; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 135, 70 S. W. 173, holding depositor's acquiescence for unreasonable time after return of balanced bank book and canceled checks has effect of account stated.

Cited in note (27 L. R. A. 820) on what constitutes an account stated; *Northwestern Nat. Bank v. Bank of Commerce*, 15 L. R. A. 102, which holds bank crediting forged draft to payee and forwarding for collection a bona fide holder.

Distinguished in *Comer v. Mackey*, 73 Hun, 242, 25 N. Y. Supp. 1023, holding party acquiescing in account stated by old firm cannot charge new firm with subsequently discovered error.

**Estoppel by acquiescence in mistake.**

Cited in *Devine v. Bank of Baldwin*, 91 Wis. 73, 64 N. W. 589, holding retention of certificate by illiterate depositor for less amount than due does not preclude recovery of payment made on forged indorsement; *Todd v. Meding*, 56 N. J. Eq. 101, 38 Atl. 349, holding receiver not protected in paying dividend on whole claim to owner of half, by failure of other owner to inquire on receiving dividend on individual claim.

**Payment benefiting depositor as equitable defense.**

Cited in *La Montagne v. Bank of New York, Nat. Bkg. Asso.* 94 App. Div. 233, 88 N. Y. Supp. 21, holding bank not liable to special partnership, succeeding to assets of general partnership for funds checked out by general partner to pay old firm's debts.

12 L. R. A. 799, *PACIFIC EXP. CO. v. FOLEY*, 46 Kan. 457, 26 Am. St. Rep. 107, 26 Pac. 665.

**Limitation of carrier's liability by contract.**

Cited in *St. Louis & S. F. R. Co. v. Sherlock*, 59 Kan. 28, 51 Pac. 899, holding contract limiting railroad's common-law liability without permission of railroad commissioners, invalid; *Atchison, T. & S. F. R. Co. v. Mason*, 4 Kan. App. 402, 46 Pac. 24, and *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 213, 29 Pac. 148, holding

railroad may limit common-law liability by special contract with shipper, if freely made; *Ft. Scott, W. & W. R. Co. v. Sparks*, 55 Kan. 295, 39 Pac. 1032, holding contract providing that person traveling with stock shall remain in caboose, valid.

Cited in note (63 L. R. A. 329) on conflict of laws as to carrier's contracts.

Distinguished *v. Western U. Teleg. Co. v. Beals*, 56 Neb. 418, 71 Am. St. Rep. 682, 76 N. W. 903, holding telegraph company liable for failure to correctly transmit message, notwithstanding agreement on blanks.

#### **Bill of lading as contract.**

Cited in *Smith v. American Exp. Co.* 108 Mich. 577, 66 N. W. 479, holding carrier's receipt taken by shipper without objection, valid contract.

12 L. R. A. 808. *BERGER v. VARRELMANN*, 127 N. Y. 281, 27 N. E. 1065.

#### **When conclusions of law regarded as findings of fact.**

Cited in *Wright v. Loud*, 39 App. Div. 275, 56 N. Y. Supp. 959; *Christopher & T. Street R. Co. v. Twenty-third Street R. Co.* 149 N. Y. 58, 43 N. E. 538, holding findings improperly designated conclusions of law regarded as findings of fact.

#### **Absence of finding to support judgment.**

Cited in *Haffey v. Lynch*, 68 Hun, 509, 23 N. Y. Supp. 59, holding in absence of finding court may examine evidence to support judgment.

#### **General assignments — Preferences.**

Cited in *Re Dauchy*, 59 App. Div. 388, 69 N. Y. Supp. 827, holding assignor creating preferences to statutory limit may provide for *pro rata* payment of individual and firm debts out of residue; *Spelman v. Freedman*, 130 N. Y. 429, 29 N. E. 765, holding complaint in action to set aside preferential judgments alleging executions and levies in contemplation of assignment, sufficient.

Distinguished in *Central Nat. Bank v. Seligman*, 138 N. Y. 442, 34 N. E. 196, Reversing 64 Hun, 620, 19 N. Y. Supp. 362, holding assignment invalidated by excessive preferences in instruments forming part of same transaction.

#### **What constitutes unlawful preference.**

Cited in *Mack v. Prince*, 40 W. Va. 330, 21 S. E. 1012, holding judgment confessed by insolent void as preference.

Cited in footnote to *Re Fixen*, 50 L. R. A. 605, which holds payment of money by insolvent to unsecured creditor in ordinary course of business, an unlawful preference.

#### **Transfer prior to general assignment as preference.**

Cited in *White v. Benjamin*, 3 Misc. 499, 23 N. Y. Supp. 981, holding judgment suffered immediately prior to general assignment, one transaction; *Thalheimer v. Klapetsky*, 36 N. Y. S. R. 118, 12 N. Y. Supp. 941, holding general assignment not invalidated by judgments previously confessed without intent to unlawfully prefer; *Clapp v. Clark*, 49 Fed. 124, holding (*obiter*), judgment creating excessive preference void as part of general assignment; *Ottenberg v. Corner*, 34 L. R. A. 623, 22 C. C. A. 168, 40 U. S. App. 320, 76 Fed. 269 (dissenting opinion), majority upholding validity of mortgage immediately preceding general assignment, where mortgagee acted in good faith; *Johnson v. Rapalyea*, 1 App. Div. 476, 37 N. Y. Supp. 540 (dissenting opinion), majority holding mortgage not given or taken in contemplation of assignment, valid.

Distinguished in *Benham v. Ham*, 5 Wash. 132, 34 Am. St. Rep. 851, 31 Pac.

459, holding mortgage by insolvent shortly before assignment valid, where mortgagee acted in good faith; *Abegg v. Bishop*, 66 Hun, 9, 20 N. Y. Supp. 810, holding transfer to creditor with intent to give unlawful preference, void, irrespective of transferee's knowledge; *Shotwell v. Dixon*, 163 N. Y. 48, 57 N. E. 178, Affirming 22 App. Div. 261, 48 N. Y. Supp. 984, sustaining transfer to creditor without knowledge that assignment contemplated.

Distinguished and limited in *Manning v. Beck*, 129 N. Y. 7, 14 L. R. A. 200, footnote p. 198, 29 N. E. 90, which holds bona fide transferee not affected by debtor's intention to make general assignment for creditors.

Not followed in *Waggoner-Gates Milling Co. v. Ziegler-Zaiss Commission Co.* 128 Mo. 486, 31 S. W. 28, holding mortgage to creditor not invalidated by general assignment immediately thereafter.

**Preferential transfer to creditors not followed by assignment.**

Cited in *Maass v. Falk*, 146 N. Y. 44, 40 N. E. 504, Same case in court below, 54 N. Y. S. R. 163, 24 N. Y. Supp. 448, holding transfer of property to creditor unconnected with subsequent transfers of remaining property to other creditors, not invalid preference.

Cited in notes (37 L. R. A. 354) on whether preference by mortgage or sale is an assignment for creditors; (37 L. R. A. 482) on effect of insolvency statutes on mortgage or sale preferring creditors.

Limited in *Tompkins v. Hunter*, 149 N. Y. 124, 43 N. E. 532, Same case in court below, 24 N. Y. Supp. 12, upholding insolvent's sale of entire assets to creditor in payment of debt without making general assignment.

Distinguished in *Cutter v. Pollock*, 4 N. D. 214, 25 L. R. A. 381, 50 Am. St. Rep. 644, 59 N. W. 1062, sustaining transfer of entire property to creditors, where no general assignment made.

12 L. R. A. 815, *HALEY v. EUREKA COUNTY BANK*, 21 Nev. 127, 26 Pac. 64.

**Power to require proof after default.**

Approved in *Sibley v. Weinberg*, 116 Wis. 6, 92 N. W. 427, sustaining court's discretionary power to require evidence of unlawful detention upon default in replevin action.

**Privileged communication to attorney.**

Cited in footnotes to *Stone v. Minter*, 50 L. R. A. 356, which holds communication by client to attorney in presence of other party to contract not privileged; *Koeber v. Somers* 52 L. R. A. 512, which holds conversation authorizing attorney to compromise action not privileged; *Bruley v. Garvin*, 48 L. R. A. 839, which holds conversation with attorney receiving no fee, regarding contemplated lawsuit, privileged.

**Collusive litigation.**

Cited in *Ward v. Alsup*, 100 Tenn. 739, 46 S. W. 573, holding suit brought solely to affect third parties' rights collusive.

**Dismissal of collusive litigation.**

Cited in *Ward v. Alsup*, 100 Tenn. 739, 46 N. W. 573, and *Judson v. Flushing Jockey Club*, 14 Misc. 563, 36 N. Y. Supp. 128, holding attorney, as *amicus curiae*, may, and should, move to dismiss fictitious action; *Fesler v. Brayton*, 145 Ind. 73, 32 L. R. A. 579, 44 N. E. 37, holding (*obiter*), that collusive action may be dismissed on motion of *amicus curiae*.

**Dismissal of futile litigation.**

Cited in *Williams v. Williams*, 117 Wis. 127, 94 N. W. 25, holding court may summarily dismiss action upon payment into court of amount claimed; *Wedekind v. Bell*, 26 Nev. 413, 99 Am. St. Rep. 704, 69 Pac. 612, dismissing appeal where conflicting claims had been transferred to one person.

12 L. R. A. 821, *LILIENTHAL v. SUFFOLK BREWING CO.* 154 Mass. 185, 26 Am. St. Rep. 234, 28 N. E. 151.

**Parol evidence varying writing.**

Cited in *Will M. Kinnard Co. v. Cutter Tower Co.* 159 Mass. 393, 34 N. E. 460, holding evidence of agreement that written contract should not be binding if goods unsuitable, inadmissible; *Clapp v. Wilder*, 176 Mass. 346, 50 L. R. A. 126, 57 N. E. 692, by Morton, J., dissenting, who holds declarations of grantor as to purpose in inserting condition in deed, made after delivery, inadmissible.

**Fraudulent inducements as ground for rescinding contract.**

Cited in note (37 L. R. A. 594) on right to rely on representations made to effect contract as basis for charge of fraud.

Distinguished in effect in *Kilgore v. Bruce*, 166 Mass. 138, 44 N. E. 108, holding misrepresentations by seller of stock as to price another was paying entitle purchaser to recoup difference.

12 L. R. A. 823, *PEABODY v. OREGON R. & NAV. CO.* 21 Or. 121, 26 Pac. 1053.

**Ejection of passenger without required ticket.**

Cited in *Hot Springs R. Co. v. Deloney*, 65 Ark. 181, 67 Am. St. Rep. 913, 45 S. W. 351, holding carrier liable for ejecting passenger presenting ticket improperly made out; *Kiley v. Chicago City R. Co.* 189 Ill. 390, 52 L. R. A. 628, 82 Am. St. Rep. 460, 59 N. E. 794, denying liability of carrier for ejecting passenger to whom wrong transfer given; *Callaway v. Mellett*, 15 Ind. App. 369, 57 Am. St. Rep. 238, 44 N. E. 198, holding as between passenger and conductor, face of ticket conclusive as to passenger's rights; *Indianapolis Street R. Co. v. Wilson*, 161 Ind. 182, 100 Am. St. Rep. 261, 66 N. E. 950 (dissenting opinion), majority holding street railway liable for expulsion of passenger to whom wrong transfer given; *Mahoney v. Detroit Street R. Co.* 93 Mich. 616, 18 L. R. A. 337, footnote, p. 335, 32 Am. St. Rep. 528, 53 N. W. 793, which authorizes ejection of one refusing to pay fare without having previously obtained transfer.

Cited in footnotes to *Poulin v. Canadian P. R. Co.* 17 L. R. A. 800, which holds face of ticket conclusive evidence to conductor as to terms of contract; *Trezona v. Chicago G. W. R. Co.* 43 L. R. A. 136, which denies carrier's liability for ejecting one attempting to ride on ticket which he knows does not on its face entitle him to a ride; *Illinois C. R. Co. v. Harper*, 64 L. R. A. 283, which holds carrier liable for ejection of passenger whose ticket, apparently correct, does not entitle holder to transportation by desired route; *Southern R. Co. v. Wood*, 55 L. R. A. 536, which holds carrier liable for ejection of passenger whose round trip ticket unstamped from inability to find agent; *Kansas City. M. & B. R. Co. v. Riley*, 13 L. R. A. 38, which holds carrier liable for conductor's refusal to accept return coupon; *Ellsworth v. Chicago. B. & Q. R. Co.* 29 L. R. A. 173, which holds failure, from haste, to pay for ticket, does not defeat recovery for ejection because ticket

bears prior date; *United R. & Electric Co. v. Hardesty*, 57 L. R. A. 275, which denies carrier's duty to accept coupon detached from commutation book.

Disapproved in *Evansville & T. H. R. Co. v. Cates*, 14 Ind. App. 174, 41 N. E. 712, holding railroad liable for ejecting passenger given ticket to wrong station where mistake explained to conductor.

**Burden of proof as to fact within party's peculiar knowledge.**

Cited in *Shmit v. Day*, 27 Or. 115, 39 Pac. 870, holding burden of proof on defendant alleging assignment of contract as defense to negligence action by employee.

12 L. R. A. 830, *BIRMINGHAM MINERAL R. CO. v. JACOBS*, 92 Ala. 187, 9 So. 320.

**What are "railroads" within meaning of law.**

Cited in *Ensley R. Co. v. Chewing*, 93 Ala. 29, 9 So. 458, holding dummy railroad subject to railroad law requiring signals at stopping places; *Birmingham R. & Electric Co. v. Baylor*, 101 Ala. 498, 13 So. 793, holding dummy railroads bound to adopt same safeguards and appliances as ordinary railroads; *Louisville & N. R. Co. v. Anchors*, 114 Ala. 501, 62 Am. St. Rep. 116, 22 So. 279, holding electric line running beyond corporate limits railroad within statute requiring stop of intersection; *Savannah, T. & I. of H. R. Co. v. Williams (Ga.)* 61 L. R. A. 251, 43 S. E. 751, holding act imposing on railroads liability to employees for fellow-servant's negligence applicable to street railways.

**Presumption of compliance with statute requiring stop at crossing.**

Cited in second appeal in *Birmingham Mineral R. Co. v. Jacobs*, 101 Ala. 156, 13 So. 408, holding engineer approaching crossing may presume compliance by employees of intersecting road with statute requiring stop; *Richmond & D. R. Co. v. Greenwood*, 99 Ala. 515, 14 So. 495, holding trainmen complying with statute on approaching crossing may assume compliance by employees of intersecting road; *Southern R. Co. v. Bryan*, 125 Ala. 306, 28 So. 445, holding presumption of observance of statute by employees of other road will not excuse negligence of engineer having right of way.

**Sufficiency of averment of wilful injury.**

Cited in *Louisville & N. R. Co. v. Anchors* 114 Ala. 501, 62 Am. St. Rep. 116, 22 So. 279, holding allegation that defendant "wilfully caused" collision avers wilful injury; *Georgia P. R. Co. v. Ross*, 100 Ala. 492, 14 So. 282, holding wanton and wilful negligence sufficiently averred by charge that injury resulted from "wanton and reckless negligence."

**Variance between pleading and proof.**

Cited in *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 432, 11 So. 262, *Harold Bros. v. Jones Bros.* 97 Ala. 638, 98 Ala. 349, 11 So. 747; *Stringer v. Alabama Mineral R. Co.* 99 Ala. 407, 13 So. 75; *Lee v. DeBardeleben Coal & I. Co.* 102 Ala. 630, 15 So. 270; *Louisville & N. R. Co. v. Markee*, 103 Ala. 169, 49 Am. St. Rep. 21, 15 So. 511; *Levin v. Memphis & C. R. Co.* 109 Ala. 334, 19 So. 395; *Highland Ave. & Belt R. Co. v. Winn*, 93 Ala. 308, 9 So. 509,—holding proof of negligence will not sustain allegation of wilful misconduct.



12 L. R. A. 836, *EISENLORD v. CLUM*, 126 N. Y. 552, 27 N. E. 1024.

**Effect of death on competency of witness.**

Cited in *Chace v. Lamphere*, 148 N. Y. 213, 42 N. E. 580, holding wife of plaintiff in ejectment against decedent's devisees competent to testify to transactions with decedent; *Albany County Sav. Bank v. McCarty*, 149 N. Y. 84, 43 N. E. 427, holding tenant by curtesy initiate competent to testify for wife's heirs in mortgage foreclosure, though joining in bond and mortgage; *Bouton v. Welch*, 59 App. Div. 290, 69 N. Y. Supp. 407, holding mortgagor in default on foreclosure may testify to deceased mortgagee's agreement to bequeath mortgage to wife; *Healy v. Healy*, 55 App. Div. 320, 66 N. Y. Supp. 927, holding mother competent to testify to decedent's agreement to make testamentary provision for child; *Rosseau v. Rouss*, 91 App. Div. 237, 86 N. Y. Supp. 497, holding that wife may testify in action against husband's executors to enforce promise to settle certain sum on illegitimate child; *Baxter v. Baxter*, 13 App. Div. 67, 43 N. Y. Supp. 94, holding heir joined as defendant in action by other heirs to set aside fraudulent deed may testify to conversations with decedent in codefendant's behalf; *Adams v. Internal Improv. Fund*, 37 Fla. 289, 20 So. 266, holding in action involving ownership of coupons, that treasurer may testify to delivery to decedent as committee to settle accounts; *Hixson v. Rodbourn*, 36 Misc. 22, 72 N. Y. Supp. 42, holding survivor of firm in action against deceased member's estate may testify to decedent's acquiescence in payment on firm note; *Lecour v. Importers & T. Nat. Bank*, 61 App. Div. 166, 70 N. Y. Supp. 419, holding in action by decedent's administrator to recover proceeds of check, decedent's attorney may testify to personal transactions showing authority to indorse; *Putnam v. Lincoln Safe Deposit Co.* 87 App. Div. 18, 83 N. Y. Supp. 1091, Affirming 39 Misc. 745, 80 N. Y. Supp. 961, holding evidence of executors as to funds turned over to deceased testamentary trustee admissible to show ownership of securities; *Crampton v. Foster*, 29 App. Div. 223, 51 N. Y. Supp. 883, holding maker of note competent to testify in payee's behalf as to transaction with deceased indorsee; *Tecumseh Nat. Bank v. McGee*, 61 Neb. 721, 85 N. W. 949, holding that one cannot testify to transactions with decedent tending to disprove loan to firm of which former is a member; *Sorensen v. Sorensen*, 56 Neb. 735, 77 N. W. 68, holding alleged widow incompetent to testify to conversation with decedent constituting common-law marriage, in contesting administrator's appointment.

Distinguished in *Johnson v. Cochrane*, 91 Hun, 168, 36 N. Y. Supp. 283, holding wife, who is party to action, cannot testify to conversation with testator, to sustain devise of realty to husband.

**Judgments or pleadings in other actions as evidence.**

Cited in *Millard v. Adams*, 1 Misc. 432, 21 N. Y. Supp. 424, holding judgment by default in third person's action against firm admissible to prove partnership.

Distinguished in *Roscoe Lumber Co. v. Standard Silica Cement Co.* 62 App. Div. 424, 70 N. Y. Supp. 1130, holding defendant's counsel asking on cross-examination if bill of particulars true does not render it admissible against defendant.

**Evidence as to pedigree.**

Cited in *Re Seabury*, 1 App. Div. 233, 37 N. Y. Supp. 308, holding declarations of deceased relations as to person's birth and parentage admissible; *Alston v. Alston*, 114 Iowa, 38, 86 N. W. 55, holding declarations of foster parents as to child's paternity admissible; *Arents v. Long Island R. Co.* 156 N. Y. 7, 50 N. E.

422, holding testimony as to death of children on information derived from deceased mother and general report, competent; *Washington v. Bank for Savings*, 171 N. Y. 175, 89 Am. St. Rep. 800, 63 N. E. 831, Affirming 65 App. Div. 341, 72 N. Y. Supp. 752, holding decedent's declarations that she never had children, admissible; *Re Rawson*, 29 Misc. 542, 61 N. Y. Supp. 1078, holding evidence of declarations of deceased members of family admissible to prove marriage; *Young v. Shulenberg*, 165 N. Y. 388, 80 Am. St. Rep. 730, 59 N. E. 135, holding on proof that deceased grantor member of family, recitals in deed admissible on question of pedigree; *State v. Marshall*, 137 Mo. 478, 36 S. W. 619 (dissenting opinion), majority holding prosecution in seduction action may testify as to age.

Cited in footnotes to *Young v. State*, 47 L. R. A. 548, which holds man's declarations as to own history and pedigree provable after his death for purpose of identification; *Re Pickens*, 25 L. R. A. 477, which holds admissible common reputation in family as to who are members of same; *Re Hurlburt*, 35 L. R. A. 794, which holds general reputation in family as to death of member not derived from deceased members of family inadmissible.

Cited in note (41 L. R. A. 449) on entries in family Bible or other religious book as evidence.

#### **— When inadmissible.**

Cited in *People v. Mayne*, 118 Cal. 520, 62 Am. St. Rep. 256, 50 Pac. 654, holding entry in Bible not admissible to show age of prosecutrix in rape case; *Bowen v. Preferred Acci. Ins. Co.* 68 App. Div. 344, 74 N. Y. Supp. 101, holding letter written to insured by deceased brother inadmissible to prove age, in action on accident policy; *People v. Miller*, 30 Misc. 358, 63 N. Y. Supp. 949, holding hearsay evidence as to death of first husband inadmissible on issue of validity of second marriage; *Wallace v. Syracuse Rapid Transit R. Co.* 42 App. Div. 538, 59 N. Y. Supp. 651, holding evidence of mare's reputed pedigree inadmissible in action for negligent killing.

Distinguished in *Flora v. Anderson*, 75 Fed. 223, holding declarations of servant inadmissible on question of pedigree.

#### **Hearsay evidence — Declarations against interest.**

Cited in *Reed v. McCord*, 160 N. Y. 341, 54 N. E. 737, holding defendant's statements of facts attending accident, not based on personal knowledge, admissible against him; *Putnam v. Lincoln Safe Deposit Co.* 87 App. Div. 18, 83 N. Y. Supp. 1091, holding written declaration of trustee that securities in individual name of beneficiary belonged to trust estate, inadmissible against beneficiary's executor.

12 L. R. A. 843, *PEIL v. REINHART*, 127 N. Y. 381, 27 N. E. 1077.

#### **Landlord's liability for defective premises.**

Cited in footnote to *Fellows v. Gilliuber*, 17 L. R. A. 577, which holds lessor of hotel not liable for injury to guest by defective awning.

Distinguished in *O'Dwyer v. O'Brien*, 13 App. Div. 573, 43 N. Y. Supp. 815, holding landlord of tenement not liable for defect in alley used by only one tenant; *Reissman v. Jacobowitz*, 22 Misc. 553, 49 N. Y. Supp. 1006, and *Miller v. Rinaldo*, 21 Misc. 471, 47 N. Y. Supp. 636, denying liability of landlord for fall of ceiling in tenant's apartment upon child; *Sanders v. Smith*, 5 Misc. 4, 25 N. Y. Supp. 125, holding landlord not liable to tenant for personal injuries resulting

from failure to repair; *Leonard v. Gunther*, 47 App. Div. 195, 62 N. Y. Supp. 99, denying landlord's liability where one tenant lets water pipes freeze, flooding premises of another.

— **Portions under landlord's control.**

Cited in *Harris v. Boardman*, 68 App. Div. 440, 73 N. Y. Supp. 963, holding landlord liable for injury to tenant's goods from overflow of closet under his control; *Barman v. Spencer* (Ind.) 44 L. R. A. 819, 49 N. E. 9, holding landlord negligently leaving well uncovered liable to tenant's guest; *Indianapolis Abattoir Co. v. Temperly* 159 Ind. 654, 95 Am. St. Rep. 330, 64 N. E. 906, holding landlord, with knowledge of leak, liable for injury to tenant from explosion of gas piped to landlord's office.

Cited in note (14 L. R. A. 239) on responsibility of landlord for injuries resulting from defects in portions of building remaining in his possession.

— **Portions used in common by several tenants.**

Cited in *Dollard v. Roberts*, 130 N. Y. 273, 14 L. R. A. 242, 29 N. E. 104, holding landlord liable for injuries to occupant by plaster falling in tenement hallway; *Mahon v. Burns*, 13 Misc. 19, 68 N. Y. S. R. 162, 34 N. Y. Supp. 91, holding landlord's duty to keep hallway of tenement in condition for safe passage; *Wilber v. Follansbee*, 97 Wis. 581, 72 N. W. 741, holding landlord liable to tenant in apartment house for defect in hallway; *Wessel v. Gerken*, 36 Misc. 222, 73 N. Y. Supp. 192, holding landlord liable for fall of child caused by projecting screws in tenement stairway; *Lewin v. Pauli*, 19 Pa. Super. Ct. 450, holding landlord liable for failure to keep tenants' common stairway in repair; *Flood v. Huff*, 29 Misc. 353, 60 N. Y. Supp. 517, denying liability of landlord of tenement using reasonable care to keep staircase safe; *Brady v. Valentine*, 3 Misc. 21, 21 N. Y. Supp. 776, holding landlord liable to visitor for defective tenement stairs; *Blake v. Fox*, 43 N. Y. S. R. 528, 17 N. Y. Supp. 508, holding landlord's duty to keep dumb-waiter in common use of tenants in repair; *Gallagher v. Button*, 73 Conn. 177, 46 Atl. 819, holding (*obiter*), landlord liable for defective fire-escape in common use of tenants; *Collier v. Collins*, 58 App. Div. 553, 69 N. Y. Supp. 94, holding landlord's liability to tenant for tilting of grating under entrance to common yard, for jury; *Canavan v. Stuyvesant*, 7 Misc. 118, 27 N. Y. Supp. 413, holding landlord liable for fall of child down uncovered airshaft in tenement yard; *Schmidt v. Cook*, 4 Misc. 85, 23 N. Y. Supp. 799, holding landlord liable for fall of rock in tenement back yard.

Cited in note (23 L. R. A. 156) on landlord's liability as to condition of part of premises not controlled by tenant.

Distinguished in *Muller v. Minken*, 5 Misc. 445, 26 N. Y. Supp. 801, denying liability of landlord of tenement for failure to light hallway; *Harkin v. Crumbie*, 20 Misc. 571, 46 N. Y. Supp. 453, denying landlord's liability to tenant's visitor falling on ice in courtyard of apartment house.

— **Contributory negligence, when question for jury.**

Cited in *Walton v. Kane*, 4 Misc. 297, 23 N. Y. Supp. 1029, holding contributory negligence of tenant falling on tenement stairway, for jury; *Karlson v. Healy*, 38 App. Div. 487, 56 N. Y. Supp. 361, holding contributory negligence of tenant of apartment house going upon roof to hang out clothes, for jury; *Schwartz v. Apple*, 21 Misc. 515, 48 N. Y. Supp. 253, holding tenant, knowing ceiling of room unsafe, negligent in continuing to occupy; *Goff v. Little Falls*, 47 N. Y. S. R.

731, 20 N. Y. Supp. 175, holding contributory negligence of person falling on icy sidewalk, for jury; *Richardson v. Syracuse*, 41 App. Div. 122, 58 N. Y. Supp. 487, holding contributory negligence of person stepping through hole in walk, for jury; *Simmons v. Peters*, 85 Hun, 97, 32 N. Y. Supp. 680, holding contributory negligence of employee walking into elevator shaft, for jury; *Wesener v. Smith*, 89 App. Div. 213, 85 N. Y. Supp. 837, holding negligence of one not looking out though knowing yard littered with rubbish, for jury.

**Evidence of condition of locality subsequent to accident.**

Cited in *Tompert v. Hastings Pavement Co.* 35 App. Div. 581, 55 N. Y. Supp. 177, holding evidence of condition of street on morning after accident, competent.

Distinguished in *Roe v. Crimmins*, 10 Misc. 717, 31 N. Y. Supp. 807, holding evidence of condition of trench in street on morning after accident, inadmissible.

**When facts reviewable on appeal.**

Cited in *Boyle v. Williams*, 1 Misc. 113, 48 N. Y. S. R. 652, 20 N. Y. Supp. 727; *Chaimson v. Mensling*, 12 Misc. 651, 33 N. Y. Supp. 271; *Bishop v. Hendrickson*, 42 N. Y. S. R. 37, 16 N. Y. Supp. 799,—holding facts not reviewable on appeal from judgment only.

**Order granting new trial, when reviewable by court of appeals.**

Cited in *Caponigri v. Altieri*, 164 N. Y. 479, 58 N. E. 667; *Bank of China v. Morse*, 168 N. Y. 471, 56 L. R. A. 144, 85 Am. St. Rep. 676, 61 N. E. 774; *Chapman v. Comstock*, 134 N. Y. 512, 31 N. E. 876,—holding general-term order granting new trial not reviewable by court of appeals unless order affirmed as to facts or appeal therefrom dismissed.

12 L. R. A. 845, *CARNWRIGHT v. GRAY*, 127 N. Y. 92, 24 Am. St. Rep. 424, 27 N. E. 835.

**Agreements to pay money after promisor's death.**

Cited in *Hegeman v. Moon*, 131 N. Y. 466, 30 N. E. 487, sustaining promissory note payable after maker's death; *Beatty v. Western College*, 177 Ill. 291, 42 L. R. A. 802, 69 Am. St. Rep. 242, 52 N. E. 432, sustaining validity of note to become due in event of maker's death before maturity; *Hopkins v. Marlette*, 47 N. Y. S. R. 916, 20 N. Y. Supp. 576, holding instrument promising to pay certain person or bearer, certain sum at death, valid note; *Hatch v. Gillette*, 8 App. Div. 607, 40 N. Y. Supp. 1016, sustaining claim founded on instrument requesting payment of sum at death to person named; *Durland v. Durland*, 83 Hun, 176, 31 N. Y. Supp. 596, holding assignment by husband to wife of bonds to be delivered after his decease, not testamentary disposition; *Edie v. Horn*, 42 Misc. 30, 85 N. Y. Supp. 535, raising, without deciding, question whether agreement to pay wife weekly sum for support during her life is effective after promisor's death.

Cited in note (14 L. R. A. 860) on agreement to pay money or give property after death of promisor.

**What instruments deemed promissory notes.**

Cited in *Hickok v. Bunting*, 67 App. Div. 562, 73 N. Y. Supp. 967, same case of subsequent appeal, 92 App. Div. 169, 86 N. Y. Supp. 1059, holding instrument promising to pay certain sum with interest on or after certain date to order of payee, valid note; *Rice v. Rice*, 43 App. Div. 463, 60 N. Y. Supp. 97, holding instrument promising to pay certain sum when payee is twenty-one, not promissory note.

Distinguished in *Bradt v. Krank*, 164 N. Y. 520, 79 Am. St. Rep. 662, 58 N. E. 657, holding written agreement to pay third party's debt on or before day named, not promissory note importing consideration.

**When consideration presumed.**

Cited in *Root v. Strang*, 77 Hun, 16, 28 N. Y. Supp. 273, and *Sprague v. Sprague*, 80 Hun, 286, 30 N. Y. Supp. 162, holding burden on defendant to prove want of consideration for promissory note; *Wells v. Monihan*, 35 N. Y. S. R. 496, 13 N. Y. Supp. 156, holding consideration of promissory note need not be expressed or proved; *Wilson v. Wilson*, 26 Or. 319, 38 Pac. 189, holding consideration for promissory note presumed though none expressed; *Yarwood v. Trusts & Guarantee Co.* 94 App. Div. 51, 87 N. Y. Supp. 947, raising, without deciding, question whether burden on defendant to show want of consideration for note promising to pay certain sum at death.

Distinguished in *Deyo v. Thompson*, 53 App. Div. 12, 65 N. Y. Supp. 459, holding non-negotiable note does not import consideration; *Johannessen v. Munroe*, 84 Hun, 599, 32 N. Y. Supp. 863, holding in action on special letter of credit consideration must be proved; *Barondess v. Kaminsky*, 38 Misc. 763, 78 N. Y. Supp. 1108, holding words "value received" in note sufficiently prove consideration.

**What instruments negotiable.**

Cited in *D'Esterre v. Brooklyn*, 90 Fed. 589, holding municipal bonds payable in blank negotiable.

12 L. R. A. 848, *COLVILLE v. MILES*, 127 N. Y. 159, 24 Am. St. Rep. 433, 27 N. E. 809.

**Lessor's rights as against lessee's creditors.**

Cited in *Marshall v. Luiz*, 115 Cal. 625, 47 Pac. 597, holding lease containing stipulation against removal of hay, quantity remaining to be purchased by lessor, creates no lien against bona fide mortgagee.

Distinguished in *Osmun v. Barker*, 92 Hun, 609, 38 N. Y. Supp. 43, by Ward, J., dissenting, who holds landlord entitled to wheat straw under farm lease may replevy from tenant's mortgagee; *Neubauer v. Gabriel*, 86 Wis. 206, 56 N. W. 733, holding chattel mortgage by lessee of property leased, invalid.

12 L. R. A. 852, *ATLANTA v. FIRST PRESBY. CHURCH*, 86 Ga. 730, 13 S. E. 252.

**Exemption from assessment for local improvements.**

Cited in *Erie v. School District*, 17 Pa. Super. Ct. 39, holding school district not liable for paving assessment; *Board of Improvement v. Little Rock School District*, 56 Ark. 357, 16 L. R. A. 420, 35 Am. St. Rep. 109, 19 S. W. 969, holding public schoolhouses not liable to assessment for local improvements; *Edwards & W. Constr. Co. v. Jasper County*, 117 Iowa, 379, 94 Am. St. Rep. 301, 90 N. W. 1006, holding public square containing county buildings liable to special paving assessment.

Cited in footnote to *Zabel v. Louisville Baptist Orphans' Home*, 13 L. R. A. 668, which holds street assessment not within exemption of charitable institution from "all taxation."

Cited in note (35 L. R. A. 34, 36) on liability to local assessments for benefits of property exempt from general taxation.

**Church property, private property.**

Cited in *Macon & A. R. Co. v. Riggs*, 87 Ga. 159, 13 S. E. 312, holding church property subject to condemnation for railway.

12 L. R. A. 856, *FARRIOR v. NEW ENGLAND MORTG. SECUR. CO.* 92 Ala. 176, 9 So. 532.

**Effect of change in judicial construction of statute.**

Cited in *Jones v. Woodstock Iron Co.* 95 Ala. 563, 10 So. 635, holding proceedings to acquire legal title governed by former decision under which instituted, since overruled; *St. Louis, O. H. & C. R. Co. v. Fowler*, 142 Mo. 687, 44 S. W. 771, holding change in judicial construction does not affect rights acquired under former decision.

Cited in note (16 L. R. A. 647) on change of decision of state court as unconstitutional impairment of contract.

Distinguished in *Yazoo & M. Valley R. Co. v. Adams*, 81 Miss. 120, 32 So. 937, holding erroneous decisions as to constitutionality of exemption. rendered after purchase of railroad, do not prevent assertion of claim for back taxes; *Gross v. Whitley County*, 158 Ind. 536, 58 L. R. A. 396, 64 N. E. 25, holding public officer cannot collect salary under earlier act for time during which later act held unconstitutional.

Disapproved in *Storrie v. Cortes*, 90 Tex. 289, 35 L. R. A. 669, 38 S. W. 154, holding rights acquired on faith of earlier, may be invalidated by later, decision.

12 L. R. A. 859, *KILGORE v. RICH*, 83 Me. 305, 23 Am. St. Rep. 780; 22 Atl. 176.

**What are necessities.**

Cited in footnotes to *Fisher v. Shea*, 61 L. R. A. 567, which holds defense of suit against policeman for assault while acting in line of duty, within exception of claims for necessities in statute prohibiting garnishment of wages; *Peacock v. Linton*, 53 L. R. A. 192, which denies liability for tutoring minor son during vacation; *Crafts v. Carr*, 60 L. R. A. 128, which holds services of attorney in prosecuting for infant action for damages for indecent assault on her, necessities.

**Infant's liability for necessities.**

Cited in footnotes to *Gregory v. Lee*, 25 L. R. A. 618, which holds minor leasing rooms while attending college bound to pay for same as necessary only while occupying same; *Goodman v. Alexander*, 55 L. R. A. 781, which authorizes recovery against infant for food and lodging without alleging that defendant an orphan.

Cited in note (15 L. R. A. 211) on infant's right to repudiate contract for services and sue on *quantum meruit*.

12 L. R. A. 862, *PHILLIPS v. MADRID*, 83 Me. 205, 23 Am. St. Rep. 770, 22 Atl. 114.

**Extraterritorial effect of prohibition against remarriage of divorced persons.**

Cited in *Frame v. Thormann*, 102 Wis. 673, 79 N. W. 39, holding state stat-

ute prohibiting marriage of guilty party divorced does not affect validity of marriage elsewhere.

Cited in notes (24 L. R. A. 831, 832) on effect of statutes forbidding remarriage of guilty party after divorce; (57 L. R. A. 170) on conflict of laws as to validity of marriage; (19 L. R. A. 816) on validity of decree of divorce obtained on publication or service out of state, where defendant did not appear.

**Conflict of laws.**

Cited in note (17 L. R. A. 85) on supremacy of state or nation over devolution.

12 L. R. A. 864, *STOWERS v. POSTAL TELEG. CABLE CO.* 68 Miss. 559, 24 Am. St. Rep. 290, 9 So. 356.

**Additional burdens on highway entitling abutter to compensation.**

Cited in *East Tennessee Teleph. Co. v. Russellville*, 106 Ky. 670, 51 S. W. 308; *Bronson v. Albion Teleph. Co.* (Neb.) 60 L. R. A. 428, 93 N. W. 201; *Donovan v. Allert* (N. D.) 58 L. R. A. 780, 91 N. W. 441; *Krueger v. Wisconsin Teleph. Co.* 106 Wis. 108, 50 L. R. A. 304, 81 N. W. 1041,—holding telephone line in street additional servitude; *Alabama & V. R. Co. v. Bloom*, 71 Miss. 252, 15 So. 72, upholding abutting owner's right to compensation for construction of railroad in street, though fee in public; *Hazlehurst v. Mayes*, (Miss.) 64 L. R. A. 806, 36 So. 33, denying abutter's right of action for necessary trimming of trees in highway in installing municipal electric lighting system; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 550, 28 L. R. A. 315, 51 Am. St. Rep. 543, 63 N. W. 111 (dissenting opinion), majority holding telephone line on rural highway not additional servitude.

Cited in notes (17 L. R. A. 480) on what use of street or highway constitutes an additional burden; (24 L. R. A. 721) on telegraph or telephone poles as additional burden on highway.

Not followed in *Magee v. Overshiner*, 150 Ind. 138, 40 L. R. A. 374, 65 Am. St. Rep. 358, 49 N. E. 951, denying abutting owner's right to compensation for telephone line in street.

**Right to flow of stream as easement.**

Cited in *Richardson v. Mississippi Levee Comrs.* 77 Miss. 536, 26 So. 963, raising, without deciding, question whether right to have waters of stream flow in accustomed channel easement for taking which compensation must be made.

**Injunction against obstruction of highway.**

Cited in *Louisville & N. R. Co. v. Mobile J. & K. C. R. Co.* 124 Ala. 166, 26 So. 895, holding unauthorized construction of railroad in street may be enjoined.

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